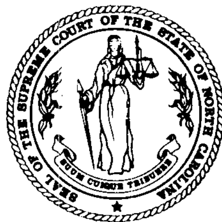
NORTH CAROLINA REPORTS

VOLUME 315

SUPREME COURT OF NORTH CAROLINA



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WILLIAM M. FREEMAN, JR. ... Winston-Salem, applied from the State of New York First Department
MARY GRZECHOWIAK HOLLIDAY ...... Durham, applied from the State of Wisconsin
CHARLES GLADSON KING Springfield, Virginia, applied from the State of Tennessee
JAMES MICHAEL KUSZAJ .... Raleigh, applied from the State of Michigan
SUSAN OLIVER RENFER .... Raleigh, applied from the State of Virginia
ELLIOT ZEMEK ..... Staten Island, New York, applied from the State of New York Second Department

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The State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. LEONARD D. AVERY

No. 561A83

(Filed 10 December 1985)

1. **Criminal Law § 29— impaired memory—mental capacity to stand trial**

The trial court did not err in ruling that defendant had the mental capacity to stand trial and to assist in the preparation of his defense, notwithstanding defendant was suffering from an impaired memory concerning the events at issue, where the trial court found that although defendant's memory was impaired and his intellectual functions, judgment and insight were limited, he was able to understand the nature and object of the proceedings against him and comprehend his situation in reference to those proceedings, and he was capable of assisting his attorneys in the preparation of his defense in a rational and reasonable manner. The Court refused to adopt the rule that a defendant is incompetent to stand trial or assist in the preparation of his defense when the defense pleaded is insanity and defendant's amnesia hampers preparation of his defense in a crucial way. N.C.G.S. 15A-1001.

2. **Homicide § 12.1— indictment for first degree murder—failure to allege premeditation and deliberation or felony murder**

Article I, § 23 of the N.C. Constitution and N.C.G.S. 15A-924(a)(5) did not repeal the statute authorizing a short form indictment for murder, N.C.G.S. 15-144. An indictment in the form authorized by N.C.G.S. 15-144 was sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder.

3. **Constitutional Law § 60; Grand Jury § 3.3; Jury § 7.4— use of voter registration lists—random selection by computer—no systematic exclusion of non-whites from grand jury—fair cross-section of community**

There was no systematic exclusion of non-whites from the jury pool from which the grand jury was drawn so as to deny defendant equal protection under the Fourteenth Amendment where non-whites constituted 35.9 percent of the eligible population in the county for service on a jury; the county voter

registration list was used as a master jury list from which a computer randomly selected the jury pool; the jury pool was then purged of deceased and incompetent persons; the result was a jury pool with 26.3 percent non-whites; and this result represents only a 9.6 percent deviation between the percentage of non-whites in the county and the percentage of non-whites in the jury pool. Nor did selection of the jury pool in such manner violate defendant's right to be tried by a petit jury drawn from a representative cross-section of the community as guaranteed by the Sixth Amendment. N.C.G.S. 9-2.

4. Criminal Law § 5— insanity defense—burden of proof

The Supreme Court declined to change the common law rule in North Carolina that insanity is an affirmative defense which must be proved by the defendant.

5. Constitutional Law § 63; Jury § 7.11— death qualification of jury

The death qualification of the jury in a first degree murder trial did not violate defendant's rights to due process and trial by a jury drawn from a representative cross-section of the community.

6. Jury § 7.11— excusal of jurors for death penalty views

Twelve potential jurors were properly excused for cause under the requirements of *Witherspoon v. Illinois*, 391 U.S. 510 and N.C.G.S. 15A-1212(8) where each of the jurors indicated that they could not vote for the death penalty under any circumstances.

7. Jury § 6.3— prospective jurors—exclusion of questions relating to insanity defense—no abuse of discretion

The trial court did not abuse its discretion in refusing to permit defense counsel to ask two prospective jurors certain questions relating to the insanity defense where the questions were hypothetical and tended to stake out the jurors and cause them to pledge themselves to a future course of action at a stage of the trial when no evidence had been presented and no instructions had been given on the applicable law.

8. Jury § 7.8— excusal of jurors for cause—no abuse of discretion

The trial court in a prosecution for first degree murder and various other crimes did not abuse its discretion in excusing five prospective jurors for cause based on reasons of employment, conflicts, religious opinion, opposition to the death penalty, and potentially prejudicial knowledge of defendant's parole opportunity if convicted.

9. Jury § 7.7— challenge for cause—failure to exhaust peremptory challenges

Defendant was not prejudiced when the trial court refused to allow defendant to elicit from a juror the opinion expressed to the juror by friends about defendant's guilt or innocence and denied defendant's challenge for cause to the juror where defendant exercised a peremptory challenge to remove the juror, and defendant failed to exhaust all of his peremptory challenges. N.C.G.S. 15A-1214(h).

10. Burglary and Unlawful Breakings § 1— IBM complex—separate charges relating to different buildings

Four connected buildings in an IBM complex, constructed at different times and treated as separate buildings by those using them, with separate building numbers, do not constitute only one building under the breaking or entering statute, N.C.G.S. 14-54, because the buildings are connected by passageways that permit unrestricted access from one building to another. Therefore, the trial court correctly treated the IBM complex as four separate buildings and did not err in failing to dismiss three of the four charges against defendant for felonious entry into four buildings in the complex on the ground that only one building was involved.

11. Arson §§ 1, 4— conviction under N.C.G.S. 14-67.1—burning not required—sufficiency of evidence

A conviction under N.C.G.S. 14-67.1 does not require that the State prove a "burning" as is required under the arson statute and the common law but requires only that a defendant willfully and wantonly *attempt* to set fire to or burn any building or structure. The evidence was sufficient to support defendant's conviction for attempting to set fire to or burn a building under N.C.G.S. 14-67.1 where it tended to show that defendant ignited a fire bomb in Building 201 of the IBM complex which caused some blackening of the floor tile, a steel cabinet and an office partition, and that some burned matches were also found in Building 201.

12. Homicide § 4.2— attempted burning of building—use of fire bombs—underlying felony for felony murder

Fire bombs used by defendant were deadly weapons used in the perpetration of the felony of attempting to burn a building used for trade, and the killing of the victim in this case was in the perpetration of this felony within the meaning of N.C.G.S. 14-17. Therefore, the felony of attempting to burn a building could serve as the underlying felony under the felony murder rule.

13. Criminal Law § 88.2— cross-examination of expert witness—knowledge of certain criminal cases—exclusion not error

In a prosecution for a murder and various other crimes wherein the State's expert rebuttal witness testified that defendant's violent outburst did not "fit with the literature about Post Traumatic Stress Disorder (PTSD) types of outburst," the trial court did not err in refusing to permit defendant to ask the witness questions about his familiarity with the facts of certain criminal cases involving the PTSD defense where the court permitted defendant to question the witness extensively on his familiarity with PTSD literature, and the verdict was thus not improperly influenced by the court's limitation of defendant's cross-examination of the witness.

14. Criminal Law § 173— opening door to evidence of defendant's misconduct

When defendant elicited testimony from his mother that he had not been involved in any court action involving his brother's children and that there had been no allegations that defendant had misused any money of these children, defendant "opened the door" to the State's introduction of written exhibits showing the facts surrounding his involvement in the alleged court action for

the purpose of impeaching defendant's testimony on cross-examination denying any involvement in or knowledge of such a court action.

15. Criminal Law § 63.1— length of witness's flashbacks concerning Vietnam—exclusion of testimony

The trial court did not err in refusing to allow defendant's surrebuttal witness to testify concerning the length of his own "flashbacks" concerning Vietnam for the purpose of rebutting the State's psychiatric testimony that dissociative episodes related to PTSD were of limited duration and not consistent with defendant's conduct at the time of his offenses where the witness was not qualified as an expert and no expert testimony was introduced to show that he had PTSD; the witness testified that he was using drugs prior to his alleged dissociative episode; and the State's psychiatric witnesses did not testify that extended dissociative episodes related to PTSD were impossible but only that such episodes were not generally consistent with PTSD.

16. Homicide § 30.3— first degree murder—refusal to submit involuntary manslaughter—conviction under felony murder rule

The trial court in a first degree murder prosecution did not err in refusing to submit to the jury the lesser included offense of involuntary manslaughter where the law and evidence justified use of the felony murder rule, defendant was found guilty of first degree murder under the felony murder rule, and there was no evidence to support submission of involuntary manslaughter.

17. Assault and Battery §§ 14.6, 15.4— assault on law officer—knowledge that victim was officer—absence of instruction

Knowledge by defendant that the victim was a law enforcement officer is an essential element of the crime of assault with a firearm upon a law enforcement officer in violation of N.C.G.S. 14-34.2, and the trial court's failure to so instruct the jury constituted prejudicial error. However, by finding defendant guilty of felonious assault upon a law enforcement officer, the jury necessarily found the facts that would support defendant's conviction of the lesser included offense of assault with a deadly weapon, and the case will be remanded to permit resentencing on the charge of assault with a deadly weapon.

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

The trial court's instruction that "if you are in doubt as to the insanity of the defendant, the defendant is presumed to be sane and you would find the defendant guilty" did not improperly convey to the jury that defendant was required to overcome all doubt on this issue when considered in context with the court's other instructions on the burden of proving insanity.

19. Criminal Law § 119— charge in substantial accord with requested instructions

The trial court gave instructions substantially in accord with defendant's requested instructions pertaining to general criminal intent or *mens rea*, specific intent and willfulness insofar as the requested instructions were a correct statement of the law and proper in the context of the case.

20. Criminal Law § 138.29— defendant as dangerous and mentally abnormal person—proper aggravating factor

The *trial court's finding* as an *aggravating* factor that "defendant is a dangerous and mentally abnormal person whose commitment for an extended period of time is necessary for the protection of the public and society at large" did not punish defendant for being mentally ill but constituted a finding that defendant was abnormal in the sense of being unusually dangerous, and it was proper for the court to find such a factor in aggravation.

21. Criminal Law § 138.15— aggravating factor—separate finding for each crime

The record reveals that the trial court made a separate finding in aggravation that defendant is a dangerous and mentally abnormal person for each crime in accordance with the rule stated in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689.

22. Criminal Law § 138.15— two findings in aggravation not based on same evidence

The trial court's findings in aggravation that defendant is a dangerous and mentally abnormal person and that defendant engaged in a pattern or course of violent conduct were not based on the same evidence in violation of N.C.G.S. 15A-1340.4(a)(1)(p) where there was sufficient evidence that defendant had engaged in a pattern or course of violent conduct to support the judge's finding of that factor in aggravation separate and apart from the evidence of a psychiatrist which supported the aggravating factor that defendant is a dangerous and mentally abnormal person.

23. Criminal Law § 138.30— mitigating factors found by jury in capital case—failure of judge to find in non-capital cases

The trial court did not abuse its discretion in failing to find as mitigating factors in non-capital felony cases all of the mitigating factors found by the jury in the sentencing phase of a capital case tried with the non-capital cases.

24. Criminal Law § 26— felony murder—no separate punishment for underlying felony—separate punishment for other crimes

When a defendant has been convicted of first degree murder based upon a finding that the murder was committed in the perpetration of a felony, separate punishment may not be imposed for the underlying felony. However, separate punishment may be imposed for any offense which arose out of the same transaction but was not the underlying felony for the murder conviction.

25. Criminal Law § 26— felony murder—separate punishments for crimes not underlying felonies

Where a first degree murder conviction was premised on the underlying felony of burning or attempting to burn a certain building used in trade, the trial court could properly impose separate punishments for felonious entry convictions and two other felonious burning convictions which were not submitted as possible underlying felonies.

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

APPEAL by defendant pursuant to G.S. 7A-27(a) from a judgment imposing life imprisonment, entered by *Lee, J.*, at the 31 May 1983 criminal session of DURHAM Superior Court upon a jury verdict of guilty of first degree murder. Defendant was also convicted of three counts of assault with a deadly weapon inflicting serious injury, two counts of assault with a firearm upon a law enforcement officer, four counts of felonious entry of a building, misdemeanor assault with a deadly weapon, attempting to burn a building used for trade, and setting fire to or burning a building used for trade. Defendant's motion to bypass the Court of Appeals on his appeal from the judgments in the non-capital cases was allowed by the Supreme Court on 2 October 1984.

Lacy H. Thornburg, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State.

Ann F. Loflin and Thomas F. Loflin, III, Attorneys, for defendant-appellant.

FRYE, Justice.

The essential facts are that defendant, Leonard D. Avery, was employed at IBM in the Research Triangle Park during July and early August 1982. He worked under the supervision of an IBM Manager, Shirley Johnson. Doctors at IBM had been advised that defendant was suffering from a mental condition diagnosed by doctors at the Veterans Administration Hospital in Durham, North Carolina, as Post Traumatic Stress Disorder (PTSD). Defendant had been given permission to be absent from work to attend PTSD treatment sessions at the VA Hospital. During July and August, defendant was absent from work for the purpose of attending PTSD sessions on the advice of his doctor at the VA Hospital. He did not, however, attend these therapy sessions during his absence. Mrs. Johnson contacted the defendant and scheduled an appointment for him with Dr. Patrick Connor of the IBM Medical Department on 18 August 1982. During the appointment, defendant became upset, angry, and defensive when Dr. Connor confronted him with the fact that he knew defendant had not attended a therapy session in several weeks. The interview was terminated shortly thereafter.

Dr. Connor believed defendant to be dangerous and he so advised his superiors in the medical department and other of-

ficials at IBM. As defendant was leaving the interview, he told Mrs. Johnson that he would be back to blow the place up starting with the medical department. Mrs. Johnson notified her manager and appropriate officials in the medical, security, and personnel departments concerning what had occurred. The decision was then made to terminate the defendant's employment with IBM. Mrs. Johnson called defendant on 19 August 1982 and informed him of this decision.

On 23 August 1982, defendant went to the Dixie Loan Company in Raleigh and purchased a .45 caliber semi-automatic rifle, two boxes of ammunition containing fifty bullets each and two 30-round ammunition clips. On 26 August 1982, defendant returned to the Dixie Loan Company and complained that the gun he had bought was jamming and exchanged that weapon for another .45 caliber automatic rifle.

Defendant was scheduled to be admitted to the VA Hospital on 17 August 1982 under the treatment of Dr. Owen Buck, a psychiatrist who was treating defendant for PTSD. He did not, however, appear for admission. Defendant called Dr. Buck on 23 August 1982 and requested a letter excusing his absences from work in August of 1982. When Dr. Buck declined to write such a letter, defendant told him that was all right that he would read about it in the newspaper. Dr. Buck notified the medical department at IBM of these matters prior to 30 August 1982.

On 30 August 1982 at approximately 1:00 p.m., defendant drove up to the loading dock of Building 205 which housed the medical department of the IBM Complex. He was wearing army fatigues and a hat with medals on it. He had several weapons, ammunition and homemade fire bombs of gasoline or some other flammable substance in his possession or in his car. Defendant was observed entering Building 205 through an open loading dock, and the IBM security section was notified. The manager of security called the Durham County Sheriff's Department, the North Carolina Highway Patrol and the IBM Medical Department.

As defendant proceeded toward the medical department in Building 205, he encountered Daniel Gooch, an employee of IBM, in the hallway. Defendant told Gooch to back up against the wall if he wanted to live. Defendant then entered the medical depart-

ment and began firing as employees scattered to safety. He then ignited a fire bomb in the medical department.

Defendant then exited the medical department through the hallway or ramp toward Building 201 of the IBM Complex. At the end of the hallway, defendant ignited another fire bomb. A contract construction worker passed defendant to extinguish the fire, but defendant told him to let the fire burn. A nurse supervisor from the IBM Medical Department then approached defendant in the hallway and asked him if she could help him or if anything was wrong. Defendant then struck her on the head with the butt of the rifle, knocking her to the floor. The nurse supervisor sustained a laceration and hematoma above the right ear and was treated and released at Rex Hospital. Defendant continued through the hallway to Building 201, firing shots from the rifle on the way.

In Building 201, defendant encountered Ralph Glenn, an employee of IBM. Mr. Glenn asked defendant what he was doing and if he could help him. Defendant told Glenn to get out of his way and subsequently shot Glenn in the chest. Ralph Glenn died as a result of the gunshot wound to his chest. Defendant then ignited a fire bomb in Building 201.

After leaving Building 201, defendant entered Building 303 where he shot Richard Martin in the chest. Martin later underwent surgery and was in serious condition for approximately ten days before he slowly recovered and was able to return to work in October 1982. After leaving Building 303, defendant shot Charles Davis in the left elbow. The bullet was surgically removed from Davis' arm, and he fully recovered in approximately seven weeks. Defendant also shot and wounded Charles Thompson. Thompson received medical attention at the hospital for minor injuries.

Defendant then entered Building 203 where he ignited a fourth and final fire bomb. While defendant was in Building 203, a Durham County Sheriff's Department Deputy arrived. When the deputy encountered defendant in the building, defendant fired at him. The deputy waited for assistance, during which time defendant returned to his car. While leaving the IBM Complex, defendant fired shots at another sheriff's deputy who fired three shots

from his shotgun into the back of defendant's car as it drove away.

The deputies, as well as a number of highway patrol troopers, followed defendant's car from the IBM Parking Lot down Interstate 40 into Raleigh where a roadblock was set up by the Raleigh Police Department. Defendant stopped his car before reaching the roadblock. Defendant then shot himself in the head with a .22 caliber derringer pistol. Defendant was then transported to Durham County General Hospital where he underwent brain surgery to remove the bullet. The surgery necessitated the removal of the entire left frontal lobe of defendant's brain and a small portion of the right frontal lobe.

Later processing of the crime scene at IBM on 30 August 1982 revealed that a total of twenty-eight shots were fired while defendant was inside the various IBM buildings. Burned or charred areas were observed in four locations in the IBM Complex: (1) in the medical department of Building 205; (2) in the passageway running between Building 205 and Building 201; (3) near a cabinet in Building 201; and (4) in Building 203.

After defendant was sufficiently recovered, he was released from Durham County General Hospital and transferred to the Central Prison Hospital in Raleigh. He was later transferred to Dorothea Dix Hospital where he was examined by Dr. Bob Rollins, head of the Forensic Psychiatry Unit at Dorothea Dix Hospital, who made the determination that defendant was competent to stand trial even though defendant was unable to remember the events at the IBM Complex on 30 August 1982.

After a jury trial, defendant was convicted of first degree murder predicated on the felony murder rule, two counts of assault with a firearm upon a law enforcement officer, four counts of felonious entry of a building, a misdemeanor assault with a deadly weapon, attempting to burn a building used for trade, and setting fire to or burning a building used for trade.

Defendant sets forth twenty-two assignments of error in his appeal, each of which will be addressed in this opinion.

I.

[1] Defendant first assigns as error the trial court's ruling that defendant had the mental capacity to stand trial and to assist in

the preparation of his defense, notwithstanding defendant's apparent memory impairment or possible amnesia.

The trial court conducted a pre-trial hearing to determine Defendant Avery's capacity to proceed to trial or to plead to the fourteen indictments in question. At this hearing, forensic psychiatrists, Dr. Bob Rollins and Dr. Selwyn Rose, testified for the State and the defense respectively. Based on their separate interviews and examinations of defendant, Dr. Rollins and Dr. Rose agreed in their testimony that defendant was suffering from an impaired memory concerning the events at issue in the various indictments. Both psychiatrists also agreed that defendant was suffering from Chronic Post Traumatic Stress Disorder as a result of his service in the Vietnam War. At the time each forensic psychiatrist saw defendant, a portion of defendant's brain had already been removed in surgery as a result of his self-inflicted gunshot wound.

Dr. Rollins expressed the opinion that the portion of the brain removed controls affect and mood but has no significant effect on memory. It was Dr. Rollins' opinion that defendant had chosen not to remember the events of the allegations, that there was no evidence of organic brain damage or psychosis and that defendant had good memory of events before the week of the offenses and immediately after the offenses. In the opinion of Dr. Rollins, defendant was able to understand the nature and the object of the proceedings against him, was capable of assisting counsel in his defense, and was competent and capable to stand trial.

Dr. Rose expressed the opinion that defendant's memory impairment resulted from either organic brain damage or psychological repression. In the opinion of Dr. Rose, defendant did understand the nature and object of the proceedings against him but was unable to assist counsel in a rational manner in his defense because of memory impairment that prevented him from providing significant information about his behavior or mental state at the time of the commission of the alleged offenses.

At the conclusion of the hearing, the trial court made findings of fact and conclusions of law resolving conflicts in the testimony. The trial court found that although defendant's memory was impaired and his intellectual functions, judgment, and insight were limited, he was able to understand the nature and object of

the proceedings against him and comprehend his own situation in reference to those proceedings, and he was capable of assisting his attorneys in the preparation of his defense in a rational and reasonable manner. Based upon these findings of fact, the court concluded as a matter of law that pursuant to G.S. 15A-1001 defendant was capable of proceeding to trial.

In challenging this ruling, defendant urges this Court to adopt the rule that where the defense pleaded is insanity and the defendant's amnesia hampers preparation of his defense in a "crucial way" the defendant is then incompetent to stand trial or assist in the preparation of his defense. Defendant contends that where an accused suffers complete loss of memory of the events in question as here, he cannot rationally and reasonably consult with his defense counsel, or any expert psychiatric witness, concerning what he was thinking and feeling at the time of the transaction in question; nor can he testify in his own behalf before a jury as to a state of mind or what he was thinking or feeling. Furthermore, defendant contends that such a defendant is not able to give meaningful testimony in his own behalf on whether he understood right from wrong or could appreciate the nature and quality of his actions during the events in question, as required by the M'Naghten test for insanity recognized by North Carolina courts. We are not persuaded that such a rule for determining competency to stand trial should be adopted by this Court.

The law is clear in North Carolina with respect to determining a defendant's competency to stand trial and whether he is capable of assisting in his defense. As set out by this Court in *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980):

> G.S. 15A-1001(a) was enacted in 1973 providing in pertinent part:
>
> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.
>
> This statutory provision expresses a legislative intent to alter the existing case law governing the determination of

> whether a defendant is mentally incapable of proceeding to trial. In contrast to our former case law, the new statute clearly sets forth in the disjunctive three tests of mental incapacity to proceed, and the failure to meet any one would suffice to bar criminal proceedings against a defendant. The statute does not, however, require the trial judge to make a specific finding that defendant is able 'to cooperate with his counsel to the end that any available defense may be interposed' . . . .

Id. at 582-83, 268 S.E. 2d at 462. Furthermore, in directly addressing this issue, this Court has held that:

> Obviously if defendant is unable to recall the events of the crime, his available defenses may be limited. We do not believe this fact alone renders him incompetent to stand trial or denies him a fair trial . . . . The general rule in other jurisdictions, which we adopt, is that amnesia does not *per se* render a defendant incapable of standing trial or of receiving a fair trial. (Citations omitted.) Partial amnesia places a defendant in no worse a position than the defendant who cannot remember where he was on a particular day because of the passage of time, or because he was insane, very intoxicated, completely drugged, or unconscious at the time. (Citation omitted.) In each of these cases, the defendant's available defenses may be limited or impaired because of his present inability to reconstruct a past period of his life.

State v. Willard, 292 N.C. 567, 576-77, 234 S.E. 2d 587, 593 (1977).

Applying the Court's previous reasoning to the case *sub judice*, we find no error in the trial court's ruling that defendant was competent to stand trial and to assist in his defense, notwithstanding his memory impairment.

II.

[2] Defendant next assigns as error the trial court's failure to dismiss the murder indictment against him insofar as it purported to allege first degree murder since such indictment did not allege each essential element of the offense of first degree murder, specifically premeditation and deliberation or felony murder. Defendant's indictment for murder charged the following:

> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder RALPH A. GLENN.

The indictment complies with the short form indictment for murder authorized by G.S. 15-144, Essentials of bill for homicide, which provides:

> In indictments for murder . . . it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed) . . . .

Defendant contends that G.S. 15-144, which was enacted in 1887, and prior case law were repealed by the enactment of G.S. 15A-924(a)(5) in 1973 and the adoption of Article I, § 23 of the Constitution of North Carolina, effective 1971. G.S. 15A-924(a)(5) provides that a criminal pleading must contain a factual statement that asserts facts supporting every element of a criminal offense. Article I, § 23 of the Constitution of North Carolina provides:

> In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation . . . .

Defendant concludes that G.S. 15A-924(a)(5) and Article I, § 23 of the Constitution of North Carolina implicitly repealed G.S. 15-144 and that an indictment for first degree murder must now specifically allege premeditation and deliberation or felony murder. We disagree.

Cases decided after the enactment of G.S. 15A-924(a)(5) and Article I, § 23 of the Constitution of North Carolina have upheld indictments drawn in compliance with G.S. 15-144. In *State v. Norwood,* 303 N.C. 473, 279 S.E. 2d 550 (1981), this Court held that the short form indictment for murder allows the State to prove both premeditation and deliberation and felony murder. In *State v. Williams,* 304 N.C. 394, 284 S.E. 2d 437 (1981), we held that the short form indictment for murder meets the requirements of due process of both the United States and the North Carolina Constitutions. In *State v. Wall,* 304 N.C. 609, 286 S.E. 2d 68 (1982), this Court found no error and noted that "[d]efendant was tried under an indictment drawn pursuant to the

provisions of G.S. 15-144." *Id.* at 620, 286 S.E. 2d at 75. In *State v. Melton,* 307 N.C. 370, 298 S.E. 2d 673 (1983), we held that a short form murder indictment complying with the requirements of G.S. 15-144 would support a conviction of first degree murder. In *State v. Hinson,* 310 N.C. 245, 311 S.E. 2d 256 (1984), we held that the murder indictment "appears in the form approved by G.S. 15-144 and is in all respects proper." *Id.* at 250, 311 S.E. 2d at 260.

These cases are consistent with the principles of statutory construction. Article I, § 23 of the Constitution of North Carolina and G.S. 15A-924(a)(5) did not specifically repeal G.S. 15-144 nor did they repeal it by implication. The above cases reaffirm prior case law and uphold the validity of indictments drawn in conformity with G.S. 15-144. The indictment in question complies with the short form indictment authorized by G.S. 15-144 and is therefore sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder.

III.

[3] In his third assignment of error, defendant contends that the trial court denied him his fourteenth and sixth amendment rights by denying his motion to quash the petit jury venire and the indictments against him. By this assignment, defendant first argues he was denied equal protection under the fourteenth amendment because of systematic exclusion of non-whites from the jury pool from which the grand jury was drawn. Defendant next argues that the pool from which the petit jury was selected did not contain an adequate number of non-whites to reflect a fair cross-section of the community, thus depriving him of rights secured to him by the sixth amendment. For the reasons that follow, we find no error in the trial court's denial of defendant's motions.

For the 1982-83 biennium, the Durham County Jury Commission used the county voter registration list, as prescribed by G.S. 9-2,[1] exclusively as a master jury list. This list was given to the register of deeds who fed the list through a computer, which randomly selected the jury list from which the grand jury and the

1. The current version of the statute requires that the list of licensed drivers residing in the county also be used in preparing the jury list. N.C. Gen. Stat. § 9-2 (c) (1981).

petit jury venire were drawn. The jury commission then purged this list of deceased persons and incompetents.

Dr. James H. O'Reilly, a sociologist who was qualified as an expert witness in the fields of statistics and demography, as those fields are applied to composition of jury pools, testified for the defense. His testimony focused on various methods used to analyze whether a recognized group of persons, such as non-whites, are excluded in significant numbers from pools from which grand or petit juries are selected. At the conclusion of the presentation of the evidence, the trial court concluded that the case *sub judice* was governed by this Court's decision in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980), where we held that the Mecklenburg County Jury Commissioners had complied with G.S. 9-2 in the preparation of the jury list and that there was no subjective or discriminatory selection of jurors by the commissioners. The trial court further stated that "the statistical figures offered by the defendant did not establish an unfair cross-section in violation of the sixth and fourteenth amendments, and that if they did, there was no evidence of any systematic exclusion on the part of the jury commission within the meaning of the law."

Fourteenth and sixth amendment challenges to jury selections were extensively considered by this Court in *State v. Avery*, which governs the case *sub judice* based on the similarity of the essential facts. The Court noted in *Avery*, "[A] conviction cannot stand if it is based on a grand jury or a verdict of a petit jury from which Negroes were excluded by reason of their race." *Id.* at 129, 261 S.E. 2d at 806 (quoting *Whitus v. Georgia*, 385 U.S. 545 (1967)); *see also State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970); *State v. Ray*, 274 N.C. 556, 164 S.E. 2d 457 (1968). However, the defendant "is not entitled to a jury of any particular composition, nor is there any requirement that the jury actually chosen must mirror the community and reflect various and distinctive population groups." *Avery*, 299 N.C. at 130, 261 S.E. 2d at 806 (citations omitted).

On the defendant's fourteenth amendment right to be free from racial discrimination, the *Avery* Court noted that:

> [T]he fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbid-

> den by the [equal protection] clause. 'A purpose to discriminate must be present which may be proven by a systematic exclusion of eligible jurymen of the prescribed race, or by unequal application of the law to such an extent as to show intentional discrimination.'

Id. at 130, 261 S.E. 2d at 806 (citations omitted).

The *Avery* Court held that the defendant had failed to show a discriminatory purpose on the part of the jury commission where Blacks constituted twenty-four percent of the population of the county, the use of voter registration and tax lists in selecting the jury resulted in a jury pool with fifteen percent Blacks, and a computer randomly selected every second, fourth, eighth, twelfth and fifteenth name from the master jury list, since there was only a nine percent deviation between the percentage of Blacks in the county and the percentage of Blacks in the jury pool, and there was no subjective or discretionary selection of jurors by the Jury Commissioners. *Id.* at 130-31, 261 S.E. 2d at 806-07.

In the case *sub judice*, non-whites constitute 35.9 percent of the eligible population in Durham County for service on a jury. The county voter registration list was used as a master jury list from which a computer randomly selected the jury pool.[2] The jury pool was then purged of deceased and incompetent persons. The result was a jury pool with 26.3 percent non-whites. This result represents a 9.6 deviation, only .6 percent above the result found in *Avery*. There was also no evidence in the record of subjective or discretionary selection by the Durham County Jury Commission. Thus the trial court correctly concluded that there was insufficient evidence of systematic exclusion of non-whites from the jury venire or unequal application of the law to such an extent as to show intentional discrimination as required to constitute an equal protection violation under the fourteenth amendment.

Regarding the defendant's sixth amendment challenge, the United States Supreme Court has held that the selection of a petit jury from a representative cross-section of the community is

2. Effective 1 July 1983, the list of licensed drivers residing in the county is a required source of names for use by the commission in preparing the jury list. N.C. Gen. Stat. 9-2(c). Dr. O'Reilly testified that by merging the voter and licensed drivers list "you get a more inclusive master list."

an essential component of the right to a jury trial. *Taylor v. Louisiana*, 419 U.S. 522 (1975). In *Duren v. Missouri*, 439 U.S. 357 (1979), the Court held that to establish a prima facie violation of the fair cross-section requirement, the defendant must show: "(1) that the group alleged to be excluded is a distinctive group; (2) that the representation of the group within the venire is not fair and reasonable with respect to the number of such persons in the community; and (3) that the underrepresentation is due to systematic exclusion in the jury selection process." *Id.* at 364.

Following the *Avery* analysis in applying the *Duren* test to the case *sub judice*, "the defendant satisfies the first requirement for Negroes are an identifiable class." *Avery*, 299 N.C. at 134, 261 S.E. 2d at 808 (citation omitted). As in *Avery*, however, the defendant here has failed to establish a prima facie case with respect to requirements 2 and 3 of the *Duren* test. In both *Taylor* and *Duren*, the Court found that the female defendants' sixth amendment rights had been violated where the disparity between the female population in the community and the women in the jury pool exceeded thirty-five percent. *Id.* at 134, 261 S.E. 2d at 808. In *Avery*, this Court found no violation where disparity totaled nine percent.[3] Here the disparity totaled only 9.6 percent.[4] As noted in *Avery*, the *Taylor* Court stated that the fair cross-section requirement must have much leeway in its application. In *Duren*, the Court noted a gross discrepancy between the percentage of women in the jury venire and the percentage of women in the community. Here, as in *Avery*, it does not appear that the defendant has presented evidence showing a gross discrepancy comparable to the cases where a violation has been found. On the contrary, the evidence is substantially similar to that found by this Court in *Avery* to be insufficient to establish a sixth amendment violation. Thus we reject defendant's fourteenth and sixth amendment challenges to the grand jury and petit jury venire.

3. No sixth amendment violation was found in *State v. Price*, 301 N.C. 437, 272 S.E. 2d 103 (1980) where the absolute disparity was fourteen percent.

4. This figure represents the absolute disparity for the 1982-83 biennium and is considered more accurate than the disparity figure of 10.1 percent testified to by Dr. O'Reilly for the venire used for a much shorter period (1 June through 9 June 1983).

IV.

[4] Defendant's next assignment of error challenges the long-standing common-law rule in North Carolina that insanity is an affirmative defense which must be proved by the defendant. *See State v. Heptinstall*, 309 N.C. 231, 237, 306 S.E. 2d 109, 112 (1983); *State v. Wetmore*, 298 N.C. 243, 245, 259 S.E. 2d 870, 872 (1979); *State v. Caldwell*, 293 N.C. 336, 339, 237 S.E. 2d 742, 744 (1977). By this assignment, defendant urges this Court to reexamine and overrule our precedents on this issue and adopt the rule of twenty-eight states which place the burden of disproving insanity on the prosecution. *See Patterson v. New York*, 432 U.S. 197, 208, n. 10 (1977).

The defendant in *Heptinstall* made a similar request and the Court declined to change the rule. *Heptinstall*, 309 N.C. at 237, 306 S.E. 2d at 112. As did the *Heptinstall* Court, we continue to believe our rule to be the better view, while recognizing that reasonable arguments can be made to the contrary. We again decline to change the rule and hold that the trial court did not err in placing the burden on defendant to prove his insanity.

V.

Defendant makes two arguments in his next assignment of error. He first contends the trial court improperly denied his pretrial motion to prohibit "death qualification" of the jury. He then contends that during jury *voir dire*, the trial court improperly excused twelve jurors based on their beliefs concerning the death penalty.

[5] Defendant argues that the pretrial "death qualification" violated his rights to due process and a trial by a jury drawn from a representative cross-section of the community. This argument has been consistently rejected by this Court. *See e.g.*, *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984); *State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984); *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984); *State v. Hinson*, 310 N.C. 245, 311 S.E. 2d 256 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983); and *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). Defendant here advances no new evidence or argument which merits our reconsideration of the well-established principles set forth in the above cited cases. The motion was properly denied.

[6] Defendant's second argument contends that the trial court's excusal of twelve potential jurors for cause based on their answers during the pretrial "death qualification" violated the principles established in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In addressing this issue we recently noted that:

> *Witherspoon* permits the exclusion for cause of a juror if it is established that the juror 'would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case. . . .' 391 U.S. at 522, n. 21 (emphasis in original). The North Carolina statute which sets forth the grounds for challenging a juror for cause, G.S. 15A-1212, adopts the *Witherspoon* test as the basis for excluding jurors who '[a]s a matter of conscience, regardless of the facts and circumstances,' would be unable to return a verdict imposing the death penalty.

State v. Gardner, 311 N.C. 489, 500, 319 S.E. 2d 591, 599 (1984).[5]

In the case *sub judice*, each of the twelve jurors indicated that they could not vote for the death penalty under any circumstances. We conclude that the jurors were properly excused for cause under the requirements of *Witherspoon* and G.S. 15A-1212(8).

VI.

Defendant's next three assignments of error challenge the trial court's use of its discretion in regulating defendant's questioning of prospective jurors regarding the insanity defense; in excusing five prospective jurors for cause; and in regulating defendant's examination of a prospective juror to determine whether he had been prejudiced by opinions expressed to him concerning defendant's guilt.

[7] Regarding the insanity defense, defendant attempted to question two jurors to determine if they had any impermissible bias against an insanity defense. The trial court did not allow defendant's questioning. Defendant contends that the trial court's failure

5. While the United States Supreme Court has "clarified" the *Witherspoon* test, *Wainwright v. Witt*, 105 S.Ct. 844 (1985), the "clarification" does not appear to be inconsistent with G.S. 15A-1212.

to permit the questioning denied defendant his right to establish potential challenges for cause and to intelligently exercise his peremptory challenges. We cannot agree.

Defendant asked the first juror in question if he knew what a dissociative episode was and whether he believed "that it is possible for a person not to know because of some mental disorder where they actually are, and do things that they believe they are doing in another place and under circumstances that are not actually real?" Defendant asked the second juror in question if she was thinking, "well, if [defendant] says he has PTSD, for that reason alone I would vote that he is guilty."

It is well established that: "In this jurisdiction counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. [Citation omitted.] The overwhelming majority of the states follow this rule." *State v. Bryant*, 282 N.C. 92, 96, 191 S.E. 2d 745, 748 (1972), *cert. denied*, 410 U.S. 987 (1973); *accord State v. Carey*, 285 N.C. 497, 506, 206 S.E. 2d 213, 220 (1974). "A defendant seeking to establish on appeal that the exercise of such discretion constitutes reversible error must show harmful prejudice as well as clear abuse of discretion." *State v. Young*, 287 N.C. 377, 387, 214 S.E. 2d 763, 771 (1975) (citations omitted). This Court also has noted that "the court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts." *State v. Vinson*, 287 N.C. 326, 336, 215 S.E. 2d 60, 68 (1975). Nevertheless this Court recognizes that "in certain cases appropriate inquiry may be made in regard to whether a juror is prejudiced against the defense of insanity. . . ." *Id.* at 338, 215 S.E. 2d at 69.

We have reviewed defendant's contention under the circumstances here presented and find no abuse of discretion. It was within the trial court's discretion to determine whether the questions were improper in that they were hypothetical and tended to "stake out" the jurors and cause them to pledge themselves to a future course of action at a stage of the trial where no evidence had been presented and no instructions had been given on the applicable law.

VII.

[8] Defendant next contends that the trial court abused its discretion in excusing five prospective jurors for cause based on reasons which are not legal justifications for excuse, thereby violating his rights under the sixth and fourteenth amendments to the United States Constitution and article I, §§ 19, 24, and 35 of the North Carolina Constitution. The jurors in question were five of more than 150 prospective jurors examined during the three week jury selection process. The trial court excused the five for reasons of employment, conflicts, religious opinion, opposition to the death penalty, and potentially prejudicial knowledge of the defendant's parole opportunity if convicted. The trial judge "has the duty to supervise the examination of prospective jurors and to decide all questions relating to their competency." *State v. Young*, 287 N.C. at 387, 214 S.E. 2d at 771. He has broad discretion "to see that a competent, fair and impartial jury is empaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion." *State v. Johnson*, 298 N.C. 355, 362, 259 S.E. 2d 752, 757 (1979). *Accord State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980). We find no abuse of discretion.

VIII.

[9] Defendant further contends that the trial court abused its discretion in refusing to allow defendant to elicit from a juror the opinion expressed to the juror by friends about the defendant's guilt or innocence. The defendant exercised a peremptory challenge and removed the juror after his challenge for cause was denied. Defendant was entitled to fourteen peremptory challenges plus one additional peremptory challenge for each alternate juror. N.C. Gen. Stat. § 15A-1217 (1983). Defendant only exercised twelve peremptory challenges during selection of the first twelve jurors and two peremptory challenges during selection of the three alternate jurors. Thus, defendant did not exhaust his peremptory challenges as provided by G.S. 15A-1214(h). Therefore, no prejudice has been shown. *See Young*, 287 N.C. at 389, 214 S.E. 2d at 772. We conclude that the trial court did not abuse its discretion.

IX.

Defendant's ninth assignment of error is directed to the trial court's refusal to dismiss three of the four felonious entry charges, two of the three felonious burning charges, and the first degree murder charge at the close of the State's evidence and again at the close of all the evidence, on the basis of the insufficiency of the evidence to support convictions in these cases. Defendant was subsequently convicted of all charges. However, the trial court arrested judgment on one of the felonious burning offenses, holding as a matter of law that the conviction for this offense merged into the murder case under the felony murder rule.

The evidence presented at trial tended to show that defendant entered the IBM Complex through the loading dock of Building 205. While in Building 205, defendant burned or attempted to burn that building. Defendant then exited Building 205 via a passageway which connects Buildings 205 and 201. The passageway is about twenty-five feet wide, totally enclosed, and used for production and pedestrian traffic between the two buildings. No door or barrier seals off either Building 205 or Building 201 from this connecting passageway which links the two buildings. Defendant then entered Building 201 where he fatally shot IBM employee Ralph Glenn and burned or attempted to burn Building 201. Defendant next entered Building 303 which was built as an extension of Building 201. A wall of Building 303 is butted against a wall of Building 201. The buildings are connected by a sliding door which always remains open, except in the event of a fire emergency. Defendant finally entered Building 203 via a passageway similar to the one described above which connects Buildings 205 and 201. Defendant burned or attempted to burn Building 203 before exiting the IBM Complex.

A.

[10] Defendant makes three arguments in this assignment. First, defendant argues that the trial court erred in failing to dismiss the multiple charges against him of felonious entry. Defendant contends that the IBM Complex is but a single structure or building whose various parts are identified by different numbers for administrative convenience, and are connected by passageways with neither doors nor any other barriers to impede access to all parts of the facility once entry is gained. The State contends that

the buildings in question constitute four separate buildings in that they were not all built at the same time, are only connected by the passageways and a sliding door, are separately secure to someone entering from the outside, and each possesses a separate character and individual identity. The trial court found the separate indictments proper and refused to dismiss three of the four felonious entry charges.

The specific argument raised here is one of first impression in this State. Its resolution must be the result of our interpretation of the legislative intent of the meaning and limitations of the term "building" as that term is used in G.S. 14-54 which reads as follows:

> (a) Any person who breaks or enters any *building* with intent to commit any felony or larceny therein shall be punished as a Class H felon.
>
> (b) Any person who wrongfully breaks or enters any *building* is guilty of a misdemeanor and is punishable under G.S. 14-3(a).
>
> (c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, *and any other structure* designed to house or secure within it any activity or property.

(Emphases added.)

The dispositive question for our review is whether it was the intent of the legislature that several connected buildings, constructed at different times, and treated as separate buildings by those using them, with separate building numbers, should nevertheless be treated as only one building under the above statute because the buildings are connected by passageways that permit unrestricted access from one building to the other. The only case cited by defendant is *State v. Gamble*, 56 N.C. App. 55, 286 S.E. 2d 804 (1982). In that case, the Court of Appeals determined that a fenced-in area is not a building as that term is used in G.S. 14-54. The opinion further noted the common definition of "building" as

> a constructed edifice designed to stand more or less permanently, covering a space of land, usu. [sic] covered by a

> roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) . . . .
>
> Webster's Third New International Dictionary (1968 ed.) 292. The 'particular designations' in the G.S. 14-54(c) definition of 'building,' 'dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house,' indicate that the legislature intended the statute to proscribe breaking or entering into that which conforms to the common definition. The statutes predating the present G.S. 14-54 also support this construction of its coverage, restricting the statute to that which has—or is intended to have—one or more walls and a roof.

Id. at 58-59, 286 S.E. 2d at 806.

We find nothing in the Court of Appeals' decision in *Gamble* to support defendant's contention that the IBM Complex involved in this case should be treated as one building rather than four. The case supports the proposition rather, that the word "building" should be given its common and usual meaning. We conclude that the trial court correctly treated the IBM Complex as four separate buildings. Accordingly, we reject defendant's contention that three of the four indictments for felonious entry must be dismissed because only one building was involved.

B.

[11] Defendant also contends that even if the Court finds that the buildings enumerated in the separate burning charges are separate buildings the evidence was insufficient to withstand his motion to dismiss the count alleging a burning of Building 201. Defendant argues that because G.S. 14-62 does not define the term "set fire to or burn or cause to be burned" the State was required to prove a "burning" as that term has been defined in arson cases. Defendant further argues that the evidence does not establish such a "burning," and therefore the motion to dismiss should have been granted. Although defendant was indicted for feloniously setting fire to Building 201, the jury only convicted him of the lesser included offense of *attempting* to set fire to or burn said building, a violation of G.S. 14-67.1. The trial court ruled as a matter of law that this conviction merged with the murder conviction under the felony murder rule.

A conviction under G.S. 14-67.1 does not require that the State prove a "burning" as is required under the arson statute and the common law. *See State v. Oxendine*, 305 N.C. 126, 286 S.E. 2d 546 (1982). It requires that a defendant willfully and wantonly *attempt* to set fire to or burn any building or structure. The definition of attempt is "to make an effort to do, accomplish, solve . . . ." Webster's Third International Dictionary 140 (3d ed. 1971). The evidence here clearly shows that defendant attempted to burn Building 201. Defendant ignited a fire bomb in Building 201 which caused some blackening of the floor tile, a steel cabinet and an office partition. Some burned matches were also found in Building 201. Defendant concedes that this burning occurred but he claims that it was insufficient evidence to support a conviction under G.S. 14-62. Since defendant was convicted under G.S. 14-67.1, his argument is without merit. We hold that the evidence was sufficient to support a conviction for attempting to set fire to or burn a building under G.S. 14-67.1. We find no error.

Defendant next argues that the trial court erred in failing to dismiss two of the three felonious burning charges against him. Defendant bases this argument on his contention that the IBM Complex is a single building. Under the facts of this case, we find no compelling reason to distinguish between the word "building" as used in the felonious entry statutes and the same word as used in the felonious burning statutes. Accordingly, we reject defendant's assignment of error.

C.

Defendant's final argument under this assignment is that his conviction of first degree murder predicated on the felony murder rule should not be allowed to stand because the underlying felony, burning of a building used for trade (Building 201) should have been dismissed. As stated earlier, there was sufficient evidence to go to the jury and sustain a jury verdict of guilty of attempting to set fire to or burn a building in violation of G.S. 14-67.1. This is a felony conviction and therefore it is available to serve as the underlying felony under the felony murder rule.

[12] Defendant next contends that the felony for which he was convicted, attempting to set fire to a building used for trade as set forth in G.S. 14-67.1, is not a felony within the meaning of G.S. 14-17 under the facts of the present case because it is not a listed felony and this felony did not "cause" the victim's death. G.S. 14-17 provides in pertinent part that:

> A murder . . . which shall be committed in the perpetration or attempted perpetration of any . . . other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree . . . .

We believe that the fire bombs used by defendant were deadly weapons used in the perpetration of the felony of attempting to burn a building used for trade, and that the killing of the victim in question was in the perpetration of this felony within the meaning of G.S. 14-17. Furthermore, the law is clear in this State that a killing is committed in the perpetration or attempted perpetration of a felony for the purpose of the felony murder rule when there is no break in the chain of events leading from the initial felony to the act causing death. *State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981). An interrelationship between the felony and the homicide is a prerequisite to the application of the felony murder rule. *State v. Strickland*, 307 N.C. 274, 291-94, 298 S.E. 2d 645, 657-58 (1983); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). We hold that the evidence was sufficient to establish that defendant killed Ralph Glenn in the perpetration of the felony of attempting to burn Building 201, a felony committed with the use of a deadly weapon, a fire bomb.

X.

[13] We next consider defendant's contention that the trial court erred by limiting defendant's cross-examination of the State's rebuttal witness, Dr. Owen Buck. Dr. Buck, a psychiatrist who was qualified as an expert witness, testified that defendant's violent outburst did not "fit with the literature about Post Traumatic Stress Disorder (PTSD) types of outburst," thereby rebutting previous defense testimony that defendant's behavior was consistent with the PTSD mold. On cross-examination, defendant sought to impeach Dr. Buck's testimony by showing his apparent unfamiliarity with the literature about PTSD. The court permitted defendant to question Dr. Buck extensively on his familiarity with the literature but the court refused to permit defendant to ask Dr. Buck questions of his familiarity with the facts of certain criminal cases involving the PTSD defense. Defendant argues that it was reversible error for the trial court to limit his cross-examination of Dr. Buck in that he was thereby deprived of his constitutional right to confront and cross-examine witnesses against him. For the following reasons we disagree.

Although the range of relevant cross-examination is very broad, *State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983), and a witness in a trial may be impeached and discredited by cross-examination, *State v. Wilson*, 311 N.C. 117, 316 S.E. 2d 46 (1984), the trial court's rulings on objections to the extent of cross-examinations will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination. *Id.* at 128, 316 S.E. 2d at 54. Defendant was permitted to conduct an extensive cross-examination on Dr. Buck's familiarity with the PTSD literature. This cross-examination provided ample opportunity for the jury to form an opinion of Dr. Buck's actual familiarity with the PTSD literature. Therefore, we believe that the verdict was not improperly influenced by the trial court's limitation of defendant's cross-examination of Dr. Buck.

XI.

[14] Defendant next assigns error to the trial court's admitting into evidence over defendant's objection and *motion in limine* certain exhibits which tended to impeach previous testimony by defendant that he had not engaged in certain prior "bad acts," to wit: misuse of trust fund monies belonging to the children of his deceased brother.

At trial, defendant called as a witness his mother, Thelma Avery, who testified in response to defendant's questioning that he had not been involved in any court action involving his brother's children, and that there had never been any allegations that defendant had misused any money of these children. Subsequently, on cross-examination, defendant also denied any involvement or knowledge of such a court action. On rebuttal, the State introduced written exhibits which tended to show *inter alia* that defendant had requested that he be allowed to be absent from work to attend a court action regarding his alleged misuse of his brother's children's trust fund money.

On a similar assignment, a majority of this Court found no error where the trial court had allowed the State to introduce evidence of a defendant's drug conviction after defendant had put his parole officer on the witness stand in his behalf. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984) (Exum, J. and Frye, J., dissenting). In *Brown* it was stated that:

> The basis for the rule commonly referred to as 'opening the door' is that when a defendant in a criminal case offers

> evidence which raises an inference favorable to his case, the State has the right to explore, explain, or rebut that evidence. *State v. Albert*, 303 N.C. 173, 277 S.E. 2d 439 (1981).

Id. at 571, 313 S.E. 2d at 590. While the dissenting opinion in *Brown* disagreed with the applicability of the rule to the facts of the case, there was no disagreement as to the principle involved. This principle is explained in the case of *State v. Albert*, 303 N.C. 173, 277 S.E. 2d 439 (1981) as follows:

> [T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially. *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973); *State v. Black*, 230 N.C. 448, 53 S.E. 2d 443 (1949).

Id. at 177, 277 S.E. 2d at 441.

In the case *sub judice* we believe defendant "opened the door" to the facts surrounding his involvement in the alleged court action with his mother's testimony. Therefore, it was not error to admit evidence in rebuttal of defendant's later testimony on this issue.

XII.

[15] Defendant next contends that the trial court erred in refusing to allow defendant's surrebuttal witness, Gordon Commodore, to testify concerning the length of his own "flashbacks" concerning Vietnam. Defendant argues that the testimony would have rebutted the State's favorable psychiatric testimony that dissociative episodes related to PTSD were of limited duration and therefore were not consistent with defendant's conduct at the time of his offenses. After careful review of the record, which contains the testimony of Mr. Commodore taken in the absence of the jury, we find no merit in this assignment of error. The witness was not qualified as an expert and no expert testimony was introduced to show that he had PTSD. The witness testified

that he was using drugs prior to his alleged extended dissociative episode. This could have had an impact on his condition and at the very least makes his case factually different on this issue from this defendant's case. Finally, Dr. Buck and Dr. Walker, who provided the psychiatric testimony in question for the State, did not testify that extended dissociative episodes related to PTSD were impossible; they merely stated that such episodes were not generally consistent with PTSD.

The probative value of defendant's witness' testimony is questionable in light of these facts. we believe the testimony's value to defendant did not outweigh the potentially prejudicial and confusing effect it might have had on the jury. We find no error.

XIII.

[16] Defendant argues that the trial court erred in refusing to submit to the jury the lesser included offense of involuntary manslaughter. Since no one actually saw defendant shoot Ralph Glenn, defendant contends that he could have killed Mr. Glenn in a criminally negligent manner which would have supported submission of such lesser included offense to the jury.

Defendant was tried under an indictment drawn pursuant to the provisions of G.S. 15-144. The trial judge, as is permitted by that statute, submitted to the jury the possible verdicts of (1) guilty of first degree murder under either of the theories of malice, premeditation and deliberation or the felony murder rule; (2) guilty of second degree murder; and (3) not guilty. *See State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982). The jury returned a unanimous verdict of guilty of first degree murder under the felony murder rule. The jury found defendant not guilty of first degree murder based on malice, premeditation, and deliberation.

It is well established that when evidence shows the killing of a person by one who is engaged in the perpetration or the attempt to perpetrate a felony described in G.S. 14-17, the perpetrator may properly be charged and convicted of murder in the first degree notwithstanding such person's intentions or conduct. *See State v. Cawthorne*, 290 N.C. 639, 277 S.E. 2d 528 (1976); *see also State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1971). Furthermore, "when the law and evidence justify the use of the

felony murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it." *State v. Wall*, 304 N.C. at 613, 286 S.E. 2d at 71. In the case *sub judice*, there is no evidence to support submission of involuntary manslaughter as a lesser included offense. There was no error in failing to submit this offense to the jury.

XIV.

Defendant contends that the trial court erred in instructing the jury on the proximate cause element of the felony murder rule. Defendant argues that the instructions should have required the jury to find that the proximate cause of the victim's death was the burning or attempt to burn the building in question rather than the shooting of the victim by a .45 caliber weapon. This assignment is based on defendant's earlier argument that the felony murder rule is not applicable to this case. We have rejected that argument and therefore find it unnecessary to address this assignment further.

XV.

[17] Defendant next contends that his two convictions of assault with a firearm on a law enforcement officer cannot stand because of the failure of the trial judge to instruct the jury, upon his request, that in order to convict him of this offense the jury must find that defendant knew that he was firing at a law enforcement officer. Defense counsel contended at the trial that knowledge that the victim is a law enforcement officer in the performance of his duties is an essential element of the crime of assault with a firearm upon a law enforcement officer in violation of G.S. 14-34.2 and requested the court to so instruct the jury. The trial court refused and defendant objected.

While our research has disclosed no decision of this Court deciding this specific question, defendant cites for our consideration the decision of the Court of Appeals in *State v. Rowland*, 54 N.C. App. 458, 283 S.E. 2d 543 (1981). In that case, the Court of Appeals held that in order to obtain a conviction under G.S. 14-33(b)(4), the burden is on the State to satisfy the jury from the evidence and beyond a reasonable doubt that the party assaulted

was a law enforcement officer performing the duty of his office, and that the defendant knew his victim was a law enforcement officer. The State urges this Court to overrule *State v. Rowland* and adopt the view that knowledge that the victim is a law enforcement officer is not an element of the offenses proscribed by G.S. 14-34.2 or G.S. 14-33(b)(4). While the offense in the former case is a felony and in the latter case a misdemeanor, the essence of both statutes, we believe, is the legislative intent to give greater protection to the law enforcement officer by prescribing a greater punishment for one who knowingly assaults such an officer.

We note that the Pattern Jury Instructions for offenses in violation of both G.S. 14-34.2 and G.S. 14-33(b)(4) require not only that the jury find that the victim was a law enforcement officer but also that the defendant "knew or had reasonable grounds to know" that the victim was a law enforcement officer. N.C.P.I., Crim. 208.80 (June 1985), Crim. 208.95 (October 1984). We believe that such a requirement is in accord with the purpose and intent of the General Assembly in enacting this legislation. Thus, we hold that knowledge is an essential element of the crime of assault with a firearm upon a law enforcement officer. *State v. Rowland*, 54 N.C. App. 458, 283 S.E. 2d 543; *see also State v. Atwood*, 290 N.C. 266, 225 S.E. 2d 543 (1976).

"In giving instructions the court is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon." *State v. Mundy*, 265 N.C. 528, 529, 144 S.E. 2d 572, 573 (1965). Knowledge being an essential element of the crime, the failure of the trial judge to instruct on this element must be held to be prejudicial error. *Id.* Therefore, defendant's convictions for assault with a firearm upon a law enforcement officer must be vacated. However, as the State correctly contends, by finding the defendant guilty of felonious assault upon a law enforcement officer, the jury necessarily found the facts that would support defendant's conviction of the lesser included offenses of assault with a deadly weapon. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980); *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d

445 (1983). Accordingly, these cases will be remanded to permit resentencing on the charge of assault with a deadly weapon.

XVI.

Defendant next assigns as error that the trial court erred in its definition of "setting fire" to property in requiring only that defendant cause fire to come into contact with the property. Since defendant was only convicted of attempting to set fire to or burn a building, we fail to see how defendant was prejudiced by the trial court's instruction. Thus, we reject this assignment of error.

XVII.

[18] Defendant next contends that the trial court erred in failing to explain to the jury what proof of insanity to the jury's satisfaction means under North Carolina law. Defendant specifically objects to that portion of the trial court's charge that, "if you are in doubt as to the insanity of the defendant, the defendant is presumed to be sane and you would find the defendant guilty." The trial court instructed the jury that the burden of proving insanity rested upon defendant and that it was defendant's burden to satisfy them of his insanity but not beyond a reasonable doubt. The court further instructed the jury that even if the State proved beyond a reasonable doubt each of the things which it is required to prove about each offense, "the defendant would nevertheless be not guilty if he was legally insane at the time of the alleged offense." Defendant contends that the challenged portion of the jury instruction conveyed to the jury that defendant was "required to overcome all doubt on this issue."

The trial court in the case of *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984), charged the jury in almost the identical language used by the trial court in the instant case. This Court, in an opinion written by Chief Justice Branch, held that there was no prejudicial error in the instruction. For the reasons stated in *Adcock*, we reject defendant's assignment of error.

XVIII.

[19] Defendant's eighteenth assignment of error is that the trial court erred in refusing to instruct the jury substantially in accord with defendant's requested instructions Numbers 6 and 8. Defendant's requested instructions pertain to the concepts of

general criminal intent or *mens rea,* specific intent and willfulness.

Neither statutory nor case law requires that the trial court's charge be given exactly in the words of the tendered request for instructions. It is sufficient if the trial court gives the requested instructions in substance. *State v. Silhan,* 302 N.C. 223, 275 S.E. 2d 450 (1981); *State v. Matthews,* 299 N.C. 284, 261 S.E. 2d 872 (1979); *State v. Monk,* 291 N.C. 37, 229 S.E. 2d 163 (1976). A review of the charge in the present case reveals that the court gave instructions substantially in accord with defendant's request but only insofar as the requested instructions were a correct statement of the law and proper in the context of this case.

XIX.

[20] Defendant next contends that the trial court erred when sentencing him on the non-capital felony cases by finding as an aggravating factor that defendant was a mentally abnormal person and then utilizing such fact to impose a sentence greater than the presumptive sentence. In each of the non-capital cases, other than the one which was arrested because the trial court held that it merged into the felony murder case, the trial court found as an aggravating factor the following:

> The defendant is a dangerous and mentally abnormal person whose commitment for an extended period of time is necessary for the protection of the public and society at large.

Essentially, defendant contends that utilizing the above factor to impose a sentence greater than the presumptive term amounts to using his mental illness to enhance punishment, thus depriving him of his right not to be subjected to cruel and unusual punishment under the eighth and fourteenth amendments to the Constitution of the United States and Article I, § 23 of the Constitution of North Carolina.

We interpret the court's finding as not punishing defendant for being mentally ill; *see Robinson v. California,* 370 U.S. 666 (1962), but as a finding that defendant was abnormal in the sense of being unusually dangerous. In *State v. Higson,* 310 N.C. 418, 424, 312 S.E. 2d 437, 441 (1984), this Court held that "defendant's long history of mental disorder, coupled with the testimony of the expert witnesses at trial and the violent attack on his family

members, sufficiently demonstrates his dangerousness to others." The Court held that it was therefore proper for the trial court to find this factor (extremely dangerous abnormal person) in aggravation. In *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), this Court held that the trial court did not err in finding as an aggravating factor that defendant was dangerous to others when defendant suffered from a physical handicap, as well as social and emotional problems, and his condition manifested itself in the form of serious antisocial behavior and criminal acts.

In the case *sub judice*, the trial court's finding that defendant is a dangerous and mentally abnormal person is supported by the evidence. The evidence showed that defendant suffered from a mental disorder—PTSD—at the time of the incident at the IBM Complex for which he was convicted. The expert testimony also revealed that there are strong indications that defendant has psychotic potential when he is under emotional stress. Since the evidence supports the conclusion that defendant is a dangerous and mentally abnormal person, we find no error in the trial court's finding of this factor in aggravation.

[21] Defendant also contends that assuming the trial court's finding that he is a dangerous and mentally abnormal person was proper, it was not tailored to each offense. By this, defendant argues that the trial court mechanically recited the same aggravating factor in each of the felony judgments and commitments without giving consideration to the specific offense being punished. The record reveals that the trial court made a separate finding for each crime in accordance with the rule stated in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689. We find no error.

XX.

[22] Defendant next challenges the trial court's finding that defendant is a dangerous and mentally abnormal person and the finding that defendant engaged in a pattern or course of violent conduct. Defendant contends that these two findings were predicated upon the fact that he suffered from a mental illness at the time he committed the offenses for which he was convicted, and therefore violate G.S. 15A-1340.4(a)(1)(p). This statute provides that "the same item of evidence may not be used to prove more than one factor in aggravation." Defendant notes that in *State v. Higson*, 310 N.C. 418, 312 S.E. 2d 437, this Court reviewed the

trial court's findings in aggravation that (1) the defendant is an extremely dangerous mentally abnormal person, and (2) the defendant's conduct during the crime indicates a serious threat of violence and agreed with that defendant's contention "that these two factors are duplicitous and both are proved by the same evidence." *Id.* at 423, 312 S.E. 2d at 440-41. We note a distinction, however, between the second factor found in *Higson* and the second factor found by the trial judge in the present case. In *Higson*, the second non-statutory factor found was that the defendant's violent conduct *during this crime* indicates a serious threat of violence. In the present case the second non-statutory factor found was that defendant engaged in a pattern or course of violent conduct which included the commission by defendant of *other crimes* of violence against other persons.

In *Higson*, after first holding that the finding that the defendant was an extremely dangerous abnormal person was amply supported by the evidence of record, this Court said:

> We do not agree, however, that under the facts of this case it is relevant to consider as a separate aggravating factor that 'defendant's conduct during the crimes indicates a serious threat of violence.' Here, the defendant pled guilty to second degree murder and to assault with a deadly weapon with intent to kill inflicting serious injury. Both crimes, by definition, are crimes of violence. Presumably the threat of violence *inherent in these* crimes was considered in determining the presumptive sentences for the offenses. (Emphasis added.) (Citations omitted.)

State v. Higson, 310 N.C. at 424, 312 S.E. 2d at 441.

In the present case, in addition to the evidence relating to the violent acts committed by defendant at the IBM Complex on 30 August 1982, there was evidence that prior to that date defendant had hit several members of his family during attacks of rage, shot a gun while angry at one of his neighbors, hit his boss at another company where he once worked, and was involved in two fist fights. Thus, we conclude that there was sufficient evidence that defendant had engaged in a pattern or course of violent conduct to support the judge's finding of that factor in aggravation separate and apart from the evidence of the psychiatrist which supported the aggravating factor relating to defend-

ant being a dangerous and mentally abnormal person. Thus, it appears that the trial court's findings in aggravation were not based on the same item of evidence. Likewise, the findings are related to different sentencing purposes. The finding that defendant is a dangerous and mentally abnormal person is related to the protection of the public by restraining offenders; the finding that defendant engaged in a pattern or course of violent conduct is related to the offender's culpability and to providing a general deterrent to criminal behavior. *See* N.C. Gen. Stat. § 15A-1340.3 (1983). We conclude that the trial court's findings in aggravation were not based on the same item of evidence in violation of G.S. 15A-1340.4(a)(1)(p).

XXI.

[23] Defendant next argues that the trial court erred in failing to find as mitigating factors in the non-capital felony cases all of the mitigating factors specifically found by the jury in the sentencing phase of the capital case. The jury found nine mitigating factors and one aggravating factor. The trial judge found four mitigating and three aggravating factors, and ruled that the aggravating factors outweighed the mitigating factors. In *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689, this Court noted that:

> The fair sentencing act did not remove, nor did it intend to remove, all discretion from the sentencing judge. Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion. Thus, upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion.
>
> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another

> in a particular case. N.C. Gen. Stat. 15A-1340.4(a). The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

Id. at 597, 300 S.E. 2d at 697 (citations omitted).

The Court further held that:

> There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right . . . . A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

Id. at 597-98, 300 S.E. 2d at 697 (citations omitted).

There is no evidence that the trial judge abused his discretion in the sentencing phase of the trial by not finding the same mitigating factors as those found by the jury. We find no error.

XXII.

In defendant's final assignment of error, he argues that the trial court erred in failing to merge the felonious entry convictions and all of the felonious burning or attempting to burn convictions into the felony murder conviction. Defendant further argues that the trial court erred in imposing consecutive sentences on all four felonious entry convictions and on two of the burning or attempting to burn a building used in trade convictions.

In this assignment of error, defendant again argues that the IBM Complex is one building and therefore he could only be convicted of one charge of felonious burning and one charge of felonious entry. For the reasons stated in Part IX of this opinion, we hold that the IBM Complex is comprised of four separate buildings. Therefore, we find no merit in defendant's argument.

[24] Defendant also contends that even if the Court finds that there are four separate buildings in question, each of the felonious entry and each of the felonious burning charges should serve as the underlying felony for the felony murder conviction. We

disagree. This Court has held that when a defendant has been convicted of murder in the first degree based upon a finding that the murder was committed in the perpetration of a felony, separate punishment may not be imposed for the underlying felony. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). However, separate punishment may be imposed for any offense which arose out of the same transaction but was not the underlying felony for the felony murder conviction. *State v. Murvin*, 304 N.C. 523, 284 S.E. 2d 289 (1981).

[25] In the case *sub judice*, the trial court's instructions reveal that the only felony upon which defendant's first degree murder conviction could be based was the felonious burning or attempting to burn IBM Building 201. Thus, the first degree murder conviction under the felony murder rule was premised on the underlying felony of burning or attempting to burn Building 201 (Case No. 82-CRS-19158). The trial court properly arrested judgment on that charge. The felonious entry convictions and the two other felonious burning convictions, because they were not submitted as possible underlying felonies, were neither essential nor indispensable elements of the State's proof of murder and were not underlying felonies for the felony murder conviction. *State v. Murvin*, 304 N.C. 523, 284 S.E. 2d 289. Therefore, imposition of punishment for these convictions was proper.

Having carefully considered each of defendant's assignments of error, the decision of this Court is as follows:

Case No.	Offense	Disposition
82-CRS-19151	Assault with a deadly weapon inflicting serious injury	No error.
82-CRS-19152	Assault with a firearm on a law enforcement officer	Judgment vacated and case remanded for sentencing on Assault With a Deadly Weapon.

Case No.	Offense	Disposition
82-CRS-19153	Assault with a firearm on a law enforcement officer	Judgment vacated and case remanded for sentencing on Assault With a Deadly Weapon.
82-CRS-19154	Murder in the First Degree	No error.
82-CRS-19155	Assault with a deadly weapon inflicting serious injury	No error.
82-CRS-19156	Assault with a deadly weapon inflicting serious injury	No error.
82-CRS-19157	Misdemeanor assault with a deadly weapon	No error.
82-CRS-19159	Attempting to burn a building used for trade	No error.
82-CRS-19160	Setting fire to or burning a building used for trade	No error.
83-CRS-10213	Felonious entry of a building	No error.
83-CRS-10214	Felonious entry of a building	No error.
83-CRS-10215	Felonious entry of a building	No error.
83-CRS-10216	Felonious entry of a building	No error.

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

STATE OF NORTH CAROLINA v. WILLIE BROWN, JR.

No. 565A83

(Filed 10 December 1985)

1. **Criminal Law § 22— murder—no arraignment—no error**

The trial court did not err by trying defendant for first degree murder without first conducting a formal arraignment because the failure to conduct an arraignment on a capital charge does not constitute reversible error *per se*, because defendant was not prejudiced in that the record was replete with pretrial motions, letters, and orders listing the charges against defendant, and because defendant was tried as if he had pled not guilty. N.C.G.S. 15A-941.

2. **Searches and Seizures § 7— murder and robbery—evidence seized and statements made after arrest—probable cause to arrest—evidence and statements admissible**

Physical evidence seized from defendant and pretrial statements made by defendant after his arrest for murder and robbery were admissible where officers had probable cause to arrest in that the arresting officer had personal knowledge of the disappearance of a Zip Mart clerk, her car, and the store's money; the officer observed the clerk's car being driven in a suspicious manner in an area near the Zip Mart soon after the disappearance was reported and at an hour when the streets were largely deserted; and defendant attempted to evade apprehension when he discovered that he was being followed by police.

3. **Constitutional Law § 67; Jury § 7.11— death qualified jury—no error**

The practice of death qualifying the jury did not deprive defendant of a fair trial.

4. **Jury § 7.12— juror excluded for opposition to capital punishment—no violation of Witherspoon standard**

In a prosecution for robbery and murder, the trial court did not err by excluding a juror who explicitly stated that he could not vote to return a sentence of death under any circumstances. *Witherspoon v. Illinois*, 391 U.S. 510, did not set out any specific terminology or ritualistic form of questioning which must be employed when delving into a juror's views on capital punishment.

5. **Jury § 6— murder and robbery—motion for sequestration and individual voir dire denied—no error**

The trial court did not err in a prosecution for murder and robbery by denying defendant's motion for sequestration and individual *voir dire* of prospective jurors where the dismissed juror to whom defendant pointed in support of the contention that a collective *voir dire* permitted prospective jurors to become educated as to responses which would enable them to be excused from the panel was the first juror to be excused on the basis of his opposition to the death penalty. Moreover, the statement by the juror that he may not have been opposed to the death penalty the day before, but was that day, indicated merely that he had been forced for the first time to take a position on capital punishment. N.C.G.S. 15A-1214(j).

6. Jury § 6.4— murder and robbery—voir dire question—whether potential jurors thought death penalty would be enforced—objection sustained—no error

The trial court did not err in a prosecution for murder and robbery by sustaining the State's objection to defendant asking a potential juror whether there was anything to make him believe that a death sentence would not be carried out. Defendant failed to show that jurors who have doubts as to whether the State would actually carry out an execution would be inclined to give less than their full and serious consideration to the decision of whether to return a sentence of death; moreover, the juror in this case had been asked and had answered an almost identical question.

7. Criminal Law § 101— bailiff sitting next to prosecutor—no prejudice

In a prosecution for murder and robbery in Martin County in which the jury was brought from Perquimans County, the trial court properly denied defendant's motion for a mistrial where the sheriff of Perquimans County, who was acting as bailiff, seated himself directly behind or adjacent to the prosecutor when the jury selection began; defense counsel objected and moved for a mistrial; the trial judge gave defense counsel the alternatives of allowing the sheriff to remain seated next to the prosecutor and having a deputy carry out the jury functions, or of requiring the sheriff to move and having him continue to assist in providing transportation and lunch for the jurors; and defendant chose the latter alternative. There was no substantial and irreparable prejudice to the defendant because the conduct in question occurred on the first day of jury selection, defendant objected within a matter of minutes, the trial judge took immediate steps to correct the situation, the sheriff engaged in no communications with the jury during the short interval between the time he sat down and when the objection was lodged, and there was no allegation that the sheriff made improper extrajudicial comments to any of the jurors.

8. Homicide § 18.1— murder—evidence of premeditation sufficient

The trial court did not err by submitting to the jury the charge of first degree murder based on premeditation and deliberation where there was evidence that the Zip Mart where the victim worked had been robbed; defendant was in possession when arrested of the victim's car and personal effects, a sum of money consistent with the amount estimated to have been taken from the store, and the murder weapon; the victim's body was discovered on an isolated dirt road several miles from the store; and the physical evidence tended to show that defendant shot the deceased six times and that some of the shots were fired while the victim was lying on the ground.

9. Constitutional Law § 80— death penalty constitutional

The North Carolina death penalty statute is constitutional. N.C.G.S. 15A-2000 *et seq.*

10. Criminal Law § 135.6— sentencing for murder—prior convictions involving violence stipulated—State allowed to present evidence during sentencing phase—no error

The trial court did not err during the sentencing phase of a prosecution for murder by allowing the State to present evidence of the circumstances surrounding his prior convictions for offenses occurring in Virginia even though

defendant was willing to stipulate the existence of the Virginia convictions and that they all involved the use or threat of violence. The prosecution must be permitted to present *any* competent, relevant evidence relating to the defendant's character or record which will substantially support the imposition of the death penalty so as to avoid an arbitrary or erratic imposition of the death penalty.

11. Criminal Law § 135.9— murder—mitigating factors submitted over defendant's objection—no error

The trial court did not err in a prosecution for murder by submitting to the jury the mitigating factor of no significant history of prior criminal activity over defendant's objection. It was apparent that the trial judge felt that it was in defendant's favor for the jury to consider the significance of his convictions in 1963 and 1965 in light of circumstances and events which followed. Defendant was only 20 years old when convicted of the 1965 offenses, defense counsel argued strenuously that there was no evidence that defendant committed any violent acts or violated any prison rules during the 18 years that he was incarcerated, and defendant presented nothing to support his claim that the submission of this factor poisoned the minds of the jurors against finding any other mitigating circumstances. N.C.G.S. 15A-2000(f)(1).

12. Criminal Law § 135.9— murder—rebuttal of mitigating factor—State allowed to present evidence of prior convictions in case in chief—no prejudice

There was no prejudice in the sentencing phase of a prosecution for murder where the State was allowed to present evidence during its case in chief of defendant's six convictions for felonious breaking and entering and felonious larceny. It was clear from the instructions that the evidence was not admitted to establish the aggravating factor of prior convictions of a felony involving the use or threat of violence, as defendant contended, but to rebut the mitigating factor of no significant history of prior criminal activity. Although the introduction of this evidence was premature, there was no prejudice because it was merely the timing of the evidence which was erroneous, and because defendant had acknowledged convictions for breaking and entering, armed robbery, and assault during the guilt-innocence phase of the trial. N.C.G.S. 15A-2000(e)(3), N.C.G.S. 15A-1443(b).

13. Criminal Law § 135.8— murder—aggravating factor—especially heinous, atrocious or cruel killing—properly submitted

The trial court did not err during the sentencing phase of a prosecution for murder by submitting the aggravating factor that the killing was especially heinous, atrocious or cruel where the defendant robbed a convenience store; the clerk was forced to accompany defendant in her car to a secluded area approximately five miles from the store and was shot six times; there was evidence that her hands had been bound; and there was medical testimony that the victim may have lived as long as fifteen minutes after being shot, would have gone into shock during the last phase of life, and would have lost consciousness in the latter stages of shock. N.C.G.S. 15A-2000(e)(9).

14. **Criminal Law § 135.7— sentencing for murder—characterization of jury's decision as recommendation—no error**

The trial court did not err in the sentencing phase of a prosecution for murder by characterizing the jury's sentencing decision as a recommendation where defense counsel emphasized to the jury in his closing argument that its decision would be binding on the trial court and the judge explicitly informed the jury during its instructions that the sentencing recommendation would be binding on the court. N.C.G.S. 15A-2002.

15. **Criminal Law § 138.29— armed robbery—perjury as aggravating factor—no error**

The trial court did not err in a prosecution for armed robbery by finding as an aggravating factor that defendant had repudiated his previously acknowledged wrongdoing while under oath and that such repudiation was wholly untrue. The Fair Sentencing Act does not preclude perjury as an aggravating factor and the evidence showed that defendant gave a limited confession to the armed robbery on the day of the crime but denied making the statement at trial and also denied an earlier shooting about which the victim testified.

16. **Criminal Law § 181— murder and robbery—post-conviction motions denied—no error**

The trial court did not err in a prosecution for murder and robbery by denying defendant's post-guilt phase motions to set aside the verdict as contrary to the evidence and to law, for a new trial, and to arrest judgment. There was no abuse of discretion, the evidence was sufficient to support the jury's verdict, defendant brought forth no meritorious claim entitling him to a new trial, and the record revealed no basis for an arrest of judgment.

17. **Criminal Law § 181— murder and robbery—post-penalty motions denied—no error**

The trial court did not err in a prosecution for murder and robbery by denying defendant's post-penalty motions to set aside the verdicts as contrary to the evidence and the law where the evidence clearly supported the existence of the aggravating factors found to exist, the finding that the aggravating factors outweighed the mitigating factors, and the finding that the aggravating factors were sufficiently substantial to call for the imposition of the death penalty.

18. **Criminal Law § 135.10— murder—death penalty—evidence supported aggravating factors—no passion or prejudice—not disproportionate**

In a prosecution for murder in which the jury recommended the death penalty, the record fully supported the submission of the aggravating factors which were found by the jury; there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and the sentence was not excessively disproportionate where defendant deliberately sought out and robbed a convenience store during the early morning hours when the lone employee was most vulnerable; defendant proceeded to rob the store, kidnap the clerk, drive her to an isolated location, and shoot her six times; the obvious motive was to prevent the clerk from

identifying defendant; and the evidence indicated that the clerk did not die immediately, but may have remained conscious for up to a quarter of an hour before death. N.C.G.S. 15A-2000(d)(2).

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

Justice EXUM dissenting as to the sentence.

Justice FRYE joins in the dissent.

BEFORE *Smith, J.*, at the 7 November 1983 Criminal Session of Superior Court, MARTIN County, defendant was convicted of first-degree murder and robbery with a dangerous weapon. Following a sentencing hearing held pursuant to N.C.G.S. § 15A-2000, the jury recommended that the defendant be sentenced to death for the murder conviction. Defendant was sentenced to a consecutive term of 40 years imprisonment for the armed robbery conviction. From the imposition of a sentence of death, defendant appeals as a matter of right. N.C.G.S. § 7A-27(a). We allowed defendant's motion to bypass the North Carolina Court of Appeals on the armed robbery conviction on 14 December 1984. Heard in the Supreme Court 5 February 1985.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Assistant Attorney General, for the State.

Herman E. Gaskins, Jr., for defendant-appellant.

MEYER, Justice.

Defendant brings forward numerous assignments of error relating to both the guilt-innocence phase and the sentencing phase of his trial. For the reasons stated below, we uphold his convictions for first-degree murder and for robbery with a dangerous weapon, and the sentences imposed thereon.

Defendant was charged in indictments, proper in form, with the 6 March 1983 armed robbery and murder of Vallerie Ann Roberson Dixon. The State's evidence at trial tended to show that at 5:47 a.m. on 6 March 1983, the Williamston Police Department received a call to the effect that the Zip Mart on Main Street seemed to be open for business, but the clerk was not there. Among those officers notified of the call was Officer Verlon Godard. Officer Godard made it known that he had just seen the

clerk, Vallerie Ann Dixon, in the store while patrolling the area at 5:20 a.m. Several officers, including Godard, were immediately dispatched to the store and confirmed that Dixon and her car, a 1973 brown and tan four-door Plymouth sedan owned by her mother, were missing. The officers also found Dixon's pocketbook and a small amount of change scattered on the floor near the cash register. The store's manager was summoned, and upon her arrival, she reported that approximately $90.00 was missing from the register and safe.

At this time, the police initiated a concerted effort to find Dixon and sent Patrolman Johnny Sharp to look for her vehicle. At approximately 6:20 a.m., Patrolman Sharp reported over the radio that he had spotted the car on Highway 64. The car was heading towards town at a speed of five to ten miles per hour, and a check of the license plate number confirmed that it belonged to a member of Dixon's family. Sharp then pulled up behind the Plymouth and activated his flashing blue lights and siren. In response, the driver increased his speed and drove for several blocks in an apparent attempt to evade the patrolman. However, the car rolled to a stop just as a vehicle driven by Sergeant Donnie Hardison arrived to cut it off. The officers remained by their vehicles with guns drawn and demanded that the driver immediately exit the vehicle. After a delay of 10 to 20 seconds, a man identified as the defendant got out of the car. He was immediately placed under arrest and advised of his rights.

A search of the car incident to the defendant's arrest resulted in the discovery of a .32 caliber six-shot revolver and a paper bag containing approximately $90.00 in cash and a small change purse containing money, identification, and other items belonging to Dixon. The revolver contained four live cartridges, one spent shell, and an empty cylinder. A search of the defendant's person produced a toboggan cap with eye holes cut out of it and a pair of ski gloves. The exterior of the car was examined and found to be partly covered with fresh mud.

At the police station, the defendant was again advised of his rights and questioned by local police and Special Agent Kent Inscoe of the State Bureau of Investigation. The defendant admitted that he had walked to the Zip Mart and robbed the clerk while wearing a toboggan cap and using a .32 caliber revolver. He

stated that he ordered the clerk to give him her car keys, and he proceeded to make his escape in her vehicle until being apprehended by the police. The defendant, however, denied having any knowledge of the present whereabouts of the clerk and stated that he had left her unharmed at the store.

At approximately 10:00 a.m., an automobile belonging to the defendant's mother was discovered approximately 100 yards from the Zip Mart. When confronted with this information, the defendant admitted that he did not walk from his mother's house, but that he drove the car to that point.

At approximately 4:00 p.m. that same day, searchers discovered Ms. Dixon's body in an area consistent with the location defendant was headed away from when spotted that morning. The body was discovered more than one-tenth of a mile up an unpaved and muddy single-lane logging path located within five miles of town. The fully clothed body was lying face down across some washed-out tire tracks. A purple cord was tied around one wrist. Dixon's mother, with whom she lived, could not identify the cord as belonging to her daughter.

Dr. Lawrence Harris, a forensic pathologist, performed an autopsy on the body of the victim. Dr. Harris testified that Dixon had been shot six times. Entrance wounds were found in the chin, the back side of the upper right arm, at the back base of the neck, the lower central part of the back, the right breast, and the back of her right thigh. Assuming that Dixon's upper body was in an upright position when struck by the bullets, the shot to the chin travelled on a slightly downward plane, while the remaining bullets travelled at an upward angle of approximately 30 degrees. Dr. Harris testified that the paths of the bullet wounds to the back were consistent with the wounds having been administered to the victim as she lay face down on the ground. He testified, however, that he could not be certain as to the position of the body when the shots were fired. Although he could not ascertain which bullet was fired first, Dr. Harris was able to conclude that Dixon slowly bled to death as a result of all six wounds over a period of approximately 15 minutes and would have lost consciousness shortly before she died. Dr. Harris also discovered a series of scratch marks approximately three and one-half inches long on Dixon's left forearm.

Special Agent Douglas Branch of the State Bureau of Investigation testified that he performed test firings with the gun which was discovered in the car at the time of defendant's arrest. He stated that, in his opinion, a comparison of the test-fired bullets with the bullets removed from Ms. Dixon revealed that she had been shot with that gun. Agent Branch had also examined the blouse the victim was wearing when she was shot. He testified that the fabric ends surrounding the bullet hole to the right front midsection of the blouse were melted. This indicated that the muzzle of the gun was pressed into the blouse at the time that shot was fired. Agent Branch could not accurately determine the range involved with the other shots.

The defendant took the stand and testified that he was living in Williamston with his mother on 6 March 1983. He testified that he awoke at approximately 6:00 a.m. and left the house in his mother's car in order to pick up his girlfriend and take her to work. Upon realizing that he was too early to take his girlfriend to work, the defendant stated that he parked his mother's car and began to jog. As he did so, he saw another man run past him and away from another automobile parked on Carolina Avenue. The defendant stated that the door to that car was open and that a gun and a bag full of money were visible on the front seat. He stated that he sat down in the car but before he could leave, the police arrived and arrested him. Defendant denied that he either robbed or killed Ms. Dixon and also denied making any admissions to the police. He acknowledged that he had been to the Zip Mart on prior occasions and that he knew Dixon as the sister of a former classmate.

On cross-examination, the defendant admitted that he had been convicted of breaking or entering in North Carolina and that he had been convicted of five armed robberies and an assault on a police officer in Virginia. However, he denied having actually committed any of those crimes.

Following the presentation of all the evidence, the jury found the defendant guilty of first-degree murder and of armed robbery.

At the sentencing phase of the trial, the State introduced evidence of defendant's record of prior convictions. In 1963, defendant was convicted in Martin County of six counts of felonious larceny and six counts of breaking or entering. In 1965, defendant

received an 80-year sentence in Virginia on five counts of armed robbery and one count of felonious assault. The victim of this assault, former Portsmouth, Virginia, police officer James M. Caposella, was permitted to testify regarding the details of defendant's former crimes. Mr. Caposella stated that on 5 March 1965, the defendant, in an attempt to avoid arrest, shot him three times, causing him to fall to the floor paralyzed. As the defendant ran away, he shot at the officer twice more but missed. Mr. Caposella stated that he had yet to fully recover from his injuries.

The defense presented evidence of the defendant's close relationship with his mother and of his poor scholastic record in school.

At the close of the sentencing phase of the trial, the trial court submitted three possible aggravating and seven possible mitigating circumstances for the jury's consideration. The jury found each of the aggravating factors and none of the mitigating circumstances and returned a recommendation that the defendant be sentenced to death. Following the recommendation, the trial court entered judgment sentencing the defendant to death.

I.

Guilt-Innocence Determination Phase

[1] The defendant initially contends that the trial court committed reversible error by trying defendant on a capital charge without first conducting a formal arraignment. The record is silent as to whether a formal arraignment was held, and we must therefore proceed on the assumption that no arraignment took place. We conclude, however, that this omission does not render the verdict or judgment invalid.

An arraignment is a proceeding whereby a defendant is brought into open court before a judge having jurisdiction to try the offense so that he may be formally notified of the charges pending against him and so that he may be directed to enter a plea. N.C.G.S. § 15A-941. In recent years, this Court has recognized an increasingly flexible standard in the application of arraignment procedure:

> If a defendant fails to plead after the prosecutor has read the charges or otherwise fairly summarized them, the court must

> record the fact, and defendant must be tried as if he had entered a plea of not guilty. . . . Where there is no doubt that a defendant is fully aware of the charge against him, *or* is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding.

State v. Smith, 300 N.C. 71, 73, 265 S.E. 2d 164, 166 (1980) (citations omitted) (emphasis added); *see generally State v. McCotter*, 288 N.C. 227, 217 S.E. 2d 525 (1975).

Defendant counters by asserting that this liberalization has not been extended to capital cases. In so doing, defendant mistakenly relies on language contained in *McCotter*. In *McCotter*, this Court quoted the following language:

> Today the modern trend is that "[a]rraignment may be waived by pleading not guilty or by silence, *at least in all except capital cases*, if the accused is fully informed as to the charge and is not otherwise prejudiced in the trial of the case by the omission of that formality."

Id. at 233, 217 S.E. 2d at 529 (*quoting* 21 Am. Jur. 2d, *Criminal Law* § 457 (1965)). Contrary to the defendant's assertions, this statement does not set forth a rule requiring a formal arraignment in capital cases. The cited language merely suggests that arraignment may or may not be required in capital cases and that this Court need not have addressed the issue in that particular non-capital case. Moreover, since *McCotter*, this Court has faced this issue and reached a conclusion contrary to the defendant's position and consistent with the trend away from rigid application of arraignment procedure. For example, in *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982), it was argued that the alleged illegality of an arraignment invalidated the judgment and death sentence imposed. In rejecting the contention, this Court held that:

> The failure to conduct a formal arraignment itself is not reversible error. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). The purpose of an arraignment is to allow a defendant to enter a plea and have the charges read or summarized to him and the failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed

of the charges. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980).

Id. at 174, 293 S.E. 2d at 584. Defendant attempts to distinguish *Brown* on the grounds that the objections in that case were based on the alleged impropriety of the arraignment and not on its complete absence. The *Brown* decision, however, did not address specific allegations of illegality nor premise its ruling on those grounds. It is clear that the key inquiry is not whether the arraignment procedure was flawed or was never held, but must instead focus on whether the defendant was prejudiced thereby. We expressly reject the defendant's contention that the failure to conduct an arraignment on a capital charge constitutes reversible error *per se*.

Having rejected defendant's proposed *per se* rule, we must nevertheless determine whether he has been prejudiced under the existing standard. We conclude that he has not. The record is replete with pretrial motions, letters, and orders which are prefaced by listing the charges against him. Moreover, defendant was tried as if he had pled "not guilty." This assignment of error is overruled.

[2] The defendant next assigns as error the denial of his motion to suppress physical evidence seized from him and pretrial statements made by him on the grounds that they were obtained as a result of an illegal arrest. The defendant contends that the circumstances at the time of his arrest only justified an investigative detention by police officers. *See Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889 (1968). Relying on *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824 (1979), defendant argues that there was no probable cause to justify his arrest and that the evidence and statements subsequently obtained must be suppressed. We disagree.

Probable cause exists if, at the time of the arrest, the arresting officer has facts and circumstances within his knowledge sufficient to warrant a prudent person in believing the suspect had committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89, 13 L.Ed. 2d 142 (1964); *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). "The existence of probable cause to arrest an individual is a pragmatic question to be determined in each case in light of the

particular circumstances and the particular offense involved." *Rinck*, 303 N.C. at 562, 280 S.E. 2d at 921.

A careful analysis of the facts and circumstances known to the officers when they arrested the defendant clearly shows the existence of probable cause for his arrest. The evidence reveals that at 5:47 a.m., Officer Sharp was at the police station preparing to go on duty when a caller reported the absence of the clerk attending the Zip Mart on Main Street. Sharp went to the store with other officers but was unable to locate Dixon or the brown four-door Plymouth which was known to be driven by her. Both Dixon and the vehicle were seen at the Zip Mart at approximately 5:20 a.m. by Officer Verlon Godard. The officers contacted the manager of the store who, upon arrival, opened the cash register and found it empty. Officer Sharp was then dispatched to tour the vicinity and search for the Plymouth automobile. While patrolling, he spotted Dixon's vehicle travelling at a speed of five to ten miles per hour in a 45-mile-per-hour zone. Officer Sharp confirmed his identification by checking the license plate number. He then pulled behind the vehicle and activated his blue light and siren. The driver responded by rapidly accelerating to a speed of 40 to 45 miles per hour in an apparent attempt to evade Sharp. Defendant made two turns and stopped only after being cut off by a second patrol car driven by Sergeant Hardison. Sergeant Hardison and Officer Sharp, with weapons drawn, demanded that the driver get out of the Plymouth. The driver continued to sit in the car, and the officers repeated the order. Eventually, the defendant exited the vehicle. The defendant was then handcuffed, and a search of his person produced a pair of ski gloves and a toboggan cap. A search of the vehicle's passenger compartment produced a pistol and a brown paper bag containing, among other items, Dixon's driver's license and over $90.00 in cash and change.

In light of these facts and circumstances, the officers were clearly justified in making more than an investigative detention. Officer Sharp had personal knowledge of the disappearance of Dixon, her car, and the store's money. He observed Dixon's car being driven in a suspicious manner in an area near the Zip Mart soon after the disappearance was reported and at an hour when the streets were largely deserted. When the defendant discovered that he was being followed by the police, he attempted to evade apprehension. We hold that these facts and circumstances

were sufficient to establish probable cause to believe that the defendant had committed a crime, including but not limited to larceny of a motor vehicle. The evidence obtained as a result of the arrest was therefore admissible against the defendant. This assignment of error is overruled.

[3] The defendant next argues 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 consistently rejected such arguments. *E.g., State v. Noland,* 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied,* --- U.S. ---, 84 L.Ed. 2d 369, *reh'g denied,* --- U.S. ---, 85 L.Ed. 2d 342 (1985); *State v. Maynard,* 311 N.C. 1, 316 S.E. 2d 197, *cert. denied,* --- U.S. ---, 83 L.Ed. 2d 299 (1984). This assignment of error is without merit.

[4] The defendant also argues that one of the jurors challenged for cause due to his opposition to capital punishment was improperly dismissed in violation of the standard established in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776 (1968). In *Witherspoon,* the United States Supreme Court held that jurors may not be excused for cause simply because they voiced general objection to capital punishment. The Court went on to say that jurors may be excused for cause by the prosecution if they express an unmistakable commitment to automatically vote against the death penalty, regardless of the facts and circumstances which might be presented, or if they clearly indicate that their attitudes against the death penalty would prevent them from making an impartial decision as to the defendant's guilt. The defendant contends that *Witherspoon* requires the prosecution to ask a juror if he would "consider" the death penalty and that this question was not posed to one particular juror who was excused for cause. This contention is meritless.

First, the *Witherspoon* opinion did not set out any specific terminology or ritualistic form of questioning which must be employed when delving into a juror's views on capital punishment. It merely requires that a juror *reveal* his unwillingness to consider the death penalty. *See State v. Gardner,* 311 N.C. 489, 319 S.E. 2d 591 (1984), *cert. denied,* --- U.S. ---, 84 L.Ed. 2d 369 (1985); *State v. Oliver,* 309 N.C. 326, 307 S.E. 2d 304 (1983). Furthermore, in the recent case of *Wainwright v. Witt,* 469 U.S. ---,

83 L.Ed. 2d 841 (1985), the Supreme Court clarified *Witherspoon* and held that the proper standard for determining whether a prospective juror may be excluded for cause due to views concerning the death penalty "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at ---, 83 L.Ed. 2d at 851-52 (1985) (*quoting from Adams v. Texas*, 448 U.S. 38, 45, 65 L.Ed. 2d 581, 589 (1980)). Under this standard, it is clear that the juror in question was properly dismissed. The record clearly indicates that this juror explicitly stated that he would not vote to return a sentence of death under any circumstances.

[5] The defendant next argues that the trial court erred in denying his motion for the sequestration and individual *voir dire* of prospective jurors. He contends that as a result of the collective *voir dire*, many jurors were able to observe other jurors being excused for cause due to their opposition to the death penalty and were therefore able to frame their responses so as to achieve disqualification as well.

N.C.G.S. § 15A-1214(j) provides: "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." This provision does not grant either party any absolute right. *See State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). The decision whether to grant sequestration and individual *voir dire* of prospective jurors rests in the sound discretion of the trial court, and its ruling will not be disturbed absent a showing of an abuse of discretion. *Id.; State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). The argument that a collective *voir dire* permits prospective jurors to become "educated" as to responses which would enable them to be excused from the panel has been rejected by this Court as "speculative." *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985); *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1984).

The defendant, however, points to the following statements made by juror Gregory:

> MR. GRIFFIN: You are opposed to the death penalty?
>
> JUROR: Yes, sir.

MR. GRIFFIN: You're telling us you are—

JUROR: I am at this point. Maybe I wasn't yesterday, but this morning I am. Definitely this morning I would not.

The defendant claims that this exchange eliminates any speculation concerning his contention that jurors became "educated" to the responses necessary to obtain dismissal from the jury panel. We disagree. Initially, the record shows that Gregory was the first juror to have been excused for cause on the basis of his opposition to the death penalty. He therefore could not have been educated by the results of any prior questioning. Furthermore, the statement by Gregory may merely reflect that for the first time, he had been forced to take a position on the issue of capital punishment. We conclude that the trial judge did not abuse his discretion in denying the defendant's motion for sequestration and individual *voir dire* of prospective jurors. This assignment of error is overruled.

[6] The defendant's next argument centers on the following exchange which took place during the jury *voir dire*:

MR. GASKINS: Is there anything that, Mrs. Williamson, that you have read or heard about the death penalty that you—would make you believe that if you sat on this jury, and that if, in the first phase of the case, the defendant were convicted of first degree murder, and, in the second phase, that the jury sentenced him to death, is there anything that would make you believe that that sentence would not be carried out?

JUROR: I've never read anything about it.

MR. GASKINS: Well, is there anything you've heard or read that would make you think that the State of North Carolina would really not execute Willie Brown, Jr., if this jury said that he should be executed?

MR. GRIFFIN: I'm going to object to that question.

COURT: Sustained.

The defendant contends that he was attempting to ascertain whether the jurors might believe that even if they were to return a verdict recommending the death penalty, it would not be car-

ried out for reasons such as appeal, clemency, or change in the law. The defendant argues that such jurors might be less likely to give serious consideration to the decision of whether to return the death penalty against him. He therefore argues that the trial court impermissibly restricted his right to inquire into the beliefs and attitudes of the prospective jurors concerning the death penalty. We find this argument to be without merit.

It is well established that in a capital case, both the State and the defendant are entitled to inquire into a prospective juror's beliefs and attitudes regarding capital punishment so that both sides may be assured a fair trial before an impartial jury. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1983); *State v. Bell*, 287 N.C. 248, 214 S.E. 2d 53 (1975). The trial court, however, is vested with broad discretion in controlling the extent and manner of such inquiry, and its decision will not be disturbed absent a showing of an abuse of discretion. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1983); *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984), *cert. denied*, --- U.S. ---, 84 L.Ed. 2d 369 (1985). We detect no such abuse of discretion here.

Initially, the defendant has failed to present any evidence or authority in support of his theory that jurors who have doubts as to whether the State would actually carry out an execution would be inclined to give less than their full and serious consideration to the decision of whether to return a sentence of death. We believe that such an argument is speculative at best. Therefore, even if a juror did not feel the State would carry out an execution, the defendant has failed to show that the inclusion of such a juror would deprive him of a fair and unbiased jury. Since the question was irrelevant to this inquiry, the trial judge did not err in sustaining the State's objection to it. Also, we note that immediately before the objected-to question was posed, the juror was asked, and in fact answered, an almost identical question. The trial judge acted well within his discretion in sustaining an objection to a question which was merely repetitious. *See State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980) (upheld trial judge's sustaining of State's objections to repetitious questions asked during cross-examination of a witness). This assignment of error is overruled.

[7] The defendant's next assignment of error concerns the trial court's denial of his motion for a mistrial based on an alleged im-

propriety involving the Sheriff of Perquimans County. Due to substantial prejudicial pretrial publicity in Martin County, the jury for the trial was selected from a special venire drawn from Perquimans County. The jury was to be selected in Perquimans County and then transported to Martin County for the trial. In the order directing that the jury be selected in Perquimans County, the Sheriff of Perquimans County was instructed to assist the Sheriff of Martin County in providing transportation for the jurors between Perquimans and Martin Counties and to make arrangements each day for the jurors' lunch.

On the first day of jury selection, Sheriff Broughton of Perquimans County was present in the courtroom and was acting as bailiff. When jury selection began, Sheriff Broughton seated himself "directly behind or adjacent to" the prosecutor. Early in the jury selection process, defense counsel objected to the position of Sheriff Broughton and moved for a mistrial. The motion was denied. However, the trial judge gave defense counsel the alternatives of allowing Sheriff Broughton to remain seated adjacent to the prosecutor, in which case the trial judge would designate a deputy to carry out the functions specified in the order, or requiring the Sheriff to move, in which case he would continue to carry out the duties set out in the order. Defense counsel chose the latter alternative. The defendant argues, however, that by his actions Sheriff Broughton became a "silent advocate" for the prosecution and that the alternatives afforded him by the trial court were insufficient to cure the prejudice which had occurred. We do not agree.

A mistrial is to be declared when conduct takes place inside or outside the courtroom, which results in substantial and irreparable prejudice to the defendant. *State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982); N.C.G.S. § 15A-1061. The decision of whether to grant a mistrial, however, rests in the sound discretion of the trial judge, and it will not be disturbed absent a showing of an abuse of discretion. *State v. Loren*, 302 N.C. 607, 276 S.E. 2d 365 (1981); *State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979).

Although we acknowledge that neutral court officials should refrain from in-court association with the prosecution in order to avoid even the appearance of impropriety, we are unable to dis-

cern how Sheriff Broughton's conduct constitued substantial and irreparable prejudice to the defendant. The conduct in question took place on the first day of jury selection, and the defendant objected within a matter of minutes after Sheriff Broughton initially took a seat adjacent to the prosecutor. Following the objection, the trial judge took immediate steps to correct the situation. Sheriff Broughton engaged in no communications with the jury during the short interval between the time he sat down and when the objection was lodged. There is no allegation that the Sheriff made improper extrajudicial comments to any of the jurors. (*Compare with State v. Johnson*, 295 N.C. 227, 244 S.E. 2d 391 (1978), where the bailiff told the jury after it had retired to deliberate that "he was proud that the district attorney in his argument to the jury stood up for the law enforcement officers of Swain County.") In light of the early stage of the trial and the short period of time involved, Sheriff Broughton's act of sitting adjacent to the prosecutor was simply too ambiguous to constitute a statement or communication to the jury and provides no reasonable basis upon which to impugn the fairness of the trial or the integrity of the verdict.

We have held that where the custodian or officer in charge of the jury in a criminal case is a witness for the State, prejudice to the defendant is conclusively presumed and he is entitled to a new trial. *State v. Bailey*, 307 N.C. 110, 296 S.E. 2d 287 (1982); *State v. Mettrick*, 305 N.C. 383, 289 S.E. 2d 354 (1982); *State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286 (1970). We have also held that prejudice is conclusively presumed where the custodian of the jury is the spouse of the prosecuting attorney. *State v. Wilson*, 314 N.C. 653, 336 S.E. 2d 76 (1985). The underlying rationale for these holdings was the belief that the conduct which took place would create a threat to the public's confidence in the integrity of our jury system. It was felt that such conduct could lead some to believe that the jury may have been improperly influenced in some manner. The conduct here does not warrant the application of a conclusive presumption of prejudice. Sheriff Broughton was not called as a witness, and there is no indication that he engaged in any extrajudicial communication to the jury other than that required by his duties as jury custodian. In short, Sheriff Broughton's conduct was not such as to lead people to be-

lieve the jury may have been improperly influenced. This assignment of error is overruled.

[8] The defendant next argues that it was error for the trial court to submit the charge of first-degree murder based on premeditation and deliberation. He contends that the evidence was insufficient 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. 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 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*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983); *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). 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).

Murder in the first degree is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); N.C.G.S. § 14-17. 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. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Deliberation means an intent to kill carried out 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, suddently 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).

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*, 464 U.S. 865, 78 L.Ed. 2d 117, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (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. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982).

We 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 of first-degree murder based on the theory of premeditation and deliberation. There was evidence tending to show that the Zip Mart where Dixon worked had been robbed. When arrested, the defendant was in possession of Dixon's car, personal effects belonging to Dixon, a sum of money consistent with the amount estimated to have been taken from the store, and the murder weapon. The victim's body was discovered on an isolated dirt road several miles from the store. From this evidence, the jury could reasonably infer that the defendant robbed the store, forced Dixon to accompany him in her car, and then killed her in an attempt to avoid apprehension. There was no evidence of provocation by the deceased. Further, the physical evidence tended to show that the defendant shot the deceased six times and that some of the shots may have been fired while Dixon was lying on the ground. 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.

II.

Sentencing Phase

[9] The defendant initially contends that the North Carolina death penalty statute, N.C.G.S. § 15A-2000, *et seq.*, is unconstitutional. Specifically, he argues: (1) that the statute is applied in a manner which violates the prohibition against cruel and unusual punishment contained in the Eighth Amendment which is made applicable to the states through the Fourteenth Amendment; (2) that the statute is applied discriminatorily against certain classes of defendants in violation of the Fourteenth Amendment; (3) that the statute allows the jury subjective discretion in applying the death penalty in violation of the Eighth and Fourteenth Amendments; (4) that the provision establishing proportionality review fails to set out clear standards and guidelines for the Supreme Court to follow and thus deprives a defendant sentenced to death of an effective or adequate review of his sentence in violation of his Fourteenth Amendment right to due process; and (5) that the provision establishing proportionality review by the Supreme Court constitutes an unconstitutional expansion of the Court's jurisdiction.

The contentions raised by the defendant have been previously considered by the Court and have been decided adversely to him. *See State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, --- U.S. ---, 83 L.Ed. 2d 299 (1984) (statute not unconstitutional on grounds that it permits subjective discretion and discrimination in imposing the death penalty); *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, 456 U.S. 932, 72 L.Ed. 2d 450 (1982) (proportionality review provision is not unconstitutional on the grounds that it fails to provide adequate guidelines and standards or that it constitutes an impermissible expansion of the Supreme Court's jurisdiction); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983) (death penalty for first-degree murder does not constitute cruel and unusual punishment). The defendant, nevertheless, urges the Court to reconsider our prior holdings and find that the death penalty statute as applied to this case is unconstitutional. The defendant, however, has presented no reasons for the Court to

depart from its prior decisions on these issues, and we decline to do so. This assignment of error is overruled.

[10] The defendant next argues that the trial court erred by allowing the State to present evidence of the circumstances surrounding his prior convictions for offenses occurring in the State of Virginia. The objected-to evidence consisted of the testimony of several witnesses who had first-hand knowledge of these prior crimes. Among these witnesses was James M. Caposella, a former Portsmouth, Virginia, policeman. Caposella testified that while responding to a 1965 robbery call, the defendant shot at him several times and inflicted a serious debilitating injury. This evidence was offered to establish the aggravating circumstance set out in N.C.G.S. § 15A-2000(e)(3), that the defendant had been previously convicted of a felony involving the use or threat of violence to the person. The defendant contends that because he was willing to stipulate to the existence of the Virginia convictions and that they all involved the use or threat of violence to the person, the State should be precluded from introducing extrinsic evidence of the circumstances surrounding the convictions. This assignment of error is meritless.

We have held that the prosecution may establish the involvement of the use or threat of violence to the person in the commission of a prior felony by the testimony of witnesses notwithstanding the defendant's stipulation of the record of conviction. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983). The defendant contends that these holdings are not controlling because he was prepared to stipulate not just to the existence of the convictions, but also to the fact that each involved the use or threat of violence. We find this distinction to be of no significance. As we stated in *McDougall*, the prosecution must be permitted to present *any* competent, relevant evidence relating to the defendant's character or record which will substantially support the imposition of the death penalty so as to avoid an arbitrary or erratic imposition of the death penalty. Based on the sound reasonings set forth in *McDougall*, we overrule this assignment of error.

[11] The defendant next argues that the trial court committed prejudicial error by submitting to the jury, over his objection, the mitigating factor contained in N.C.G.S. § 15A-2000(f)(1), that the defendant has no significant history of prior criminal activity. The defendant contends that in view of the evidence before the jury concerning his criminal record (convictions on six counts of felony breaking or entering, six counts of felonious larceny, five counts of armed robbery, and one count of felonious assault), it would strain credibility to believe that a jury would find the existence of this factor, and its submission merely served to denigrate in the minds of the jurors the remaining mitigating factors which were submitted. We disagree.

Initially, we note that the jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). The trial court has a fundamental duty to declare and explain the law arising from the evidence. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). We have also recognized that common sense, fundamental fairness, and judicial economy require that any reasonable doubt regarding the submission of a statutory or requested mitigating factor be resolved in favor of the defendant. *Id.*

With these principles in mind, we cannot say that the trial court erred by submitting this mitigating factor to the jury for consideration. It is apparent that the trial judge felt that, despite the objection of counsel, it was in the defendant's favor for the jury to consider the significance of the defendant's record of convictions in 1963 and 1965 in light of the circumstances and events which followed. Indeed, during the sentencing phase jury argument, defense counsel strenuously argued that there was no evidence that the defendant had committed any violent acts or violated any prison rules during the 18 years that he was incarcerated following the 1965 convictions. There was also evidence that the defendant was only 20 years old when convicted of the 1965 offenses. Although somewhat tenuous, in view of the peculiar facts presented we cannot say that the trial judge erred in submitting this mitigating factor. Moreover, even assuming the mitigating circumstance was erroneously submitted, the defendant's argument that he was prejudiced thereby is the height of

speculation. The defendant has presented nothing to support his claim that the submission of the factor, if erroneous, would have poisoned the minds of the jurors against finding any of the other mitigating circumstances submitted. This assignment of error is overruled.

[12] The defendant next argues that the trial court erred by allowing the State during its case in chief at the sentencing hearing to present evidence of his 1963 convictions on six counts of felonious breaking or entering and six counts of felonious larceny. He contends that the evidence was introduced in order to establish the aggravating factor set out in N.C.G.S. § 15A-2000 (e)(3), that he had been previously convicted of a felony involving the use or threat of violence to the person. He argues that the convictions were inadmissible for this purpose because neither felonious breaking or entering nor felonious larceny have as an element the involvement of the use or threat of violence to the person, and no evidence was presented that he actually engaged in or threatened violence in order to perpetrate the offenses. *See State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983).

The defendant is correct in his assertion that the convictions were inadmissible to establish this aggravating factor. However, after a close examination of the record, we conclude that the convictions were not admitted for that purpose. Instead, it is apparent that the convictions were admitted to rebut the mitigating factor that the defendant had no significant history of prior criminal activity.

We derive this conclusion from an examination of the instructions given the jury at the close of the penalty phase of the trial. In discussing the aggravating factor that the defendant had been previously convicted of a felony involving the use or threat of violence, the trial judge instructed the jury that it could find this aggravating circumstance if it found the defendant had been previously convicted of robbery or the malicious shooting of Officer Caposella. No reference was made to the breaking or entering or the larceny convictions. However, when instructing the jury on the mitigating circumstance that the defendant had no significant history of prior criminal activity, the trial judge stated: "Now you would find the mitigating circumstance if you

found that Willie Brown, Jr. had *no prior criminal convictions,* or that he had been convicted of *breaking or entering, or larceny,* or assault or robbery, and that this was not a significant history of prior criminal activity." (Emphasis added.) It is obvious that evidence of the breaking or entering and the larceny convictions were admitted to rebut the mitigating factor that the defendant had no significant history of prior criminal activity and was not introduced in support of any aggravating factor.

However, as noted above, the State presented the evidence of these convictions during its case in chief at the sentencing hearing. In *State v. Taylor,* 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied,* 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied,* 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983), we said that the prosecution is entitled to offer evidence designed to rebut mitigating circumstances only after the defendant offers evidence in support of such mitigating factors. We went on to hold in *Taylor* that the premature admission of evidence offered by the State solely to refute mitigating circumstances upon which a defendant might later rely was error (although in that case the error was found not to be prejudicial). Here, the defendant did not present evidence in support of the mitigating factor that he had no significant history of prior criminal activity. Rather, the trial judge *sua sponte* instructed the jury on this mitigating circumstance. The defendant therefore presented no evidence on this issue for the State to rebut. Nevertheless, since the evidence was still technically rebuttal evidence, we feel the State should have waited until the defendant had presented his evidence at the sentencing hearing before introducing these convictions into evidence.

Having concluded that the trial court committed error by allowing the State to introduce this evidence "out of turn," our next task is to discern whether the error was prejudicial. We conclude that it was not.

In *Taylor,* we applied the standard set out in N.C.G.S. § 15A-1443(b) to determine whether prejudice occurred. Under that standard, the error is deemed prejudicial unless the State shows that the error was harmless beyond a reasonable doubt. We find that the State has clearly satisfied this standard. Initially, it should be pointed out that evidence of the convictions was proper evidence in rebuttal of the mitigating factor that the

defendant had no significant history of prior criminal activity. The timing of its admission was what constituted error. Also, the defendant acknowledged during cross-examination at the guilt-innocence phase of the trial that he had been convicted of breaking or entering (although he did not specify the number of counts nor did he acknowledge any convictions for felonious larceny), and he admitted the Virginia convictions for armed robbery and assault. The jury therefore had before it a clear record of the defendant's prior criminal activities. *See State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983). We conclude that the error was harmless beyond a reasonable doubt. This assignment of error is overruled.

[13] The defendant's next assignment of error 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). He contends that the evidence did not support the existence of this aggravating factor and that he is therefore entitled to a new sentencing hearing. We do not agree.

Although every murder may be characterized as heinous, atrocious, and cruel, this aggravating factor is not to be applied in every first-degree murder case. 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 permissible when the level of brutality involved exceeds that normally present in first-degree murder, *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), or when the first-degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). We have also stated that this factor is appropriate when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder. *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984).

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 the infliction of psychological torture, placing the victim in agony in his last moments, aware of, but helpless to prevent, impending death.

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. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984); *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984).

With the above principles in mind, we find that the evidence in this case was sufficient to support the submission of this aggravating factor to the jury.

The evidence presented tends to show that on the morning of 6 March 1983, the defendant robbed the Zip Mart convenience store in Williamston, North Carolina. He proceeded to force the clerk, Vallerie Dixon, to accompany him in her car. She was taken to a secluded area approximately five miles from the store and shot six times. There was also evidence to indicate that her hands had been bound. Dr. Lawrence Harris, who conducted an autopsy on the body, testified that, in his opinion, the principal cause of death was a gunshot wound to the right central lower back. He stated that the victim may have lived as long as 15 minutes after being shot. He went on to say that the victim would have gone into shock during the last phases of life and would have lost consciousness in the later stages of shock.

The defendant argues that there is no evidence as to what transpired after he left the Zip Mart with the decedent and that this precludes the finding of this aggravating factor. He cites *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983), in support of this assertion. In *Jackson*, the evidence showed that the defendant went for a ride with the decedent. Later, the defendant appeared and told friends that he had killed the decedent when he refused to give him any money. The decedent's body was later

discovered in his car. He had been shot twice in the head at close range with a .22 caliber weapon. We vacated the defendant's death sentence on the ground that it was disproportionate based in part on a lack of evidence of what occurred after the defendant left with the decedent. We noted that while the crime was heinous, there was no evidence to indicate that it was "especially heinous." *Id.* at 46, 305 S.E. 2d at 717.

In *Jackson*, there was simply no evidence to indicate that the victim suffered great physical pain or psychological terror prior to his murder. The same is not true in the present case. As noted earlier, the evidence would tend to show that Dixon was forced at gunpoint to leave the store with the defendant. He proceeded to drive several miles to an isolated dirt road. Clearly, Dixon was aware that she was in great danger at the time the defendant forced her to leave the store. Her anxiety undoubtedly increased as the defendant drove away from town and arrived at the secluded dirt road. We feel the evidence supports a finding that the victim was subjected to a prolonged period of terror and anguish from the time they left the store until they stopped and she was shot six times. Furthermore, Dr. Harris testified that Dixon may have lived for as long as 15 minutes after being shot and would not have lost consciousness until the final stages of life. From this testimony, it could be found that Dixon lay mortally wounded for several minutes, "aware but helpless to prevent impending death." *State v. Oliver*, 309 N.C. 326, 346, 307 S.E. 2d 304, 318 (1983).

Dr. Harris' testimony that although shot six times, Dixon may have lived for as long as 15 minutes and would not have lost consciousness until the final stages of life, would also support a finding that she suffered great physical pain prior to death.

We hold that the evidence justified the submission of the aggravating factor that the murder was especially heinous, atrocious, or cruel. This assignment of error is overruled.

[14] The defendant next argues that the trial court erred, both in the jury instructions and on the verdict form, by repeatedly characterizing the jury's sentencing decision as a "recommendation." He contends that the use of this word is misleading in that it suggests to the jurors that they are serving in merely an advisory capacity regarding sentencing, when in fact their decision

is binding on the trial court under N.C.G.S. § 15A-2002. We find this argument to be without merit.

During his closing argument at the sentencing hearing, defense counsel emphasized to the jury that its decision regarding sentencing would be binding on the trial court. Additionally, during the instructions, the trial judge explicitly informed the jury that its sentencing "recommendation" would be binding on the court. In light of this, we fail to see how the jurors could have been less than fully aware of the legal effect of their decision regarding punishment. This assignment of error is overruled.

[15] The defendant next contends that the trial court erred in finding as an aggravating factor *as to the armed robbery* conviction that he "took the stand and under oath repudiated his acknowledged . . . wrongdoing . . . [and] said repudiation was wholly untrue and has been found to be so by a Jury and the Court." We hold that the trial judge did not err in finding this aggravating factor.

In *State v. Thompson*, 310 N.C. 209, 311 S.E. 2d 866 (1984), we held that the Fair Sentencing Act does not preclude the court from finding as an aggravating factor that the defendant committed perjury. We said, however, the court's finding of perjury must be supported by a preponderance of the evidence. We believe the evidence here clearly supports the court's finding of this aggravating factor. The evidence shows that the defendant gave a limited confession to the armed robbery, but not the murder, on the day of the crime. In the statement, he said that he cut two eyeholes out of a toboggan cap and pulled it over his face. However, during his testimony at trial, he denied making any statement and said that his toboggan cap did not have eyeholes cut out of it when the police seized it from him. He also denied shooting Caposella in 1965. Caposella testified that the defendant did shoot him, and his testimony was corroborated by a police officer who participated in the defendant's arrest in Virginia. We hold that this and other evidence establishes by a preponderance of the evidence that the defendant committed perjury and that consideration of this aggravating factor was appropriate in this case. This assignment of error is overruled.

We take this opportunity to reiterate our statement in *Thompson* that due to the potential dangers inherent in this par-

ticular aggravating factor (the risk of "chilling" a defendant's right to testify, that it is in some respects an unreviewable determination, etc.), trial judges should exercise extreme caution in this area and refrain from finding perjury as an aggravating factor except in the most egregious cases.

[16] The defendant next contends that the trial court erred in denying his post-guilt phase motions to set aside the verdict as being contrary to the evidence and to law, for a new trial, and to arrest judgment. The decision whether to grant or deny a motion to set aside the verdict and for a new trial is vested in the discretion of the trial judge and is not reviewable absent a showing of an abuse of that discretion. *State v. McKenna,* 289 N.C. 668, 224 S.E. 2d 537, *modified,* 429 U.S. 912, 50 L.Ed. 2d 278 (1976). A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Hayes,* 314 N.C. 460, 334 S.E. 2d 741 (1985). We detect no abuse of discretion here. The evidence was sufficient to support the jury's verdict, and the defendant has brought forth no meritorious claim entitling him to a new trial.

As for the motion to arrest judgment, such a motion is made after the verdict to prevent the entry of judgment and is based on the insufficiency of the indictment or some other fatal defect appearing on the face of the record. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971). An examination of the record reveals no basis for an arrest of the judgment.

[17] The defendant next asserts as error the trial court's denial of his post-penalty phase motion to set aside the verdict as being contrary to the weight of the evidence and the law. This argument is meritless. The evidence clearly supported the existence of the aggravating factors found to exist, the finding that the aggravating factors outweighed the mitigating factors, and the finding that the aggravating factors were sufficiently substantial to call for the imposition of the death penalty. Furthermore, it is well established that the trial court has no power to overturn the jury's sentencing recommendation. *State v. Smith,* 305 N.C. 691, 292 S.E. 2d 264, *cert. denied,* 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied,* 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983); *State v. Johnson,* 298 N.C. 335, 259 S.E. 2d 752 (1979); *see* N.C.G.S. § 15A-2002. This assignment of error is overruled.

III.

Statutory Review of Sentence by Supreme Court

[18] Having determined that the defendant's trial was free from prejudicial error during the guilt-innocence and sentencing phases, we now turn to duties reserved by statute to this Court in reviewing the judgment and sentence of death. Pursuant to N.C.G.S. § 15A-2000(d)(2), we must ascertain whether the record supports the jury's findings of the aggravating factors on which the sentence of death was based; 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. We have also closely examined those exhibits which were forwarded to the Court. We find that the record fully supports the submission of the aggravating factors which were considered and found by the jury. We also find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

We now undertake our final statutory duty of proportionality review. This task requires the Court to determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant. In conducting this review, we use the "pool" of similar cases announced in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). This "pool" consists of all cases arising since 1 June 1977 (the effective date of North Carolina's capital punishment statute) which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended the death sentence or life imprisonment or the trial court imposed a life sentence following the jury's inability to agree upon a sentencing recommendation within a reasonable period of time.

In *Williams*, we expressly rejected any approach that would utilize "mathematical or statistical models involving multiple regression analysis or other scientific techniques, currently in

vogue among social scientists." *Id.* at 80, 301 S.E. 2d at 355. Instead, we said that we would "rely upon our own case reports in the 'similar cases' forming the pool" in order to carry out this review. *Id.* at 81, 301 S.E. 2d at 356.

After a careful review of the record, transcripts, other pertinent material, and other similar cases, we conclude that the defendant's sentence of death is not excessive or disproportionate. The facts tend to show that the defendant deliberately sought out and robbed a convenience store during the early morning hours when the lone employee was most vulnerable. He proceeded to rob the store, kidnap the clerk, drive her to an isolated location, and shoot her six times. The obvious motive for the killing was to prevent the clerk from identifying the defendant as the perpetrator of the robbery. The evidence would indicate that the victim did not die immediately, but may have remained conscious for up to a quarter of an hour before death. This was a senseless and brutal murder—the robbery had been completed—its sole purpose was witness elimination. We cannot say that it does not fall within the class of first-degree murders in which we have previously upheld the death penalty. *See State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984), *cert. denied*, --- U.S. ---, 84 L.Ed. 2d 369 (1985); *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, --- U.S. ---, 86 L.Ed. 2d 267 (1985); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1389, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983). We are satisfied that the facts of this case fully support the jury's decision to recommend a sentence of death.

No error.

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

Justice EXUM dissenting as to sentence.

I concur in the result reached by the majority on the guilt phase of this case; but believing there was error committed in the sentencing phase entitling defendant to a new sentencing hearing, I dissent from the majority's conclusion to the contrary and vote for a new sentencing hearing.

The majority finds no error in submitting the mitigating factor that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1), even though defendant did not contend he was entitled to have this factor submitted and, indeed, expressly objected to its submission. The majority concludes the trial judge has a duty to submit any statutory mitigating factor notwithstanding defendant's objection whenever the trial judge "feels" such submission may be "in the defendant's favor." It reaches this conclusion by relying on this statement from *State v. Pinch*, 306 N.C. 1, 27, 292 S.E. 2d 203, 223 (1982), *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982):

> Moreover, we must also point out that common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the *first* sentencing hearing.

The majority takes the statement out of context. The statement was immediately preceded by the following language:

> This Court has previously established instructive guidelines for the trial judges of our State to follow in the submission of mitigating circumstances, including those which arise upon the evidence in a given capital case as well as those specified in G.S. 15A-2000(f). First, in *State v. Goodman*, we held that, although the jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted, the trial court 'is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value,' especially when the trial court instructs the jury upon the open-ended provision of G.S. 15A-2000(f)(9) and thus does not hinder it from evaluating on

> its own *anything* of mitigating value. 298 N.C. 1, 33-34, 257 S.E. 569, 589-90 (1979). Second, in *State v. Johnson*, we held that the trial court must include additional factors, which are timely requested by the defendant, on the written list submitted to the jury *if* they are 'supported by the evidence, and . . . are such that the jury could *reasonably* deem them to have mitigating value. . . .' 298 N.C. 47, 72-74, 257 S.E. 2d 597, 616-17 (1979) (emphasis added). Third, in *State v. Hutchins*, we held that, although the trial court has a fundamental duty to declare and explain the law arising upon the evidence, it is not required to instruct upon a *statutory* mitigating circumstance *sua sponte* unless defendant, who has the burden of persuasion, brings forward sufficient evidence of the existence of the specified factor. 303 N.C. 321, 355-56, 279 S.E. 788, 809 (1981); *see State v. Taylor*, 304 N.C. 249, 277, 283 S.E. 2d 761, 779 (1981).

Id. at 26-27, 292 S.E. 2d at 223.

It is clear that the statement in *Pinch* relied on by the majority was made with reference to mitigating circumstances which defendant contended should be submitted, not mitigating circumstances for which defendant concedes there is no supporting evidence.

It is error for the trial court to submit a mitigating circumstance when the circumstance is not supported by the evidence. There is no evidence in this case to support submission of the no significant criminal history mitigating factor. Defendant had had prior convictions of six felonious breakings, six felonious larcenies, five armed robberies, and one felonious assault. He had served a lengthy prison term.

Obviously, defendant did not want the no significant criminal history mitigating circumstance submitted because he realized that to submit it would enable the state to introduce evidence of his prior convictions which did not involve violence to another person. The state would not have been permitted to offer evidence of these convictions at the sentencing hearing but for the submission of the no significant criminal history mitigating circumstance. The majority so concedes, saying:

> The defendant is correct in his assertion that the convictions were inadmissible to establish [that defendant had been

convicted of a felony involving violence to another, N.C.G.S. § 15A-2000(e)(3)]. However, after a close examination of the record, we conclude that the convictions were not admitted for that purpose. Instead, it is apparent that the convictions were admitted to rebut the mitigating factor that the defendant had no significant history of prior criminal activity.

As noted by the majority, an error in the sentencing phase of a capital case is reversible unless the state demonstrates the error was harmless beyond a reasonable doubt. I cannot say submission of the no significant criminal history mitigating circumstance was harmless beyond a reasonable doubt because it permitted the state to offer otherwise inadmissible evidence detailing defendant's prior convictions for nonviolent crimes. The majority recognizes that defendant legitimately objected to the submission of the no significant criminal history circumstance so as to keep out evidence of his conviction of nonviolent crimes. Yet the majority holds it was not error to submit the circumstance over defendant's objection and to offer evidence of the otherwise inadmissible nonviolent felony convictions because they were relevant to the circumstance. I cannot subscribe to this kind of judicial sleight of hand to justify sustaining a sentence of death.

State v. Taylor, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983), holds that it is error to permit the state to introduce evidence rebutting the no significant criminal history mitigating circumstance "when defendant never intended to rely on that mitigating circumstance." In *Taylor* the Court found the error harmless beyond a reasonable doubt because much of the state's evidence "also was competent as evidence of aggravating circumstances," 304 N.C. at 277, 283 S.E. 2d at 779, and when considered with evidence at the guilt phase, the jury already had before it "a clear record of what must be described as this defendant's unconscionable acts toward so many of his victims." 304 N.C. at 278, 283 S.E. 2d at 779. This is not the case here. The evidence of which defendant here complains is evidence of a number of serious but nonviolent felonies. Furthermore, I would not agree that because evidence of prior convictions was admitted in the guilt phase on cross-examination of a testifying defendant, permitting the jury to consider the same evidence at the sentencing phase on the question of defendant's sentence is

rendered harmless beyond a reasonable doubt. During the guilt phase such evidence was admitted for the limited purpose of impeaching defendant's credibility. This does not justify permitting the jury to consider this evidence on the question of defendant's sentence. The jury may not so consider it unless authorized to do so by the capital sentencing statute, N.C.G.S. § 15A-2000. As I have demonstrated, this statute did not authorize consideration in this case of defendant's prior nonviolent felony convictions on the question of his sentence.

I also think it was error to permit testimony which, in effect, re-tried defendant for an earlier felonious assault committed in Virginia on James Caposella. Defendant had been tried, convicted and punished for this crime in Virginia. He stipulated that he had been convicted of this felonious assault and that it was a crime which involved violence to the person. Upon this stipulation the state was entitled to have the aggravating circumstance that defendant had been previously convicted of a felony involving violence to the person, N.C.G.S. § 15A-2000(e)(3), answered in its favor.

The statute permits the state to establish the existence of such a *conviction*, nothing more. The purpose of this aggravating circumstance is to show the sentencing jury defendant's *status* as one previously convicted of a violent crime. That one previously convicted of a violent crime again commits a violent crime means, in essence, that the person has not yet learned the lesson the law desires to teach. That person properly may be sentenced more severely the second time. This, however, is the only sense in which the prior offense may be considered as bearing on the punishment for the second offense. The statute does not permit the state to offer evidence of the details of the prior crime. Those details were offered and taken into consideration when defendant was tried, convicted, and punished for that crime. The statute permits the capital sentencing jury to know only that defendant has been previously convicted of a crime involving violence to another person. The reason for the limitation is to preclude the possibility that the capital sentencing jury will, upon hearing the details of the prior crime, become so incensed by its gravity that it will impose the death penalty as punishment not only for the capital crime under consideration but also for the prior violent of-

fense. This is not and cannot constitutionally be the purpose of the prior violent offense aggravating factor.

While I concur in the result reached by the majority that it was proper to submit the especially heinous aggravating circumstance, I do not agree that there is evidence supporting those facts which the majority uses to distinguish this case from *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). There is no evidence as to when, where, or under what circumstances the victim was shot or that she suffered before the shooting, as the majority says, "a prolonged period of terror and anguish . . . ." There is, however, evidence that the victim bled to death and could have lived and remained conscious for as long as fifteen minutes after the fatal wounds were inflicted. I think this fact, in itself, is enough to distinguish this case from *Jackson* and would support the submission of the especially heinous aggravating circumstance.

Justice FRYE joins in this dissent.

STATE OF NORTH CAROLINA v. SYLVESTER SMITH

No. 713A84

(Filed 10 December 1985)

1. Criminal Law § 89.2— instruction on corroborating evidence—necessity for request

An instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such an instruction, and a general objection will not suffice.

2. Criminal Law § 89.2— evidence admissible for substantive purposes—corroboration limitations inapplicable

If evidence is admissible for substantive purposes, none of the "corroboration" limitations apply, and a party is not entitled to an instruction limiting its admissibility to that purpose, whether he requests one or not.

3. Criminal Law § 73.5— medical diagnosis or treatment exception to hearsay rule—statements made by sexual assault victims to grandmother

Statements made by four-year-old and five-year-old girls to their grandmother concerning sexual assaults which immediately resulted in their receiving medical treatment and diagnosis were admissible as substantive evidence under the medical diagnosis or treatment exception to the hearsay rule set

forth in N.C.G.S. 8C-1, Rule 803(4) even though the grandmother did not have a license to practice medicine or psychology.

4. **Criminal Law § 73.5— medical diagnosis or treatment exception to hearsay rule—identity of perpetrator**

A statement by a child to her grandmother that it was defendant who had caused her injuries was admissible under the medical diagnosis or treatment exception to the hearsay rule.

5. **Criminal Law § 73.5— medical diagnosis or treatment exception to hearsay rule—statements to Rape Task Force volunteers inadmissible**

Statements made by rape and sexual assault victims to Rape Task Force volunteers after they had already reached the hospital and had received medical treatment and diagnosis were not admissible as substantive evidence under the medical diagnosis or treatment exception to the hearsay rule.

6. **Criminal Law § 73.4— excited utterance exception to hearsay rule—children's statements three days after assaults**

Statements made by four-year-old and five-year-old girls to their grandmother about sexual assaults between two and three days after the assaults occurred were admissible under the N.C.G.S. 8C-1, Rule 803(2) excited utterance exception to the hearsay rule.

7. **Criminal Law § 73.2— catchall exception to hearsay rule—notice—inquiry by court**

It is the duty of the proponent of a hearsay statement proffered under the N.C.G.S. 8C-1, Rule 803(24) catchall exception to the hearsay rule to alert the trial judge that the statement is being offered as a hearsay exception under Rule 803(24). Upon being notified that the proponent is seeking to admit the statement pursuant to that exception, the trial judge must have the record reflect that he is considering the admissibility of the statement pursuant to Rule 803(24), and only then should the trial judge proceed to analyze the admissibility by undertaking the six-part inquiry required of him by the rule.

8. **Criminal Law § 73.2— catchall exception to hearsay rule—analysis required of trial court**

In order to admit hearsay testimony under the "catchall" or "residual" exception of N.C.G.S. 8C-1, Rule 803(24), the trial court must: (1) make the initial determination that proper written notice was given to the adverse party and must include that determination in the record, although detailed findings of fact in making this determination are not required; (2) determine that the hearsay statement is not specifically covered by any of the other 23 exceptions and enter this conclusion on the record; (3) make findings of fact and conclusions of law supporting a determination that the proffered statement possesses circumstantial guarantees of trustworthiness equivalent to those required for admission under the enumerated exceptions; (4) include in the record a statement that the proffered evidence is offered as evidence of a material fact; (5) make findings of fact and conclusions of law supporting a determination that the proffered evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable ef-

forts; and (6) enter a conclusion on the record that admission of the proffered evidence will best serve the general purposes of the Rules of Evidence and the interests of justice.

9. **Criminal Law § 73.2— admission of testimony under Rule 803(24)—absence of findings—reversible error**

Testimony by two Rape Task Force volunteers as to statements made by two child rape and sexual offense victims which did not corroborate the victims' testimony at trial was not admissible under the N.C.G.S. 8C-1, Rule 803(24) residual exception to the hearsay rule where the record reflects no statements, rationale or findings and conclusions whatsoever concerning the requirements of Rule 803(24) and thus does not support the trial court's ruling in effect allowing this testimony to be considered as substantive evidence. Furthermore, the admission of such testimony by one volunteer was reversible error in defendant's trial for first degree sexual offense against one of the children where the testimony was in direct conflict with the testimony of the child victim.

10. **Criminal Law § 53; Rape and Allied Offenses § 4.2— expert medical testimony —opinion that injuries caused by male sex organ**

A physician was properly allowed to state his opinion that injuries he observed during his examination of a child were caused by "a male penis" even though the opinion was not qualified by the words "could" or "might" since N.C.G.S. 8C-1, Rule 705 has eliminated the requirement that expert opinion testimony be in response to a hypothetical question. Furthermore, under N.C.G.S. 8C-1, Rule 704, the testimony was not objectionable because it embraced the ultimate issue to be decided by the jury.

11. **Criminal Law § 53; Rape and Allied Offenses § 4.2— expert medical testimony —likelihood that victims engaged in sexual intercourse**

The Child Medical Examiner of Brunswick County was properly permitted to state his expert medical opinion that it was "highly likely" that two female children had had sexual intercourse based upon the contents of another doctor's medical report and information supplied to the witness by two colleagues that they were unaware of a case of trichomonas in a prepubertal female who had not engaged in sexual intercourse. N.C.G.S. 8C-1, Rule 703.

12. **Rape and Allied Offenses § 5— first degree rape—first degree sexual offense— sufficiency of evidence**

The evidence was sufficient to support submission to the jury of issues as to defendant's guilt of first degree rape and first degree sexual offense against a four-year-old child and a five-year-old child.

13. **Rape and Allied Offenses § 6.1— first degree rape—first degree sexual offenses—instructions on attempts not required**

The evidence in a prosecution for first degree rape and first degree sexual offense against a four-year-old child and a five-year-old child did not require the trial court to instruct on the lesser included offenses of attempted first degree rape and attempted first degree sexual offense where there was sufficient evidence of penetration to support first degree rape convictions, there was sufficient evidence to support convictions of first degree sexual offenses, and defendant denied any knowledge of the alleged incidents.

Justice BILLINGS did not participate in the consideration and decision of this case.

DEFENDANT was tried before *Clark, J.*, at the 13 August 1984 Criminal Session of Superior Court, BRUNSWICK County, on charges of two counts each of first-degree rape, first-degree sexual offense, and indecent liberties with a minor against Gloria Ogundeji and Janell Smith. The jury returned verdicts of guilty on all charges except the first-degree rape of Janell, for which defendant was acquitted. Judgment was arrested on both indecent liberties convictions; defendant was sentenced to three life sentences, two of which were to run concurrently and the third consecutively. Defendant appeals as a matter of right.

Lacy H. Thornburg, Attorney General, by Jane Rankin Thompson, Assistant Attorney General, for the State.

William F. Fairley for the defendant-appellant.

Northern Little and Thibaut, by J. Anderson Little, for Orange County Social Services; Corinne G. Russell for Wake County Social Services; Russell Odom for Durham County Social Services; G. Keith Whited for Alamance County Social Services; David Kennedy for Cumberland County Social Services, amici curiae.

Adam Stein, Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, amicus curiae.

MEYER, Justice.

The State's evidence tended to show that one night during the weekend of 2 March 1984, the defendant, Sylvester Smith, entered the bedroom of Gloria Ogundeji and Janell Smith, age four and five, respectively, and engaged in sexual relations with both girls. Gloria is the daughter of Ann Ogundeji with whom the defendant was then living. Janell is Gloria's cousin, daughter of Ann's sister, Catherine. During the time in question, Janell was staying with Ann, Sylvester, Gloria, and Sylvester, Jr., in a mobile home. The victims' grandmother is Mrs. Fannie Mae Davis.

At trial, Gloria testified that the defendant came into the bedroom where she and Janell were sleeping, slipped off her pants, and touched her in her "project" with his "worm." She

denied at trial that he had touched her anywhere else. Janell testified that the defendant threatened to beat her "half to death," pushed her down on the bed, and stuck his "thing in my project." She also testified that he "stick [sic] his hand in my butt."

At trial, each victim was sequestered during the other's testimony. The girls were asked to show the jury where their "project" was, and both independently pointed to their vaginal areas. Gloria indicated the same area when asked to show where the "worm" is, and also identified both the "project" and the "worm" on anatomically correct dolls used as exhibits at trial. Janell pointed to her anal area when asked to show where her "butt" is.

The State called Minerva Glidden and Elena Peterson, both of whom were Rape Task Force volunteers in Wilmington. Ms. Glidden had worked with Gloria following the incident, and Ms. Peterson had worked with Janell. The trial judge had allowed defendant's request that these witnesses be sequestered during the children's testimony over the State's objection that their presence was crucial in order that the girls feel at ease during their testimony.

Minerva Glidden, a registered nurse and Rape Task Force volunteer, testified that she was called to the New Hanover Memorial Hospital emergency room at around 1:45 p.m. on 5 March 1984, where she first met Gloria. Over defendant's request for a limiting instruction on corroboration, Ms. Glidden was allowed to testify that Gloria told her that defendant had put his finger in Gloria's "project," then he put his finger in her "butt." Ms. Glidden said Gloria had indicated her vaginal and anal areas. She also testified that Gloria told her the defendant had gotten on top of her and put his "peeter-weeter" in her "project." Gloria had indicated that as the penis on an anatomically correct doll.

Ms. Peterson, Rape Task Force Coordinator, testified that she had first met Janell on 7 March 1984. Over a general objection by the defendant, Ms. Peterson recounted what Janell told her about the incident. "The story was that Sylvester put his 'thing' in her 'project.' And he stuck his finger in her—in her 'butt.' And that if she told anybody, that he would beat her half to death."

Mrs. Fannie Mae Davis, the girls' grandmother, testified that she went to the mobile home where Sylvester, Ann, Gloria, and Janell were living on 3 March 1984[1] and that Gloria had led her into the bedroom to tell her "what Sylvester done [sic] to me." Gloria told Mrs. Davis that "Sylvester had went [sic] in her and had, you know, hurt her; and in her 'butt' area, he put his hand there." "She said he pressed his 'peeter' in her 'project;' and in her 'butt,' his finger." Gloria told Mrs. Davis that Sylvester had told her to go in the bathroom and wash the blood off.

Mrs. Davis told her daughter Ann what Gloria had said and told Ann to take the child to the hospital. Ann later testified that she and Gloria hitchhiked to the hospital in the rain. Mrs. Davis and her husband met Janell at the mobile home when Janell came home from school that afternoon. Janell's mother, Catherine, then took Janell to New Hanover Memorial Hospital. Both Gloria and Janell were examined at the hospital by Dr. Alfred Woodworth on 5 March 1984.

Dr. Woodworth testified that his examination of Gloria revealed "a well-circumscribed area of bruising around the vaginal opening" on the interior of the labia. He stated that it was his opinion that a "male penis" caused the trauma he observed. Dr. Woodworth also discovered the presence of protozoa trichomonas, an organism transmitted primarily through sexual contact.[2]

Dr. Woodworth testified that his examination of Janell revealed "marked redness and irritation, with areas of contusions, . . . around the vaginal opening." He stated that a finger or penis could have caused Janell's injuries. His examinations revealed no presence of sperm, and he noted that Gloria's hymenal ring was intact.

The defendant, Sylvester Smith, took the stand and denied any knowledge of the incidents.

1. All other evidence indicates that Mrs. Davis' visit referred to here was on 5 March 1984, a Monday.

2. Dr. Woodworth stated on cross-examination that the disease could also be caused by improper hygiene. Dr. James Robert Forstner, Brunswick County Child Medical Examiner and family practice physician, was allowed to testify that two of his colleagues told him that they did not know of a case of trichomonas in a prepubertal female that had shown up without sexual contact.

Defendant first assigns as error the trial court's failure to instruct the jury that the testimony of Minerva Glidden, Elena Peterson, and Fannie Mae Davis was to be considered for the limited purpose of corroborating the victims' testimony. At trial, defendant requested an instruction limiting to corroboration the jury's consideration of Ms. Glidden's testimony as to what Gloria told her. The trial judge stated that he would instruct the jury at the appropriate time and that the defendant could hand up whatever instructions he wished. (Defendant subsequently tendered limiting instructions for the jury charge, and they were refused.) Prior to Ms. Peterson's and Mrs. Davis' testimony regarding what Janell and Gloria told them about the incidents, defendant made general objections, both of which were overruled.

[1] The law of this State is that an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such an instruction. A general objection will not suffice. *State v. Spain*, 3 N.C. App. 266, 164 S.E. 2d 486 (1968). *See also State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. denied*, 431 U.S. 916 (1977); *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972). Although defendant properly requested a limiting instruction as to Ms. Glidden's testimony at the time it was offered, he did not do so as to the testimony of Mrs. Davis and Ms. Peterson. The record does show, however, that defendant made a written request for a jury instruction on corroboration. The trial judge, in his charge to the jury, did not give defendant's requested instruction and noted defendant's exception to the omission. Defendant's assignment of error as to the jury charge omitting his requested instruction is, therefore, properly before us.

[2] Corroboration, the opposite of impeachment, is "the process of persuading the trier of the facts that a witness is credible." 1 Brandis on North Carolina Evidence § 49 (2d rev. ed. 1982). "Corroborate" means "to strengthen; to add weight or credibility to a thing by additional conforming facts or evidence." *State v. Higgenbottom*, 312 N.C. 760, 769, 324 S.E. 2d 834, 840 (1985). Evidence may also be used for corroboration purposes when the corroborating evidence is not admitted solely for its bearing on credibility. "It is *only* when the evidence is inadmissible for substantive . . . purposes, *and* its sole claim to competence is to enhance credibility, that resort must be had to the special rules

and policies" relative to corroboration. 1 Brandis on North Carolina Evidence § 49 (2d rev. ed. 1982) (emphasis added). The corollary to this rule, then, is that if evidence is admissible for substantive purposes, none of the "corroboration" limitations apply, and a party is not entitled to an instruction limiting its admissibility to that purpose, whether he requests one or not. In the instant case, therefore, a determination of defendant's second issue as to whether this testimony was admissible as substantive evidence is a prerequisite to a determination of the first.

Defendant's second issue, in effect, requires us to decide whether the trial court erred in allowing, as substantive evidence, the testimony of Ms. Glidden, Ms. Peterson, and Mrs. Davis as to what Gloria and Janell related to them following the assaults. The defendant contends this evidence was inadmissible hearsay.

The North Carolina Evidence Code, Chapter 8C of the North Carolina General Statutes, became effective 1 July 1984. It therefore governed the admissibility of evidence at this trial which commenced 13 August 1984. N.C.G.S. § 8C-1, Rule 801(c) (Cum. Supp. 1983), defines "hearsay" as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." A hearsay statement is "not admissible except as provided by statute or by these rules." N.C.G.S. § 8C-1, Rule 802. There is no question that the testimony in dispute here was "hearsay." However, statements which otherwise would be deemed hearsay are not excluded by the rule if they are found to fall within one of the exceptions provided in Rule 803 (Availability of declarant immaterial) or in Rule 804 (Declarant unavailable).

I.

The disputed testimony of the two Rape Task Force volunteers, as well as that of Mrs. Davis, was assumed in the briefs of this case to have been admitted by the trial judge as substantive evidence pursuant to the hearsay exception set out in Rule 803(4) (statements made for purposes of medical diagnosis or treatment), which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .

(4) Statements for Purposes of Medical Diagnosis or Treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The defendant contends that the disputed testimony does not fall within this hearsay exception and is therefore inadmissible because Gloria's and Janell's statements were not made for the purposes of medical diagnosis or treatment. Defendant bases his argument on the fact that none of these witnesses claimed to hold licenses to practice medicine or psychology and could not, therefore, provide medical diagnosis or treatment.

[3] The testimony of Mrs. Davis, the girls' grandmother, to whom they first related the incident, clearly comes within the Rule 803(4) hearsay exception. In addition to telling her grandmother about the assault, Gloria described bleeding and pain. As a direct result of that conversation, Mrs. Davis advised Gloria's mother to take her to the hospital for diagnosis and treatment. Likewise, as a direct result of the conversation with Janell that afternoon, Janell was also taken to the hospital for diagnosis and treatment.

The commentary to N.C.G.S. § 8C-1, Rule 803(4), explains that "[u]nder the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, *or even members of the family* might be included." (Emphasis added.) The basis for allowing such statements into evidence as exceptions to the hearsay rule is that they are inherently trustworthy and reliable for the reason that the patient has an interest in telling or relaying to medical personnel as accurately as possible the cause for the patient's condition. *See* 4 D. Louisell & C. Mueller, Federal Evidence § 444 (1980); 4 Weinstein's Evidence § 803(4)[01] (1985).

While, here, Gloria and Janell did not specifically request medical attention, we recognize that young children cannot independently seek out medical attention, but must rely on their caretakers to do so. Their statements to Mrs. Davis immediately resulted in their receiving medical treatment and diagnosis. We

hold, therefore, that Mrs. Davis' testimony regarding her conversations with Gloria and Janell resulting in their being examined, diagnosed, and treated at New Hanover Memorial Hospital on 5 March 1984 was properly admitted as substantive evidence pursuant to the Rule 803(4) hearsay exception.

[4] Defendant also contends that Mrs. Davis' testimony, to the effect that Gloria told her it was "Sylvester" who had caused her injuries, was improperly admitted as irrelevant to Gloria's treatment or diagnosis. Some courts before which the point has been raised have found that the identity of the perpetrator is not relevant under the 803(4) (medical diagnosis or treatment) exception. If a declarant identifies the perpetrator while under the impression that he is being asked to indicate the responsible party, the identification may be accusatory in nature and thus would destroy any inherent reliability. *United States v. Narcisco*, 446 F. Supp. 252, 289 (E.D. Mich. 1977). If, however, the motivation for such statement was to disclose information to aid in medical diagnosis or treatment, the trustworthiness remains intact. *Id.* In *Goldade v. Wyoming*, 674 P. 2d 721 (Wyo. 1983), *cert. denied*, --- U.S. ---, 82 L.Ed. 2d 844 (1984), a mother was convicted of physically abusing her daughter *solely* on the basis of statements made by the child to a doctor. The doctor was allowed to testify that the child identified the mother as the perpetrator.

One commentator has noted that "[w]hile admissible evidence under traditional doctrine included only the fact that complaint was made, the trend is to allow the details of the offense and the identity of the offender, a result which appears wholly justifiable." McCormick on Evidence § 297 (3d ed. 1984). *See also* VI Wigmore, *Evidence* § 1761 n. 2 (Chadbourn rev. 1976) and cases cited therein.

We believe that, under these circumstances, the trial court did not err in allowing Mrs. Davis to testify that Gloria named Sylvester as her assailant. We note, also, that because Gloria had identified Sylvester from the witness stand, Mrs. Davis' testimony was corroborative of this fact.

[5] Defendant's contention that it was error to admit the testimony of Ms. Glidden and Ms. Peterson pursuant to Rule 803(4) (medical diagnosis or treatment) is more troubling. Defendant correctly points out that neither Ms. Glidden nor Ms. Peter-

son testified to being licensed as medical doctors or psychologists. Although Ms. Glidden had experience as a registered nurse in a psychiatric clinic, she was called to the hospital in her capacity as a Rape Task Force volunteer, not as a registered nurse. We also note that the girls' statements to these volunteers were made after they had been examined and treated by qualified medical personnel. The volunteers did not pretend to diagnose the girls' medical "condition" as Rape Task Force volunteers, but worked with them in treating the emotional effects of the events described by the girls. Gloria first met Ms. Glidden in the emergency room of the hospital. Ms. Glidden testified that she entered the room as Dr. Woodworth was leaving. Although it is possible that Gloria may have associated Ms. Glidden with the hospital and may have considered her to be among the medical personnel who treated her in connection with her injuries, we are unwilling to hold that these witnesses' testimony as to the victims' statements were properly admitted under the Rule 803(4) hearsay exception. We do not believe that the exception was created to except from the operation of the hearsay rule statements made to persons acting in the capacity of these volunteers at a time after the victims had already reached the hospital and had received medical treatment and diagnosis.

II.

[6] The State contends that the grandmother's (Mrs. Davis') testimony was also admissible under the hearsay exception, N.C.G.S. § 8C-1, Rule 803(2). That rule provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (2) Excited Utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

In order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication. McCormick on Evidence § 297. These two requirements necessitate subjective standards. "[T]he fact

that another person in a similar situation might not have been excited does not suffice to bar resort to the exception." 4 D. Louisell & C. Mueller, Federal Evidence § 439. Although the "requirement of spontaneity is often measured in terms of the time lapse between the startling event and the statement, . . . the modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement." J. Bulkley, Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial, in Child Sexual Abuse and the Law 153, 155 (J. Bulkley ed., ABA-National Legal Resource Center for Child Advocacy and Protection 1983).

Many courts have addressed the admissibility of statements made by young children and testified to in court by the adult to whom they were made as Rule 803(2) "excited utterance" exceptions to the hearsay rule. The Wisconsin appellate courts[3] have developed "a special species of the excited utterance exception to the hearsay rule" for such statements. *State v. Padilla*, 110 Wis. 2d 414, 329 N.W. 2d 263 (Wis. Ct. App. 1982). In *Padilla*, the Wisconsin Court of Appeals allowed the testimony of the victim's mother and a social worker as to statements made to them by the victim three days after a sexual assault. The ten-year-old victim did not testify at the preliminary hearing, but did testify at trial. Recognizing that "[a] broad and liberal interpretation is [to be] given to what constitutes an excited utterance when applied to young children," the court noted that the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than in adults. *See* Annot. "Time Element as Affecting Admissibility of Statement or Complaint Made by Victim of Sex Crime as Res Gestae, Spontaneous Exclamation, or Excited Utterance," 89 A.L.R. 3d 102 (1979). "This

3. *See, e.g., State v. Gollon*, 115 Wis. 2d 592, 340 N.W. 2d 912 (1983) (mother and neighbor allowed to testify to statements of six-year-old victim made one and two days after assault when victim too afraid to testify at trial); *State ex rel. Harris v. Schmidt*, 69 Wis. 2d 668, 230 N.W. 2d 890 (1975) (five-year-old stepson of defendant told his mother the next day; told defendant's probation officer 15 days later); *Love v. State*, 64 Wis. 2d 432, 219 N.W. 2d 294 (1974) (three-and-a-half-year-old told her mother the next morning after mother noticed blood); *Bertrang v. State*, 50 Wis. 2d 702, 184 N.W. 2d 867 (1971) (nine-year-old daughter of defendant told her mother the next day); *Bridges v. State*, 247 Wis. 350, 19 N.W. 2d 529, *reh'g denied*, 247 Wis. 350, 19 N.W. 2d 862 (1945) (seven-year-old told her mother one hour after assault). In all of these cases, the Wisconsin Supreme Court allowed the adults' hearsay testimony to be received as substantive evidence.

ascertainment of prolonged stress is born of three observations. First, a child is apt to repress the incident. Second, it is often unlikely that a child will report this kind of incident to anyone but the mother. Third, the characteristics of young children work to produce declarations 'free of conscious fabrication' for a longer period after the incident than with adults." *Padilla*, 110 Wis. 2d at 419, 329 N.W. 2d at 266 (citations omitted).

Although it noted that the three-day time period at issue was "less contemporaneous" with the assault than were the periods in previously decided cases, the court in *Padilla* stated that "contemporaneity is not a condition precedent to a finding of an excited utterance." *Id.* at 420, 329 N.W. 2d at 267. Spontaneity and stress are the crucial factors. In *Padilla*, as here, the victim was assaulted by her mother's boyfriend who told her that if she said anything to her mother, he would "hit her." *Id.* There, as here, the witness stated that the child was "afraid, scared" when she related the incident.

Where there was an overnight interval between a sexual assault and a four-year-old's statement to his mother, the Colorado Court of Appeals noted that in cases involving young children, the element of trustworthiness underscoring the excited utterance exception is primarily found in the "lack of *capacity* to fabricate rather than the lack of time to fabricate." *People v. Ortega*, 672 P. 2d 215, 218 (Colo. App. 1983) (emphasis added).

The Eighth Circuit Court of Appeals held in *United States v. Iron Shell*, 633 F. 2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 68 L.Ed. 2d 203 (1981), that the trial court did not abuse its discretion in stretching the excited utterance exception to let in a statement of a nine-year-old female victim of sexual assault to a police officer up to an hour and a half after the assault. The officer described the child as being "nervous and scared" and speaking in "short bursts." *Id.* at 86. "Considering the surprise of the assault, its shocking nature and the age of the declarant," it was not unreasonable to find that the victim was in a "state of continuous excitement from the time of the assault." *Id. Accord Haggins v. Warden, Ft. Pillow State Farm*, 715 F. 2d 1050 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071, 79 L.Ed. 2d 217 (1984) (four-year-old's statement to nurses and police an hour and a half after sexual assault). *See also People v. Stewart*, 39 Colo. App. 142, 568 P. 2d

65 (1977) (six-year-old victim of sexual assault did not relate her story to her rescuers, but waited to tell the police (first authority figures) two hours later; court cites Federal Rule of Evidence 803(2) and upholds admissibility); *United States v. Nick*, 604 F. 2d 1199 (9th Cir. 1979) (three-year-old victim of babysitter's sexual assault described event to his mother when she picked him up from the babysitter's house after the assault; description properly admitted under Federal Rule 803(2)).

Other factors may come into play in causing a delay between the assault and the child's statement. "In allowing a wider length of time, courts have indicated that a young child may not make immediate complaint because of threats, fear of reprisals, admonishments of secrecy, or other pressures not to disclose," particularly where, as here, the child had a close relationship with the offender. J. Bulkley, Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial, in Child Sexual Abuse and the Law 153, 156 (J. Bulkley ed., ABA-National Legal Resource Center for Child Advocacy and Protection 1983). *See also People v. Edgar*, 113 Mich. App. 528, 317 N.W. 2d 675 (1982); *People v. Bonneau*, 323 Mich. 237, 35 N.W. 2d 161 (1948); *State v. Creighton*, 462 A. 2d 980 (R.I. 1983).

However, in *State v. Hollywood*, 67 Or. App. 546, 680 P. 2d 655 (1984), *review denied*, 298 Or. 553, 695 P. 2d 49 (1985), the court found the excited utterance exception inapplicable where there was a complete absence of evidence as to exactly when the attack took place and the victim had been in defendant's custody for nearly a month. There, a four-year-old female victim told her grandmother that her mother's boyfriend "hit me there" with his "thing down there" (pointing to her vaginal area). The trial court admitted the grandmother's testimony under the excited utterance exception, but the appellate court found that the time factor precluded application of that exception. Instead, the appellate court found the testimony properly admitted under the Rule 803 (24) "catchall" exception. We find *Hollywood* distinguishable. In *Hollywood*, the time of the assault was unable to be determined because the victim had been in the custody of the defendant for nearly a month prior to the victim's disclosure of the assault to her grandmother. In the instant case, the record reveals that the assaults took place on the weekend of 2 March 1984, with the victims reporting the assaults on Monday, 5 March 1984.

We believe that the girls' statements to Mrs. Davis on 5 March 1984 were of such a nature as to have been properly admitted under the Rule 803(2) excited utterance exception to the hearsay rule. In volunteering the information to her grandmother, Gloria said, "I have something to tell you. . . . I want you to come in the room. I am scared. . . . I want to tell you what Sylvester done [sic] to me." Although it is not entirely clear on exactly what night the event took place during that weekend, the trial court assumed it took place on the earliest night of the weekend, Friday night, 2 March 1984. The evidence tends to show that Gloria and Janell talked to Mrs. Davis on the morning and the afternoon of Monday, 5 March 1984, between two and three days of the event. Under these circumstances, then, we hold that Mrs. Davis' testimony was also admissible under the excited utterance exception of Rule 803(2). Neither party addressed the admissibility of the Rape Task Force volunteers' testimony under Rule 803(2). Therefore, we shall not do so here.

III.

Having found the testimony of Ms. Glidden and Ms. Peterson not admissible under the Rule 803(4) exception (medical diagnosis or treatment) and noting that the State does not argue for its admissibility under Rule 803(2) (excited utterances), we turn now to the State's contention that this testimony was admissible as substantive evidence pursuant to Rule 803(24) (other exceptions). Often termed the "catchall" or "residual" hearsay exception, Rule 803(24) provides that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (24) Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the inter-

ests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

The record indicates that the State provided notice to the defendant of its intention to introduce the statements of Ms. Glidden and Ms. Peterson. The written and oral notice included the names and addresses of these witnesses, as well as the "particulars" of the hearsay statements this testimony would contain. In a conversation among the district attorney, defense counsel, and the trial judge which took place between the jury charge and the announcement of the verdict, the district attorney again advised the trial court that this notice had been given. The judge asked defense counsel if this was correct, and counsel responded, "Judge, I was not contesting [the statements] on that basis, and what Mr. Easley says is correct."

The trial judge here did not specify on what basis he refused to limit the disputed testimony to corroboration. If he allowed the testimony into evidence pursuant to the Rule 803(24) exception, he did not say so on record. Consequently, there appear in the record no findings by the trial judge or any other indication that he analyzed the appropriateness of admitting this testimony in light of the specific requirements set out in Rule 803(24).

[7] Because of the residual nature of the Rule 803(24) hearsay exception and the Commentary's warning that "[t]his exception does not contemplate an unfettered exercise of judicial discretion,"[4]

4. The legislative history of Federal Rule of Evidence 803(24) reveals that the Senate Judiciary Committee cautioned that the exception should be invoked "very rarely, and only in exceptional circumstances." S. Rep. No. 1277, 93d Cong., 2d Sess. 20, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7066. *See also* Lewis, *The Residual Exceptions to the Federal Hearsay Rule: Shuffling the Wild Cards*, 15 Rutgers L.J. 101 (1983); Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U.L. Rev. 867 (1982). *But see* Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 San Diego L. Rev. 239 (1978) (urging a more liberal construction).

evidence proffered for admission pursuant to N.C.G.S. § 8C-1, Rule 803(24) ("other exceptions"), must be carefully scrutinized by the trial judge within the framework of the rule's requirements. It is the duty of the proponent of the proffered hearsay statement to alert the trial judge that the statement is being offered as a hearsay exception under Rule 803(24). Upon being notified that the proponent is seeking to admit the statement pursuant to that exception, the trial judge must have the record reflect that he is considering the admissibility of the statement pursuant to Rule 803(24). Only then should the trial judge proceed to analyze the admissibility by undertaking the six-part inquiry required of him by the rule. The trial judge must engage in this inquiry prior to admitting or denying proffered hearsay evidence pursuant to Rule 803(24).

[8] A. Has proper notice been given?

When hearsay testimony is sought to be admitted as substantive evidence under Rule 803(24), the proponent must first provide written notice to the adverse party "sufficiently in advance of offering[5] the statement to provide the adverse party with a fair opportunity to prepare to meet the statement." The hearsay statement may not be admitted unless this notice (a) is in writing; and (b) is provided to the adverse party sufficiently in advance of offering it to allow him to prepare to meet it; and (c) contains (1) a statement of the proponent's intention to offer the hearsay testimony, (2) the "particulars" of the hearsay testimony, and (3) the name and address of the declarant.

Thus, a trial judge must make the initial determination that proper notice was duly given and must include that determination in the record; detailed findings of fact are not required. Should the trial judge determine that notice was not given, was inadequate, or was untimely provided, his inquiry must cease and the proffered hearsay statement must be denied admission under Rule 803(24).

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5. Federal Rule of Evidence 803(24) requires that the notice be given sufficiently "in advance of the *trial or hearing*." (Emphasis added.) In all other respects, N.C.G.S. § 8C-1, Rule 803(24), is identically worded.

B. Is the hearsay not specifically covered elsewhere?

If the trial judge determines that the statutory notice requirements have been met, he must next determine whether the "statement [is] not specifically covered by any of the foregoing exceptions . . . [Rule 803(1)-(23)]." Again, detailed findings of fact are not required, but the trial judge must enter his conclusion in the record. If the trial judge determines that the statement is covered by one of the other specific exceptions, that exception, not the catchall Rule 803(24), governs; admission pursuant to Rule 803(24) is not necessary, and the inquiry must end. If, however, the trial judge concludes that the hearsay statement is not specifically covered by any of the other 23 exceptions, he must so determine and proceed to the next inquiry.

C. Is the statement trustworthy?

Although a hearsay statement is not specifically covered by any of the 23 "pigeonhole" exceptions, it may be admissible under the residual exception if it possesses "circumstantial guarantees of trustworthiness" equivalent to[6] those required for admission under the enumerated exceptions. This threshold determination has been called "the most significant requirement"[7] of admissibility under Rule 803(24). Courts and commentators have struggled with the meaning of this requirement, and certain factors are acquiring recognition as significant in guiding the trial judge's determination of the proffered statement's trustworthiness. Among these factors are (1) assurance of personal knowledge of the declarant of the underlying event, *United States v. Barlow*, 693 F. 2d 954, 962 (6th Cir. 1982), *cert. denied*, 461 U.S. 945, 77 L.Ed. 2d 1304 (1983); *United States v. Carlson*, 547 F. 2d 1346, 1354 (8th Cir.) (applying Federal Rule 804(b)(5)), *cert. denied*, 431 U.S. 914, 53 L.Ed. 2d 224 (1976); (2) the declarant's motivation to speak the truth or otherwise, *Huff v. White Motor Corp.*, 609 F. 2d 286, 292 (7th Cir. 1979); (3) whether the declarant ever recanted the testimony, *United States v. Barlow*, 693 F. 2d 954, 962 (6th Cir. 1982), *cert. denied*, 461 U.S. 945, 77 L.Ed. 2d 1304 (1983); and

6. The Commentary to Rule 803(24) explains that the statement's trustworthiness must be "within the spirit of the specifically stated exceptions."

7. M. Graham, Handbook of Federal Evidence § 803.24 (1981); McCormick on Evidence § 324.1 (3d ed. 1984) (central focus of the residual exception).

(4) the practical availability of the declarant at trial for meaningful cross-examination, M. Graham, Handbook of Federal Evidence § 803.24 (1981). *See also United States v. McPartlin*, 595 F. 2d 1321, 1350 (7th Cir.) (dictum), *cert. denied*, 444 U.S. 833, 62 L.Ed. 2d 43 (1979); 4 D. Louisell & C. Mueller, Federal Evidence § 472 (1980) ("the 'trustworthiness' of statements offered under Rule 803(24) is slightly less a matter of concern where the declarant in fact testifies and is subject to cross-examination").

None of these factors, alone or in combination, may conclusively establish or discount the statement's "circumstantial guarantees of trustworthiness." The trial judge should focus upon the factors that bear on the declarant at the time of making the out-of-court statement and should keep in mind that the peculiar factual context within which the statement was made will determine its trustworthiness.

In making his determination of whether the proffered statement possesses "equivalent circumstantial guarantees of trustworthiness," the trial judge must include in the record not only his conclusion but also his reasoning in reaching it. Findings of fact and conclusions of law as to the trustworthiness requirement must appear in the record. Again, if the trial judge examines the circumstances and determines that the proffered testimony does not meet the trustworthiness requirement, his inquiry must cease upon his entry into the record of his findings and conclusions, and the testimony may not be admitted pursuant to Rule 803(24). If the trial judge's analysis leads him to the conclusion that the trustworthiness element is satisfied, he must proceed to the next inquiry.

D. Is the statement material?

If the proffered statement is not specifically covered by any of the enumerated exceptions and has equivalent circumstantial guarantees of trustworthiness, it is still inadmissible unless the trial judge determines that it "is offered as evidence of a material fact." This requirement has been construed as a mere restatement of the requirement of relevancy set out in Rules 401 and 402. *See Huff v. White Motor Corp.*, 609 F. 2d 286, 294 (7th Cir. 1979); M. Graham, Handbook of Federal Evidence § 803.24 (1981). Although findings of fact need not be made, the trial judge must include in the record a statement that the proffered evidence is

offered as evidence of a material fact if he so finds. If not, the record should so reflect, and the inquiry should end.

E. Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts?

The fifth inquiry is reached only if each of the preceding four have been answered in the affirmative. A hearsay statement is admissible under Rule 803(24) only if it "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement of "necessity" has been inherent in the analysis of hearsay exceptions long before even the Federal Rules of Evidence were codified. *See* V Wigmore on Evidence § 1421 (Chadbourn Rev. 1974). The requirement imposes the obligation of a dual inquiry: were the proponent's efforts to procure more probative evidence diligent, and is the statement more probative on the point than other evidence that the proponent could reasonably procure? 4 D. Louisell & C. Mueller, Federal Evidence § 472 (1980).

Where a declarant is available at trial, the degree of necessity to admit his or her hearsay statement through the testimony of another is greatly diminished. Usually, *but not always*, the live testimony of the declarant will be the more (if not the most) probative evidence on the point for which it is offered.[8] Because Rule

8. *See, e.g., United States v. Mathis*, 559 F. 2d 294 (5th Cir. 1977) (court faced with defendant's recalcitrant wife who, after making sworn statements and testifying before a grand jury as to defendant's involvement in the crime, refused to testify against him at trial. The court in that situation reasoned:

"The live testimony of the available witness, whose demeanor the jury would have been able to observe and whose testimony would have been subject to cross-examination, would have been of more probative value in establishing the truth than the bare statements transcribed by the ATF agents. *See California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970); *United States v. Williams*, 447 F. 2d 1285 (5th Cir. 1971); *United States v. Lynch*, 163 U.S. App. D.C. 6, 499 F. 2d 1011 (1974). Unlike the case in which the witness takes the stand, the use of the statements foreclosed any exploration of weaknesses in the witness' perception, memory, and narration of the matters asserted within the statements. While it has been contended that availability is an immaterial factor in the application of Rule 803(24), this argument is wide of the mark. Although the introductory clause of Rule 803 appears to dispense with availability, this condition re-enters the analysis of whether or not to admit statements into evidence under the last subsection of Rule 803 because of the requirement that the proponent use reasonable efforts to

803(24) allows hearsay evidence to be admitted "even though the declarant is available as a witness," the trial judge must, in this event, take care in documenting for the record his basis for finding that this "necessity" requirement is met. The record must reflect findings of fact and conclusions of law supporting the trial judge's determination as to this fifth inquiry. Should the trial court determine that the proffered evidence is not "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," his inquiry must end, and the evidence may not be admitted under Rule 803(24). If, however, the trial judge determines that the "necessity" test is satisfied, he must move to the sixth inquiry.

F. Will the interests of justice be best served by admission?

The sixth and final inquiry under Rule 803(24) is whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence." The general purposes of the North Carolina Evidence Code are set out in N.C.G.S. § 8C-1, Rule 102, as follows: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

After considering whether admission of the proffered evidence would best serve these purposes and the interests of justice, the trial judge must state his conclusion. Detailed findings of fact regarding this determination are not required so long as the trial judge includes in the record his analysis.

By setting out in the record his analysis of the admissibility of hearsay testimony pursuant to the requirements of Rule 803(24) as set forth above, the trial judge will necessarily undertake the serious consideration and careful determination contemplated by

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procure the most probative evidence on the points sought to be proved. Rule 803(24), thus, has a built-in requirement of necessity. Here there was no necessity to use the statements when the witness was within the courthouse. The trial court erred in overlooking this condition of admissibility under Rule 803(24).").

Id. at 298-99.

We note that the presence of the declarant in the courthouse does not *necessarily* preclude a finding of necessity.

the drafters of the Evidence Code. This thoughtful analysis will greatly aid in assuring that only necessary, probative, material, and trustworthy hearsay evidence will be admitted under this residual exception and will provide a sound framework for meaningful appellate review.

Our research has revealed that, in applying Federal Rule 803(24), the federal courts encourage[9] if not demand[10] that the trial courts make findings. Because admissibility of hearsay statements pursuant to the 803(24) residual exception is within the sound discretion of the trial court, appellate review of an assignment of error to that exercise of discretion is rendered virtually impossible[11] absent the inclusion in the record of the statements, rationale, or findings and conclusions as set forth herein. We hold that, before allowing the admission of hearsay evidence to be presented under Rule 803(24) (other exceptions), the trial judge must enter appropriate statements, rationale, or findings of fact and conclusions of law, as set forth herein, in the record to support his discretionary decision that such evidence is admissible under that rule. If the record does not comply with these requirements and it is clear that the evidence was admitted pursuant to Rule 803(24), its admission must be held to be error.

Because the language of Rule 803(24) does not itself specify how and in what detail the trial judge must "determine" its requirements, we have established the requirements set forth herein pursuant to this Court's residual supervisory power as par-

9. *United States v. Hinkson*, 632 F. 2d 382, 385 (4th Cir. 1980); *Huff v. White Motor Corp.*, 609 F. 2d 286, 291 (7th Cir. 1979); *United States v. Palacios*, 556 F. 2d 1359, 1363, n. 7 (5th Cir. 1977). *See also* S. Rep. No. 1277, 93d Cong., 2d Sess. 20, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7066.

10. *United States v. Guevara*, 598 F. 2d 1094, 1100 (7th Cir. 1979); *United States v. King*, 16 M.J. 990, 992, n. 3 (A.C.M.R. 1983).

11. *United States v. Guevara*, 598 F. 2d 1094 (7th Cir. 1979). One treatise has stated that "resort to [803(24)] for the first time on appeal as the basis for challenging or supporting rulings below is inappropriate." 4 D. Louisell & C. Mueller, Federal Evidence § 472 (1980). *But see Huff v. White Motor Corp.*, 609 F. 2d 286, 291-92 (7th Cir. 1979) (Seventh Circuit Court of Appeals, after noting that findings by the district court would have "greatly aided" in reviewing a ruling of this nature under 803(24), stated that "we have little choice except to attempt to replicate the exercise of discretion that would be made by a trial judge in making the ruling." The circuit court went on to analyze the proffered testimony under Federal Rule 803(24)).

tially expressed in Rule 2 of the North Carolina Rules of Appellate Procedure. We now consider the application of the rule announced herein to cases involving the admission or exclusion of evidence where the record reflects that the trial judge made his ruling on the basis of Rule 803(24). Because the effective date of the rules is recent (1 July 1984), there are probably few cases in the process of appellate review at this time. Our holding in this case will apply only to cases the trial of which begins after the certification date of this opinion. It may not be used as the basis for collaterally attacking any case which was tried prior to the certification date of this opinion or in any case in which no appeal was taken from the trial judgment. In those cases to which the rule established herein does not apply, the appellate courts will examine each appeal on a case-by-case basis to determine whether the ruling by the trial judge admitting or excluding evidence pursuant to Rule 803(24) may be sustained on the contents of the record on appeal. If the record will not support the ruling of the trial judge, his ruling will be determined to be error and the appellate court will then proceed to determine whether the error was reversible pursuant to the provisions of N.C.G.S. § 15A-1443.

[9] We now proceed to determine the question in the case at bar. As previously indicated herein, the trial judge denied defendant's motion to limit the Rape Task Force volunteers' hearsay testimony to corroboration and refused to give limiting instructions in his charge as tendered by defendant. We have previously noted that the testimony of these witnesses could not properly have been admitted as substantive evidence under either Rule 803(4) (medical diagnosis or treatment) or Rule 803(2) (excited utterances), the only other exceptions contended. The trial judge did not state, and the record does not reflect, that the evidence was admitted pursuant to Rule 803(24). The record reflects no statements, rationale, or findings and conclusions whatsoever concerning any requirement of the rule and thus does not support the trial judge's ruling which in effect allowed this testimony to be considered as substantive evidence. Because we are unable to find in the record on appeal any support for the admission of the testimony under Rule 803(24), we find that so much of this testimony as did not corroborate the victims' testimony at trial was inadmissible and thus its admission was error.

We now consider whether the error was reversible error. Our review of the transcript indicates that the portion of the volunteers' testimony relating to statements made by the children which was non-corroborative was Ms. Glidden's testimony that Gloria told her that Sylvester "put his finger in her 'butt.'" The only evidence of first-degree sexual offense against Gloria was Gloria's statements to others to the effect that Sylvester touched her in the area of her rectum. At trial, Gloria repeatedly denied that Sylvester had touched her anywhere except her vagina. Thus, Ms. Glidden's testimony, proffered pursuant to Rule 803(24), was in direct conflict with the testimony of the victim. Although the properly admitted *subsequent* testimony of the grandmother, Mrs. Davis (whom the jury probably viewed as an interested witness), was to the effect that Gloria had told her Sylvester had put his hand in her "butt," we find that the admission of Ms. Glidden's testimony to the same effect was highly prejudicial to the defendant. The testimony of this "disinterested" Rape Task Force volunteer obviously had great impact upon the jury, especially in the face of Gloria's denial at trial that the defendant had touched her anywhere except in her vagina. The prejudicial effect of this testimony requires us to arrest judgment on defendant's conviction for the first-degree sexual offense as to Gloria, 84CRS1377, and to grant a new trial on that charge.

IV.

[10] Defendant has made several additional assignments of error, none of which we find to have merit, but which we shall address briefly here. First, defendant contends that it was error to allow Dr. Woodworth, the examining physician, to give his opinion as to the cause of the trauma he observed during his examination of Gloria on 5 March 1984. The record reveals that, in response to questioning as to the cause of the injuries, Dr. Woodworth stated, "In my opinion it was a male penis." Defendant contends first that this statement was improperly admitted because it was unqualified by the words "could" or "might." Second, defendant contends that the statement was improper as an invasion of the province of the jury.

In *State v. Brown*, 300 N.C. 731, 268 S.E. 2d 201 (1980), this Court set out a three-part test for determining the admissibility of expert opinion testimony as to the cause of injuries. The sec-

ond prong of that test allows the witness to testify only that an event *could* or *might* have caused the injury unless his expertise leads him to an unmistakable conclusion. *Id.* at 733, 268 S.E. 2d at 203. Since *Brown* was decided, the North Carolina Evidence Code, Chapter 8C of the North Carolina General Statutes, has come into effect. As we stated earlier, the trial of the instant case was governed by the "new" Evidence Code. N.C.G.S. § 8C-1, Rule 705, eliminates the requirement that experts' opinion testimony be in response to a hypothetical question. Rule 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." In this case, an "ultimate issue" was whether the victims' injuries were caused by a male sex organ. As to Gloria, Dr. Woodworth testified that, in his opinion, the injuries were caused by "a male penis."

We hold that Dr. Woodworth's failure to qualify his opinion by the words "could" or "might" did not render this testimony as to an ultimate issue improper. We note parenthetically that, on cross-examination, Dr. Woodworth agreed that the injuries he observed during his examination of Gloria could have been caused by some other object the same size and shape as a penis. We also note that Dr. Woodworth did not testify that Gloria had been raped, nor that the defendant raped her. The rule that an expert may not testify that such a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. 3 D. Louisell & C. Mueller, Federal Evidence § 395 (1979). *See also State v. Robinson*, 310 N.C. 530, 538, 313 S.E. 2d 571, 577 (1984).

[11] Defendant next contends it was reversible error to admit the testimony of Dr. James Robert Forstner in which he stated that, in his opinion, it was "highly likely" that Gloria and Janell had had sexual intercourse. Defendant argues that Dr. Forstner's opinion was not based on any personal examination of the victims but was based solely on his review of Dr. Woodworth's medical reports. In addition, defendant contends that it was error to allow Dr. Forstner to testify as to his conversations with Drs. Frank Loder and Suzanne White regarding the implications of the presence of protozoa trichomonas in very young females.

First, defendant erroneously concludes that a medical expert's testimony is limited to conditions he has personally observed. The correct limitation, that facts must be "within his knowledge," *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980), is quite different. Dr. Forstner gave an expert medical opinion based upon the contents of Dr. Woodworth's medical reports and information supplied to him by his colleagues, Drs. Loder and White. Based upon that information, Dr. Forstner relied on his personal knowledge and expertise as Child Medical Examiner of Brunswick County to form an opinion as to the likelihood that Gloria and Janell had had sexual intercourse. His opinion was based in part on the statements of Drs. Loder and White that they were unaware of a case of trichomonas in a prepubertal female who had not engaged in sexual intercourse.

We find that these bases upon which Dr. Forstner relied in forming his opinion were of the type reasonably relied upon by experts in the field in forming opinions upon the subject. N.C.G.S. § 8C-1, Rule 703. Therefore, we hold that the trial court did not err in allowing Dr. Forstner to testify to his opinion as to the likelihood that the victims had engaged in sexual intercourse.

[12] Defendant's next contention is that there was insufficient evidence upon which to submit all the indictments to the jury and to sustain the jury's verdicts. We have held that "[b]efore 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. Hamlet*, 312 N.C. 162, 166, 321 S.E. 2d 837, 842 (1984); *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." *Hamlet*, 312 N.C. at 166, 321 S.E. 2d at 837; *State v. Williams*, 308 N.C. 47, 64, 301 S.E. 2d 335, 346, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983). Our review of the evidence properly admitted at trial leads us to the conclusion that there is no merit in this assignment of error.

[13] Finally, defendant contends that the trial court erred in failing to instruct the jury as requested on the lesser-included offenses of attempted first-degree rape and attempted first-degree sexual offense as to both children. The general rule is that the

trial court must only so instruct when there is evidence from which the jury could find that the defendant committed the lesser offense. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). Where there is evidence of some penetration sufficient to support a conviction of rape and the defendant denies having any sexual relations with the victim, the defendant is not entitled to a charge of attempted rape. *State v. Wood*, 311 N.C. 739, 319 S.E. 2d 247 (1984); *State v. Horner*, 310 N.C. 274, 311 S.E. 2d 281 (1984). We find that Gloria's testimony, coupled with the medical evidence presented by Dr. Woodworth, constituted sufficient evidence of a penetration to support a first-degree rape conviction. Likewise, Janell's testimony was sufficient to support a conviction for first-degree sexual offense; no medical evidence of penetration, such as bruising or tearing, is required to support such a conviction. *Cf. State v. Ashley*, 54 N.C. App. 386, 283 S.E. 2d 805 (1981), *cert. denied*, 305 N.C. 153, 289 S.E. 2d 381 (1982). Therefore, we hold that, there being insufficient evidence to support a finding that the defendant committed any lesser offenses, the trial court did not err in failing to instruct the jury on the lesser offenses of attempted rape and attempted first-degree sexual offense.

V.

In summary, we hold that there was no error in defendant's convictions for the first-degree rape of Gloria Ogundeji and the first-degree sexual offense of Janell Smith. Defendant is entitled to a new trial on the charge of first-degree sexual offense as to Gloria Ogundeji.

No. 84CRS1376—First-Degree Rape—no error.

No. 84CRS1377—First-Degree Sexual Offense—new trial.

No. 84CRS1611—First-Degree Sexual Offense—no error.

Justice BILLINGS did not participate in the consideration and decision of this case.

JANE A. AZZOLINO; LOUIS AZZOLINO; MICHAEL LAWRENCE AZZOLINO, BY HIS GENERAL GUARDIANS, JANE A. AZZOLINO AND LOUIS AZZOLINO; REGINA MARY GALLAGHER, BY HER GENERAL GUARDIAN, JANE A. AZZOLINO; AND DAVID JOHN AZZOLINO, BY HIS GENERAL GUARDIAN, LOUIS AZZOLINO v. JAMES R. DINGFELDER; JEAN DOWDY; AND ORANGE COUNTY COMPREHENSIVE HEALTH SERVICES, INC., DOING BUSINESS AS HAYWOOD-MONCURE COMMUNITY HEALTH CENTER

No. 718PA84

(Filed 10 December 1985)

1. **Physicians, Surgeons and Allied Professions § 17.1— prenatal care—Down's Syndrome child—no cause of action for wrongful life**

A claim for wrongful life on behalf of a Down's Syndrome child, based on the alleged negligent failure of defendants to properly advise the parents of the availability of genetic counseling and amniocentesis, is not cognizable at law in North Carolina. Life, even life with severe defects, cannot be an injury in the legal sense.

2. **Physicians, Surgeons and Allied Professions § 17.1— parents of Down's Syndrome child—no cause of action for wrongful birth**

An action for wrongful birth by the parents of a child born with Down's Syndrome is not cognizable at law in North Carolina and the trial court did not err by granting defendant's motions for directed verdicts. Courts which recognize such a claim do so by holding that the existence of a human life can constitute an injury or loss, a view of human life previously unknown to the law of North Carolina. Moreover, courts which have recognized claims for wrongful birth have failed to establish any trend with regard to the measure of damages to be allowed, issues concerning mitigation of damages have not been resolved, and the tort of wrongful birth would be particularly subject to fraudulent claims.

3. **Physicians, Surgeons and Allied Professions § 17.1— no right of action by siblings of Down's Syndrome child**

The trial court did not err by dismissing a medical malpractice claim by the siblings of a Down's Syndrome child where defendants' allegedly negligent failure to properly advise the mother concerning the availability of amniocentesis and genetic counseling prevented the termination of the pregnancy.

Justice EXUM dissenting.

Justice FRYE concurring in part and dissenting in part.

Justice MARTIN concurring in part and dissenting in part.

ON discretionary review of the decision of the Court of Appeals, 71 N.C. App. 289, 322 S.E. 2d 567 (1984) affirming in part and reversing in part orders entered December 14, 1982 by *Judge*

Giles R. Clark and judgment entered May 24, 1983 by *Judge Henry V. Barnette, Jr.*, in Superior Court, CHATHAM County. Heard in the Supreme Court September 9, 1985.

Beskind and Rudolf, by Donald H. Beskind, Thomas K. Maher, Tim Hubbard and Mary Lunday Adams, for the plaintiff-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by John H. Anderson, C. Ernest Simons, and Steven M. Sartorio, for the defendant-appellants.

Blanchard, Tucker, Twiggs, Earls & Abrams, P.A., by Douglas B. Abrams, for the North Carolina Academy of Trial Lawyers, amicus curiae.

Sharon Thompson, Nan D. Hunter, Janet Benshoof and Suzanne M. Lynn, for the American Civil Liberties Union Foundation, amicus curiae.

John A. Swem for the North Carolina Right to Life Education and Legal Defense Fund, amicus curiae.

MITCHELL, Justice.

This appeal arises from a medical malpractice action brought by a child and his parents and siblings alleging that the defendants' negligent failure to advise the parents properly of the availability of amniocentesis and genetic counseling and negligent prenatal care of the mother prevented the termination of the mother's pregnancy by abortion and thereby resulted in the child's birth. The child is afflicted with Down's Syndrome, a genetic disorder characterized by mental retardation and physical abnormalities. We conclude that neither the parents' claim for relief for "wrongful birth," the child's claim for "wrongful life" nor the siblings' claim presents a claim upon which relief can be granted.

The plaintiffs brought this action seeking to recover for injuries allegedly arising from the birth of the plaintiff Michael L. Azzolino, the son of the plaintiffs Louis and Jane Azzolino and the half-brother of the plaintiffs Regina Gallagher and David Azzolino. The defendants named in the complaint are Orange-Chatham Comprehensive Health Services, Inc. (hereinafter "OCCHS"), Dr.

James R. Dingfelder, a specialist in obstetrics and gynecology who at all pertinent times was a professor in the University of North Carolina School of Medicine, and Jean Dowdy, a registered nurse and family nurse practitioner employed by OCCHS at the Haywood-Moncure Clinic (hereinafter "Clinic") operated by OCCHS in Chatham County.

The plaintiffs allege that Mrs. Azzolino received prenatal care at the Clinic during her pregnancy. While at the Clinic, she was under the care of the defendants Jean Dowdy and Dr. Dingfelder. As a result of a contract between the University of North Carolina and OCCHS, Dr. Dingfelder spent one-half day per week at the Clinic supervising the work of the family nurse practitioners and providing gynecological and obstetrical services to patients.

By the first claim for relief, the plaintiffs seek damages on behalf of the parents for the "wrongful birth" of Michael. The plaintiffs allege that the defendants were negligent in their prenatal care of Mrs. Azzolino in that they failed to advise the parents properly and incorrectly advised them with respect to the availability of amniocentesis and genetic counseling. Had the parents been properly advised, they allege that they would have had amniocentesis performed which would have shown that Mrs. Azzolino's pregnancy would result in a child with Down's Syndrome if allowed to go to term. Had she known that Michael would be afflicted with Down's Syndrome, the plaintiffs allege that Mrs. Azzolino would have terminated her pregnancy by an abortion.

By the second claim for relief, Michael Azzolino, through his parents as guardians, seeks to recover damages resulting from his "wrongful life." The plaintiffs allege that Michael has suffered compensable damages by virtue of his very existence afflicted with Down's Syndrome. The plaintiffs further allege that but for the defendants' negligence, Michael would not have suffered such damages because he would have been aborted while still a fetus.

In the third claim for relief, Michael's older siblings, Regina and David, allege that their brother's birth and life has forced them to endure family financial and emotional hardships associated with having a child with Down's Syndrome in the family and also has deprived them of the full measure of the society,

comfort, care and protection of their parents. They allege that their injuries in this regard were proximately caused by the defendants' negligence.

The plaintiffs allege that Dr. Dingfelder is liable for the negligence of the defendant Jean Dowdy under the doctrine of *respondeat superior*. They further allege that the defendant OCCHS is liable for the negligence of the other defendants by reason of the same doctrine.

By orders dated December 14, 1982 and filed on December 28, 1982, Judge Giles R. Clark granted motions of the defendants under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss the claim for relief for wrongful life brought on behalf of Michael and the claim for relief on behalf of Michael's siblings. The case came on for trial of the claim for relief on behalf of the parents for wrongful birth. At the close of the plaintiffs' evidence at trial, Judge Henry V. Barnette, Jr. allowed the defendants' motions under Rule 50 of the North Carolina Rules of Civil Procedure for directed verdicts in their favor on the wrongful birth claim. On May 24, 1983 Judge Barnette entered judgment finally terminating the action. The plaintiffs appealed to the Court of Appeals.

The Court of Appeals affirmed the trial court's dismissal of the claim for relief on behalf of Regina Mary Gallagher and David John Azzolino, the minor siblings of Michael Azzolino. It also affirmed the trial court's directed verdict in favor of the defendant Jean Dowdy on the plaintiff parents' claim against her for wrongful birth. The Court of Appeals reversed the directed verdicts against the parents on their wrongful birth claim against the defendants Dr. James Dingfelder and OCCHS and also reversed the trial court's dismissal of Michael Azzolino's claim for wrongful life.

The Court of Appeals also addressed the measure of damages to be applied should Michael and his parents prevail at trial. The Court of Appeals concluded that Michael's wrongful life claim would not justify general damages for being born impaired "because of the impossibility of assessing such damages in any fair, nonspeculative manner." 71 N.C. App. at 300, 322 S.E. 2d at 576. It allowed recovery of special damages for the extraordinary expenses to be incurred during Michael's lifetime as a result of

his impairment. The Court of Appeals held that these damages were recoverable by the child with his parents being entitled to disbursements from the child's recovery for reasonable expenses for special care subject to the approval of the clerk of superior court. The Court of Appeals further concluded that it was appropriate to allow the parents to recover damages only for their mental anguish resulting from the existence of the impaired child, since they would be indirectly compensated for the child's extraordinary expenses from the damages he would recover under his wrongful life claim.

On February 28, 1985, we allowed the defendants' petition for discretionary review and the plaintiffs' cross-petition for discretionary review of additional issues. As we conclude that neither wrongful birth nor wrongful life claims are cognizable under the law of this jurisdiction, we affirm in part and reverse in part the decision of the Court of Appeals.

The terms "wrongful birth" and "wrongful life" are descriptive titles used in those jurisdictions which have recognized claims for relief of parents and children for negligent medical treatment or advice which deprives parents of the opportunity to abort a fetus in order to avoid the birth of a defective child. *E.g.*, *Procanik v. Cillo*, 97 N.J. 339, 347, 478 A. 2d 755, 760 (1984). "Wrongful life" refers to a claim for relief by or on behalf of a defective child who alleges that but for the defendant's negligent treatment or advice to its parents, the child would not have been born. *Id.* "Wrongful birth" refers to the claim for relief of parents who allege that the negligent treatment or advice deprived them of the choice of terminating pregnancy by abortion and preventing the birth of the defective child. *E.g.*, *James G. v. Caserta*, 332 S.E. 2d 872, 874 (W.Va. 1985). The various theories which have been relied upon to support these claims for relief have been discussed at length by numerous legal commentators in recent years. *See id.* at n. 4 (citations to numerous articles, comments and notes).

We emphasize at the outset that this appeal does not present a situation in which it is alleged that the defendants negligently injured a fetus and thus caused an otherwise normal child to be born in a defective condition. The plaintiffs do not allege that the negligence of the defendants caused Down's Syndrome in Michael Azzolino. Nor do the plaintiffs allege that Michael ever had a

chance to be a normal child. The essence of the plaintiffs' claims is that but for the negligence of the defendants, Michael would never have been born at all and he, his parents and his siblings would not have suffered from his affliction with Down's Syndrome.

Although we undertake to discuss separately the claims of the child, his siblings and his parents, we recognize that none of these claims may be considered properly in isolation. All of them arise from the same alleged negligence and allege as injury the life of the same defective child. Only the impact of the alleged negligence and injury upon the individual plaintiffs differs. Indeed, the few courts which have allowed the child's cause of action for wrongful life appear to have done so in part at least upon "the theory that it is illogical to give relief to the parents on a wrongful birth theory and not to the child in a wrongful life claim." *James G. v. Caserta*, 332 S.E. 2d at 880. Such courts have found it "anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care." *Turpin v. Sortini*, 31 Cal. 3d 220, 238, 182 Cal. Rptr. 337, 348, 643 P. 2d 954, 965 (1982). While we discuss each theory separately for reasons of convenience, we recognize that the "filaments of family life, although individually spun, create a web of interconnected legal interests." *Procanik v. Cillo*, 97 N.J. at 351, 478 A. 2d at 762, *quoting Schroeder v. Perkel*, 87 N.J. 53, 432 A. 2d 834 (1981).

I.

Wrongful Life

[1] For purposes of considering whether the claim for relief on behalf of Michael Azzolino for wrongful life is cognizable under the law of this jurisdiction, we assume *arguendo* that the defendants owed a duty to him *in utero* as well as to his parents and that the defendants breached that duty and thereby proximately caused his birth. We further assume *arguendo* that had Michael's parents been accurately advised of the chances that their already conceived child would be afflicted with Down's Syndrome and of the availability of amniocentesis, they would have terminated the pregnancy by abortion. In applying traditional tort concepts to Michael's claim then, there remains the question of whether he has suffered any legally cognizable injury. In order to hold that

Michael has been "injured" in a legal sense, the Court of Appeals felt compelled to say that it was "unwilling, and indeed, unable to say as a matter of law that life even with the most severe and debilitating of impairments is always preferable to nonexistence." 71 N.C. App. at 300, 322 S.E. 2d at 576. We take a view contrary to that of the Court of Appeals. Therefore, we conclude that life, even life with severe defects, cannot be an injury in the legal sense.

We are aware that the decision of the Court of Appeals recognizing Michael Azzolino's claim for relief for wrongful life represents an honest and principled effort by that court to address and resolve genuine social problems thrust upon the courts by recent developments in science and medicine. We share the concerns expressed on behalf of plaintiffs such as Michael Azzolino by those courts allowing wrongful life claims. *See, e.g., Procanik v. Cillo,* 97 N.J. 339, 353, 478 A. 2d 755, 763 (1984) (a sensitive opinion by Mr. Justice Pollock recognizing wrongful life claims and expressing the view that courts should "seek only to respond to the call of the living for help in bearing the burden of their affliction."); *see also Turpin v. Sortini,* 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P. 2d 954 (1982); *Harbeson v. Parke-Davis, Inc.,* 98 Wash. 2d 460, 656 P. 2d 483 (1983). Absent clear legislative guidance to the contrary, however, we find compelling the view of the Court of Appeals of New York in an earlier case involving a claim for wrongful life that:

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?
>
> . . . .

> Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make . . . . Recognition of so novel a cause of action requiring, as it must, creation of a hypothetical formula for the measurement of an infant's damages is best reserved for legislative, rather than judicial, attention.

Becker v. Schwartz, 46 N.Y. 2d 401, 411-12, 413 N.Y.S. 2d 895, 900-01, 386 N.E. 2d 807, 812 (1978).

Although not determinative of our holding, we note that the overwhelming majority of jurisdictions which have been called upon to consider the issue have rejected claims for relief for wrongful life by children born afflicted with defects. Annotation, 83 A.L.R. 3d 15 (1978 & Supp. 1985). We hold that such claims for relief are not cognizable at law in this jurisdiction. We reverse that part of the decision of the Court of Appeals reversing the trial court's dismissal of the claim for relief for wrongful life.

II.

Wrongful Birth

[2] We next consider the claim for relief for wrongful birth brought on behalf of the plaintiff parents Mr. and Mrs. Azzolino. The jurisdictions which have reached the merits of claims for wrongful birth currently appear to be almost unanimous in their recognition of them when but for the defendants' negligence, the parents would have terminated the defective fetus by abortion. *See generally,* Annotation, 83 A.L.R. 3d 15 (1978 & Supp. 1985). Although we do not lightly adopt a view contrary to such a strong trend among other jurisdictions, we nevertheless hold that claims for relief for wrongful birth of defective children shall not be recognized in this jurisdiction absent a clear mandate by the legislature.

We again assume *arguendo* that the defendants owed the plaintiffs a duty and that they breached that duty. The issue of whether the breach of duty was the proximate cause of the "injury" to the plaintiff parents is more problematic, since even the

plaintiffs acknowledge that the fetus which was to be Michael Azzolino was in existence and already genetically defective at the time the defendants first came into contact with the plaintiffs. We also assume *arguendo*, however, that the birth of Michael Azzolino was the proximate result of the defendants' negligence.

Courts which purport to analyze wrongful birth claims in terms of "traditional" tort analysis are able to proceed to this point but no further before their "traditional" analysis leaves all tradition behind or begins to break down. In order to allow recovery such courts must then take a step into *entirely untraditional analysis* by holding that the existence of a human life can constitute an injury cognizable at law. Far from being "traditional" tort analysis, such a step requires a view of human life previously unknown to the law of this jurisdiction. We are unwilling to take any such step because we are unwilling to say that life, even life with severe defects, may ever amount to a legal injury.

It should be reemphasized here that the plaintiffs only allege that the defendants negligently caused or permitted an already conceived and defective fetus not to be aborted. The plaintiffs do not allege that the defendants in any way directly caused the genetic defect. Therefore, the only damages the plaintiffs allege they have suffered arise, if at all, from the failure of the defendants to take steps which would have led to abortion of the already existing and defective fetus.

Courts which have recognized claims for wrongful birth have failed to establish a clear trend or any real trend at all with regard to the measure of damages to be allowed. *See generally,* Annotation 83 A.L.R. 3d 15 (1978 & Supp. 1985); Collins, An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework, 22 J. Fam. L. 677 (1983-84) (hereinafter cited as "Collins"); Comment, Recovery of Child Bearing Expenses in Wrongful Birth Cases: A Motivational Analysis, 32 Emory L.J. 1167 (1983) (hereinafter cited as "A Motivational Analysis"). Under traditional theories of tort law, defendants are liable for all of the reasonably foreseeable results of their negligent acts or omissions. *Kanoy v. Hinshaw,* 273 N.C. 418, 160 S.E. 2d 296 (1968); *Toone v. Adams,* 262 N.C. 403, 137 S.E. 2d 132 (1964); Collins, 22 J. Fam. L. 677

(1983-84). But few if any jurisdictions appear ready to apply this traditional rule of damages with full vigor in wrongful birth cases.

Some courts have allowed the parents to recover the extraordinary expenses resulting from the child's impairment but not the expenses they would normally incur in rearing the child. *See* Collins, 22 J. Fam. L. 677 (1983-84); A Motivational Analysis, 32 Emory L.J. 1167 (1983). Other courts have permitted damages only for the parents' pain, suffering and mental anguish resulting from the birth of the defective child. *Id.* Others have allowed both the extraordinary expenses and recovery for mental anguish. At least one court has allowed parents to recover all expenses involved in rearing the child with no reduction of the damages awarded by the cost of rearing a normal child. *See* ***Robak*** *v. United States*, 658 F. 2d 471 (7th Cir. 1981) (applying Alabama law).

Courts allowing parents' wrongful birth claims have also been unable to resolve issues concerning the extent to which traditional tort concepts requiring plaintiffs to take reasonable steps to mitigate or reduce damages are to be applied in wrongful birth cases. They have for example been unable to reach anything resembling a consensus as to whether damages in wrongful birth cases should be reduced or offset by any emotional or other benefits accruing to the parents by reason of the life, love and affection of the defective child. Collins, 22 J. Fam. L. 677 (1983-84). Likewise, they have been unable to reach any consensus on the issue of whether there is a duty on the part of the parents to place the child for adoption in order to reduce their damages. *See generally*, Note, 53 Fordham L. Rev. 1107, 1114-18 (1985); *see also Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 517, 219 N.W. 2d 242, 245 (1974).

Perhaps the uncertainty and lack of uniformity among courts concerning both the proper measure of damages and the duty to mitigate damages in wrongful birth cases arises at least in part from a failure to recognize that the "injury" for which they seek to compensate the plaintiffs is the existence of a human life. As a result:

> Although courts and commentators have attempted to make it such, wrongful birth is not an ordinary tort. It is one thing to compensate destruction; it is quite another to com-

> pensate creation. This so-called "wrong" is unique: It is a new and on-going condition. As life, it necessarily interacts with other lives. Indeed, it draws its "injurious" nature from the predilections of the other lives it touches. It is naive to suggest that such a situation falls neatly into conventional tort principles, producing neatly calculable damages.

Note, 13 Val. U.L. Rev. 127, 170 (1978).

Further, as the "injury" suffered arises not just from the existence of the afflicted human life in question but from the "predilections of the other lives it touches," the tort of wrongful birth will be peculiarly subject to fraudulent claims. The wrongful birth claim will almost always hinge upon testimony given by the parents after the birth concerning their desire prior to the birth to terminate the fetus should it be defective. The temptation will be great for parents, if not to invent such a prior desire to abort, to at least deny the possibility that they might have changed their minds and allowed the child to be born even if they had known of the defects it would suffer. *See Rieck v. Medical Protective Co.*, 64 Wis. 2d at 519, 219 N.W. 2d at 245.

Additionally, since the parents will decide which "defects" would have led them to abort the fetus, other questions will rapidly arise in jurisdictions recognizing wrongful birth claims when determining whether such claims will be permitted in particular cases. When will parents in those jurisdictions be allowed to decide that their child is so "defective" that given a chance they would have aborted it while still a fetus and, as a result, then be allowed to hold their physician civilly liable? When a fetus is only the carrier of a deleterious gene and not itself impaired? When the fetus is of one sex rather than the other? Should such issues be left exclusively to the parents with doctors being found liable for breaching their duty to inform parents of any fetal conditions to which they know or should know the parents may object? When considering such questions it must constantly be borne in mind that pregnant women have been recognized as having an absolute constitutional right, at least until a certain point in their pregnancy, to have an abortion performed for any reason at all or for no reason. *See Planned Parenthood Assn. v. Ashcroft*, 462 U.S. 476 (1983); *Roe v. Wade*, 410 U.S. 113 (1973).

As medical science advances in its capability to detect genetic imperfections in a fetus, physicians in jurisdictions recognizing claims for wrongful birth will be forced to carry an increasingly heavy burden in determining what information is important to parents when attempting to obtain their informed consent for the fetus to be carried to term. Inevitably this will place increased pressure upon physicians to take the "safe" course by recommending abortion. This is perhaps best illustrated by a story drawn from a real life situation.

> A clinical instructor asks his students to advise an expectant mother on the fate of a fetus whose father has chronic syphilis. Early siblings were born with a collection of defects such as deafness, blindness, and retardation. The usual response of the students is: "Abort!" The teacher then calmly replies: "Congratulations, you have just aborted Beethoven."

Trotzig, The Defective Child and the Actions for Wrongful Life and Wrongful Birth, 14 J. Fam. L. 15, 38-39 (1980), *quoting* Feinman, *Getting Along with the Genetic Genie,* Legal Aspects of Med. Prac. 38 (March 1979). Although it is not the controlling consideration in our rejection of claims for wrongful birth, we do not wish to create a claim for relief which will encourage such results.

It should be readily apparent even to the most casual reader of the pertinent cases that both the theories upon which recovery is allowed and the measure of damages applied by the various courts recognizing claims for wrongful birth are so varied as to almost exceed the number of courts which have decided them. New Jersey, for example, has taken at various times at least three distinct positions as to the theories upon which recovery must be based and the appropriate measure of damages in wrongful birth and wrongful life cases. *Compare Procanik v. Cillo,* 97 N.J. 339, 478 A. 2d 755 (1984), *with Berman v. Allan,* 80 N.J. 421, 404 A. 2d 8 (1979), *and Gleitman v. Cosgrove,* 49 N.J. 22, 227 A. 2d 689 (1967).

In light of such developments, we find particularly prophetic the words of Judge Wachtler in his dissent from that part of the majority opinion of the Court of Appeals of New York first recognizing a claim for relief for wrongful birth in that State. He agreed with the majority's view that claims for wrongful life

should not be recognized. He would also have denied claims for wrongful birth, however, because:

> A doctor who provides prenatal care to an expectant mother should not be held liable if the child is born with a genetic defect. Any attempt to find the physician responsible, even to a limited extent, for an injury which the child unquestionably inherited from his parents requires a distortion or abandonment of fundamental legal principles and recognition, by the courts, of controversial rights and duties more appropriate for consideration and debate by a legislative body. These problems, which are always present when the child born with a genetic disorder seeks to hold the doctor responsible, are compounded when the parents seek compensation, on their own behalf, for collateral injuries occasioned by emotional distress or the increased cost of caring for a handicapped child.
>
> The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. In addition, it is incurable and was incurable from the moment of conception. Thus the doctor's alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition by analogy to those cases in which the doctor has failed to make a timely diagnosis of a curable disease. The child's handicap is an inexorable result of conception and birth.
>
> . . . .
>
> In sum, by holding the doctor responsible for the birth of a genetically handicapped child, and thus obligated to pay most, if not all, of the costs of lifetime care and support, the court has created a kind of medical paternity suit. It is a tort without precedent, and at variance with existing precedents both old and new. Indeed the members of the majority are divided among themselves as to what principle of law requires the doctor to pay damages in this case. The limits of this new liability cannot be predicated. But if it is to be limited at all it would appear that it can only be confined by drawing arbitrary and artificial boundaries which a majority of the court consider popular or desirable. This alone should

> be sufficient to indicate that these cases pose a problem which can only be properly resolved by a legislative body, and not by courts of law.

Becker v. Schwartz, 46 N.Y. 2d at 417-22, 413 N.Y.S. 2d at 904-07, 386 N.E. 2d 807 at 816-19 (1978) (Wachtler, J. dissenting in part).

We recognize that each of the opinions rendered in the various American jurisdictions allowing wrongful birth claims since Judge Wachtler wrote his words of warning have represented conscientious efforts by principled jurists to address legitimate social problems. The results have made it apparent, however, that courts in those jurisdictions have in fact been required to confine the extent of liability just as predicted, "by drawing arbitrary and artificial boundaries which a majority of the court consider popular or desirable." *Id.* Having the benefit of hindsight not available to the majority of New York's highest court in *Becker*, we now share Judge Wachtler's view that the myriad problems arising from claims for wrongful life and wrongful birth can be resolved properly only by a legislative body. They have not been and will not be resolved properly by courts attempting to apply "traditional" tort notions which simply do not fit or which courts steadfastly refuse to apply with their full vigor.

To the extent our legislature has spoken to date, it has tended to discourage holding physicians or nurses liable for not acting in a manner which will result in abortion. *See* N.C.G.S. 14-45.1(e) and (f). However, the legislature has not spoken directly to the issues presented by this appeal.

The General Assembly of North Carolina, as a coordinate and equal branch of our government, is better suited than this Court to address the issues raised by this case. Only that body can provide an appropriate forum for a full and open debate of all of the issues arising from the related theories of "wrongful" birth and "wrongful" life. Unlike courts of law, the General Assembly can address all of the issues at one time and do so without being required to attempt to squeeze its results into the mold of conventional tort concepts which clearly do not fit.

As we hold today that claims for relief for wrongful birth are not cognizable at law in this jurisdiction, the trial court erred in

denying the defendants' motions under Rule 12(b)(6) to dismiss the claim on behalf of the plaintiff parents for failure to state a claim upon which relief can be granted. However, the trial court's later action in directing a verdict for the defendants and against the plaintiff parents cured the prior error of denying the motion to dismiss in the present case. Therefore, the Court of Appeals erred in reversing the trial court's action of allowing the defendants' motions for directed verdicts with regard to the wrongful birth claim. The decision of the Court of Appeals in this regard is reversed.

III.

The Siblings' Claim

[3] *In their cross-petition for discretionary review,* the plaintiffs sought to bring forward for this Court's review the claim on behalf of Michael's minor siblings. Our action in allowing the cross-petition brought this issue forward for review. The plaintiffs chose not to brief or argue the issue before this Court. Nevertheless, in our discretion we have reviewed the briefs filed in the Court of Appeals with regard to the issue as well as the authorities relied upon. For the reasons set forth and discussed in detail in the opinion of the Court of Appeals, we affirm that part of the decision of the Court of Appeals which affirmed the trial court's dismissal of the siblings' claim under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

For the foregoing reasons we hold that neither claims for wrongful birth nor claims for wrongful life are cognizable at law in this jurisdiction. We also reject the related claim of the siblings. The decision of the Court of Appeals is affirmed in part and reversed in part and this action is remanded to the Court of Appeals with instructions to reinstate the orders and judgment of the trial court.

Affirmed in part, reversed in part and remanded.

Justice EXUM dissenting.

I dissent from that portion of the majority's opinion which holds that Michael Azzolino's parents have no actionable claim against the defendants Dr. Dingfelder and Orange-Chatham Com-

prehensive Health Services, Inc. Although the cases from our sister jurisdictions do not control us, the majority recognizes that all of them find an actionable claim under circumstances here presented. These cases differ as to the appropriate measure of damages. My view of the claim's validity and the appropriate measure of damages follows.

First, I would note what this case may seem to be, but is not. Although this case may seem to present many thorny moral, philosophical, and theological questions, not the least of which involves our views concerning the abortion issue, we need not address any of those difficult areas. This case becomes much less problematic when expressed in its simplest terms: whether an obstetrician's alleged negligent failure to inform or to inform accurately his patient concerning relevant facts, risks, and procedures indicated in light of her condition gives rise to an actionable claim for damages proximately caused by this failure. The simple application of traditional tort concepts compels an affirmative answer.

Although I might personally believe that life in any condition is always preferable to nonexistence, I am not willing to accept the majority's stance that this philosophy precludes the recognition of a cognizable and compensable legal injury to Michael's parents under the circumstances of this case.

The legal injury in this case is not Michael's life, or even his impaired life. Although Michael's life exists because of defendants' alleged negligence, his parents were not injured by his existence. They were injured when they were deprived of information they needed to make an informed choice whether to allow their child to come to term. The right of a woman to seek an abortion free from state interference is recognized by the legislature. N.C.G.S. § 14-45.1(a) (1981). It seems to me the upshot of this legislation is to place the right to choose whether to bear or not to bear a conceived child in the hands of its parents. Parents, and in this case Michael's parents, should be the ones to make the choice and bear the responsibility for it. Defendants by negligently providing wrong information or failing to provide proper information the Azzolinos were entitled to have prevented them from making an informed choice for themselves, and, in effect, substituted defendants' choice for theirs. For this injury, not

Michael's existence, defendants should be subject to whatever damages may reasonably be attributed to the injury.

The majority worries that prospective plaintiff parents will invent a prior desire to abort to support a claim, and that physicians will be held civilly liable by parents who, perhaps on a whim, decide that their child is "defective" and would have been aborted had the defect been known early in the pregnancy. The majority carries these concerns to the conclusion that physicians will be pressured into taking the "safe" course by recommending abortion and giving advice to that effect.

I do not find these concerns persuasive, or even pertinent. A physician need not, indeed should not, advise a patient on whether or not to abort a child. A physician's responsibility is simply to exercise due care to provide the information necessary for the *patient* to make an informed decision. If physicians do this, they need not fear a lawsuit if parents bear a child of one sex rather than the other, or even a child with congenital defects. The physician will not be liable for the patient's informed decision on the abortion question. To deny, as the majority does, any remedy for a physician's negligently withholding information or negligently providing misinformation so immunizes the physician as to encourage the physician himself, in effect, to make the abortion decision.

Finally, the majority opinion quotes from the dissent in *Becker v. Schwartz*, 46 N.Y. 2d 401, 413 N.Y.S. 2d 895, 386 N.E. 2d 807 (1978), to the effect that if the physician did not cause the child's handicap, that condition is an "inexorable result of conception and birth." *Id.* at 46 N.Y. 2d at 417-22, 413 N.Y.S. 2d at 904-07, 386 N.E. 2d at 816-19 (Wachtler, J., dissenting in part). Birth is not, however, inexorable. As plaintiffs here allege, Mrs. Azzolino would have undergone an abortion had she been informed fully and accurately.

Measuring the damages reasonably attributable to the injury to Michael's parents does not seem to me to be a difficult problem. I would hold that Michael's parents are entitled to the extraordinary medical and living expenses attributable to the child's Down's Syndrome and the pain, suffering, and mental anguish this impairment caused them. As with any question involving computation of damages, properly identifying the claimant's loss is

central to the task. The method I would choose to identify the loss to Michael's parents is one based on their expectations.

According to plaintiffs' allegations, the negligence of defendants prevented Michael's parents from making an informed decision whether to bear him. This negligence caused a child to be born, Michael's parents allege, that would not otherwise have been born. Michael's parents, however, had decided to carry their child to term and become parents, not expecting that their child had Down's Syndrome. They were prepared to incur the expenses of giving birth to and raising a child without that disorder. If they received all expenses of childbearing and childrearing when they were committed to bearing these expenses had their child been normal, they would receive a windfall. They would receive amounts not reasonably attributable to the injury of which they complain. They should receive the extraordinary medical and other expenses attributable to Down's Syndrome but not other childbearing or childrearing expenses.

These extraordinary expenses can be calculated with reasonable certainty. Michael's exceptional needs can be forecast from the needs of many other children like him who suffer from Down's Syndrome. These needs give rise to certain provable expenses.

Michael's parents also should be compensated for any mental anguish they prove they have suffered as a result of Michael's birth with Down's Syndrome. Although plaintiffs could introduce evidence from similarly situated parents to illustrate typical emotional burdens in cases such as this, these damages cannot be calculated with the same empirical accuracy as the extraordinary expenses they will likely incur. Jurors, nevertheless, are capable of determining intangible, nonpecuniary losses. In wrongful death actions, for example, jurors are required to evaluate damages for such intangible items as loss of society, companionship, comfort, guidance and kindly offices of the decedent. N.C.G.S. § 28A-18-2(b)(2), (4). They routinely determine pain and suffering in personal injury actions. A jury, through its shared understanding of the human condition, should be capable of awarding reasonable compensation for the pain, suffering, and mental anguish Michael's parents experienced from his birth with Down's Syndrome.

A jury's award if made for the mental anguish Michael's parents suffered because of Michael's birth with Down's Syndrome should not be offset by the intangible benefits that will accrue to them as parents, including the love and affection of Michael. This issue is the mirror image of the issue dealt with above relating to ordinary expenses of childrearing. The Azzolinos expected to be parents, albeit of a healthy child. Just as they were prepared to incur the expenses of raising a child, they were anticipating the benefits which accompany that experience. If they must bear so much of the cost of raising Michael as they would have incurred if he were born healthy, they are entitled to the benefits they would have likewise received.

I vote to affirm the Court of Appeals insofar as it affirmed the trial court's denial of defendants' motion to dismiss Michael Azzolino's parents' claim for relief. I also conclude plaintiffs' evidence in support of the parents' claim is sufficient to survive a motion for directed verdict and vote to affirm the Court of Appeals' reversal of the trial court's directed verdict in favor of defendants on this claim.

Justice FRYE concurring in part and dissenting in part.

I concur in the holding of part III of the majority opinion with respect to the siblings' claim. I concur in the result reached by the majority in denying the wrongful life claim on behalf of the child.

I dissent from that portion of the opinion which denies the validity of a medical malpractice claim in this State on behalf of the parents for the wrongful birth of an unhealthy child. The decision of the majority is contrary to that reached by the great majority of courts which have considered such a claim. *See generally* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts*, p. 372 (5th ed. 1984). The fact that courts differ as to the measure of damages in such cases is insufficient reason to deny the validity of the underlying claim. This Court should recognize the validity of the claim and determine an appropriate measure of damages, while realizing that the General Assembly of North Carolina could, by appropriate legislation, adopt a new or different standard.

Justice MARTIN concurring in part and dissenting in part.

I concur in the holding of part III of the majority opinion with respect to the siblings' claim. In sum, the defendant Dingfelder owed no duty to them concerning genetic counselling and informed consent.

Further, I concur in the result reached by the majority with respect to Michael's claim, but for different reasons. In its activist rush to decide what is basically a social issue: whether life can be an injury in a legal sense, the majority makes several assumptions "arguendo" which clearly are not supported by the record. First, that Dr. Dingfelder owed Michael a duty "in utero" and, second, that he breached this duty to the fetus, Michael. Although defendant Dingfelder had a duty not to negligently injure the fetus, Michael, *Gay v. Thompson*, 266 N.C. 394, 146 S.E. 2d 425 (1966), he had no duty to the *fetus* to provide the fetus or its parents with proper genetic counselling. Dr. Dingfelder did not undertake to render professional services to Michael as a fetus with respect to genetic counselling. *See Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762 (1955). Because Dr. Dingfelder owed no duty to the fetus, Michael, respecting genetic counselling, he cannot be found liable to Michael on this basis. By relying upon unfounded assumptions, the majority has reached an issue not necessary for a principled disposition of Michael's claim. For these reasons I agree that Michael's alleged claim is subject to dismissal.

I cannot concur in the majority opinion as to the claim of Jane and Louis Azzolino, parents of Michael Azzolino. As the majority concedes, its opinion with respect to this claim is out of step with all jurisdictions that have decided this issue on the merits.

Although the majority tags plaintiffs' claim as being for "wrongful birth," it is in actuality a malpractice action based upon the doctor's negligent genetic counselling and treatment of Mrs. Azzolino, depriving them of the ability to make an informed decision on whether to abort the fetus. *See generally* Note, *Azzolino v. Dingfelder: North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims*, 63 N.C.L. Rev. 1329 (1985). We have a statute governing causes of action based upon

lack of informed consent. N.C.G.S. 90-21.13 states in pertinent part:

> (1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and
>
> (2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or
>
> (3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

The statute establishes an objective test to determine whether the patient would have undergone the procedure (here, abortion) had she been advised in accordance with the statute. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E. 2d 829 (1982). The statute codifies the standard required of health care providers concerning proper advice to a patient for the purpose of making an informed decision or consent as to medical procedures.

Plaintiffs' evidence tended to show, and the majority concedes, that the negligence of Dr. Dingfelder proximately resulted in the birth of Michael, a Down's syndrome child. Damages resulted to plaintiffs, which will be later discussed. This evidence made out a case for the jury and the trial court erred in directing a verdict against plaintiffs. N.C. Gen. Stat. § 90-21.13 (1981).

The majority evidently fears that by allowing plaintiffs' claim to go to the jury, it is "creating" or "recognizing" some new cause

of action. Its fears are unfounded. Plaintiffs' claim is not based upon the theory that the *existence* of a human life constitutes an injury. It is the negligent *birth* of the child that constitutes the injury.[1]

Most of the recent cases of this nature have been resolved on traditional tort grounds. *See, e.g., Procanik v. Cillo,* 97 N.J. 339, 478 A. 2d 755 (1984); *Turpin v. Sortini,* 31 Cal. 3d 220, 643 P. 2d 954 (1982). When analyzed on this basis, it is clear that plaintiffs made out a case for the jury. Dr. Dingfelder owed plaintiffs the duty to properly advise them concerning the possibility of genetic defects and the diagnostic procedures that could be utilized to discover genetic disorders in the fetus. He negligently failed to do so. The evidence on this issue was especially strong in the light of Mrs. Azzolino's specific request of the doctor about amniocentesis and in view of the history of the use of amniocentesis in her family. Plaintiffs testified that had they been properly advised, Mrs. Azzolino would have undergone the amniocentesis procedure and, upon disclosure of the Down's syndrome, the fetus would have been aborted. The evidence is sufficient to support a jury finding that a reasonable person under all the circumstances would have submitted to an abortion had she been advised by the doctor in a nonnegligent manner. N.C. Gen. Stat. 90-21.13(a)(3) (1981).

The majority's concern for fraudulent claims is unfounded. It assumes that the parents will decide which defects in the child would have led them to an abortion. It raises illusory bug-a-boos that the parents would abort because the child was the wrong sex or for some other fanciful reasons. This argument fails because it overlooks the statute, N.C.G.S. 90-21.13, that establishes an objective standard to determine whether the patient would have undergone an abortion. Recovery is not predicated on the after-the-fact whim of the parents, but upon the standard of what a

1. Examples of parental suits for undiscovered genetic defects include *Phillips v. United States,* 508 F. Supp. 544 (D.S.C. 1980) (Down's syndrome); *Gildiner v. Thomas Jefferson Univ. Hosp.,* 451 F. Supp. 692 (E.D. Pa. 1978) (Tay-Sachs disease); *Call v. Kazirian,* 135 Cal. App. 2d 189, 185 Cal. Rptr. 103 (1982) (Down's syndrome); *Schroeder v. Perkel,* 87 N.J. 53, 432 A. 2d 834 (1981) (cystic fibrosis); *Berman v. Allen,* 80 N.J. 421, 404 A. 2d 8 (1979) (Down's syndrome); *Becker v. Schwartz,* 46 N.Y. 2d 401, 386 N.E. 2d 807, 413 N.Y.S. 2d 895 (1978) (Down's syndrome); *Park v. Chessin,* 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977) (polycystic kidney disease), *aff'd sub nom. Becker v. Schwartz,* 46 N.Y. 2d 401, 386 N.E. 2d 807, 413 N.Y.S. 2d 895 (1978).

reasonable person would have done under the same or similar circumstances. N.C. Gen. Stat. § 90-21.13(a)(3).

The majority's principal difficulty in resolving this issue appears to be its reluctance to determine the proper measure of damages. If one stays with the common law tort principles, the problem is not insurmountable. Plaintiffs are entitled to recover all damages proximately resulting from Dr. Dingfelder's negligence, just as in any tort action. Because plaintiffs planned to have a child, they intended to provide the ordinary and normal expenses of rearing a child to the age of majority. (Plaintiff husband has an equal duty to maintain and support his child. N.C. Gen. Stat. § 50-13.4(b) (1984). *See Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980).) Therefore, plaintiffs cannot recover for the ordinary and normal expenses of rearing a child to its majority.

Plaintiffs are entitled to recover compensation for the costs and expense of the childbirth, Mrs. Azzolino's pain and suffering accompanying the childbirth, the mental anguish suffered, and the extraordinary costs incurred in rearing their Down's syndrome child. *See Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P. 2d 483 (1983); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W. 2d 209 (1981). Of course, plaintiffs have the burden to prove their damages by the greater weight of the evidence.

Such damages as plaintiffs prove would be subject to an offset or reduction by any benefits defendant Dingfelder may prove plaintiffs received from the birth of the child. Restatement (Second) of Torts § 920 (1979); *Eisbrenner*, 106 Mich. App. 357, 308 N.W. 2d 209.

Child support expenses are determined by judges and juries in North Carolina every court week. Doing so in this case would not burden the fact finder with an unusual or burdensome task. Such expenses are traditionally awarded to parents in recognition of their duty to provide support for their child. N.C. Gen. Stat. § 50-13.4(b) (1984).

Strong policy reasons support plaintiffs' claim: tort-feasors should be responsible in damages for the harm they proximately cause; medical malpractice suits are one method of improving the delivery of proper health services; genetic counselling and treatment should not be excepted from medical malpractice actions;

prosecution of the parental claim demonstrates the high value our society places on the family unit, 3 R. Lee, *N.C. Family Law* § 241 (4th ed. 1981); such claims support parents in carrying out their duty of maintaining their children, N.C. Gen. Stat. § 50-13.4(b).

Finally, the majority opinion appears to violate section 18 of article I of the North Carolina Constitution: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

The majority concedes that Dr. Dingfelder owed a duty to Mr. and Mrs. Azzolino with respect to genetic counselling and treatment and that he breached that duty, proximately resulting in the birth of Michael. From this birth plaintiffs suffered damages. This constitutes a valid cause of action. *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762; N.C. Gen. Stat. § 90-21.13. The plaintiffs, having established a tort cause of action, are protected by the open courts clause of our constitution. This provision of the constitution is binding upon this Court. *See Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904); *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E. 2d 188 (1981), *aff'd*, 306 N.C. 364, 293 S.E. 2d 415 (1982). *See also Pentuff v. Park*, 194 N.C. 146, 138 S.E. 616 (1927). Under these circumstances, plaintiffs have a constitutional right to a judicial forum in which to litigate their claim. The decision of the majority violates that constitutional right.

It is submitted that if the public policy of the state would protect the medical profession from such claims, that is a matter within the province of the General Assembly, not this Court. Whether the legislature can constitutionally abolish altogether a common law cause of action is an open question in this jurisdiction. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983). Certainly this Court should not do so.

I find that the trial court erred in allowing defendants' motion for directed verdict as to this issue.

JAMES C. HOGAN, EMPLOYEE v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 480PA83

(Filed 10 December 1985)

1. **Master and Servant § 94.2— workers' compensation—order of dismissal—final adjudication for res judicata purposes**

An order of dismissal of plaintiff's 1976 workers' compensation claim, entered at the instance of defendants, was by its terms a final adjudication of the merits for *res judicata* purposes rather than a voluntary dismissal. A reference in the order to a telephone conversation between plaintiff and the hearing officer in which plaintiff by his attorney stated that he did not object to the order dismissing the case did not make the dismissal voluntary.

2. **Master and Servant § 93; Rules of Civil Procedure § 1— inapplicability of Rules to workers' compensation proceedings**

The Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act.

3. **Master and Servant §§ 85.3, 94.3— workers' compensation—power of Commission to set aside former judgment**

The Industrial Commission has inherent power, analogous to that conferred on courts by N.C.G.S. 1A-1, Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a claim requires it. N. C. Const. art. IV, §§ 1, 3.

4. **Master and Servant § 94.2— workers' compensation—relief from former judgment—failure to make motion**

Plaintiff is not barred from relief from a 1977 judgment dismissing his workers' compensation claim because he never filed a motion with the Industrial Commission seeking such relief where the Commission awarded plaintiff compensation in his 1980 action and he had no reason to petition the Commission to set aside the 1977 judgment; no opportunity to obtain relief from the 1977 judgment arose until defendants appealed the 1980 award; and when the opportunity did arise, plaintiff asked the Court of Appeals for relief from the 1977 judgment should it find the 1980 award was barred by *res judicata*.

5. **Master and Servant § 94.3— workers' compensation—setting aside former judgment—remand to Commission**

There were sufficient facts in the record to warrant a remand of this case to the Industrial Commission in order for it to consider whether to set aside its 1977 judgment dismissing plaintiff's workers' compensation claim for byssinosis where plaintiff presented evidence tending to show that plaintiff believed the 1977 dismissal of his claim was without prejudice to his right to refile his claim and that his attorney acted without authority when he did not contest the 1977 order dismissing his claim with prejudice.

6. **Master and Servant § 68— workers' compensation—byssinosis—judgment denying claim not altered by session law**

The legislature cannot by enacting 1979 N. C. Sess. Laws ch. 1305 retroactively alter a 1977 judgment of the Industrial Commission that plaintiff had no claim to compensation for byssinosis. Therefore, if the Industrial Commission declines to set aside its 1977 judgment, ch. 1305 will not redeem plaintiff's claim from the bar of *res judicata*.

7. **Master and Servant § 68— workers' compensation—byssinosis—statute of limitations**

If the Industrial Commission decides to set aside its 1977 judgment dismissing plaintiff's 1976 compensation claim for byssinosis, it will then be in a position to reconsider on the merits plaintiff's 1976 claim which was timely filed within two years after he was informed in 1976 that he had byssinosis. However, if plaintiff must rely on his 1980 claim to compensation for byssinosis, the claim is barred by the two-year period set forth in N.C.G.S. 97-58(c).

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

APPEAL by plaintiff under N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 63 N.C. App. 439, 305 S.E. 2d 213 (1983), reversing a decision of the Industrial Commission.

Boone, Higgins, Chastain and Cone by Peter Chastain for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter by J. Donald Cowan, Jr., and Caroline Hudson for defendant appellees.

EXUM, Justice.

This is a workers' compensation claim filed in 1980 by plaintiff appellant James C. Hogan for total disability caused by long exposure to cotton dust in the employ of defendant Cone Mills. The Industrial Commission found claimant to be totally disabled due to byssinosis and awarded him compensation. The Court of Appeals reversed on three grounds: (1) This action, initiated in 1980, was filed more than two years after claimant became disabled in 1976; (2) the summary dismissal of an earlier claim filed by Hogan in 1976 seeking relief on the same facts barred this 1980 claim under the doctrine of *res judicata* and (3) Hogan should not be granted relief from the former dismissal of his claim under N.C. R. Civ. P. 60(b)(6) because he never filed a Rule 60(b)(6) mo-

tion and Rule 60(b) is not a substitute for appellate review. We agree with the first two conclusions of the Court of Appeals but with respect to its third conclusion hold: (1) The Commission has inherent power, analogous to that conferred on courts by Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a claim requires it; (2) there are sufficient facts in the record to warrant a remand of this case to the Commission in order for it to consider whether to set aside its former judgment; (3) Hogan's claim may be entitled to prevail on the merits; and (4) this case should be remanded to the Commission in order for it to consider whether to set aside its former judgment dismissing Hogan's claim.

I.

Appellant Hogan worked for appellee Cone Mills Corporation from 1932 to 1959 either in the card or slashing room, both of which were dusty. Cone Mills is a textile corporation and the Minneola Plant of that company, where Hogan worked, runs 100 percent cotton. Hogan was continuously exposed to cotton dust. He left Cone on his doctor's advice due to breathing problems in 1959.

Hogan took a vocational rehabilitation course and began working for J. P. Stevens in 1962 as an operator of a small printing press, a job which did not contribute to his pulmonary impairment. He stopped working there in 1975 after his production dropped because he tired easily. In February 1976 Dr. Herbert O. Sieker informed Hogan that he suffered from byssinosis and was totally and permanently disabled from all but the most sedentary types of employment. On 12 August 1976 Hogan filed a claim with the Industrial Commission which was calendared for hearing on 19 January 1977. The hearing officer assigned to Hogan's case, Deputy Commissioner Richard B. Conely, wrote Hogan's former attorney on 8 December 1976 and inquired whether plaintiff's last injurious exposure to cotton dust was before 1 July 1963. He advised that Hogan would not be entitled to compensation for byssinosis if he was last exposed before that date and attached an opinion and award in which he denied compensation in another case on those grounds.

In 1976 a commonly held but erroneous interpretation of the law which permits compensation for byssinosis, N.C.G.S. § 97-53 (13), was that it had no application to claimants last injuriously exposed to cotton dust before 1 July 1963. In 1959 when Hogan stopped working for Cone Mills, N.C.G.S. § 97-53(13) defined occupational disease as the following:

> Infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances.

1935 N.C. Public Laws ch. 123, *as amended by* 1957 N.C. Sess. Laws ch. 1396, § 6, *quoted in Wood v. Stevens & Co.*, 297 N.C. 636, 642, 256 S.E. 2d 692, 697 (1979). The legislature amended N.C.G.S. § 97-53(13) in 1963 to include infections or inflammations of "any other internal or external organ or organs of the body." 1963 N.C. Sess. Laws ch. 965, § 1. This amendment applied only to cases in which "the last exposure in an occupation subject to the hazards of such disease occurred on or after July 1, 1963." *Id.; Wood*, 297 N.C. at 642-43, 256 S.E. 2d at 697. In 1971 the legislature amended N.C.G.S. § 97-53(13) to its present form, which defines occupational disease as:

> Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

The 1971 amendment applies to all "cases originating on and after July 1, 1971." 1971 N.C. Sess. Laws ch. 547, § 3. Unlike the 1963 amendment, it was not limited to cases in which the "last exposure" to disease occurred after its effective date but to cases "originating" after such date.

The Industrial Commission interpreted the date a case "originated" as the date an employee's medical case arose or the date an employee contracted disease. A person last injuriously exposed before 1963 was deemed to have contracted disease before 1 July 1971. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692. Under

the Commission's interpretation of N.C.G.S. § 97-53(13), then, neither the 1971 nor the 1963 amendments would apply to persons exposed before 1963. That person's claim was governed by the 1958 version of N.C.G.S. § 97-53(13) which the Commission in 1976 interpreted to provide no compensation for byssinosis.[1]

In 1979 we concluded these interpretations of N.C.G.S. § 97-53(13) were erroneous. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692. The claimant in *Wood* brought an action for compensation alleging total disability as a result of exposure to cotton dust. She was last exposed to cotton dust before 1 July 1963 and suffered total permanent disability as of 12 November 1975. *Id.* at 638, 256 S.E. 2d at 694. Both the Commission and a divided panel of the Court of Appeals (Judge, now Justice, Mitchell dissenting) concluded, under the same interpretation of the occupational disease statute, N.C.G.S. § 97-53(13), as employed here by Deputy Commissioner Conely, that the 1958 version applied to Wood's claim; under it byssinosis was not compensable as an occupational disease. Former Chief Justice Sharp, writing for the Court, explained that under the 1971 legislation a case originates when the claim arises. The claim arises when the employee becomes disabled. "Under our Workmen's Compensation Act injury resulting from occupational disease is compensable only when it leads to disablement. N.C.G.S. § 97-52. Until that time the employee has no cause of action and the employer had no liability." *Id.* at 644, 256 S.E. 2d at 697. The Court in *Wood* held that the "current [1971] version of N.C.G.S. § 97-53(13) applies to all claims for disablement in which the disability occurs after the statute's effective date, 1 July 1971." *Id.* The Court reversed and remanded the case to permit the Commission to determine when Wood's disability occurred.

In 1976 when Deputy Commissioner Conely had Hogan's claim before him, he did not have the benefit of our decision in *Wood*. His letter inquiring of the date of Hogan's last injurious exposure stemmed from the then prevailing interpretation of the law that persons last exposed before 1963 were not entitled to

1. *Taylor v. Cone Mills*, 306 N.C. 314, 293 S.E. 2d 189 (1982), which held that inflammation of the respiratory surfaces of the lungs from cotton dust exposure could be inflammation of an "external contact surface" within the meaning of the 1958 version of N.C.G.S. § 97-53(13), was not decided until 1982.

compensation. After Deputy Commissioner Conely inquired of the date of Hogan's last exposure to cotton dust, defendants moved on 13 December 1976 to dismiss the claim on the ground that Hogan was last exposed in 1959.

Hogan's attorney informed Deputy Commissioner Conely by letter dated 28 December 1976 that the date of Hogan's last injurious exposure to cotton dust was before 1963. The letter by Hogan's attorney went on to say:

> I have discussed your letter and the accompanying portion of an opinion and award which you forwarded to me along with your letter of December 8, 1976, with Mr. Hogan, and in doing so, have informed him that the opinion forwarded seemed to control in regard to his case and would appear to terminate any claim he might have regarding this matter. . . .

Deputy Commissioner Conely had a telephone conversation with Hogan's attorney on 3 January 1977 in which Hogan's attorney told Conely that Hogan did not intend to pursue his claim and would not object to dismissal of his case. Deputy Commissioner Conely entered an order granting defendant's motion to dismiss on 4 January 1977. Hogan did not appeal from the dismissal.

There was apparently some confusion on the part of Hogan, his former attorney, or both of them, concerning the effect of Conely's order. Hogan testified he consented to dismissal of his claim in 1976 on the express condition that he would have the right to refile it. He stated:

> I filed a claim for benefits under the Workers' Compensation Act before this claim, on August 12, 1976. I'm not too positive about the date. I can't seem to remember. At that time [my former attorney] represented me in that. Commissioner Conely wrote me a letter and wrote [my attorney] a letter and said that I wasn't eligible for workmen's compensation because I left the cotton mill before 1963, and [my attorney] suggested to me that we drop it. He wasn't getting anything out of it and he was just going to drop it, and he wanted me to sign a letter to that effect. I refused to sign a letter. I told him the only way I would sign a letter to that effect would be the right to re-open the case at a later date, and that was the letter I signed. My case was subsequently dismissed.

. . . .

My agreement with my former attorney . . . was that he would write a letter and he would dismiss my case without prejudice to my bringing a new claim. The substance of my request was written by [him] and is explained in a letter of January 6, 1977. I consented to the letter of January 6, 1977. At that time it was my understanding that I would have the right to re-open at a later date.

In a letter dated two days after the order of dismissal, Hogan's attorney wrote Deputy Commissioner Conely to confirm the substance of their telephone conversation of 3 January 1977. The letter states:

Dear Commissioner Conely:

This letter is in regard to our phone conversation of Monday, January 3, 1977, concerning the brown lung claim with Mr. James Hogan. . . .

I have discussed this matter with Mr. Hogan and have explained to him that it is my opinion that further pursuit of this proceeding would be futile at this time. Therefore, I have been authorized by my client, Mr. Hogan, to notify you that he is willing to allow the dismissal of this case without prejudice to his initiating a new action and he reserves the right to do so at a later time. Although Mr. Hogan is willing to allow the dismissal of this case, he has informed me that he will continue to pursue this matter with the Brown Lung Association of North Carolina in their efforts to make legislative changes for the benefit of its members. Mr. Hogan asked me to re-emphasize to you that he is willing to allow the dismissal of this case so long as it does not prejudice his rights to initiate a new action should he so desire.

. . . .

The matter lay dormant until July 1980 when the Occupational Disease Section of the Industrial Commission wrote Hogan and informed him that new legislation had been enacted which allowed him "to refile" his claim. The Industrial Commission referred to 1979 N.C. Sess. Laws, ch. 1305 which provides:

An act to provide that byssinosis, known as "brown lung disease," shall be deemed an occupational disease within the meaning of G.S. § 97-53(13) for purposes of the Workmen's Compensation claims regardless of the date the disease originated.

The General Assembly of North Carolina enacts:

Section 1. Claims for 'brown lung' disease, which can be proved under G.S. § 97-53(13) shall be compensable regardless of the employee's date of last injurious exposure.

Section 2. This act is effective upon ratification.

Section 3. This act will expire April 30, 1981; however, this provision does not apply to any claims filed prior to April 30, 1981.

In the General Assembly read three times and ratified, this the 25th of June 1980.

Hogan filed a claim with the Commission on 19 August 1980 which was heard on 11 December of that year. Defendants moved to dismiss on the ground the claim was not filed within two years after Hogan became disabled as required by N.C.G.S. § 97-58(c). Deputy Commissioner Rich denied defendants' motion and entered an Opinion and Award finding Hogan totally disabled and awarding him compensation. The Full Commission modified his order in some respects not relevant here and affirmed. The Full Commission ruled that new life was breathed into Hogan's claim as a result of this Court's holding in *Wood* that the date of disability determines whether a claimant is entitled to compensation under N.C.G.S. § 97-53(13) and the enactment of Chapter 1305 which provides that byssinosis claims are compensable without regard to the employee's date of last injurious exposure to cotton dust.

The Court of Appeals reversed. It concluded, first, that Hogan's claim was time barred. Since Hogan became disabled on 1 February 1976 but re-filed his claim more than four years later, the Court of Appeals reasoned that his claim was not within the two-year period following disablement during which claims must be brought by N.C.G.S. § 97-58(c). The court also found that the dismissal of Hogan's first claim in 1977 was *res judicata* as to his 1980 claim. Finally, the court held Hogan could not have the 1977

judgment against him set aside under N.C. R. Civ. P. 60(b)(6) because Hogan never filed a Rule 60(b)(6) motion and was improperly attempting to use that rule as a substitute for appellate review of the earlier dismissal of his claim. Believing the Court of Appeals erred in its last conclusion, we vacate the decision of the Court of Appeals and remand the case to the Industrial Commission for further proceedings.

II.

A.

[1] The Court of Appeals enunciated the doctrine of *res judicata* concisely as follows:

> The essential elements of *res judicata* are: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits."

Hogan v. Cone Mills Corp., 63 N.C. App. 439, 442, 305 S.E. 2d 213, 215 (1983) (citations in original omitted). Hogan argues that the first essential element of *res judicata* is lacking because the dismissal of his 1976 claim was in the nature of a voluntary dismissal and not a final adjudication of the merits.

The order dismissing plaintiff's claim provided:

> On December 13, 1976, counsel for defendants filed a motion to dismiss on the basis that the disease byssinosis was not a listed occupational disease during the period of plaintiff's exposure to the hazards thereof.
>
> . . . .
>
> By letter dated January 28, 1976, counsel for plaintiff advised the Commission that plaintiff's last injurious exposure to the hazards of byssinosis was prior to 1963 and that there appears to be no valid response to the motion propounded by the defendants. Counsel further advised the Commission by telephone on January 3, 1977, that plaintiff does not intend to pursue this claim further and does not object to the Commission's entering an order dismissing this claim.
>
> . . . .

IT IS, THEREFORE, ORDERED that defendants' motion is hereby granted and this matter is DISMISSED.

Each side shall bear its own costs.

This the 4th day of January, 1977.

s/ RICHARD B. CONELY
Deputy Commissioner

The dismissal followed not plaintiff's, but defendants' motion to dismiss. The order states "IT IS, THEREFORE, ORDERED that defendants' motion is hereby granted and this matter is DISMISSED." An order of dismissal granted at the instance of a party's opponent does not seem to us "voluntary." By its very terms the order was a final dismissal of Hogan's claim on the merits.

Plaintiff argues that the reference in the order to a telephone conversation between plaintiff and Deputy Commissioner Conely in which plaintiff by his attorney stated he did not object to the order dismissing the case makes the dismissal voluntary. This conversation ensued after plaintiff's counsel sent a letter to Deputy Commissioner Conely informing him that the interpretation of compensation law prevailing then "would appear to terminate any claim he might have regarding this matter" and there was no "valid response, on the part of Mr. Hogan, to the motion propounded" by defendants. It appears to us the reason plaintiff did not contest defendants' motion to dismiss is because he decided he did not have a viable claim under the law then in effect. That plaintiff determined for whatever reason not to oppose defendants' motion does not transform what is otherwise a dismissal on the merits into a voluntary dismissal.

B.

Hogan contends that if the Industrial Commission erred in ruling that Deputy Commissioner Conely's order was not a final judgment on the merits, N.C. R. Civ. P. 60(b)(6) should afford plaintiff relief from the operation of that judgment. Rule 60(b)(6) provides:

> On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

. . . .

(6) Any other reason justifying relief from the operation of the judgment.

Defendant argues that Rule 60(b)(6) is not applicable to proceedings before the Industrial Commission under the Workers' Compensation Act.

[2, 3] The Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act, *see* N.C. R. Civ. P. 1, and we find no counterpart to Rule 60(b)(6) in the Act or the Rules of the Industrial Commission. We believe the Industrial Commission, nevertheless, has inherent power to set aside one of its former judgments. Although this power is analogous to that conferred upon the courts by N.C. R. Civ. P. 60(b)(6), it arises from a different source. We conclude the statutes creating the Industrial Commission have by implication clothed the Commission with the power to provide this remedy, a remedy related to that traditionally available at common law and equity[2] and codified by Rule 60(b). This power inheres in the judicial power conferred on the Commission by the legislature and is necessary to enable the Commission to supervise its own judgments.

Although the Industrial Commission is not a court with general implied jurisdiction, it is clothed with such implied power as is necessary to perform the duties required of it by the law which it administers. *Barber v. Minges*, 223 N.C. 213, 25 S.E. 2d 837 (1943). Although it primarily is an administrative agency of the state, charged with the duty of administering the provisions of the Workers' Compensation Act "in hearing and determining facts upon which the rights and liabilities of employers and employees depend, it exercises certain judicial functions to which

2. This remedy was available by the common law writs of *audita querela, coram nobis* and the equitable bill of review or bill in the nature of a bill of review. These kinds of writs and bills were not substitutes for appeal but were available to challenge judgments because of matters extraneous to the record. *State v. Green*, 277 N.C. 188, 176 S.E. 2d 756 (1970), *overruled on other grounds, Dantzie v. State*, 279 N.C. 212, 182 S.E. 2d 563 (1971); *In re Taylor*, 230 N.C. 566, 53 S.E. 2d 857 (1949). Although Fed. R. Civ. P. 60(b) expressly abolishes these writs and bills in federal courts, there is no comparable language in N.C. R. Civ. P. 60(b). The Court of Appeals has said our Rule does not abolish these writs and bills. *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E. 2d 9 (1980). For a discussion of these remedies, *see* 7 Moore's Federal Practice § 60.12 at 60-82 (2d ed. 1985).

appertain the rules of orderly procedure essential to the due administration of justice according to law." *Tindall v. Furniture Co.*, 216 N.C. 306, 312, 4 S.E. 2d 894, 897 (1939). When it hears a matter in dispute, "the Commission is constituted a special or limited tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court, within the provisions of the act, and necessary to determine the rights and liabilities of employees and employers." *Hanks v. Utilities Co.*, 210 N.C. 312, 319-20, 186 S.E. 252, 257 (1936).

From the foregoing authorities, it is apparent that the Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. This Court has held that the Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. *Neal v. Clary*, 259 N.C. 163, 130 S.E. 2d 39 (1963). It also includes the power to order a rehearing on the basis of newly discovered evidence. *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799 (1935).

Our cases admittedly have not always identified the source of the Industrial Commission's implied judicial powers. The search for such judicial power, however, must begin with the North Carolina Constitution which provides that:

> Section 1. Judicial power.
>
> The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.
>
> . . . .
>
> Section 3. Judicial powers of administrative agencies.
>
> The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals

from administrative agencies shall be to the General Court of Justice.

N.C. Const. art. IV, §§ 1, 3. The Constitution is not an independent grant of judicial power to the Industrial Commission. It requires the General Assembly to implement by legislative enactment the judicial power it authorizes for the Commission.

Our cases have found in various statutes an intent by the legislature to vest the Commission with judicial power. In *Hanks v. Utilities Co.*, 210 N.C. 312, 186 S.E. 252 (1936), the Industrial Commission's judicial power to administer the Workers' Compensation Act was derived from N.C.G.S. §§ 97-47, -48. Those statutes provide that if an employer and employee fail to reach agreement in fourteen days, either party may apply to the Industrial Commission for a hearing in regard to the matters at issue. The Commission must then set a hearing date and determine the dispute in a summary manner.

In *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799 (1935), the Court traced the Industrial Commission's power to grant a rehearing on the basis of newly discovered evidence to provisions of the Workers' Compensation Act which permit the Commission to set aside an award previously made due to changed conditions, N.C.G.S. § 97-47, and its power to make rules not inconsistent with the Act, N.C.G.S. § 97-80. These provisions show "it was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms." *Id.* at 288, 179 S.E. at 801.

The source of the Industrial Commission's power to set aside a former judgment on the basis of fraud, misrepresentation or mistake was not specified in *Neal v. Clary*, 259 N.C. 163, 130 S.E. 2d 39 (1953). We believe, however, that such power derives from the Commission's supervisory power over its judgments.

The power to provide relief against the operation of a former judgment is an integral part of the judicial power. Such power is a remedy fashioned by courts to relieve hardships which from time to time arise from a fast and hard adherence to the usual rule that judgments should not be disturbed once entered. The remedy has been characterized by a flexibility which enables it to

be applied in new situations to avoid the particular injustices inherent in them. Because the power to set aside a former judgment is vital to the proper functioning of the judiciary, we believe the legislature impliedly vested such power in the Commission in conjunction with the judicial power the legislature granted it to administer the Workers' Compensation Act.[3]

Because the power to set aside a former judgment is an inherent part of a tribunal's supervisory power over its judgments, the proper tribunal in which a party initially should seek relief from a former judgment is that tribunal which rendered the judgment.

[4] Defendants argue Hogan is not entitled to relief from the 1977 judgment dismissing his claim because he never filed a motion with the Industrial Commission seeking such relief. The Commission awarded Hogan compensation when he initiated this action in 1980. He had no reason to petition the Commission to set aside its 1977 judgment dismissing his claim. No opportunity to obtain relief from the 1977 judgment arose until defendants appealed his award. When the opportunity did arise, Hogan asked the Court of Appeals for relief from the 1977 judgment should it find the 1980 award was barred by *res judicata*. The Court of Appeals denied such relief stating Hogan had never filed a Rule 60(b) motion. We think the proper course is to remand this action to the Industrial Commission in order for Hogan to make and it to decide a motion to set aside the 1977 judgment dismissing his claim.

Defendants also argue Hogan is not entitled to relief from the 1977 judgment because relief from a former judgment cannot be a substitute for appeal. We agree with defendant that the Industrial Commission cannot properly set aside its judgment dismissing Hogan's claim merely because its decision proved to be erroneous as a result of a subsequent decision of this Court. The

3. The Court of Appeals has in at least one case indicated the Industrial Commission has power to relieve a party from a judgment on grounds of newly discovered evidence under Rule 60(b). *See Grupen v. Furniture Industries*, 28 N.C. App. 119, 220 S.E. 2d 201 (1975), *disc. rev. denied*, 289 N.C. 297, 227 S.E. 2d 696 (1976). Although *Grupen* misperceives the basis of the Commission's power, the decision correctly recognizes that the Commission possesses power to set aside one of its own judgments.

law would have no finality if disappointed claimants had the right to retry their claims after further development of the law shows that a decision barring their claims was erroneous. The remedy for these claimants is to appeal the denial of their claims.

[5] We are not remanding this case to the Industrial Commission because its earlier judgment was erroneous in light of further development of the law but because we believe there are present in this case sufficient grounds upon which the Commission may rely to set aside its former judgment, which may be more fully developed on remand. The Commission, as noted above in *Neal v. Clary*, 259 N.C. 163, 130 S.E. 2d 39 (1953), may set aside a former judgment on the ground of fraud, misrepresentation or mistake. In the hearing below Hogan presented evidence that his former attorney acted without authority when he did not contest Deputy Commissioner Conely's order dismissing his claim with prejudice. Hogan testified:

> [M]y former attorney suggested to me that we drop [the case]. He wasn't getting anything out of it and he was just going to drop it, and he wanted me to sign a letter to that effect. I refused to sign a letter. I told him the only way I would sign a letter to that effect would be the right to reopen the case at a later date, and that was the letter I signed. My case was subsequently dismissed.

Hogan's belief that the dismissal of his claim was without prejudice to a later reopening of his claim is corroborated by a letter written by his former attorney to Deputy Commissioner Conely. The letter states:

> I have been authorized by my client, Mr. Hogan, to notify you that he is willing to allow the dismissal of this case without prejudice to his initiating a new action and he reserves the right to do so at a later time. Although Mr. Hogan is willing to allow the dismissal of this case, he has informed me that he will continue to pursue this matter with the Brown Lung Association of North Carolina in their efforts to make legislative changes for the benefit of its members. Mr. Hogan asked me to re-emphasize to you that he is willing to allow the dismissal of this case so long as it does not prejudice his rights to initiate a new action should he so desire.

Hogan's belief that he had reserved the right to initiate a new action also would explain his failure to appeal the dismissal of his claim in 1977. The Commission could find that Hogan's determined attempts to keep his case alive are all that a lay person, not schooled in the intricacies of *res judicata,* reasonably should be expected to do. We express no opinion as to whether the Commission should set aside its former judgment against Hogan. While we have mentioned certain equities which weigh in Hogan's favor, we have done so only for the purpose of justifying our remand of this case for the Commission's consideration. The decision whether to set aside the judgment rests, in the first instance, within the judgment of the Commission. If the Commission refuses to set aside the former judgment, Hogan's claim will be barred by *res judicata.* If, on the other hand, the Commission does set aside the former judgment, no final judgment on the merits will exist to bar this action under N.C.G.S. § 97-53(13).

C.

[6] Hogan contends that even if he is not afforded relief under the principle of Rule 60(b)(6), the doctrine of *res judicata* is not applicable as a bar to this action. Hogan contends this action arises under new legislation, 1979 N.C. Sess. Laws ch. 1305, the purpose of which is to create for byssinosis sufferers like himself a new cause of action. Because his 1980 claim under Chapter 1305 was different from the one he initially brought in 1976, he argues there is no identity of the two causes of action.[4] Even if we construe Chapter 1305 in a light most favorable to Hogan, he may not avail himself of that statute.

The doctrine of separation of powers embodied in N.C. Const. Art. IV, § 3 precludes the legislature from enacting a statute which alters a result obtained by final judicial decision before the date of the statute's enactment. *Gardner v. Gardner,* 300 N.C. 715, 268 S.E. 2d 468 (1980). In *Gardner,* the trial court rendered a judgment that under existing law venue lay properly in Wayne County and would not be transferred to Johnston County for the convenience of the parties on defendant's motion. Defendant never questioned that decision in an appeal from a judgment

4. Judge Eagles adopted this theory in his dissent to the majority opinion of the court below. *See Hogan v. Cone Mills,* 63 N.C. App. 439, 446-47, 305 S.E. 2d 213, 217 (1983) (Eagles, J., dissenting).

awarding plaintiff temporary alimony. While the divorce action was still pending the legislature enacted a statute which, if applied to defendant's case, established venue in Johnston County. Defendant again moved to transfer venue to Johnston County. The Court held:

> Article IV, Sec. 1 of the North Carolina Constitution vests the judicial power of the State, including the power to render judgments, in the General Court of Justice, not in the General Assembly. Under this provision, the Legislature has no authority to invade the province of the judicial department. *State v. Matthews*, 270 N.C. 35, 153 S.E. 2d 791 (1967). It follows, then, that a legislative declaration may not be given effect to alter or amend a final exercise of the courts' rightful jurisdiction. *Hospital v. Guilford County*, 221 N.C. 308, 20 S.E. 2d 332 (1942).

Id. at 719, 268 S.E. 2d at 471.

When Deputy Commissioner Conely ordered the dismissal of Hogan's claim, he exercised judicial power granted to the Industrial Commission by the legislature pursuant to the North Carolina Constitution. The legislature cannot by enacting Chapter 1305 retroactively alter his judgment that Hogan had no claim to compensation for byssinosis. If the Industrial Commission declines to set aside the former judgment, Chapter 1305 will not redeem Hogan's claim from the bar of *res judicata*. If the Commission does set aside its former judgment, there will be no need for claimant to invoke Chapter 1305. Assuming as it now appears of record that Hogan became disabled in 1976, his claim will be governed by the current version of G.S. 97-53(13) under the principles announced in *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979).

III.

[7] Defendant contends finally that this action is barred by the limitations period specified in N.C.G.S. § 97-58(c). That section provides, "The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability or disablement as the case may be." N.C.G.S. § 97-58(c). In *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980), we held this period begins to

run from the time a claimant is notified by competent medical authority of the nature and work related quality of his disease. Because Hogan refiled this action in 1980, more than two years after he was informed he had byssinosis in 1976, defendant argues this action is barred by the claims period of N.C.G.S. § 97-58(c).

If Hogan must rely on his 1980 filing, defendant's position that it is time barred is correct. But if the Commission decides to set aside its former judgment, it will then be in a position to reconsider on the merits Hogan's claim filed in 1976, less than two years after he was informed by competent medical authority he suffered from byssinosis. The 1976 proceedings were timely filed within the provisions of N.C.G.S. § 97-58(c).

For all the reasons given above the judgment of the Court of Appeals is vacated and this case remanded to that court for further remand to the Industrial Commission for further proceedings consistent with this opinion.

Vacated and remanded.

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

DAVIDSON AND JONES, INC. v. NORTH CAROLINA DEPARTMENT OF ADMINISTRATION AND THE UNIVERSITY OF NORTH CAROLINA

No. 511PA84

(Filed 10 December 1985)

1. State § 4— construction contract—breach by State—remedy in contract not required

A contractor is not precluded from recovery under N.C.G.S. § 143-135.3 for breach of a construction contract by the State by failure of the contract to specify a remedy for the alleged breach. Rather, the statute simply requires that the contractor's claim arise out of a breach of the contract or some provision thereof so as to entitle the contractor to some relief.

2. State § 4— construction contract—overrun in rock excavation—mutual mistake—entitlement to duration-related costs

An unexpected overrun exceeding 400% in the amount of rock to be excavated under a construction contract with the State was a mutual mistake en-

titling plaintiff contractor to recover its duration-related costs incurred after the originally scheduled completion date as "extra costs" contemplated by the contract. N.C.G.S. § 143-135.3.

3. **State § 4— construction contract—no waiver of extra duration-related costs**

The trial court properly concluded that plaintiff did not waive or release its claim to duration-related costs caused by a massive overrun in the amount of rock to be excavated under a contract with the State when it executed a change order providing for payment for some extra expenses and for rock at the unit price and referring to "adjustment of all other construction caused thereby."

4. **State § 4— construction contract—overrun in rock excavation—no entitlement to extra home office costs**

A contractor could not recover extra home office costs incurred as a result of an extension of a construction contract with the State resulting from a massive overrun in the amount of rock to be excavated because such expenses were not contemplated by the contract.

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

ON grant of a writ of certiorari to review a decision of the North Carolina Court of Appeals, 69 N.C. App. 563, 317 S.E. 2d 718 (1984), affirming in part and reversing in part an award by *Godwin, J.*, for plaintiff entered out of session on 15 July 1982 in Superior Court, WAKE County. Heard in the Supreme Court 9 April 1985.

Griffin, Cochrane & Marshall, by Luther P. Cochrane and Jennifer W. Fletcher; and Manning, Fulton & Skinner, by Charles L. Fulton for petitioner-appellant.

Lacy H. Thornburg, Attorney General, by Grayson G. Kelley, Assistant Attorney General, for defendant-appellees.

FRYE, Justice.

Petitioner has presented two essential questions for our review. The first is whether the Court of Appeals correctly held that a contractor in a civil action, pursuant to G.S. 143-135.3, may not recover duration-related costs incurred as the direct result of an unexpected overrun exceeding 400% in the amount of rock to be excavated under a construction contract with the State of North Carolina. For the reasons stated hereinafter, we conclude that the Court of Appeals erred in so holding. As to the second,

we agree with the trial court and the Court of Appeals that plaintiff may not recover extra home office expenses. Other questions decided by the Court of Appeals in reversing the trial court's award of financing costs and interest costs to the plaintiff were not briefed or argued before this Court, and we express no opinion thereon.

Plaintiff contracted with defendants North Carolina Department of Administration and the University of North Carolina to build an addition to Wilson Library on the University's Chapel Hill campus. As the project progressed, plaintiff encountered a massive overrun in the amount of rock to be excavated and requested compensation for certain extra costs. Defendants rejected part of this request. After the project was completed, plaintiff brought suit for relief pursuant to G.S. 143-135.3 on grounds of mutual mistake and implied warranty. The trial court found in favor of the plaintiff and awarded it (1) payment at the contract's unit price for all rock excavated, (2) duration-related costs, (3) financing costs, and (4) interest on the entire award, but denied plaintiff's request for reimbursement for extra home office costs. Defendants appealed to the Court of Appeals, which affirmed the first part of the award and reversed the remainder. Plaintiff contends before this Court that the Court of Appeals erred in its interpretation of both G.S. 143-135.3 and the contract between the parties.

The bidding documents for the Wilson Library Project, which were made part of the contract, included a "rock clause" instructing the bidder to include 800 cubic yards of rock excavation in its base bid. The documents also requested a unit price, per cubic yard, for computing adjustments to the contract for rock above or below this quantity. Plaintiff included in its proposal a unit price of $55 per cubic yard and proposed a completion time of 540 days for the entire project. In computing the amount of time to complete the project, plaintiff had allowed eight weeks for rock removal based on the 800 cubic yard quantity given in the bidding documents.

The anticipated amount of rock turned out to be grossly erroneous. Plaintiff had submitted a schedule to the project architect which called for completing all excavation by 10 October 1975. By that date, plaintiff's subcontractor had already removed

over 800 cubic yards of rock, and an unknown quantity still remained. Plaintiff began petitioning for additional compensation and time to complete the project. Not until April of the following year (1976) was all of the rock that needed to be removed excavated. The quantity totaled 3714 cubic yards.

Defendants did not respond to plaintiff's requests for additional payment until February 1976, when plaintiff threatened to stop working if no agreement was reached. On 2 March 1976, representatives of the plaintiff and the defendants met to discuss plaintiff's claims. Plaintiff was by that time seeking not only payment for extra rock excavation at the unit price but also for the duration-related costs it expected to incur after the originally scheduled completion date. At this meeting, defendants' representatives agreed to pay plaintiff for some of the requested items but instructed plaintiff to pursue the statutory disputes resolution process for payment on the other items when the project was finished.

As a result of this meeting, plaintiff continued to work on the project, completing it within the time extensions granted. It then followed the procedures outlined in G.S. 143-135.3, in applying for additional compensation. After the required hearing before the North Carolina Department of Administration, plaintiff filed a civil action in Superior Court, Wake County, on 11 September 1978. After making detailed and extensive findings, the trial court concluded that plaintiff was entitled to payment at the unit price for all rock excavated; $110,710 for duration-related expenses; $2,369 for interest obligations incurred due to the State's tardy payments; and interest on the total award at the rate of five percent per year from 31 March 1976. The trial court denied plaintiff's claim for payment for home office expenses attributable to the extension of the project.

On appeal, the Court of Appeals reversed the trial court's decision as to the duration-related expenses, the financing expenses, and the interest on the total award. It affirmed the denial of reimbursement for home office expenses. Plaintiff's petition for a writ of certiorari to review the Court of Appeals' decision was allowed by this Court on 8 January 1985.

The trial court held in its conclusions of law that plaintiff was entitled to relief "pursuant to the Contract, Articles 15 and

16, and because of mutual mistakes . . . ." We note that it is unclear whether the court was basing its decision on two separate grounds (provisions of the contract and the equitable ground of mutual mistake) and saying that an award could be based on either, or whether the court meant that plaintiff was entitled to relief as provided by Articles 15 and 16 because of mutual mistake of fact.

Without drawing any distinctions between these two interpretations, the Court of Appeals concluded that plaintiff was not entitled to recover anything beyond the unit price for rock excavation for which the State had not yet paid. The court quoted part of G.S. 143-135.3, which outlines the procedures to be followed "should the contractor fail to receive such settlement as he claims to be entitled to under terms of his contract," N.C. Gen. Stat. § 143-135.3 (Cum. Supp. 1983).[1] Citing *Middlesex Construction Corp. v. State ex rel. Art Museum Bldg. Comm.*, 307 N.C. 569, 299 S.E. 2d 640 (1983), *reh'g denied*, 310 N.C. 150, 312 S.E. 2d 648 (1984), the court said:

> [W]e hold that the State's waiver of sovereign immunity in a breach of contract action is valid only to the extent expressly

1. The relevant portions of the statute read at that time:

> § 143-135.3 *Procedure for settling controversies arising from contracts; civil actions on disallowed claims.* — Upon completion of any contract for construction or repair work awarded by any State board to any contractor, under the provisions of this Article, should the contractor fail to receive such settlement as he claims to be entitled to under terms of his contract, he may, within 60 days from the time of receiving written notice as to the disposition to be made of his claim, submit to the Secretary of Administration a written and verified claim for such amount as he deems himself entitled to under the terms of said contract . . . .
>
> As to such portion of the claim which may be denied by the Secretary of Administration, the contractor may, within six months from receipt of the decision, institute a civil action for such sum as he claims to be entitled to under said contract . . . .
>
> . . . .
>
> The provisions of this section shall be deemed to enter into and form a part of every contract entered into between any board of the State and any contractor, and no provision in said contracts shall be valid that is in conflict herewith.

1973 N.C. Sess. Laws, ch. 1423.

> stated in the statute, and that the plaintiff's remedy here must be found exclusively within the express terms of the statute. The statute is clear in limitation of recovery except as otherwise provided '*under the terms of his contract.*'

Davidson and Jones v. N.C. Dept. of Administration, 69 N.C. App. at 570, 317 S.E. 2d at 723.

[1] If the Court of Appeals meant by these words to suggest that a contractor with the State has no remedy for a breach by the State of a specific contractual obligation unless the contract itself specifies a remedy for such a breach, we disagree. *See Middlesex Construction Corp. v. State ex rel. Art Museum Bldg. Comm.*, 307 N.C. 569, 574, 299 S.E. 2d 640, 643 (1983), *reh'g denied*, 310 N.C. 150, 312 S.E. 2d 648 (1984); *Smith v. State*, 289 N.C. 303, 307-22, 222 S.E. 2d 412, 414-25 (1976). We note that when referring to the contractor's claim before the Department of Administration, the statute (G.S. 143-135.3) uses the language "under the terms of said contract." However, when referring to the action to be filed in the superior court, the statute uses the language "under said contract." While there may conceivably be situations suggesting a reason for the difference in language between the two portions of the statute, we attach no significance to these differences as they apply to the case *sub judice*, since plaintiff here sought the same relief before the Department of Administration as it seeks by this civil action, that is, extra costs pursuant to Articles 15 ("Changed Conditions") and 16 ("Extra Costs") of its contract. Nevertheless, to the extent that language in the opinion of the court below may be read to suggest that the courts are powerless to grant relief to an aggrieved contractor for breach of the construction contract in the absence of a specific term of the contract allowing such relief, we disavow such language. We interpret the statute as requiring simply that the contractor's claim arise out of a breach of the contract or some provision thereof so as to entitle the contractor to some relief. *See* N.C. Gen. Stat. § 143-135.3 (Cum. Supp. 1983).

Article 16 of the contract in question reads:

> Claims for Extra Cost
>
> Should the contractor consider that as a result of any instructions given in any form by the Engineer or Architect, he

is entitled to extra cost above that stated in the contract, he shall give written notice therefor to the Engineer or Architect without delay, and shall not proceed with the work affected until further advised except in emergency involving the safety of life or property, which condition is covered in Article 12 and 15. No claim for extra compensation will be considered unless the claim is so made.

THE CONTRACTOR SHALL NOT ACT ON INSTRUCTIONS RECEIVED BY HIM FROM PERSONS OTHER THAN THE ENGINEER OR ARCHITECT, AND ANY CLAIMS FOR EXTRA COMPENSATION ON ACCOUNT OF SUCH INSTRUCTION WILL NOT BE HONORED. The Architect or Engineer will not be responsible for misunderstanding claimed by the contractor of verbal instructions which have not been confirmed in writing, and in no case shall instructions be interpreted as permitting a departure from the contract documents unless such instruction is confirmed in writing and supported by a properly authorized change order whether or not the cost is affected.

While it is abundantly clear from the language therein that Article 16 of the construction contract involved in this action provides a procedure for an aggrieved contractor to seek and obtain relief, the only relief specifically provided is reimbursement for "extra costs." We must therefore determine whether the duration-related expenses awarded to plaintiff by the trial court may fairly be said to be included within the meaning of the term "extra costs" as that term is used in Article 16 of the contract. If so, it is unnecessary to search further for support for the trial court's award of such expenses to the contractor.

Article 16 contains five requirements important to this inquiry:

1) instructions from the project architect, which caused
2) extra costs,
3) written notice without delay,
4) cessation of work affected until,
5) further instruction either by the architect or, if the instruction meant departing from the contract documents, by a change order.

The Court of Appeals implicitly held that plaintiff was not entitled to relief for its duration-related costs under Article 16 because it had already excavated most of the extra rock by the time it requested additional compensation instead of giving timely notice and stopping work as contemplated under that article. We do not agree.

The bulk of plaintiff's extra costs were caused by the presence of a greater quantity of rock than either party anticipated rather than by a new instruction from the architect to remove extra rock.[2] Nevertheless, Article 16 clearly states that such an instruction can be "in any form" and contains no requirement that it come after the contract was made. The contract itself contained specifications requiring excavation to particular dimensions set by the architect.

Plaintiff claimed two types of extra costs. The first was the direct cost of removing the extra rock. The trial court awarded the plaintiff compensation for this expense at the unit price. The Court of Appeals affirmed this award and this part of its decision was not disputed before this Court. The second cost was that of maintaining required personnel, equipment and services at the project site itself for six months after the originally scheduled completion date. The trial court found as a fact, based on evidence introduced at trial, that these items were customarily budgeted as a function of a project's expected duration and were included as such in a contractor's base bid. The trial court further found that it was not customary, at least at that time, to make any allowance for such costs in setting unit prices.

The trial court noted that the plaintiff had introduced the originals of its cost records for these duration-related items, that these records were made contemporaneously "in the regular course" of business by someone with "personal knowledge of the events and amounts recorded," and that the plaintiff had required periodic checks and used various other methods to insure accuracy.

2. The trial court found as a fact that due to the nature of the subsurface rock, "representatives of the Owner" ordered the plaintiff to excavate to a lower depth than was originally specified to find firmer footing. The record shows that this "representative" did in fact come from the architect, but it also shows that only 172 cubic yards was involved and that the State seems to have paid for the costs related to this "instruction" with Change Order G-4.

The trial court also found in extensive findings of fact that the sole reason for extending the completion date for twenty-six weeks (six months) was the necessity of removing 2914 unanticipated cubic yards of rock. The court found that plaintiff completed all other construction within the time frames set forth in its initial schedule. The court frequently refers in the findings to the efficiency shown by plaintiff and its subcontractor in excavating the excess rock. The original schedule, which the court found reasonable, had allocated eight weeks for rock excavation, or about one hundred cubic yards per week. Despite problems caused by the nature of the rock and delays by other contractors, plaintiff's subcontractor actually removed 3714 cubic yards in thirty-four weeks. The court also found that the rock excavation was a "critical item" in the project; in other words, the contractor could not have used the time to work on other parts of the project.

[2] The Court of Appeals disagreed with the trial court that this overrun was a mutual mistake entitling the plaintiff to any relief for its extra duration-related costs. Quoting *Corbin on Contracts,* the court concluded that the "rock clause" in the contract created an aleatory agreement, one which depends upon an uncertain event. The portion of the rock clause at issue reads as follows:

> 0230 *Rock Excavation:*
>
> Material to be excavated is assumed to be earth and materials that can be removed with hand tools. If rock is encountered within limits of excavation, adjustments will be made in Contract on basis of unit price stated in Form of Proposal for all rock removed above or below these quantities:
>
> 1. The General Contractor shall include *800* cubic yards of rock excavation in his base bid.

Because the clause required the contractor to propose a unit price "for all rock . . . above or below these quantities," the court reasoned that the plaintiff had assumed the risk of rock overruns and, despite recognizing that 3714 cubic yards "is materially and substantially different from 800 cubic yards of rock," *Davidson and Jones v. N.C. Dept. of Administration,* 69 N.C. App. at 572, 317 S.E. 2d at 724, concluded that there was no mutual mistake.

After examining the trial court's findings of fact, we do not agree that the rock clause allocated the risk of an overrun exceeding 400%. The trial court found that the plaintiff had inspected the site as required in the bidding documents and had seen nothing to indicate the presence of such an excess. The court further found that it was neither customary nor reasonable for a contractor to order his own subsurface investigation. Contractors customarily relied upon the State's figures; plaintiff here had actually relied upon them. Some variation was to be expected. Based upon the evidence presented at trial, the trial court found that ten to fifteen percent was a reasonable variation. The court's findings of fact were based on competent evidence and may not be disturbed on appeal. *Whitaker v. Everhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976). We agree with the trial judge's conclusion that the extra duration-related costs resulted from a mutual mistake as to the amount of rock. *See Groves & Sons v. State*, 50 N.C. App. 1, 273 S.E. 2d 465 (1980) (wetness substantially in excess of that indicated in project specifications constituted a mutual mistake), *cert. denied*, 302 N.C. 396, 279 S.E. 2d 353 (1981); *see generally* 3 A. Corbin, *Contracts*, § 598 (1960).

As to the notice requirement, the trial court made several findings showing that plaintiff gave both verbal and written notice of its increasing costs as they increased and concluded that plaintiff provided "appropriate notification." Plaintiff correctly points out that defendants failed to except both to this portion of the court's conclusion and to the findings of fact on which it was based. We accept the trial judge's conclusion that notice was appropriate. *See Triangle Air Cond. v. Board of Education*, 57 N.C. App. 482, 291 S.E. 2d 808, *cert. denied*, 306 N.C. 564, 294 S.E. 2d 376 (1982); *Groves & Sons v. State*, 50 N.C. App. 1, 273 S.E. 2d 465 (1980), *cert. denied*, 302 N.C. 396, 279 S.E. 2d 353 (1981); *cf. Bridge Co. v. Highway Comm.*, 30 N.C. App. 535, 227 S.E. 2d 648 (1976) (notice found insufficient).

Echoing the Court of Appeals, defendants object that plaintiff did not give notice of its request to be reimbursed for duration-related costs until the bulk of the extra excavation was completed, nor did it then stop work until it had received a change order. Article 16 dictates that the contractor not "proceed with the work affected until further advised." Defendants' objection confuses the nature of the types of costs plaintiff incurred.

Had the contractor claimed additional payment for the rock excavation itself under Article 16, this argument might have been a good one. In this case, however, plaintiff would not incur extra duration-related costs until the following January, when the project was originally scheduled for completion. Its duration-related expenses at the time of the excavation itself had been included in its base bid. Thus, as far as these expenses were concerned, there was no "work about to be affected" for the plaintiff not to proceed with, and hence no requirement under Article 16 that it stop what it was doing at the time. By 5 January 1977, the originally scheduled completion date, the State had approved extending the completion date 240 days, in Change Orders G-2, G-5, G-10 and G-12. The trial court found that at least 210 of these days, or thirty weeks, were caused exclusively by the prolonged period for rock excavation. By the time plaintiff began incurring its extra duration-related expenses, it had its change orders in hand.

Plaintiff has therefore shown that it has complied with the requirements of Article 16. Since its extra duration-related costs were the result of mutual mistake as to the amount of rock to be excavated, it is entitled to recover these extra costs under this article. *See Groves & Sons v. State*, 50 N.C. App. 1, 273 S.E. 2d 465, *cert. denied*, 302 N.C. 396, 279 S.E. 2d 353; *see also Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 217 S.E. 2d 682 (relief given under changed conditions clause for breach of implied warranty), *cert. denied*, 288 N.C. 393, 218 S.E. 2d 467 (1975).

[3] Defendants in their brief also argue that Change Order G-4, which ordered payment for some extra expenses and for rock at the unit price, forecloses any claim for additional reimbursements. This change order was issued at least partially as a result of the 2 March 1976 meeting. The trial court found, supported by competent evidence, that at this meeting plaintiff requested compensation for several additional expenses, among them duration-related costs, and that defendants' representatives told plaintiff that the State lacked sufficient contingency funds to pay for all of the requested items. The parties agreed on payment for some of the extra costs but not others. Change Order G-4 reflects the agreed upon items. As to those costs not agreed upon, plaintiff was advised (according to the evidence, by the Department of Administration representative) to pursue the remedy provided by

the contract disputes resolution statute (G.S. 143-135.3) after the project was over, which plaintiff did.

The section of the change order on which defendants rely reads:

> Net Amount to be paid Davidson & Jones, Inc. for any and all rock excavation on this project to date plus payment for adjustment of all other construction caused thereby: $111,985.00.

Pointing to the phrase "adjustment of all other construction caused thereby," defendants argue that plaintiff waived or released its claim to duration-related costs by executing the change order. We note that defendants do not claim that this change order represented an accord and satisfaction but claim instead that it is a part of the construction contract.

The section quoted above is not the only important part of the change order. Change Order G-4, which includes an attached letter from Davidson and Jones, appears as document #73 in plaintiff's document book, a part of the record on appeal. The change order first authorizes payment for 3300 cubic yards of rock at the unit price. It then states:

> With the lowering of footings, additional concrete column pedestals were required as well as the lowering of the exterior wall along the west side and south side; also requiring compacted fill between column pedestals and beneath floor slab as shown in Davidson & Jones, Inc. letter dated March 19, 1976 attached hereto and revised as follows.

The change order then authorizes payment for these other construction-related costs item by item (total amount $24,485). The attached letter from plaintiff, dated 19 March 1976, had requested almost $5,000 more than this amount for these items. Thus, G-4 does not authorize payment for all that plaintiff claimed for these listed items. Looking at the change order as a whole, plaintiff could reasonably conclude that it was only waiving its claim to this $5,000 difference.

The trial court thus found as facts that plaintiff claimed reimbursement for duration-related expenses, that defendants' representatives told plaintiff's representatives that there was not

sufficient money to cover these expenses and to pursue the statutory remedy after completion of the project for disputed costs, and that in executing Change Order G-4, plaintiff did not intend to compromise or release any disputed claims. There is evidence to support each of these findings. The court then concluded that Change Order G-4 did not waive, release or negate plaintiff's claims and that plaintiff was entitled to execute the change order without affecting its rights to appeal the disputed amounts. Considering the statements of defendants' representatives about the lack of funds, the instruction to pursue the statutory remedy, and the entire contents of Change Order G-4, we agree that the trial court's conclusions were correct.

[4] Plaintiff assigns error to the denial of its claim for compensation for part of its extra home office expenses. The trial court denied recovery under the rule of *Construction Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962) and the Court of Appeals affirmed. This Court in *Crain & Denbo* concluded that the plaintiffs were not entitled to recover any home office expenses because they were not contemplated in the contract. We agree that nothing in this contract contemplates reimbursement for such indirect, off-site expenses.

On defendants' appeal, the Court of Appeals reversed the trial court's award of $2,369 to the plaintiff for "financing costs." These "financing costs" represented interest plaintiff had to pay on a loan it secured to pay its subcontractor. Despite the fact that plaintiff notified the State of the rock overrun as soon as it occurred (early October 1975), and on several occasions requested payment for it as contemplated by the contract, the State did not pay plaintiff anything for any of the rock removed in excess of 800 cubic yards until February 1976. The trial court found that these "financing costs" were incurred because of the State's tardiness in making its payments. The Court of Appeals' reversal of this award was not briefed or argued before this Court, and we express no opinion thereon.

The Court of Appeals also reversed the trial court's award of interest on the judgment. This part of the court's decision was not disputed before this Court. Accordingly, we do not disturb that portion of the Court of Appeals' decision.

In summary, we reverse the Court of Appeals' reversal of the trial court's award of duration-related costs of $110,710. In all other respects, the decision of the Court of Appeals is affirmed. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for a final judgment not inconsistent with this opinion.

Affirmed in part; reversed in part and remanded for judgment.

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

STATE OF NORTH CAROLINA v. ARTHUR LEE WILSON

No. 447A83

(Filed 10 December 1985)

1. **Criminal Law § 87.4— redirect examination—explanation of testimony elicited on cross-examination—no error**

Where defendant was arrested on a warrant charging breaking and entering with intent to commit rape and the indictment charged that defendant's intent was to commit larceny, there was no error in admitting testimony from a police officer which indicated that defendant had stolen seven dollars from the victim's purse before he raped her. Defendant had elicited testimony on cross-examination as to why the warrant charged that defendant entered with one intent and the indictment charged that he entered with another; it is proper to admit on redirect examination testimony which is explanatory of evidence elicited during cross-examination by defendant.

2. **Burglary and Unlawful Breakings § 3— indictment for felonious breaking and entering based on larceny—evidence of rape and larceny—indictment sufficient**

The trial court did not err by failing to dismiss the charge of felonious breaking and entering for the purpose of committing larceny on the grounds that all of the evidence indicated that defendant entered the victim's house with the intent to commit rape where the victim testified that she had seven dollars in her purse prior to defendant's entry into her home and that upon his departure the money was missing. Just as the intent to commit rape may be inferred from the fact that defendant raped the victim, the intent to commit larceny may also be inferred from the fact that defendant committed larceny. N.C.G.S. 14-54(a) (1981).

3. Larceny § 4— indictment for felonious larceny of seven dollars—not sufficient to charge felony

The trial court erred in a prosecution for first degree rape, felonious breaking and entering, and felonious larceny by not dismissing the charge of felonious larceny where the indictment alleged that defendant feloniously stole seven dollars but contained no allegation that the larceny was committed pursuant to a violation of N.C.G.S. 14-51, 14-53, 14-54, or 14-57, or that the larceny was committed pursuant to a burglary of any kind or to an unlawful entry or breaking in or out of any building. The offense charged was a misdemeanor, the jury verdict will be considered a verdict of guilty of larceny of seven dollars, and the case remanded for resentencing. N.C.G.S. 14-3(a), N.C.G.S. 14-72(a).

4. Rape and Allied Offenses § 6.1— first degree rape—no evidence of second degree rape—no error in not submitting second degree rape

The trial court did not err in a prosecution for rape, breaking and entering, and larceny by refusing to submit second degree rape as a possible verdict where defendant did not request such an instruction, all of the evidence was that defendant was either guilty or innocent of first degree rape, and there was no evidence of second degree rape. North Carolina Rules of App. Procedure Rule 10(b)(2).

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

DEFENDANT appeals as a matter of right pursuant to G.S. 7A-27(a) from judgment entered by *Morgan, J.*, at the 16 May (extended to 25 May) 1983 Session of Superior Court, GUILFORD County, sentencing him to the mandatory term of life imprisonment upon a jury verdict of guilty of first degree rape in violation of G.S. 14-27.2. Defendant's motion to bypass the Court of Appeals was allowed on 26 September 1984, with respect to his appeal from his convictions and presumptive sentences of three years imprisonment for felonious larceny and felonious breaking or entering. All of the sentences were to run concurrently.

Lacy H. Thornburg, Attorney General, by Catherine McLamb, Assistant Attorney General, for the State.

Mark Galloway and W. Osmond Smith, III, for defendant-appellant.

FRYE, Justice.

Defendant was tried upon a single-count indictment charging first degree rape, and a two-count indictment charging first de-

gree burglary and larceny. Evidence for the State tended to show that the victim[1] was in her bedroom on 24 April 1982, at night, when defendant confronted her with a knife. He directed her to another bedroom and, while holding a knife to her head, had vaginal intercourse with her without her consent. Afterwards, the two went into another part of the house and talked. Defendant told the victim that he had been watching her and had listened at her bedroom window while she and her boyfriend had sex and that he had wanted to "have" her for some time. On his way out, defendant showed her a table which had been placed under the bathroom window through which, he indicated, he had entered the house. After defendant left, the victim discovered that seven dollars was missing from her purse. She called a relative, then the rape crisis line and the police.

Defendant admitted that he had entered the victim's home and had sexual intercourse with her but claimed that both of these acts were done with the victim's consent. Witnesses for defendant testified that they had seen defendant with the victim on social occasions.

Defense motions for dismissal of all charges, made at the close of the State's case and at the close of all the evidence, were denied by the trial court. The jury returned verdicts of guilty of first degree rape and felonious larceny. On the first degree burglary charge, the jury returned a verdict of guilty of the lesser included offense of felonious breaking or entering.

I.

[1] Defendant's first assignment of error is that the trial court erred in overruling his two objections to Police Sergeant J. W. Lee's testimony wherein the officer stated that, based upon the police investigation, the evidence indicated that the defendant committed the larceny of seven dollars from the purse of the victim before he raped her. The portion of Sergeant Lee's testimony to which defendant objected is as follows:

Q. Sergeant Lee, which crime did your evidence indicate occurred first, after the unlawful entry?

1. We find it unnecessary to expose the victim to further pain and embarrassment by using her name in this opinion.

. . . .

A. According to our information, the larceny took place prior to the rape.

Q. So tell the ladies and gentlemen of the jury what the sequence then, as best your evidence indicated, was of the unlawful events that occurred at [the victim's] residence on April the 24th, 1982.

. . . .

A. The evidence indicates to us that Arthur Lee Wilson broke into the residence of [the victim] through a bathroom window, went into her kitchen where a purse was hanging in there or was in the kitchen, took $7.00 in money from the purse, had a knife with him that came from the kitchen, went back to the bedroom with the same knife and then removed [the victim] from one bedroom to another and raped her.

Defendant contends that the above testimony was Sergeant Lee's opinion on the ultimate fact of whether defendant possessed the specific intent to commit larceny at the time of the breaking or entering and therefore invaded the province of the jury. This line of questioning was centered around the fact that the burglary warrant charged defendant with breaking and entering with the intent to commit rape, while the indictment charged that defendant's intent was to commit larceny. The State argues that the testimony by Sergeant Lee was an attempt by the prosecution to allow the police officer to elaborate on his prior explanation to defense counsel as to why the warrant charged that defendant entered with one intent and the indictment charged that he entered with another intent. Prior to the district attorney's questioning on redirect, the following testimony was elicited by defense counsel on recross examination of Sergeant Lee:

Q. And, at no time did you charge him with breaking and entering with the intent to commit felonious larceny as he is charged here today, did you?

A. I can explain how that happened.

Q. Yes, sir, that's right.

A. After the District Attorney received our paper work, before going to the grand jury, in conversations with the District Attorney, it was decided that the larceny had occurred prior to the rape, and that the two-count indictment would be what we would seek from the grand jury with the breaking and entering and larceny.

. . . .

Q. What I'm trying to say is that you did not charge him with stealing the first time and your explanation is that after talking with Mr. Coman, Assistant District Attorney, you decided to charge him since you say it allegedly occurred prior to the alleged rape.

A. Yes, ma'am, that's right.

It is proper to admit on redirect examination testimony which is explanatory of evidence elicited during cross-examination by defendant. In *State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 254 (1977), this Court held that where defendant's cross-examination of a police officer elicited responses indicating an alleged accomplice was charged with the identical crime as the defendant, the defendant could not complain about the district attorney's redirect examination of the officer concerning the accomplice and his role in the alleged crimes. In the case *sub judice*, the evidence elicited on recross by defendant was developed initially without objection by the State. Therefore, defendant will not now be heard to complain that the State sought on redirect examination to have Sergeant Lee explain his response to the questions on recross examination. This assignment of error is rejected. *State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 245; *see generally*, 1 Brandis on North Carolina Evidence § 30 (1982).

II.

[2] Defendant's second assignment of error is that the trial court erred in failing to dismiss the charge of felonious breaking and entering for the purpose of committing larceny. We note that defendant was indicted for first degree burglary, rather than the statutory offense of felonious breaking or entering. *See* N.C. Gen. Stat. 14-54(a) (1981). The indictment is as follows:

THE JURORS OF THE STATE UPON THEIR OATH PRESENT that on or about the 24 day of April, 1982, in Guilford County

> Arthur Lee Wilson unlawfully and wilfully did feloniously during the nighttime between the hours of 4:00 a.m. and 6:00 a.m. on April 24, 1982, break and enter the dwelling house of [the victim] located at [victim's address]. At the time of the breaking and entering the dwelling house was actually occupied by [the victim]. The defendant broke and entered with the intent to commit a larceny therein. This breaking and entering was committed in violation of the following law: G.S. 14-51.

Following the presentation of evidence, the court submitted three possible verdicts to the jury as follows:

1. Guilty of First Degree Burglary or
2. Guilty of Felonious Breaking or Entering or
3. Not Guilty.

The jury returned a verdict of guilty of felonious breaking or entering.

The statutory offense of felonious breaking or entering is a lesser included offense of the crime of burglary. *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979); *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973). Defendant does not question this rule but contends that his conviction of the lesser included offense cannot stand because "all of the evidence" indicated that he entered the victim's house with the intent to commit rape, not larceny as charged in the indictment. We disagree. The victim testified that prior to defendant's unlawful entry into her home on the night in question, she had seven dollars in her purse and that upon defendant's departure she discovered that the money was missing from her purse. This evidence was sufficient for the jury to find that defendant entered her home for the purpose of committing larceny. *See State v. Warren*, 313 N.C. 254, 328 S.E. 2d 256 (1985); *State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577 (1982); *State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967).

While there was substantial evidence that defendant may have entered the victim's home with the intent to sexually assault her, this alone does not necessarily mean that he did not also enter for the purpose of stealing money. Just as the intent to

commit rape may be inferred from the fact that defendant raped the victim, the intent to commit larceny may also be inferred from the fact that defendant committed the larceny. When an intruder unlawfully enters one's home and commits two crimes therein, it is illogical to presuppose that he entered for one purpose only. At least a jury should not be precluded from finding that he entered with a dual purpose. *State v. Joyner*, 301 N.C. 18, 30, 269 S.E. 2d 125, 133. ("Whether defendant intended to commit either larceny or rape or both at the time he entered the dwelling is a fact which in this case must be inferred, if at all, from defendant's actions after he entered.")

While intent is a state of mind sometimes difficult to prove, the mind of an alleged offender may be read from his acts, conduct, and inferences fairly deducible from all of the circumstances. *See State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982); *State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577; *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968). When considered in the light most favorable to the State, the evidence was sufficient to be submitted to the jury upon the allegations contained in the indictment. Thus, it was for the jury to determine, under all the circumstances, whether defendant had the criminal intent to commit larceny at the time of the breaking and entering as charged in the indictment.

III.

[3] Defendant's third assignment of error is that the trial court erred in refusing to submit misdemeanor larceny as a possible verdict. Because, as discussed below, the indictment alleged only misdemeanor larceny, it was improper to submit felonious larceny and the jury should have been allowed to consider only misdemeanor larceny as charged in the indictment.

IV.

Defendant's next assignment of error is the trial court's refusal to dismiss the charge of felonious larceny. The indictment is a two-count indictment. The count on larceny reads:

> AND THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 24th day of April, 1982, in Guilford County, Arthur Lee Wilson unlawfully and wilfully did feloniously steal, take and carry away Seven ($7.00) dollars in

> good and lawful United States currency, the personal property of [the victim]. This act was in violation of the following law: G.S. 14-70; 14-72(a).

Defendant contends that the indictment fails to allege felonious larceny, since it does not specifically state that the larceny was "pursuant to" or "incidental to" a breaking or entering, and the amount of money alleged to have been stolen was below the statutory amount of $400, which is necessary to constitute a felony. We agree.

The larceny indictment charges that the defendant "unlawfully and wilfully did feloniously steal, take and carry away" seven dollars, "the personal property of" the victim in violation of G.S. 14-70 and 14-72(a). G.S. 14-70 abolishes the distinctions between grand and petit larceny and provides that, unless otherwise provided by statute, larceny is a felony punishable under G.S. 14-2. G.S. 14-2 provides that persons convicted of felonies that occur on or after 1 July 1981 (the effective date of the Fair Sentencing Act) shall be sentenced in accordance with G.S. 14-1.1. G.S. 14-1.1 establishes maximum sentences for the various classes of felonies and provides that a felony not assigned by statute to any felony class shall be punishable as a class J felony.

G.S. 14-72(a) provides that larceny of goods of the value of more than four hundred dollars ($400.00) is a class H felony. It also provides that larceny as provided in subsection (b) is a class H felony and that except as provided in subsection (b), larceny where the value of the property or goods is not more than $400 is a misdemeanor punishable under G.S. 14-3(a). G.S. 14-72(b) provides that larceny is a felony without regard to the value of the property in question if the larceny is (1) from the person; or (2) committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or (3) of any explosive or incendiary device or substance; or (4) of any firearm; or (5) of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8).

It is clear that the larceny indictment in question does not charge a felony under G.S. 14-72(a) based on value, since the amount alleged to have been taken ($7) is clearly *less* than $400 rather than *more* than $400 as required by the statute. It is also clear that the crime alleged is not a felony under the provisions of

G.S. 14-72(a) without regard to value or under G.S. 14-72(b)(1), (3), (4), or (5), since there is no allegation that the larceny was from the person, of any explosive or incendiary device or substance, of any firearm or of any record or paper in the custody of the State Archives. We must thus determine whether the larceny was alleged to have been committed pursuant to a violation of G.S. 14-51, 14-53, 14-54, or 14-57 as provided in G.S. 14-72(b)(2).

G.S. 14-51 describes the degrees of the crimes of burglary. G.S. 14-53 proscribes breaking out of dwelling house burglary. G.S. 14-54 proscribes breaking or entering buildings generally and G.S. 14-57 proscribes burglary with explosives. A careful reading of the larceny indictment discloses that there is no allegation therein to the effect that the larceny was committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57 or that the larceny was committed pursuant to a burglary of any kind or pursuant to an unlawful entry or breaking in or out of any building. Thus it is clear that although the indictment alleges that defendant "did feloniously steal" the seven dollars, the offense charged is, by the terms of G.S. 14-72(a), a misdemeanor rather than a felony.

In an indictment containing more than one count, each count should be complete in itself. *State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969). An indictment charging felonious larceny must allege facts sufficient to raise the charge to the level of a felony. *Id.* Because the indictment for larceny failed to properly allege felonious larceny the conviction for felonious larceny cannot stand. *Id.* However, since the indictment clearly charged misdemeanor larceny, the jury verdict will be considered a verdict of guilty of larceny of personal property of a value of seven dollars —a misdemeanor. The judgment imposing sentence as for a class H felony must therefore be vacated and the cause remanded for a proper sentence pursuant to G.S. 14-3(a).

V.

[4] Defendant next assigns as error the trial court's refusal to submit second degree rape as a possible verdict. Defendant did not request such instruction nor was he denied an opportunity to do so. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

> (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 . . . .

Because defendant failed to object at trial to the court's failure to submit second degree rape as a possible verdict, he may not assert on appeal that this aspect of the instruction was in error. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

Even if defendant had objected at trial, an instruction on second degree rape would not have been proper. All the State's evidence indicated that vaginal penetration of the victim by defendant took place after he showed her a knife and that the victim was in fear for her life. Defendant's evidence was that he entered the home at the invitation of the victim and that the act of sexual intercourse occurred with the victim's consent. If the State's evidence is believed, defendant is guilty of first degree rape. If defendant's evidence is believed, he is not guilty of rape, either in the first or second degree. There is no evidence of second degree rape. No instruction on a lesser included offense is required unless the lesser offense is supported by the evidence. *State v. Jones*, 304 N.C. 323, 283 S.E. 2d 483 (1981).

> The trial court is required to submit lesser included degrees of the crime charged in the indictment when and only when there is evidence of guilt of the lesser degrees. (Citations omitted.) The presence of such evidence is the determinative factor . . . . (Citations omitted.) If the included offense is not supported by the evidence, it should not be submitted, regardless of conflicting evidence.

Id. at 330-31, 283 S.E. 2d at 487-88. Under the circumstances, the trial judge was not required to submit second degree rape as a possible verdict.

In summary, we find no error in the judgments entered upon verdicts of guilty of first degree rape and felonious breaking or entering. The judgment under the Fair Sentencing Act entered

on the jury verdict of guilty of felonious larceny is vacated and the cause remanded to the Superior Court, Guilford County, for resentencing as for misdemeanor larceny.

The result is:

No. 82CRS29634—First Degree Rape—no error.

No. 82CRS29635—First Count—felonious breaking or entering—no error; Second Count—felonious larceny—judgment vacated and remanded for resentencing.

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

STATE OF NORTH CAROLINA v. FRANCIS VESPER FEARING

No. 68A85

(Filed 10 December 1985)

Witnesses § 1.2— child ruled incompetent to testify by stipulation of parties—no examination of child by judge—error

The trial court erred in a prosecution for first degree rape, incest, and taking indecent liberties with a child by adopting counsel's stipulation in concluding that the child victim was incompetent to testify without personally examining or observing the child's demeanor in responding to questions during a *voir dire* examination. Underlying the evidence rules as codified and the traditional case law analysis regarding the competency of a child witness to testify is the assumption that a trial judge must rely on his personal observation of the child's demeanor and responses to inquiry on *voir dire* examination. N.C.G.S. 8C-1, Rules 104(a) and (b)2, 803(24), 804(b)(5).

Justice BILLINGS concurring.

DEFENDANT was convicted of first-degree rape, incest, and indecent liberties with a minor at the 17 September 1984 Criminal Session of Superior Court, WAKE County, *Brannon, J.*, presiding. Defendant was sentenced to life imprisonment for the rape conviction, to four and one-half years for the incest conviction, and to three years for the indecent liberties conviction. The latter two sentences were ordered to run concurrently with the life sentence. Defendant appeals the life sentence as of right pursuant to

N.C.G.S. § 7A-27(a); his motion to bypass the Court of Appeals as to the other convictions was allowed 4 April 1985. Heard in the Supreme Court 9 September 1985.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Gerald L. Bass for defendant-appellant.

Adam Stein, Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, amicus curiae.

INTERACT, Inc., by Lou A. Newman and Thomas W. Jordan, Jr., amicus curiae.

MEYER, Justice.

The defendant was charged with first-degree rape, incest, and taking indecent liberties with his three-year-old daughter. A neighbor had discovered the victim wandering outdoors on a cold October morning wearing only a nightgown and panties. A medical examination of the child revealed indications of sexual abuse.

Prior to the trial of this case, the State filed a motion entitled "Motion in Limine *to Allow Witnesses to Testify*" seeking to admit the testimony of a social worker, two detectives, a licensed practical nurse, and a medical doctor. A "motion in limine" is customarily defined as one seeking "*to avoid injection into trial* of matters which are irrelevant, inadmissible and prejudicial," and is not usually employed for the purpose of seeking the *admission* of evidence. Black's Law Dictionary 914 (5th ed. 1979) (emphasis added). The trial judge correctly treated the motion, pursuant to N.C.G.S. § 8C-1, Rule 104, as one raising a preliminary question concerning the qualification of witnesses to testify. Each of these witnesses had been present when the child made statements as to the cause of her injuries and the identity of the perpetrator. The State cited N.C.G.S. § 8C-1, Rule 803 (hearsay exceptions), as its basis for requesting the introduction of the testimony. The State gave defendant written notice of its intention to call these witnesses and provided defendant with copies of affidavits executed by each witness. On the same day, defendant filed a motion in limine to prevent the child victim from testifying at trial.

The trial judge, after making written findings of fact and conclusions of law, granted both motions and entered orders allowing

the testimony of the State's witnesses and preventing the child victim from testifying. In the latter order, the trial judge noted that defendant and the State had stipulated that the child should not testify and adopted the stipulation as the court's own in allowing the motion. The Mixed Findings of Fact and Conclusions of Law were set forth by the trial judge as follows:

MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Court has considered defendant's Motion in Limine pursuant to G.S. 8C-1, Rule 104, as raising a preliminary question concerning the qualification of a person to be a witness and as such has not been bound by the rules of evidence in making its determination.

(2) The stipulation of the parties that the minor child . . . during all times since January 1984 when this matter might have been called for trial and for at least the rest of 1984 is incapable of understanding and appreciating the meaning of an oath or affirmation and the duty of a witness with regard to testifying under oath or affirmation is hereby accepted and adopted by the court as its own.

(3) In granting defendant's motion the court notes that the special meaning of "competency" with regard to Rules 601(b)(2) and 603 relates to the qualifications of a witness to testify at trial and not the ability of the declarant to intelligently and truthfully relate personal information. Thus, the court's ruling in this case is based on the finding that the child . . . is incapable pursuant to Rules 601(b)(2) and 603 to understand the theological implication and ethical considerations of testifying under oath or affirmation and the court's ruling in no way addresses the qualification of [the child] as a declarant out of court to relate truthfully personal information and beliefs.

WHEREFORE, THE COURT allows that portion of Defendant's Motion and Orders that the child . . . may not testify in the trial of these matters.

This the 3 day of August, 1984.

s/ ANTHONY BRANNON
Anthony M. Brannon
Judge Presiding

Although it appears from his order that the trial judge carefully considered the contents of the case file and the arguments of attorneys in open court on this matter, it is clear that the trial judge never personally examined the four-and-one-half-year-old child or observed the child being examined by counsel on *voir dire* to determine her competency as a witness. The child did not testify at trial, although four of the State's five "hearsay" witnesses did testify.

In his order allowing the State's "hearsay" witnesses to testify, the trial judge determined that the testimony of the licensed practical nurse and the medical doctor were admissible, upon a proper foundation, pursuant to N.C.G.S. § 8C-1, Rule 803(4) (statements made for purposes of medical treatment or diagnosis). After setting out the text of Rules 803(24) and 804(b)(5) (residual hearsay exceptions), the following findings appear:

> 11. That the statements of [the child] in the aforementioned affidavits are statements of a material fact; and that the statements are more probative on the point than any other evidence which the State can procure through reasonable efforts; and that the general purposes of the rules of § 8C and the interest of justice will best be served by admission of the statements, upon a proper foundation being laid at trial by the State; and
>
> 12. That there are sufficient circumstantial guarantees of trustworthiness of the statements of [the child] to the five persons named in the affidavits to satisfy Rule 803(24) and 804(5) [sic] and the federal and state constitutional requirements as well as the previous North Carolina evidence law. . . .
>
> 13. That there is no federal or state constitutional impediment to the admission of these statements. The two-pronged test of *Ohio v. Roberts*, 448 U.S. 56 (1980), *unavailability/necessity* and reliability has been met, *the child not being allowed to testify* and reliability being inferred from the statements, falling within the firmly established hearsay exception of statements for purposes of medical diagnosis and treatment and perhaps also as being statements described in Rule 803(3), and there being sufficient circumstantial guarantees of trustworthiness of the

at trial, the "necessity" of admitting his or her statements through the testimony of a "hearsay" witness very often is greatly diminished if not obviated altogether. *State v. Smith,* 315 N.C. 76, 337 S.E. 2d 833 (1985). *See also United States v. Mathis,* 559 F. 2d 294 (5th Cir. 1977); 4 D. Louisell & C. Mueller, Federal Evidence § 472 (1980).

The trial judge clearly admitted at least some of the State's "hearsay" witness testimony pursuant to one or both of the residual hearsay exceptions, Rules 803(24) and 804(b)(5). As we have seen, the "availability" of the declarant to testify at trial unavoidably enters into the determination of admissibility of a "hearsay" witness' testimony as to out-of-court statements made by the declarant pursuant to either residual hearsay exception. The testimony admitted by the trial judge here was extremely prejudicial to the defendant because it included statements in which the victim allegedly described the cause of her injuries and identified the defendant as the perpetrator. Since the order allowing the State's motion to admit this testimony was apparently based in large part upon the trial judge's determination that the victim herself was "unavailable" to testify to these allegations at trial, we find it necessary to review the process by which the trial judge reached his conclusion that the child victim was incompetent and therefore "unavailable."

Although the parties have not raised an issue before this Court concerning the trial judge's entry of the order declaring the child witness incompetent to testify without ever having examined or observed the examination of the child on *voir dire* to determine her competency, we find that the interests of justice require that we review this order for possible error because it formed the basis upon which highly prejudicial testimony was admitted and affects substantial rights of the defendant in this matter. N.C.G.S. § 8C-1, Rule 103(d) ("Notwithstanding the requirements of subdivision (a) of this rule, an appellate court may review errors affecting substantial rights if it determines, in the interest of justice, it is appropriate to do so.").

Our research has revealed a paucity of reported cases in this State wherein the testimony of a child witness has been denied admission on the basis of the child's incapacity to understand the obligation of testifying under oath. By far, the vast majority of

cases in which a child witness' competency has been addressed have resulted in the finding, pursuant to an informal *voir dire* examination of the child before the trial judge, that the child was competent to testify. *See, e.g., State v. Price*, 313 N.C. 297, 327 S.E. 2d 863 (1985); *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984); *State v. Bowden*, 272 N.C. 481, 158 S.E. 2d 493 (1968); *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966).

The law in this State regarding a child's competency to testify was recently reiterated in *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984):

> "There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of *his examination and observation of the particular witness.*"

Id. at 722, 314 S.E. 2d at 533 (quoting *State v. Turner*, 268 N.C. 225, 230, 150 S.E. 2d 406, 410 (1966)) (emphasis added).

The obligation of a trial judge to make a preliminary determination of a witness' competency is embodied in Rules 104(a)[1] and 601(a) and (b)[2] of the new North Carolina Evidence Code. These rules are in accord with the traditional North Carolina practice and the case law on the subject. *See* Commentary to N.C.G.S. § 8C-1, Rule 104(a), and 1 Brandis on North Carolina Evidence § 8 (1982); Commentary to N.C.G.S. § 8C-1, Rule 601,

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1. "(a) *Questions of admissibility generally.*—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

2. "(a) *General rule.*—Every person is competent to be a witness except as otherwise provided in these rules.

"(b) *Disqualification of witness in general.* A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth."

and 1 Brandis on North Carolina Evidence § 55 (1982). Underlying the evidence rules as codified and the traditional case law analysis is the assumption that, in exercising his discretion in ruling on the competency of a child witness to testify, a trial judge must rely on his personal observation of the child's demeanor and responses to inquiry on *voir dire* examination. *See, e.g., State v. Roberts*, 18 N.C. App. 388, 391, 197 S.E. 2d 54, 57, *cert. denied*, 283 N.C. 758, 198 S.E. 2d 728 (1973); Stafford, *The Child As a Witness*, 37 Wash. L. Rev. 303, 308 (1962); 3 D. Louisell & C. Mueller, Federal Evidence § 251 (1979). Obviously, there can be no informed exercise of discretion where a trial judge merely adopts the stipulations of counsel that a child is not competent to testify without ever having personally examined or observed the child on *voir dire*. The competency of a child witness to testify at trial is not a proper subject for stipulation of counsel absent the trial judge's independent finding pursuant to his opportunity to personally examine or observe the child on *voir dire*.

We find error in the trial judge's adopting counsel's stipulation in concluding that the child victim was incompetent to testify, he never having personally examined or observed the child's demeanor in responding to questions during a *voir dire* examination. Because highly prejudicial testimony was erroneously admitted pursuant to Rule 803(24) and Rule 804(b)(5) on the basis of this improperly based conclusion, we arrest judgment on each of the convictions here and remand the matter to the Superior Court, Wake County, for a new trial.

New trial.

Justice BILLINGS concurring.

I concur in the opinion of the Court but wish to expand on the reasons for concluding that admission of the hearsay evidence was highly prejudicial in this case.

The suspicions of the medical personnel who first examined this child were aroused by observation of redness of her external genitalia. However, the family of the child testified to and the medical personnel observed a "severe masturbation problem" which may have explained the redness. Upon physical examination of the child, medical personnel discovered a hair in her vagina. However, this turned out to be an animal hair.

After concluding that the child had been sexually molested, one of the witnesses asked her who had hurt her, and she identified the defendant. When asked what the defendant had hurt her with, she replied with a word that different people interpreted differently. The State's witnesses who heard her response understood her to say "his dick." When the child repeated the statement to her mother in the presence of the State's witnesses, the mother understood the child to say, "his stick." She immediately explained to the people present that her husband had spanked the child on the previous evening with a switch which the child referred to as a stick.

Finally, the State allowed the witnesses to testify regarding the child's placement of anatomically correct dolls, placing the male doll face down on top of the female doll. However, there also was evidence that the child asked "What's that" when she first saw the external genitalia of the anatomically correct male doll, casting further doubt on the interpretation as "dick" of the word previously used by the child.

The above is, of course, not all of the State's evidence, but it does point up the questionable reliability of the hearsay testimony. Even if we were to find that the statements of a three-year-old child have "equivalent circumstantial guarantees of trustworthiness," N.C.G.S. § 803(24), because a child of that age lacks the cognitive ability to fabricate (evidence offered by the State), we would be reluctant to rely on the evidence in cases where, as here, the actual content of the statement was subject to interpretation.

STATE OF NORTH CAROLINA v. WILLIAM HARBISON, JR.

No. 400PA84

(Filed 10 December 1985)

1. Criminal Law §§ 154.1, 156.2— closing argument—effectiveness of counsel—no transcript—not raised on direct appeal—considered in discretion of court

The Supreme Court elected to consider the effectiveness of defendant's counsel under its power of discretionary review even though defendant failed to raise the issue during a prior direct appeal of his conviction; moreover, the closing argument by defendant's counsel was preserved in the record in a form

adequate to permit appellate review where the State never suggested that defendant mischaracterized the argument, the trial court based its denial of defendant's motion for appropriate relief on the closing argument as contained in the motion, and defendant's co-counsel set forth the substance of the closing argument in verified answers to interrogatories submitted with the motion. N.C.G.S. 7A-31, N.C.G.S. 15A-1446.

2. **Constitutional Law § 48— ineffective assistance of counsel—guilt admitted in closing argument without client's consent**

Defendant received ineffective assistance of counsel where his counsel in a murder prosecution admitted his guilt during closing arguments and asked for a manslaughter conviction without defendant's consent. Ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, is established in every criminal case in which defendant's counsel admits defendant's guilt to the jury without defendant's consent.

APPEAL by the defendant from the order of *Judge Claude S. Sitton*, entered June 12, 1984, in the Superior Court, BURKE County.

The defendant was convicted of second degree murder and assault with a deadly weapon inflicting serious bodily injury. He received a life sentence for the second degree murder conviction and a ten year sentence for the assault conviction. The defendant appealed the murder conviction to the Supreme Court as a matter of right under N.C.G.S. 7A-27(a). The Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal in the assault case. The Supreme Court found no error. *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977).

On May 3, 1984, the defendant filed a motion for appropriate relief in the Superior Court, Burke County, alleging that he was denied effective assistance of counsel at his 1977 trial. On June 12, 1984, Judge Sitton denied the defendant's motion. On November 6, 1984, the Supreme Court allowed the defendant's petition for writ of certiorari to review the Superior Court's denial of his motion. Heard in the Supreme Court October 16, 1985.

Lacy H. Thornburg, Attorney General by Lucien Capone III, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Malcolm Ray Hunter, Jr., First Assistant Appellate Defender, and Louis D. Bilinois, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant assigns as error the trial court's denial of his motion for appropriate relief. He contends that during the closing arguments to the jury during his 1977 trial, his court appointed counsel admitted his guilt without his consent. He argues that this was ineffective assistance of counsel and violated his constitutional right to enter a plea of not guilty. We conclude that the court appointed counsel's admission of the defendant's guilt during the closing arguments to the jury is per se prejudicial error. The defendant is entitled to a new trial.

A complete review of the evidence presented at trial is found in the opinion of this Court on the defendant's prior appeal. 293 N.C. 474, 238 S.E. 2d 449 (1977). The State's evidence tended to show that the defendant, William Harbison, Jr., and the prosecuting witness, Danna Franklin, had recently ended their relationship. The defendant had once professed that if he could not have Ms. Franklin, no man would. On the night of April 24, 1974, the defendant followed and overtook the car in which Ms. Franklin and the deceased, Morris Hardy, were traveling. The defendant stopped in front of Ms. Franklin's car, exited from his car, and shot both of them, seriously injuring Ms. Franklin and fatally wounding Mr. Hardy. The defendant took Ms. Franklin to the hospital and sought an ambulance for Mr. Hardy.

Throughout the 1977 trial, the defendant steadfastly maintained that he acted in self-defense. John McMurray, the court appointed attorney for the defendant, adhered to that defense during his cross-examination of the State's witnesses and during his presentation of the defendant's evidence. During the closing arguments, James Fuller, co-counsel, urged acquittal on the theory of self-defense. Mr. McMurray then made a closing argument expressing his personal opinion that his client should not be found innocent but should be found guilty of manslaughter. The defendant says in his Verified Motion for appropriate relief that Mr. McMurray made the following closing argument without the consent of the defendant:

> Ladies and Gentlemen of the Jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear conscious [sic] and I want to leave here also with a clear conscious [sic]. I have my opinion as to

> what happened on that April night, and I don't feel that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.

[1] Before addressing the defendant's assignment of error, this Court must address the procedural issues raised by the State. First, the State asserts that the defendant failed to raise this issue during the direct appeal of his conviction and thereby waived his right to raise it now. Assuming *arguendo* that the State is correct, we choose nevertheless to consider this issue under our power of discretionary review granted by N.C.G.S. § 7A-31 and § 15A-1446.

Second, the State asserts that no transcript of the closing argument was made and that this failure requires dismissal of the appeal. *State v. Sanders*, 280 N.C. 67, 185 S.E. 2d 137 (1971). We do not agree. The State has never suggested that the defendant has mischaracterized Mr. McMurray's argument. The trial court based its denial of the defendant's motion on the closing argument as contained in the motion. In verified answers to the interrogatories submitted with the motion, Mr. Fuller, the defendant's co-counsel, also set forth the substance of Mr. McMurray's closing argument during the 1977 trial. All such documents and matters were parts of the record on appeal. Therefore, the argument by Mr. McMurray was preserved in the record in a form adequate to permit appellate review of the defendant's assignment.

[2] Turning to the merits of this appeal, the defendant contends that his counsel's admission of his guilt and plea for a manslaughter conviction constituted ineffective assistance of counsel in violation of his right to a fair trial under the Sixth and Fourteenth Amendments to the Constitution of the United States. The test for resolving claims of ineffective assistance of counsel was recently articulated by this Court and by the Supreme Court of the United States. In *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985), this Court adopted the Supreme Court's language in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), and enunciated the following 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 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.

Braswell, 312 N.C. at 562, 324 S.E. 2d at 248 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed. 2d at 693).

The defendant cites several cases in support of the proposition that a counsel's admission of his client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance of counsel. In *Wiley v. Sowders*, 647 F. 2d 642 (6th Cir. 1981), the defendant's lawyer admitted his client's guilt and pled for mercy. The court held the defendant was deprived of his Sixth Amendment right to effective assistance when his counsel admitted guilt without first obtaining the defendant's consent to this trial tactic. *See also*, *King v. Strickland*, 748 F. 2d 1462 (11th Cir. 1984); *Francis v. Spraggins*, 720 F. 2d 1190 (11th Cir. 1983); *Young v. Zant*, 677 F. 2d 792 (11th Cir. 1982); *Commonwealth v. Lane*, 476 Pa. 258, 382 A. 2d 460 (1978). Although we find such authority persuasive, we conclude that the defendant in the present case need not show any specific prejudice in order to establish his right to a new trial due to ineffective assistance of counsel.

Although this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2047, 80 L.Ed. 2d 657, 667 (1984); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). The Supreme Court has presumed prejudice in various Sixth Amendment cases. That Court has, for example, "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659, 104 S.Ct. at 2047, 80 L.Ed. 2d at 668, n. 25. *See, e.g.*, *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed. 2d 592 (1975) (defense counsel was not allowed to make closing argument); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980) (prej-

udice presumed when counsel affected by actual conflict of interest). Likewise, when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.

A defendant's right to plead "not guilty" has been carefully guarded by the courts. *See Wiley v. Sowders*, 647 F. 2d 642 (6th Cir. 1981). When a defendant enters a plea of "not guilty," he preserves two fundamental rights. First, he preserves the right to a fair trial as provided by the Sixth Amendment. Second, he preserves the right to hold the government to proof beyond a reasonable doubt. *Wiley*, 647 F. 2d at 650.

A plea decision must be made exclusively by the defendant. "A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury." *State v. Sinclair*, 301 N.C. 193, 197, 270 S.E. 2d 418, 421 (1980). Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969); N.C.G.S. § 15A-1011 through § 15A-1026; *State v. Sinclair*, 301 N.C. 193, 270 S.E. 2d 418 (1980).

This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury. *Wiley*, 647 F. 2d at 649-50.

For the foregoing reasons, we conclude that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent. Accordingly, we must arrest the judgments against the defendant for murder and assault and remand these

matters to the Superior Court, Burke County, with instructions to that court to award the defendant a new trial.

Judgments arrested; remanded for new trial.

ALFORD v. TUDOR HALL AND ASSOC.

No. 428P85.

Case below: 75 N.C. App. 279.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 10 December 1985.

ALLEN v. ALLEN

No. 595P85.

Case below: 76 N.C. App. 504.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 December 1985. Notice of appeal by plaintiff dismissed 10 December 1985.

ANDREWS v. PETERS

No. 422A85.

Case below: 75 N.C. App. 252.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

CABLE v. CABLE

No. 487P85.

Case below: 76 N.C. App. 134.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

CHAVIS v. SOUTHERN LIFE INS. CO.

No. 606PA85.

Case below: 76 N.C. App. 481.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 10 December 1985.

DEREBERY v. PITT COUNTY FIRE MARSHALL

No. 456PA85.

Case below: 76 N.C. App. 67.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 10 December 1985.

FRASER v. DI SANTI

No. 470P85.

Case below: 75 N.C. App. 654.

Petition by defendants for discretionary review under G.S. 7A-31 denied 10 December 1985.

HARRIS-TEETER SUPERMARKETS v. HAMPTON

No. 638P85.

Case below: 76 N.C. App. 649.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

IN RE APPLICATION OF GOFORTH PROPERTIES

No. 565P85.

Case below: 76 N.C. App. 231.

Petition by petitioners for discretionary review under G.S. 7A-31 denied 10 December 1985.

IN RE APPLICATION OF WATSON

No. 377P85.

Case below: 74 N.C. App. 607.

Petition by plaintiffs for discretionary review under G.S. 7A-31 is allowed 10 December 1985 for the purpose of entering an order vacating the unpublished opinion of the Court of Appeals and remanding this case to the Court of Appeals for further remand to the Superior Court of Wake County with direction to that court to allow plaintiffs' petition for writ of certiorari and to hear on the merits the matters raised in the petition.

IN RE WILL OF PARKER

No. 594P85.

Case below: 76 N.C. App. 594.

Petition by propounders for discretionary review under G.S. 7A-31 denied 10 December 1985.

KING v. ALLRED

No. 610P85.

Case below: 76 N.C. App. 427.

Petition by defendant (Allred) for discretionary review under G.S. 7A-31 denied 10 December 1985.

LEVINE v. PARKS CHEVROLET, INC.

No. 503P85.

Case below: 76 N.C. App. 44.

Petition by defendant (Parks Chevrolet, Inc.) for discretionary review under G.S. 7A-31 denied 10 December 1985.

MARKS v. MARKS

No. 475PA85.

Case below: 75 N.C. App. 522.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 10 December 1985.

NEW HANOVER COUNTY v. BURTON

No. 608P85.

Case below: 76 N.C. App. 542.

Petition by defendants for discretionary review under G.S. 7A-31 denied 10 December 1985.

PARIS v. KREITZ

No. 476P85.

Case below: 75 N.C. App. 365.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 10 December 1985.

POWELL v. WILLIAMS OIL CO.

No. 473P85.

Case below: 75 N.C. App. 512.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 December 1985.

SHELTON v. MOREHEAD MEMORIAL HOSPITAL

No. 563PA85.

Case below: 76 N.C. App. 253.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 10 December 1985. Cross-petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 10 December 1985.

STATE v. BEAVER

No. 710A85.

Case below: 77 N.C. App. 734.

Petition by Attorney General for writ of supersedeas and temporary stay denied 26 November 1985.

STATE v. BYNUM

No. 609P85.

Case below: 76 N.C. App. 542.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

STATE v. CATOE

No. 766P85.

Case below: 78 N.C. App. 167.

Petition by defendant for writ of supersedeas and temporary stay allowed 20 December 1985.

STATE v. CORLEY

No. 363A85.

Case below: 75 N.C. App. 245.

Motion by defendant to dismiss Attorney General's appeal and to dissolve writ of supersedeas entered on 3 July 1985 allowed 5 November 1985.

STATE v. COUCH

No. 618P85.

Case below: 76 N.C. App. 543.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 10 December 1985.

STATE v. GAULDIN

No. 744P85.

Case below: 77 N.C. App. 845.

Petition by defendant for writ of supersedeas and temporary stay allowed 13 December 1985.

STATE v. GRAINGER

No. 765P85.

Case below: 78 N.C. App. 123.

Petition by defendant for writ of supersedeas and temporary stay allowed pending receipt and consideration of defendants' petition for discretionary review 20 December 1985.

STATE v. GREEN

No. 647P85.

Case below: 76 N.C. App. 642.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

STATE v. JONES

No. 616P85.

Case below: 76 N.C. App. 681.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals dismissed for failure to comply with Appellate Rules 5 November 1985.

STATE v. KELLY

No. 459P85.

Case below: 75 N.C. App. 461.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 10 December 1985.

STATE v. LOWE

No. 641P85.

Case below: 76 N.C. App. 682.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

STATE v. McNEIL

No. 708P85.

Case below: 77 N.C. App. 460.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

STATE v. MACKINS

No. 603P85.

Case below: 76 N.C. App. 543.

Petition by defendants for discretionary review under G.S. 7A-31 denied 10 December 1985.

STATE v. MOORE

No. 465P85.

Case below: 75 N.C. App. 543.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

STATE v. NORMAN

No. 620P85.

Case below: 76 N.C. App. 623.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 10 December 1985.

STATE v. NORWOOD

No. 327P85.

Case below: 44 N.C. App. 174.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 10 December 1985.

STATE v. ROSENBAUM

No. 740P85.

Case below: 77 N.C. App. 846.

Petition by defendant for writ of supersedeas and temporary stay denied 12 December 1985.

STATE v. SANDERS

No. 623P85.

Case below: 76 N.C. App. 683.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

STATE v. SAUNDERS

No. 645P85.

Case below: 76 N.C. App. 683.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

STATE v. STALLINGS

No. 652A85.

Case below: 77 N.C. App. 375.

Petition by defendant for discretionary review under G.S. 7A-31 denied as to additional issues 10 December 1985.

STATE v. WHITE

No. 693P85.

Case below: 77 N.C. App. 45.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 10 December 1985.

STATE v. WRIGHT

No. 642P85.

Case below: 76 N.C. App. 683.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985. Defendant's notice of appeal under G.S. 7A-30 dismissed 10 December 1985.

WEBSTER v. WEBSTER

No. 458P85.

Case below: 75 N.C. App. 621.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985.

WHITE v. BLACKWELL BURNER CO.

No. 602P85.

Case below: 76 N.C. App. 544.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 December 1985.

WORLEY v. WORLEY

No. 687P85.

Case below: 77 N.C. App. 666.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 10 December 1985.

STATE OF NORTH CAROLINA v. ANTHONY DALE FIELDS

No. 653A84

(Filed 10 December 1985)

1. **Burglary and Unlawful Breakings § 3.1— tool shed—not within curtilage—indictment for burglary should have been quashed**

An indictment for second degree burglary that specified that defendant broke and entered an unoccupied tool shed at nighttime with felonious intent should have been quashed, and convictions for second degree burglary and felony murder committed during the burglary could not stand, where the shed contained house tools, garden equipment, non-perishable food, and a freezer; was located forty-five feet from the dwelling; and was not within the curtilage of the dwelling house. The visual and auditory proximity of outbuildings that serve the comfort and convenience of the homeowner is a useful theoretical measure of whether those buildings lie within or beyond the curtilage; an outbuilding used to house and secure tools and other items of personal property does not immediately serve the comfort and convenience of those who inhabit the dwelling house.

2. **Homicide § 4.2— felony murder—larceny interrupted**

A homicide victim's death occurred during the perpetration of a larceny, not after its completion, where defendant and his companions had entered a storage shed and removed a chain saw and maul and were checking to see if the house was occupied when the victim approached to investigate. The killing resulted from and was the culmination of defendant's course of conduct.

3. **Homicide § 4.2— weapon carried but not used in underlying burglary and larceny—evidence sufficient**

A killing was effected during the perpetration of a felony committed with the use of a deadly weapon within the definition of N.C.G.S. 14-17 where defendant carried a gun during the commission of a larceny but did not use it to commit the larceny. Possession is enough; moreover, the victim's arrival was an interruption of the larceny, not an event marking its completion, and killing the victim was clearly part of defendant's attempt to escape apprehension for the breaking and entering and theft from the tool shed.

4. **Homicide § 18.1— murder during larceny—evidence of premeditation sufficient**

The evidence supported defendant's conviction for first degree murder based on premeditation where defendant and his companions entered a tool shed and were examining the house to see if it was vacant when the victim approached with a shotgun to investigate; the victim's conduct was not so threatening as to cause defendant and his companions to fear for their lives or to otherwise provoke them; the fact that defendant was even carrying a gun was conduct preceding the murder that evinced defendant's anticipation of a possible confrontation and some forethought of how he would deal with it; once warned of the victim's approach by a companion, defendant had ample time and opportunity to formulate an intent to kill the victim; defendant did not

shoot the victim immediately, but waited until the victim turned his head; defendant took advantage of the victim's diminished vigilance to draw his own gun and to warn him to "Hold it"; defendant shot the victim as he turned around; the victim fell to the ground and dropped his shotgun after the first shot hit him; defendant fired four more times, three times into the victim's body; and defendant had the presence of mind after the murder to take the victim's gun, agree with the others to keep silent, and later to have the murder weapon melted down.

5. **Robbery § 4.3— armed robbery—victim dead—use of force in theft—single transaction—evidence sufficient**

The evidence was sufficient to support a conviction for armed robbery where defendant took the shotgun the victim had been carrying after killing the victim. When the circumstances of the alleged armed robbery reveal that defendant intended to permanently deprive the owner of his property and the taking was effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force could be perceived by the jury as constituting a single transaction. N.C.G.S. 14-87.

6. **Criminal Law § 89; Witnesses § 1.3— State's witnesses abusers of alcohol and drugs—testimony admissible**

The trial court did not err in a prosecution for murder, robbery, larceny, and burglary by admitting the testimony of defendant's two companions, who were abusers of alcohol and hallucinogenic and psychotropic drugs and who had been impaired by drugs and alcohol on the night in question. A witness is not incompetent to testify on the basis of drug use alone, and the ability of these witnesses to communicate appeared generally adequate; moreover, the trial court's determination that a witness is competent to testify is with good reason within the discretion of that court. N.C.G.S. 8C-1, Rule 601(b) (Cum. Supp. 1985).

7. **Criminal Law § 86.9— impeachment by State of its own witness—questions designed to clarify testimony—no error**

In a prosecution for robbery, burglary, larceny, and murder which arose from defendant's shooting of a neighbor who came to investigate with a shotgun after defendant and his companions broke into a tool shed, the court did not err by allowing the State on redirect examination to impeach one of defendant's companions who was testifying for the State. Defense counsel had elicited a broad statement from the witness that he had been scared and shocked, and the State's purpose was to identify more precisely that moment at which the witness was afraid for his life rather than to impeach his cross-examination testimony.

8. **Criminal Law §§ 124.4, 135.4— murder—verdict based on four theories—jury not required to rank theories**

In a prosecution in which defendant was found guilty of first degree murder based on malice, premeditation and deliberation, murder committed during the perpetration of a burglary, murder committed during the perpetration of felonious breaking or entering, and murder committed during the

perpetration of felonious larceny, the Supreme Court declined to initiate a rule requiring the jury to rank the theories upon which its murder verdict rested.

APPEAL by defendant from judgments entered by *Lee, J.*, at the 14 May 1984 session of Superior Court, WAKE County. Heard in the Supreme Court 14 October 1985.

On 21 February 1983, defendant, Anthony Dale Fields, and his two companions, Norman David Collins, Jr., and Douglas Glenn Boney, having consumed quantities of beer and Quaaludes, took a drive around Wake County in defendant's truck. At approximately 8:30 p.m., they entered the driveway of Ernest Carter. Defendant and Boney slid open the door of a storage shed located some forty-five feet from the Carter house and removed a chain saw and maul. Collins was knocking on the doors and looking into the windows of the Carter home to determine whether anyone was there. Meanwhile, Samuel McBridge Fisher, Jr., who lived next door to the Carters and who knew the Carters not to be at home, had seen defendant's truck enter the Carter property. He took his single-shot, 12-gauge shotgun and drove down the Carter driveway to investigate.

When Collins saw Fisher's truck approaching, he shouted a warning to the other two, who threw the chain saw and maul into the bushes and their gloves into defendant's truck. Fisher approached the three with the gun under his arm and ordered them to get up against his truck with their hands up. When they had done so, Fisher turned away from them to look towards the Carter house. Defendant, drawing a .38-caliber pistol from his waistband, told Fisher to "Hold it." Fisher turned back around and was immediately shot five times by defendant. Defendant grabbed Fisher's shotgun, which had fallen from Fisher's hands after the first shot had hit him, put it in the bed of his truck, hurriedly got in the cab with his companions, and drove off. Fisher died as a result of his wounds.

Lacy H. Thornburg, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the state.

Robert A. Hassell for defendant.

MARTIN, Justice.

Defendant presents this Court with nine arguments. The first six of these challenge the sufficiency of the evidence supporting defendant's convictions for armed robbery, murder in the first degree on the theories of premeditated and deliberate murder, felony murder based on felonious breaking or entering, larceny, and burglary in the second degree. Defendant's remaining arguments concern evidentiary and sentencing issues. We find that the trial court erred only in refusing to quash the indictment for burglary in the second degree and in denying defendant's motion to dismiss that charge. All other assignments of error we find to be without merit.

I.

[1] Defendant first challenges the indictment and charge of burglary in the second degree. He contends that a shed that houses tools, garden equipment, nonperishable food, and a freezer and that is located at least forty-five feet from the dwelling is not within the curtilage of the dwelling house. We find that, under the facts of this case, defendant's point is well taken: the shed from which he and his companions stole a chain saw and splitting maul was not within the curtilage of the dwelling and therefore was not protected by the burglary statute, N.C.G.S. 14-51.

The curtilage is the land around a dwelling house upon which those outbuildings lie that are "commonly used with the dwelling house." *State v. Twitty*, 2 N.C. 102 (1794). Differentiating buildings that lie within the curtilage, which can be burglarized, from those outside it, which cannot, has been a troublesome exercise for the courts, one which is necessarily repeated with each case like the one before us. However, with each iteration of the exercise, two themes consistently emerge: the function of the building and its proximity to the dwelling house.

Under common law, houses or buildings within the curtilage that were used as part of the dwelling, such as smokehouses and pantries, were protected by the prohibition against burglary. *State v. Foster*, 129 N.C. 704 (1901). The question whether a building was part of the dwelling rested upon whether it served the "comfort and convenience" of the dwelling.

> But the law throws her mantle around the dwelling of man, because it is the place of his repose, and protects not only

> the house in which he sleeps, but also all others appurtenant thereto, as parcel or parts thereof, from meditated harm; thus the kitchen, the laundry, the meat or smoke house, and the dairy are within its protection; for they are all used as parts of one whole, each contributing in its way to the comfort and convenience of the place as a mansion or dwelling.

State v. Langford, 12 N.C. 253, 253-54 (1827).

The curtilage test rested not merely upon the building's use, but upon its convenience. Thus proximity was a second, supplementary[1] guide to whether the protection of the burglary law extended to a particular building. If a building, even one that served the daily needs of the homeowner, was so distant from the dwelling house that an intrusion did not disturb the repose of those in the dwelling house, then that intrusion was not burglary.

> [T]he law protects from unauthorized violence the dwelling-house and those which are appurtenant, because it is the place of the owner's *repose*; and if he choose to put his kitchen or smokehouse so far from his dwelling that his *repose* is not likely to be disturbed by the breaking into it at night, it is his own folly.

State v. Jake, 60 N.C. 471, 473 (1864).

In 1889 the burglary law was modified to provide that it was burglary in the second degree to commit the crime in an unoccupied dwelling house or a building within its curtilage or in any other unoccupied building with a sleeping compartment. Because, under these circumstances, none was present to hear the entry, the potential for disturbed repose as a measure of appurtenance survived only in the abstract. Nevertheless, the visual and auditory proximity of outbuildings that serve the comfort and convenience of the homeowner is still a useful theoretical measure of whether those buildings lie within or beyond the curtilage.

Applying this theoretical yardstick to the facts of this case, it is clear that the outbuilding "used to house and secure tools and

1. The Court in *Langford* recognized that distance alone was an unsatisfactory test: "Must the off-house be within one foot, ten, or a hundred feet? Or, as some say, a bow's shot? Those who speak of distance ascertain it only by its being reasonable, and what may be reasonable to the mind of one man may not be to that of another." 12 N.C. at 254.

other items of personal property," as specified in the burglary indictment of defendant, does not immediately serve the comfort and convenience of those who inhabit the dwelling house.[2]

It is well to remember that the law of burglary is to protect people, not property. If the intrusion is into a place where people are present,[3] then burglary in the first degree has been committed. If the intrusion is into a place where it is likely that the repose of one of the household would be disturbed if one were present (but is not), then burglary in the second degree has been committed. The indictment for burglary in the second degree that specified that defendant broke into and entered an unoccupied toolshed at nighttime with felonious intent was defective and should have been quashed. Likewise, the trial court was remiss in not dismissing charges of burglary in the second degree based upon that indictment. We accordingly arrest the judgment upon the conviction of burglary in the second degree.

In addition, because defendant's conviction for burglary in the second degree cannot stand, we likewise vacate defendant's conviction for felony murder committed during the perpetration of that felony.

II.

[2] Defendant takes two lines of attack on his convictions of felony murder based upon being committed in the perpetration of felonious breaking or entering and felonious larceny with the use of a deadly weapon. First, defendant insists that Fisher's death did not occur during the perpetration of the larceny, but after its

2. The evidence indicated that the building also contained a freezer and nonperishable foodstuffs. Although it could be argued that a building containing such provisions is a pantry, not a tool or garden shed, this is not how the building was described in the indictment. Even if the indictment had been so specific, the shed's lack of proximity to the dwelling house indicates that its contents were not indispensable to the comfort and convenience of the dwelling.

3. At common law, a building where the homeowner's servants habitually slept, as well as the house where he and his family slept, was protected by the law. But if the building housed a reposing watchman, whose job was solely to protect property, "then the house cannot be treated as a dwelling-house, and to break into it in the night-time with a felonious purpose would not be burglary." *State v. Williams*, 90 N.C. 724, 729 (1884). *Accord State v. Potts*, 75 N.C. 128, 131 (1876); *State v. Outlaw*, 72 N.C. 598, 602 (1875).

completion. Second, he suggests that if a deadly weapon is not actually used to effectuate the underlying felony, then the state cannot rely upon its mere presence in order to invoke the felony murder rule. We find neither argument persuasive.

Defendant contends that by the time Fisher arrived on the Carter property, defendant and his companions had ceased all criminal activity, including the larceny of the chain saw and maul. The test for whether the felony and the murder are so connected as to invoke the felony murder rule was articulated by this Court in *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E. 2d 788, 803 (1981):

> A killing is committed in the perpetration or attempted perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.

If Fisher's being shot had been an isolated event, one unrelated to the thefts from the toolshed or to the aborted inspection of the Carter home by defendant's companion Collins or to Fisher's apprehension of defendant and the others, then the killing could not be felony murder. But the time, place and cause of the shooting were all well within the scope of the larceny. The interconnectedness of events, indeed even their causal interrelationship, is obvious. We are as incredulous as Fisher himself apparently was of defendant's protestation that he and the others had just abandoned their felonious activities *coincidentally* the very moment Fisher arrived on Carter property.

The similarity of the facts in *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972), *superseded on other grounds by statute*, and *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982), to those in the case now before us is illuminating on this point. In *Thompson*, one accomplice had already left with some stolen goods, and the other left after the defendant told him that he had everything he wanted. The defendant then went back upstairs and shot the victim. This Court determined that, under such circumstances, "the killing resulted from and was the culmination of defendant's course of criminal conduct while engaged in the perpetration of felonious breaking and entering and felonious larceny." 280 N.C. at 213, 185 S.E. 2d at 673. The events in the case

at bar are even more contiguous than those in *Thompson*. Fisher's arrival can be viewed as a break in the chain of events only insofar as his arrival interrupted the commission of felonies that, up until that moment, had been ongoing. Like the *Thompson* Court, we are convinced that the killing in this case resulted from and was the culmination of defendant's course of criminal conduct.

[3] Defendant's second point of contention concerning the charges of felony murder raises a question of first impression for this Court about a statutory modification to the felony murder portion of the homicide statute. N.C.G.S. 14-17 now reads, in pertinent part: "A murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, *or other felony committed or attempted with the use of a deadly weapon* shall be deemed to be murder in the first degree . . . ." (Emphasis added.) The requirement that the use of a deadly weapon distinguished the commission or attempted commission of an unspecified or "other" felony was added to this statute by amendment in 1977. Defendant argues that this language requires the felony underlying the felony murder charge actually to be *effectuated* with the use of a deadly weapon, and that it is not enough merely to possess such a weapon during the commission of the felony. We find that not only do the facts of this case not support such a proposition, but the proposition itself is more restrictive than the legislature intended in amending the "other felony" phrase, and we reject the argument.

In *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574, this Court surmised that the amendment to the unspecified, "other felony" phrase was a response to holdings such as that in *State v. Streeton*, 231 N.C. 301, 56 S.E. 2d 649 (1949), in which this Court interpreted "any other felony" to mean "any other felony inherently dangerous to human life." 231 N.C. at 305, 56 S.E. 2d at 652. The *Davis* Court also cited *Thompson*, 280 N.C. 202, 185 S.E. 2d 666, in which a formula for "other felony" even broader than the "inherently dangerous" classification in *Streeton* was articulated:

> In our view, and we so hold, any unspecified felony is within the purview of G.S. 14-17 if the commission or attempted commission thereof creates any *substantial foreseeable human risk* and actually results in the loss of life. This in-

> cludes, but is not limited to, felonies which are inherently dangerous to life.

280 N.C. at 211, 185 S.E. 2d at 672 (emphasis added). The *Davis* Court stated that holdings concerning the pre-1977 phrase such as those is *Streeton* and *Thompson* "should be disregarded on this point involving murders committed after that date." *Davis*, 305 N.C. at 423, 290 S.E. 2d at 588.

Under the amended statute, where the perpetrator of such felony carries a deadly weapon, the balance is tipped: the simple fact that the felon has a weapon in his possession creates a substantial, foreseeable human risk. Thus, in the case before us, defendant's carrying a gun in the course of the felonious larceny would have satisfied the more vague, pre-1977 requisite for the dangerous nature of the unspecified felony. The question now before us is to what extent the legislature, by tightening the definition for unspecified felonies, has shifted the meaning from a risky or dangerous felony to a definition requiring the actual *use* of a deadly weapon in the commission or attempted commission of the felony. If one carries a gun throughout a larceny but never uses it to break a latch, for example, or to threaten bystanders to remain at bay, and a victim dies as a result of the crime (but not necessarily by wounds inflicted by that gun), is the defendant guilty of felony murder? Does mere "possession" of the deadly weapon satisfy the "use" language of the statute?

We hold that possession is enough, and the defendant is guilty of felony murder, even if the weapon is not physically used to actually commit the felony. If the defendant has brought the weapon along, he has at least a psychological use for it: it may bolster his confidence, steel his nerve, allay fears of his apprehension. Even under circumstances where the weapon is never used, it functions as a backup, an inanimate accomplice that can cover for the defendant if he is interrupted.

And under the circumstances of this case, there is no question that the facts fit the language of the statute. Fisher's arrival was an interruption in the larceny, not an event marking its completion. Killing Fisher was clearly part of defendant's attempt to escape apprehension for the breaking and entering and the theft from the toolshed. Under these facts, defendant's use—both physical and psychological—of his gun put his actions squarely within

the definition of N.C.G.S. 14-17. We hold the killing of Fisher was effected during the perpetration of a felony committed with the use of a deadly weapon.

III.

[4] Defendant urges this Court to reverse his conviction for premeditated and deliberate murder in the first degree because, he asserts, the evidence shows the shooting to have been a purely instinctive reflex reaction and his motive to have been no more than self-preservation. We disagree.

"Premeditation" means that the defendant thought about killing for some length of time, however short, before he killed. *State v. Lowery*, 309 N.C. 763, 768, 309 S.E. 2d 232, 237 (1983); *State v. Corn*, 303 N.C. 293, 278 S.E. 2d 221 (1981). "Deliberation" means that the intent to kill was formulated in a "cool state of blood," one "not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation." *Lowery*, 309 N.C. at 768, 309 S.E. 2d at 237.

On more than one occasion this Court has enumerated several circumstances that tend to prove premeditation and deliberation. *See, e.g., State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984); *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984); *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984). Among these are three circumstances that are directly applicable to the facts of this case: (1) lack of provocation by the deceased, (2) defendant's conduct before and after the killing, and (3) the infliction of lethal blows after the deceased has been felled and rendered helpless.

Viewed in a light most favorable to the state, the evidence before us shows that Fisher's own conduct was not so threatening as either to cause Boney and defendant to fear for their lives or otherwise to provoke them. The fact that defendant was even carrying a gun was conduct preceding Fisher's murder that evinced defendant's anticipation of a possible confrontation and some forethought of how he would deal with it. Once interrupted by Collins' warning, defendant and Boney walked from the shed to defendant's own truck, then to Fisher's. This was ample time and opportunity for defendant to formulate an intent to kill Fisher. He did not shoot Fisher immediately, but bided his time, waiting until Fisher turned away. Defendant took advantage of Fisher's

diminished vigilance to draw his own gun and to warn Fisher to "Hold it." Then, as Fisher turned around, defendant shot him. Fisher fell to the ground, dropping his shotgun after the first shot hit him, but defendant shot four more times, three times into Fisher's body. At no time does the evidence show defendant not to have been a reasoning being. He was not operating under the influence of overwhelming fear or passion, but with a cool, deliberate state of mind. Following the murder, defendant still had the presence of mind to take Fisher's gun, to agree with the others to keep silent about the affair, and later to have the murder weapon melted down.

We find the above to be evidence sufficient to sustain the jury's verdict of murder in the first degree based upon deliberation and premeditation.

IV.

[5] Defendant contends that he took Fisher's shotgun as an afterthought and that by then Fisher was already dead.[4] He argues that an intent to steal formed only after the use of force has culminated in the victim's death vitiates the charge of armed robbery and that a corpse is incapable of possessing personal property.

To accept defendant's argument would be to say that the use of force that leaves its victim alive to be dispossessed falls under N.C.G.S. 14-87, whereas the use of force that leaves him dead puts the robbery beyond the statute's reach. That the victim is already dead when his possessions are taken has not previously been an impediment in this jurisdiction to the defendant's conviction for armed robbery. *See, e.g., State v. Webb,* 309 N.C. 549, 308 S.E. 2d 252 (1983). All that is required is that the elements of armed robbery[5] occur under circumstances and in a time frame that can be

4. Whether Fisher was killed outright is not clear from the record. The state refers to testimony from Collins that Fisher was still alive even as defendant drove off with the others.

5. The elements of armed robbery under N.C.G.S. 14-87 are "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by the 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).

perceived as a single transaction.[6] When, as here, the death and the taking are so connected as to form a continuous chain of events, a taking from the body of the dead victim is a taking "from the person." *See* 67 Am. Jur. 2d *Robbery* § 14 at 65 (1985).

Defendant's reasoning is on no firmer ground with his belated intent argument. Not only does his intent to deprive Fisher of his gun appear to be so joined in time and circumstances with his use of force against Fisher that these elements appear inseparable, but this Court has held that mixed motives do not negate actions that point undeniably to a taking inconsistent with the owner's possessory rights.

In *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 198 (1966), the defendant insisted that he had taken a rifle from his victim in self-defense, theoretically negating any intent to steal the weapon. Although the Court agreed that disarming another in self-defense with no intent to steal is not robbery, it noted that the circumstances in that case pointed at the very least to defendant's mixed motives. Even assuming that the defendant had taken the rifle "for temporary use," his later abandoning it evinced " 'such reckless exposure to loss' . . . consistent only with an intent permanently to deprive the owner of his property." *Id.* at 173, 150 S.E. 2d at 200.

Similarly, in *State v. Webb*, 309 N.C. 549, 308 S.E. 2d 252 (1983), the defendant shot and killed his victim, disposed of the body, then took the victim's car.[7] Justice Exum, speaking for this Court, said that the defendant's being "scared and confused" and his motivation to escape did not exculpate him.

> As in *Smith*, all the evidence here tends to show defendant never intended to return the car and that he took it and disposed of it under circumstances rendering it unlikely that it would ever be recovered and with indifference to the

6. In *State v. Handsome*, the defendant argued that because the victim's money was taken *after* he had been shot, the theft was not armed robbery. The Court disagreed: "The elements of violence and taking were so joined in time and circumstances in one continuous transaction amounting to armed robbery as to be inseparable." 300 N.C. 313, 318, 266 S.E. 2d 670, 674 (1980).

7. The fact that the victim was dead by the time his car was stolen did not even elicit comment from the Court.

> rights of the car's owner. Therefore, even if defendant did use the car to escape the scene at a time when he was confused and scared, these facts, under *Smith*, would not exculpate him.

Id. at 557, 308 S.E. 2d at 257.

Whatever defendant's actual intentions were regarding Fisher's gun and whenever they were formulated was a dilemma for the jury. Nonetheless, we hold that when the circumstances of the alleged armed robbery reveal defendant intended to permanently deprive the owner of his property and the taking was effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction.

V.

[6] Defendant contends it was error for the trial court to admit the testimony of defendant's companions, Boney and Collins, into evidence. Defendant asserts that because Boney and Collins were abusers of alcohol and hallucinogenic and psychotropic drugs and because they were impaired by the use of drugs and alcohol on the night in question, their testimony was inherently incredible. Defendant suggests that a combination of the "drug-damaged and deranged minds" of these witnesses plus their proclivity for self-preservation made them susceptible to permitting gaps in their memories to be supplied by interrogators. In addition, defendant opines that Boney and Collins were inherently incredible witnesses generally and that as such they were incompetent to testify. Defendant also points to arguably incoherent testimony by Boney and Collins in the record as evidence of their alleged incompetency.

Rule 601(b) of the North Carolina Rules of Evidence provides that "A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter to be understood . . . or (2) incapable of understanding the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C-1, Rule 601(b) (Cum. Supp. 1985).[8] A witness is not in-

8. The text of this rule is identical to that in the rules in effect at the time of defendant's trial.

competent to testify on the basis of drug use alone, but only insofar as such use affects his ability to be understood or to respect the importance of veracity. We do not consider the testimony of Boney and Collins quoted in defendant's brief or in the record as a whole to be incoherent. The ability of Boney and Collins to communicate appears generally adequate.

In addition, the trial court's determination that a witness is competent to testify is with good reason within the discretion of that court, which has the opportunity itself to observe the comportment of the witness. And where the effect of drug use is concerned, in particular, the question is more properly one of the witness's credibility, not his competence. As such, it is in the jury's province to weigh his evidence, not in the court's to bar it. *See* Annot., 65 A.L.R. 3d 705, § 2(a) (1975) (competency of witness—drug use).

Accordingly, we hold it was not error for the trial court to refuse to strike the testimony of witnesses Boney and Collins.

[7] Defendant's second argument based on the rules of evidence concerns the common law anti-impeachment rule in effect at the time of his trial, which prohibited the state from discrediting its own witness. *See, e.g., State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973); *State v. Taylor*, 88 N.C. 694 (1883). Even if defendant's argument were meritorious and this Court were to order a new trial, it would be both feasible and just to conduct that trial under the new rules,[9] not the old. Even so, having examined the bases for defendant's argument, we find it to be without merit.

On direct examination, Boney, the state's witness, was asked if, "at the time that Mr. Fisher was out there at the scene and when he was holding the shotgun," he believed himself to be in imminent danger of death or bodily harm. Boney responded that he did not.

Later, on cross-examination, Boney was asked how he was feeling right at the moment that Fisher turned around to face Boney and defendant, his gun pointed at them, after defendant had told Fisher to "Hold it." Boney agreed that he was "scared" and "in shock" because he thought he was going to be shot.

9. *See* N.C. R. Evid. 607 (1984) and 1983 N.C. Sess. Laws ch. 701, § 3.

Subsequently, Boney was asked again by defense counsel what he thought "right at that minute" that Fisher turned back around in response to defendant's remark. Again, Boney said he was "in shock" because he thought Fisher was going to shoot them.

On redirect examination, Boney said he thought that, "whenever Dale said hold it, he was coming around with the gun so I thought he was gonna shoot." He then indicated that it had been the noise of the gun's discharge and seeing Fisher get shot that had scared and shocked him. When asked whether "up until the time that Mr. Fisher got shot, did [he] believe that anybody was gonna get shot?" he answered "No." Boney was later asked to recall a prior statement made to Lieutenant Pickett and, when his memory flagged, he was shown a portion of that statement. It indicated his earlier feeling that Fisher's intention was not to shoot but only to hold the three men and that Boney had not been afraid for his life until defendant said "hold it" and Fisher turned around.

We consider this testimony distinguishable from impeachment situations in which the testimony of the state's witness reveals prior statements to be lies or vice versa. *See, e.g., State v. Cope*, 309 N.C. 47, 305 S.E. 2d 100 (1983).[10] In the case before us, the state did not appear to be contradicting Boney's cross-examination testimony, but clarifying it. This Court has approved efforts by the state to clear up confusion as to its witness's statements. *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981); *State v. Berry*, 295 N.C. 534, 246 S.E. 2d 758 (1978). It is apparent to us that this was the state's intention here: defendant's counsel had elicited a broad statement from Boney that he had been scared and shocked, feelings that the jury might have understood him to have had throughout the entire episode after Fisher's initial apprehension of the three men. The record of cross-examination and redirect examination reveals the state's

10. In *Cope*, the procedure suggested in *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975), for invoking the "surprise" exception to the anti-impeachment rule was not followed by the state. For this reason this Court, speaking through Justice Exum, held that it was prejudicial error to permit testimony about the prior statements that contradicted the witness's testimony. Because we do not believe that Boney's prior statements differed significantly from his testimony, the surprise exception has no application to this case.

purpose was to identify more precisely that moment at which Boney was first afraid for his life.

This Court finds no irregularity in the state's use of Boney's statement to refresh his recollection. *See* 1 Brandis on North Carolina Evidence § 32 (1982). And because we perceive the intention and effect of the state's questions on redirect examination to have been not the impeachment but the clarification of testimony elicited on cross-examination, we find that the trial court did not err in ruling those questions and answers admissible.

VI.

[8] The jury found defendant guilty of murder in the first degree based upon four theories—murder on the basis of malice, premeditation, and deliberation, murder committed during the perpetration of burglary in the second degree, murder committed during the perpetration of felonious breaking or entering, and murder committed during the perpetration of felonious larceny. Defendant urges this Court to initiate a rule that the jury must rank the theories upon which its murder verdicts rest. Thus, if the jury were to decide that murder committed during the commission of a particular felony was the primary basis for its verdict of murder in the first degree, the merger rule would automatically prevent the underlying felony even from being before the trial court during the sentencing phase of the trial.

Precedent as well as logic militate against adopting such a rule. In *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981), this Court held that when a defendant is charged with both felony murder and premeditated and deliberate murder, but the jury returns a verdict of guilty for first degree murder without specifying upon which theory it relied, the court is to treat the verdict as a conviction for felony murder. The merger rule would then prohibit the court from considering the underlying felony in the sentencing hearing. *See also State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975), *death sentence vacated*, 428 U.S. 903 (1976).

In *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), the jury specifically found the defendant guilty of *both* premeditated and deliberate murder *and* felony murder. This Court made it clear that, when the jury's verdict *specifies both* theories in its verdict of murder in the first degree, it is the court's decision, not

that of the jury, to select the theory on which the sentence for the homicide is to be based. And where the sentence for homicide rests upon the premeditated and deliberate murder conviction, the merger rule does not apply.

> As we have already said, no merger of the felony occurs when the homicide conviction is based upon the theory of premeditation and deliberation. . . . Defendant was found guilty by virtue of premeditation and deliberation as well as by application of the felony-murder rule. Thus, the court could disregard the felony-murder basis of the homicide verdict and impose additional punishment upon defendant for the crimes of armed robbery and kidnapping.

Id. at 20, 257 S.E. 2d at 582 (citation omitted). There can be no question that the sentencing issue before us is governed by this Court's decision in *Goodman*.[11]

In addition, to adopt defendant's proposed rule would be to disregard the facts of this case, to vitiate the jury's determinations, and to confound the logic of the merger rule. Defendant contends that the jury must have relied more heavily upon the felony murder theory than upon a basis in premeditation and deliberation because he perceives little evidence in the record to support the latter. This notion is belied both by the actual evidence (see our discussion at III, *supra*) and by the jury's actual verdict. The jury found defendant guilty of murder based upon four theories. It did not determine that defendant was any more or less guilty of murder on the basis of one theory than on the basis of another, nor was it the jury's duty to make such distinctions. Where the evidence is sufficient to support such verdicts, the trial court should perceive them as being equally ranked for sentencing purposes, except for the application of such rules of law as the merger rule.

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11. Defendant argues that an extended colloquy in *Goodman* between the court and the jury foreman, by which the court clarified the fact that the jury found Goodman guilty of murder in the first degree under both the felony murder and the premeditation and deliberation theories of law, distinguishes that case from the one before us. We disagree. No such quizzing was necessary in this case. In *Goodman*, the jury initially gave an ambiguous verdict. The court's questions simply elucidated the fact that the jurors were convinced that Goodman had been guilty of murder under both theories, not under one or the other, without specifying which. *See State v. Goodman*, 298 N.C. at 18-20, 257 S.E. 2d at 581-82.

The result is:

83CRS38438—murder in the first degree—no error.

83CRS39442—felonious larceny—no error.

84CRS4840—armed robbery—no error.

83CRS39442—burglary in the second degree—judgment arrested.

—felony murder based upon burglary—verdict vacated.

WILLIAM L. HIGDON AND WIFE, JANE A. HIGDON v. KENNETH LARRY DAVIS AND WIFE, JENCY L. DAVIS

No. 54PA85

(Filed 10 December 1985)

1. **Deeds §§ 8.1, 9— obligation in deed—sufficiency of consideration**

An obligation imposed upon the grantees in a right-of-way deed to maintain an all-weather driveway across the right-of-way constituted sufficient consideration for the deed so that it was not a deed of gift.

2. **Easements § 8.1— construction of easement deed**

In construing a conveyance of an easement, whether or not executed prior to the effective date of N.C.G.S. § 39-1.1, the deed is to be construed in such a way as to effectuate the intention of the parties as gathered from the entire instrument.

3. **Deeds § 15; Easements § 8— defeasible easement—reversion to owner of servient tract**

When an easement is granted subject to a condition subsequent, the right of re-entry passes with the fee to the owner of the servient tract. Also, if a determinable easement terminates, it reverts to the owner of the servient tract rather than to the original grantor or his heirs.

4. **Adverse Possession § 17.1— defeasible easement—conveyance of land with "all privileges and appurtenances"—reference to deed describing easement—insufficient to constitute color of title**

Where a 1948 deed conveyed a driveway easement subject to defeasance if the owners of the dominant tract failed to maintain the driveway in an all-weather condition, and the jury found that the driveway was not maintained

as required, a 1971 deed to defendants' grantors which contained no specific reference to an easement, conveyed the fee with "all privileges and appurtenances thereto belonging," and referred to the description in a previous deed conveying both the land and easement did not constitute color of title because of the "all privileges and appurtenances thereto belonging" language so as to permit defendants to tack possession of their grantors to their possession for four and one-half years under color of title since (1) if the easement was still in existence at the time of execution of the 1971 deed and was in fact appurtenant to the tract conveyed, the deed actually conveyed the defeasible easement and could not constitute color of title to the easement, and (2) if the easement had determined prior to the 1971 conveyance and thus was not in fact appurtenant to the tract conveyed, the inclusion of "all privileges and appurtenances thereto belonging" would not convey the easement. Furthermore, the 1971 deed did not constitute color of title because of its reference to a prior deed containing descriptions of both the land and easement since (1) if the easement had not been extinguished prior to the execution of the 1971 deed, the deed actually conveyed the defeasible easement, and (2) if the easement was extinguished by operation of the limitation in the deed by which it was created, a subsequent deed referencing the deed containing the limitation could not grant more than the referenced deed and thus could not constitute color of title.

ON discretionary review, pursuant to N.C.G.S. § 7A-31, of a unanimous decision of the Court of Appeals, reported at 71 N.C. App. 640, 324 S.E. 2d 5 (1984), affirming in part and reversing in part a judgment entered by *Cornelius, J.* on 5 August 1983 in MACON County Superior Court and remanding for new trial on one issue. Heard in the Supreme Court on 9 September 1985.

Coward, Dillard, Cabler, Sossomon and Hicks, by Orville D. Coward, Jr. and Monty C. Beck, for plaintiff-appellants.

Jones, Key, Melvin and Patton, by R. S. Jones, Jr. and Chester Marvin Jones, for defendant-appellees.

BILLINGS, Justice.

Plaintiffs instituted this action on 29 July 1980 to quiet title to certain real property located in Franklin, Macon County, North Carolina, specifically requesting that the defendants' claim to an easement across the property be determined and claiming a right of re-entry. By answer, the original defendants (hereinafter referred to as defendants) alleged ownership of the easement by record title, by prescriptive easement acquired by twenty (20) years' adverse use, and by prescriptive easement acquired by seven (7) years' adverse use under color of title.

On 13 May 1985 this Court allowed defendants' motion to substitute as parties defendant Jackson T. Roper and wife, Jewell R. Roper to whom defendants' property was conveyed on 27 March 1985.

By deed dated 5 January 1976, the defendants acquired title to a tract of land adjoining the plaintiffs' property. Both the plaintiffs' property and the defendants' property border city streets in the town of Franklin. The defendants' deed also conveyed a twelve-foot right-of-way, adequately described, across the plaintiffs' property. No reference is made in the deed to any previous conveyances of an easement or right-of-way, and no conditions or references to conditions are included. The grantors specifically excluded the right-of-way from the warranty of title. A few months before institution of this action, the defendants constructed an asphalt driveway over the right-of-way.

Allegations of the complaint admitted in the answer and evidence offered at trial established the following chain of events:

On 14 June 1948, Hallie C. Cozad, widow, Mildred C. Brown and husband, C. S. Brown, Jr. and Margaret C. Wall and husband, John O. Wall, plaintiffs' predecessors in title to the servient tract, conveyed to R. D. Rogers, defendants' predecessor in title to the dominant tract, a twelve-foot right-of-way across the land that now belongs to the plaintiffs for the purpose of providing a driveway to Rogers' adjoining property.

The deed establishing the right-of-way recited that it was given "for and in consideration of the sum of One Dollar to them in hand paid, and other valuable consideration, receipt of which is hereby acknowledged, . . ." The deed further provided:

> This right of way is given to the party of the second part for the purpose of constructing a graveled driveway to the property of party of the second part, and the parties of the first part reserve unto themselves, their heirs and assigns, the right in common with party of the second part, to use said right of way for ingress and egress to their property or to the Co-Jo Filling Station Property.
>
> The consideration for which this right of way deed is made is that party of the second part, his heirs and assigns, shall always maintain an all weather drive over said right of way

> and should they fail to do so this deed shall be null and void and the rights hereby conveyed shall revert to parties of the first part, their heirs and assigns.

The right-of-way deed was not proved and recorded until 10 June 1959.

On 21 July 1948, just over one month after execution of the right-of-way deed, R. D. Rogers and wife conveyed to W. G. Hall and wife a tract of land which included the dominant tract, along with the twelve-foot right-of-way. This deed (hereinafter referred to as the Rogers to Hall deed) specifically described the right-of-way and stated that it was "the right of way described in a deed from Hallie C. Cozad, widow, *et al.*, to R. D. Rogers, dated June 14, 1948, and this deed is made subject to the conditions contained in said right of way deed." [Note that at this time the deed from Cozad, *et al.* to Rogers had not been recorded.]

On 20 August 1962, Hallie C. Cozad, widow, Mildred C. Brown and husband, C. S. Brown, Jr., and Margaret C. Wall and husband, John O. Wall, recorded an instrument which referred to the right-of-way deed dated 14 June 1948 (recorded 10 June 1959) and which contained the following:

> WHEREAS, said right of way was conveyed to R. D. Rogers for the purpose of constructing a graveled driveway to his property, and the sole consideration for the conveyance of said right of way was that R. D. Rogers, his heirs and assigns, would construct and maintain an all weather drive over said right of way, and upon their failure to do so said deed and the title conveyed thereby became null and void and the rights conveyed reverted to the grantors in said deed, their heirs and assigns; and
>
> WHEREAS, said driveway was never constructed and therefore said deed is now null and void and the rights thereby conveyed have reverted to the undersigned.
>
> NOW, THEREFORE, the undersigned hereby declare under oath that said driveway was never constructed and they hereby declare said deed null and void, and hereby withdraw any and all rights thereby conveyed.

Although the trial judge excluded this instrument from evidence at trial, its execution and filing were admitted by the defendants in their answer.

Thereafter, the dominant tract was conveyed as follows:

1. 19 August 1965. W. G. Hall and wife Avia Hall, to Marshall McElroy. The deed description is:

   > the land described in a deed from R. D. Rogers and wife Ellen Rogers to W. G. Hall and wife Avia Hall, dated July 21, 1948 and recorded in the office of Register of Deeds for Macon County, North Carolina, in Deed Book V-5, page 248, . . .

   with the exception of a portion previously conveyed to another grantee. The deed makes no specific conveyance of an easement or right-of-way, although the fee is conveyed along with "all privileges and appurtenances thereunto belonging." Therefore, to identify the property conveyed, one must examine the Rogers to Hall deed.

2. 8 September 1965. Marshall McElroy and wife, Freddie H. McElroy to L. C. Higdon and wife, Frances Higdon. The description is the same as in the Hall to McElroy deed and makes reference to that deed.

3. 10 February 1971. L. C. Higdon, widower, to Emerson G. Crawford and wife, Marjorie H. Crawford (hereinafter referred to as the Higdon to Crawford deed). The description is identical to the two previous deeds and makes specific reference to them.

4. 5 January 1976. Emerson G. Crawford and wife, Marjorie H. Crawford to the defendants.

Upon motion of the plaintiffs, the trial judge appointed a court surveyor to "survey and map the contentions of the parties," as there was disagreement regarding the location of the easement granted in 1948.

The matter came on for trial before Judge Preston Cornelius and a jury at the 1 August 1983 session of Macon County Superior Court.

The plaintiffs tendered certain issues which were rejected by the court. Among them were the following:

1. Does the description in the right of way deed dated June 14, 1948, describe the green area, G-H-I-J-G, or the red area, C-E-F-D-C?

4. Did Hallie C. Cozad, Mildred C. Brown and husband, C. S. Brown, Jr., and Margaret C. Wall and husband, John O. Wall, Grantors in the right of way deed dated June 14, 1948, receive any consideration for it?

The plaintiffs did not request an issue as to whether the defendants had acquired title by adverse use for seven (7) years under color of title. Further, the plaintiffs objected to the submission of that issue tendered by the defendants, both on the ground that the evidence failed to support the issue and on the ground that North Carolina does not allow acquisition of an easement by seven (7) years' adverse use under color of title.

The defendants proposed the following issues which were submitted to the jury and answered as indicated:

1. Did the Defendants and their predecessors in title fail to construct within a reasonable time a driveway, and thereafter, fail to always maintain the same in an all-weather condition, as contemplated in the easement deed from Hallie C. Cozad and others to R. D. Rogers dated June 14, 1948?

   Answer: Yes.

2. Have Defendants and their predecessors in title acquired an easement over the land of the Plaintiffs by adverse use of the road shown on the Court map in the green lines for a period of twenty years before this action was filed on July 29, 1980?

   Answer: No.

3. Did Defendants and their predecessors in title acquire an easement over the land of the Plaintiffs by adverse use of the road shown on the Court map in the green lines for a period of seven (7) years *under the easement deed from*

R. D. Rogers and wife to W. G. Hall and wife? [Emphasis added.]

Answer: Yes.

Based upon the jury's verdict, the trial judge entered judgment declaring the defendants to be the owners of the easement shown on the court map and delineated by green lines.

On appeal, the Court of Appeals, in a unanimous opinion, affirmed the judgment except as to the part locating the easement within the green lines on the court map. Finding error in the trial court's refusal to submit plaintiffs' issue number one, the Court of Appeals remanded for a new trial on the location of the easement. The Court of Appeals also affirmed the trial court's failure to submit an issue (plaintiffs' proposed issue 4) regarding whether the Cozad, *et al.* to Rogers deed was a deed of gift.

Because we conclude that the defendants are not possessed of an easement across the plaintiffs' land, the location of the right-of-way is immaterial, and remand for trial of plaintiffs' proposed issue number one is unnecessary.

[1] We agree with the Court of Appeals that the trial judge properly rejected plaintiffs' issue number four, relating to the absence of consideration for the 14 June 1948 right-of-way deed. The right-of-way deed was not recorded for eleven years. Because a deed of gift is void in North Carolina if not recorded within two years after its execution, N.C.G.S. § 47-26, the plaintiffs contend that the trial judge should have submitted to the jury the proposed issue number four. The right-of-way deed, besides reciting consideration as "One Dollar and other valuable consideration," contained a statement that the consideration for the conveyance was the obligation imposed upon grantees to maintain an all-weather driveway across the right-of-way, usable by all parties. This obligation constituted consideration. *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964). The fact that the driveway was not maintained (as the jury determined) does not convert a deed supported by consideration into a deed of gift. Breach of the grantees' obligation created rights in the grantor to seek either legal or equitable relief because of the breach but did not alter the nature of the instrument.

Having determined that the deed conveying the right-of-way was not void, we are next asked to determine whether effect may be given to the portion of the deed which places a limitation or condition upon the conveyance.

The defendants contend that the defeasance language in the description portion of the deed should not be given effect because no such limitation or condition is contained in either the granting clause or the habendum clause, citing *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228 (1948) and *Whetsell v. Jernigan*, 291 N.C. 128, 229 S.E. 2d 183 (1976). Because the deed was executed prior to 1 January 1968, N.C.G.S. § 39-1.1, which requires courts to determine the intent of the parties "as it appears from all of the provisions of the instrument," is not applicable. *See Whetsell v. Jernigan, id.* at 133, 229 S.E. 2d at 187.

However, because the 14 June 1948 deed conveyed an easement rather than a fee, we find that the rules applicable to its construction are the rules for construction of contracts. *Weyerhaeuser Company v. Light Company*, 257 N.C. 717, 127 S.E. 2d 539 (1962); *Price v. Bunn*, 13 N.C. App. 652, 187 S.E. 2d 423 (1972). As stated by this Court in *Weyerhaeuser*:

> An easement is an interest in land, and is generally created by deed. . . . An easement deed, such as the one in the case at bar, is, of course, a contract. The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made . . . . The intention of the parties is to be gathered from the entire instrument and not from detached portions. . . . An excerpt from a contract must be interpreted in context with the rest of the agreement. . . . When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted . . . . It is the province of the courts to construe and not to make contracts for the parties. . . . The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense.

257 N.C. at 719-20, 127 S.E. 2d at 541.

[2] We hold that in construing a conveyance of an easement, whether or not executed prior to the effective date of N.C.G.S. § 39-1.1, the deed is to be construed in such a way as to effectuate the intention of the parties as gathered from the entire instrument. In the instant case, it is clear that the parties intended for the conveyance to be made subject to the condition.

We next consider the effect of the defeasance language in the Cozad *et al.* to Rogers deed, carried forward by reference in the Rogers to Hall deed. In their brief, the defendants argue that the defeasance language in the easement deed created an easement on condition subsequent which does not determine automatically but requires re-entry upon the happening of the condition. Case law distinguishes between a determinable fee and a fee subject to a condition subsequent. In the case of a determinable fee, reverter is automatic upon the happening of the determining event, whereas if a conveyance is of a fee subject to a condition subsequent, the grantor or his heirs must re-enter after breach of the condition in order to terminate the grantee's fee. *Mattox v. State*, 280 N.C. 471, 186 S.E. 2d 378 (1972).

From a review of the cases in this State, it is obvious that our courts have held that an easement may be a determinable easement or an easement subject to a condition subsequent. *Dees v. Pipeline Co.*, 266 N.C. 323, 146 S.E. 2d 50 (1966); *Wallace v. Bellamy*, 199 N.C. 759, 155 S.E. 856 (1930); *McDowell v. Railroad Co.*, 144 N.C. 721, 57 S.E. 520 (1907); *Hall v. Turner*, 110 N.C. 292, 14 S.E. 791 (1892); *Price v. Bunn*, 13 N.C. App. 652, 187 S.E. 2d 423 (1972). *See* Hetrick, *Webster's Real Estate Law in North Carolina* § 339 (rev. ed. 1981). However, cases suggest that re-entry is not required to terminate an *easement* subject to a condition subsequent if the owner of the servient tract is already in possession. *See McDowell v. Railroad Co.*, 144 N.C. 721, 57 S.E. 520 (1907); *Price v. Bunn*, 13 N.C. App. 652, 187 S.E. 2d 423 (1972).

[3] We note also that when there is a right of re-entry for condition broken in regard to a fee granted subject to a condition subsequent, that right is exercisable only by the grantor or his heirs. *Brittain v. Taylor*, 168 N.C. 271, 84 S.E. 280 (1915). However, the cases seem to assume [*See, e.g., Wallace v. Bellamy*, 199 N.C. 759, 155 S.E. 2d 856 (1930)], and we hold, that when an easement is granted subject to a condition subsequent, the right of re-entry

passes with the fee to the owner of the servient tract. The same is true of a determinable easement; if the easement terminates, it reverts to the owner of the servient tract rather than to the original grantor or his heirs.

We believe it is unnecessary for us to determine whether re-entry was necessary in this case or what effect, if any, should be given the document filed by Cozad *et al.* on 20 August 1962 purporting to declare the deed of easement null and void. In the first place, if re-entry was necessary, the plaintiffs' action herein to quiet title constitutes re-entry. *Brittain v. Taylor*, 168 N.C. 271, 84 S.E. 280 (1915). The jury having found that the driveway was not maintained as required, the plaintiffs were entitled to have the easement declared void, in the absence of a determination that the right of re-entry was waived or that the plaintiffs were estopped to re-enter. *Barkley v. Thomas*, 220 N.C. 341, 17 S.E. 2d 482 (1941). No issue of estoppel or waiver was raised either in the pleadings or in the requests for issues to be submitted to the jury.

Further, the case was tried before the jury and presented to the Court of Appeals upon the theory that the plaintiffs were entitled to removal of the easement as a cloud on their title if the all-weather driveway was not maintained within a reasonable time after the grant of the easement, unless the defendants could establish adverse possession. No question of the necessity for re-entry was raised in the petition to this Court for discretionary review.

The jury having found that the driveway was not maintained as required and that the defendants and their predecessors in title have not acquired an easement by adverse use for 20 years, the focus of the parties' argument centers on whether an easement may be acquired by adverse use for seven years under color of title and whether the evidence of adverse use under color of title was sufficient to justify submission of the issue to the jury.

Because we find that the evidence as a matter of law does not support a finding of seven years' use of the easement under color of title, we decline to decide whether in North Carolina an easement may be acquired by seven years' adverse use under color of title.

The issue as submitted to the jury asked whether the defendants had used the easement for seven years "under the easement deed from R. D. Rogers and wife to W. G. Hall and wife."

As will be noted below, the defendants must show that the deed just prior to their deed constitutes color of title to the easement in order to satisfy the requirement for seven years' use under color of title. Unless that can be established, the defendants' claim fails, regardless of the nature of the Rogers to Hall deed.

We note that because Rogers conveyed the easement to Hall just over a month after Cozad *et al.* conveyed the easement to him, the defeasance could not have occurred by the time of the Rogers to Hall deed, and the deed actually conveyed the dominant tract and the defeasible easement. The Court of Appeals so held,[1] and the parties agree.

The defendants contend that the issue referred to the Rogers to Hall deed, however, so as not to confuse the jury, since that deed was the last deed prior to the 5 January 1976 deed from Crawford to the defendants which contained a metes and bounds description, and the subsequent deeds, necessary to the defendants' claim, reference that deed. The Rogers to Hall deed was therefore used in the issue merely to identify the easement. The Court of Appeals held that because the plaintiffs had not objected to the form of the issue, they had waived any objection to it. Although the plaintiffs may have failed to suggest a different wording for the issue and thus have waived objection to the wording, *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E. 2d 731 (1961), they clearly preserved their objection to submission of *any* issue on adverse use under color of title.

Although we do not approve the wording of the issue as submitted to the jury, we will consider the issue of adverse use under color of title as though the jury had based its affirmative

1. Here it is interesting to note that the Court of Appeals assumed that the defeasance occurred during the period after the Halls acquired the dominant tract and easement in 1948 and before they conveyed the dominant tract on 19 August 1965. Since there is nothing in the issue submitted to the jury to indicate *when* defeasance occurred, we are unable to pinpoint the time of the occurrence, unless we give effect to the 20 August 1962 document executed and filed by Cozad *et al.*

answer to that issue upon consideration of the 10 February 1971 Higdon to Crawford deed, rather than upon the Rogers to Hall deed.

As noted previously, the 5 January 1976 deed from Crawford to defendants conveyed the dominant tract plus an unrestricted, unconditional easment described by metes and bounds. If at the time of that conveyance the Crawfords did not have title to the easement, the deed would constitute color of title. But *see Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973). However, this action was instituted on 29 July 1980, only four and one-half years after execution of that deed. Thus, in order for the defendants to establish the requisite seven years' use under color of title, they must tack their use under color of title to that of previous owners.

[4] Emerson G. Crawford and wife, Marjorie H. Crawford, acquired title to the dominant tract on 10 February 1971. If, as we have assumed the jury found, the deed into them also constituted color of title to the easement and their use thereunder can be tacked to the defendants' use, the seven years time period would be satisfied. Therefore, it is necessary to examine the 10 February 1971 deed to determine whether possession thereunder constitutes possession under color of title which the defendants may tack to the four and one-half years under their deed.

The 10 February 1971 deed is from L. C. Higdon, a widower, to Emerson G. Crawford and wife, Marjorie H. Crawford. The complete description is as follows:

> In the Town of Franklin, North Carolina, on the North side of Wayah Street, being the land described in a deed from R. D. Rogers and wife, Ellen Rogers to W. G. Hall and wife, Avia Hall, dated July 21, 1948, and recorded in the Office of Register of Deeds for Macon County, North Carolina, in Deed Book V-5, page 248; EXCEPT THEREFROM the land described in a deed from W. G. Hall and wife, Avia Hall to E. A. Frizzell and wife, Velma Frizzell, dated February 21, 1957, and recorded in the Office of Register of Deeds for Macon County, North Carolina, in Deed Book 1-6, page 690.
>
> This is the same land described in the Deed from Marshall McElroy and wife, Freddie H. McElroy to L. C. Higdon and

> statements, which factors also satisfy the State constitutional requirement of necessity and a reasonable probability of truthfulness. . . .

(Citations omitted; emphasis added.)

Although the order specifies Rule 803(4) as the basis for admitting the testimony of the doctor and the nurse, it does not state the basis for admitting the testimony of the social worker and the detectives. It is apparent, however, from the above-quoted findings that the trial judge admitted at least some of the "hearsay" testimony pursuant to the residual hearsay exceptions, Rules 803(24) and 804(b)(5).

Except for the requirement of Rule 804(b)(5) that the witness be "unavailable," Rules 803(24) and 804(b)(5) are worded identically:

> Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

The availability of a witness to testify at trial is a crucial consideration under either residual hearsay exception. Although the availability of a witness is deemed immaterial for purposes of Rule 803(24), that factor enters into the analysis of admissibility under subsection (B) of that Rule which requires that the proffered statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." If the witness is available to testify

> wife, Frances Higdon, dated 8 September, 1965, recorded in Deed Book J-7, page 244, Public Land Records of Macon County, North Carolina.
>
> . . . .
>
> TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said parties of the second part, their heirs and assigns, to their only use and behoof forever.

As will be noted, this deed contains no specific conveyance of an easement or right-of-way. The only way in which the deed could convey an easement is through operation of the general provision that the conveyance includes "all privileges and appurtenances thereto belonging" or a construction of the conveyance to be a specific conveyance both of the "land" and of the easement conveyed by the referenced Rogers to Hall deed. We hold that in neither case would the deed constitute "color of title" to the easement claimed by the defendants.

If the easement was still in existence at the time of execution of the deed and in fact appurtenant to the tract conveyed, then the deed actually conveyed the easement subject to the condition and could not constitute color of title to the unlimited easement claimed by the defendants. If the easement had determined prior to the conveyance and thus was not in fact appurtenant to the tract conveyed, the inclusion of "all privileges and appurtenances thereto belonging" would not convey an easement.

Apparently the defendants are contending that because the condition in the Cozad *et al.* to Rogers deed, specifically referenced in the Rogers to Hall deed, was not satisfied within a reasonable time, the easement became null and void. Subsequent deeds conveyed the easement by reference, but since it was an easement which the grantors did not then have, the defendants assert that those deeds, including the Crawford to defendants deed, constitute color of title.

Assuming *arguendo* that a deed which conveys "land" by reference to a deed which contains a description of land plus a description of an easement appurtenant to the land is a *specific* conveyance of the easement as well as the land, the defendants' reasoning is faulty for two reasons.

First, as discussed earlier, if the conveyance was on a condition subsequent requiring re-entry, although the jury determined that the condition (failure to keep up the driveway) had occurred, they did not determine that a re-entry was made prior to institution of the present action to remove the cloud from the plaintiffs' title. If the easement had not been extinguished by re-entry at the time of execution of the deeds relied upon, the deeds actually conveyed the defeasible easement.

On the other hand, if the easement did terminate automatically, prior to the execution of the 10 February 1971 deed, upon failure of the owners of the dominant tract to maintain the driveway, or if re-entry was in fact effected, the deeds subsequent to the termination could not constitute color of title because they showed on their face that they were limited to whatever was conveyed by the Rogers to Hall deed, which was a defeasible easement, later defeated.

As this Court said in *Wallace v. Bellamy*, 199 N.C. 759, 765, 155 S.E. 856, 859-60 (1930):

> The single claim they [the defendants] had was the easement; they did not assert any other title to the disputed land at the time of their entry. By the terms of the deed, in a certain event the easement was to cease. Claiming under the deed granting the easement, the defendants confirmed it; by claiming the benefits they assumed the imposed burdens; they may not assail the deed upon which at the same time they base their right of entry. [Citations omitted.] This is not a denial of their right to establish subsequent adverse possession, but it is a denial of their right to tack their subsequent possession to the alleged adverse possession of those who occupied the property previously to the entry of the defendants under the limitations of their deed.

If the easement in this case was extinguished by operation of the limitation in the deed by which it was created, a subsequent deed referencing the deed containing the limitation could not grant more than the referenced deed, and thus could not constitute color of title. While extinguishment of the interest removes any right of the grantee to claim the interest *pursuant to the deed*, continued adverse use may ripen into adverse possession *not* under color of title. In the instant case, the jury found

that the defendants had not established adverse use for the twenty years necessary to establish an easement by prescription not under color of title.

We therefore conclude that the evidence was insufficient as a matter of law to justify submission to the jury of issue number three.

The jury having answered in favor of the plaintiffs the first two issues, and this Court having determined as a matter of law that the issue of seven years' adverse use under color of title should not have been submitted to the jury, that part of the Court of Appeals' decision which affirmed the submission of that issue and judgment for the defendants is reversed.

That part of the Court of Appeals opinion which affirmed the trial judge's determination that the Cozad *et al.* to Rogers deed was supported by consideration and was not a deed of gift is affirmed.

Because we have determined that the defendants have no easement over the plaintiffs' land, there is no reason for a jury to determine the location of the original easement; therefore the order of the Court of Appeals remanding the case for trial of that issue is reversed.

This matter is remanded to the Court of Appeals for further remand to the Superior Court of Macon County for entry of judgment based upon the jury's answers to issues one and two.

Affirmed in part, reversed in part and remanded.

STATE OF NORTH CAROLINA v. DWIGHT PARKER, SR.

No. 632A83

(Filed 10 December 1985)

1. **Searches and Seizures § 7— knife seized from jacket hanging on chair three feet from defendant—valid search incident to arrest**

In a prosecution for two counts of first degree murder and two counts of armed robbery, a knife found in a jacket when defendant was arrested was properly admitted as having been obtained by a valid search incident to arrest

where defendant attempted to reach under a sofa cushion when officers entered the small basement room where he was reclining on the sofa, a struggle ensued between defendant and some of the officers as they subdued and handcuffed him, the officer who searched the jacket stated that he grabbed it because defendant made a motion for the jacket, defendant was three or four feet from the jacket, and officers had information that defendant was wearing a gray suede jacket.

2. Homicide § 21.6— felony murder—independent evidence of corpus delicti—satisfied if fact of death independently shown

State v. Franklin, 308 N.C. 682, did not abandon the rule that there must be some evidence of the *corpus delicti* in addition to defendant's confession, but simply held that this rule is fulfilled in a felony murder prosecution when the fact of death is independently shown.

3. Criminal Law § 106.4— confession—non-capital cases—independent proof of corpus delicti no longer necessary—corroboration of confession sufficient

It is no longer necessary in non-capital cases that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime, but there must be strong corroboration of essential facts and circumstances embraced in the defendant's confession.

4. Criminal Law § 106.4— robbery—proof of corpus delicti only by confession—corroborative evidence sufficient

Where defendant confessed to an armed robbery and there was no evidence of the *corpus delicti* independent of defendant's confession, there was sufficient substantial independent evidence which would tend to establish that defendant was telling the truth when he confessed where the State's evidence paralleled defendant's confession as to two murders and one other armed robbery; defendant stated in his confession that he shot one victim three times and shot and stabbed the other, that he had tied a cinder block to one victim's leg with a green clothesline and a concrete block to the other's ankle with a lightweight chain, and that he had disposed of the bodies in the river; the victims' bodies were recovered from the Tar River; both victims died as a result of gunshot wounds to the head and one had also been stabbed; police seized a knife from defendant's jacket pocket when he was arrested and defendant admitted it was the knife he used to stab the victims; the bodies were in the condition described by defendant when they were recovered by the police; one victim's stolen Cadillac was recovered when the defendant was arrested; there were bloodstains on newspapers in the automobile, on a blanket draped over the front seat, on the seats, and on the passenger door; blood in the car was consistent with the victims' blood types; defendant had confessed to burning his shoes and clothes, one victim's bedroom slippers, and two bloody sheets and towels in a trash barrel in his girlfriend's yard; police recovered from a trash barrel behind the girlfriend's residence the partially burned remains of a pair of bedroom slippers, a towel, and a number of other pieces of cloth; and one victim's wallet was recovered at the back of a neighbor's trailer.

THE defendant was convicted at the 6 September 1983 Criminal Session of PITT County Superior Court of two counts of first degree murder and two counts of armed robbery. Following a sentencing hearing, the defendant was sentenced to life imprisonment on each of the murder convictions and to fourteen years on each of the armed robbery convictions, all sentences to be served consecutively. The defendant appealed the life sentences to this Court as a matter of right pursuant to N.C.G.S. § 7A-27(a), and we granted the defendant's motion to bypass the Court of Appeals on the charges of armed robbery on 1 March 1985.

The State's evidence tended to show that on 23 February 1983 the body of Ray Anthony Herring was recovered from the Tar River near the bridge on Highway 222 near Falkland, Pitt County, North Carolina. A cinder block was tied to Herring's right ankle with a piece of green clothesline. On 24 February 1983 the body of Leslie Levon Thorbs was removed from the Tar River directly below the same bridge. A concrete block was tied to the right ankle with a piece of lightweight chain. Both had died as the result of gunshot wounds to the head fired from close range. Herring had been stabbed.

Herring had last been seen alive when he left his home in his automobile at around 10:45 p.m. on Friday, 18 February 1983. Thorbs was last seen alive when Walter Kizzie, a young man in Thorbs' foster care, left him at home alone at about 10:00 p.m. on the same night. At that time, Thorbs' black Cadillac automobile with a brown top was parked in Thorbs' driveway. When Kizzie and James Porter returned to Thorbs' home about 12:30 a.m. on 19 February 1983, no one was at home, the lights and television were on, Herring's car was parked across the street, and the Cadillac was gone.

Because of evidence linking the defendant to the murders, a warrant was issued for his arrest, and on 26 February 1983 Pitt County Sheriff's investigators went to Newark, New Jersey where they had reason to believe the defendant was staying. Officers from the Essex County, New Jersey Sheriff's Department, accompanied by the North Carolina officers, arrested the defendant in the basement of a residence at 328 Slide Street. A set of keys for Thorbs' Cadillac was recovered from the defendant's left

front pants pocket, and an eight-inch butcher knife was taken from the pocket of a gray suede jacket which was draped over a chair in the room where he was arrested. The defendant was taken to the Essex County Sheriff's Department where he was interrogated. He gave a detailed written confession in which he said that he had planned to kill Thorbs for his money and car. He said that when "the other man" arrived at Thorbs' house, he decided that he would have to kill him, too, and that he took $25.00 and a diamond ring from Thorbs and $10.00 from the other man.

Additional evidence necessary to an understanding of the issues raised on this appeal will be included in the opinion.

The defendant did not offer evidence in the guilt-determination phase of his trial.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Assistant Attorney General, for the State.

Ann B. Petersen for the defendant-appellant.

BILLINGS, Justice.

The defendant brings forward three assignments of error:

(1) The knife recovered from the pocket of the defendant's jacket was unlawfully seized in the course of an unlawful search conducted without a warrant;

(2) The evidence was not sufficient to permit a conviction for armed robbery of Ray Herring;

(3) The imposition of a sentence based upon a verdict of guilt [sic] returned by a jury drawn from a venire from which potential jurors were excluded because of their scruples against capital punishment deprives the defendant of his right to due process of law and his right to trial by jury.

[1] At the defendant's trial, the State offered into evidence the fixed-blade knife that was taken from the defendant's jacket pocket at the time of his arrest. The defendant objected on the basis that the knife, allegedly the one used to stab the victim Herring, was obtained in the course of a warrantless search that extended beyond the bounds justified by a search pursuant to an

arrest and therefore violated his rights under the Fourth Amendment to the United States Constitution.

After a *voir dire* hearing, the trial judge determined that the arrest was lawful. The defendant does not raise on appeal any claim that the arrest was unlawful.

Evidence offered at the *voir dire* hearing on the motion to suppress the knife supported the trial judge's findings that at the time of defendant's arrest, the defendant was handcuffed and frisked, that the gray suede jacket from which the knife was taken was within three or four feet of the place where the defendant was reclining on the sofa, that when the defendant was confronted by the officers he made a movement toward the jacket, and that the officers had information that the defendant was wearing a gray suede jacket. The trial judge upheld the seizure of the knife as having been obtained by a valid search incident to the arrest of the defendant.

Recognizing that under the rule laid down by the United States Supreme Court in *Chimel v. California*, 395 U.S. 752 (1969) the parameters of a search incident to arrest depend upon the facts of each case, the defendant contends that although the jacket was within three or four feet of him when he was arrested, it was not within the permissible scope of the search incident to the arrest because when it was searched he was in handcuffs and in the control of a number of officers in a confined space.

We reject the defendant's contention. The uncontradicted evidence on *voir dire* was that when the officers entered the small basement room where the defendant was reclining on the sofa, he first attempted to reach under the sofa cushion and then started to get up. A struggle ensued between the defendant and some of the officers as they subdued and handcuffed him. The officer who searched the jacket stated that he grabbed it because the defendant, who was three or four feet from the jacket, made a motion toward it. Additionally, when the defendant was taken to the sheriff's department he was allowed to wear the jacket.

In the case of *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980), this Court upheld as incident to an arrest the search and seizure of a gun hidden under the rug in the corner of the nine by twelve foot motel room oc-

cupied by the defendant, even though the defendant was handcuffed and under the control of police officers. In upholding the search, the Court quoted with approval the following statement from *State v. Austin*, 584 P. 2d 853, 855 (1978):

> Appellant does not challenge the legality of his arrest but maintains that because he was handcuffed, he had no "control" over the area; therefore, the search cannot be justified under the *Chimel* standard. . . .
>
> . . .
>
> It thus appears that the defendant in custody need not be physically able to move about in order to justify a search within a limited area once an arrest has been made.

We hold that the findings of the trial judge, amply supported by the evidence, support the conclusion that the knife was lawfully seized incident to the arrest of the defendant.

[2] By his second assignment of error, the defendant contends that his conviction for the armed robbery of Ray Herring must be vacated because apart from his extrajudicial confession that "he [the defendant] took $10.00 off the guy," there was no evidence of the *corpus delicti* of that armed robbery. In support of his contention, the defendant cites a long line of North Carolina cases standing for the proposition that there must be direct or circumstantial proof of the *corpus delicti* independent of the defendant's confession in order to sustain a conviction. *See, e.g., State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983); *State v. Green*, 295 N.C. 244, 244 S.E. 2d 369 (1978); *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960).

The State concedes that aside from the defendant's confession there was no evidence presented at trial tending to prove the *corpus delicti* of the Herring armed robbery. There is nothing in the record to show that Herring had any money with him when he left home at 10:45 p.m. on 18 February, the night he was murdered, and nothing which would tend to prove that any property was missing from his person when his body was found in the Tar River. In short, the *corpus delicti* of this robbery, missing property, was shown *only* by the defendant's extrajudicial statement given to police officers following his arrest on 26 February 1983.

While conceding the absence of independent evidence tending to prove the *corpus delicti*, the State takes the position that under this Court's recent decision in *State v. Franklin*, 308 N.C. 682, 304 S.E. 2d 579 (1983), proof of the *corpus delicti aliunde* the defendant's confession is no longer necessary so long as there are sufficient facts and circumstances which corroborate the defendant's confession and generate a belief in its trustworthiness.

We do not agree that *Franklin* determines the question presented in this case. In *Franklin*, the defendant was convicted of felony murder and contended on appeal that his conviction could not stand as there was no evidence of the *corpus delicti* of first degree sexual offense, the predicate felony for the murder conviction. We characterized the issue as "one of first impression in our State." *Id.* at 692, 304 S.E. 2d at 585. Following an analysis of the underlying purposes and policies of the *corpus delicti* rule, the Court in *Franklin* concluded that "[w]here there is proof of facts and circumstances which add credibility to the confession and generate a belief in its trustworthiness, *and where there is independent proof of death, injury, or damage, as the case may require*, by criminal means, these concerns vanish and the rule has served its purpose." *Id.* at 693, 304 S.E. 2d at 586 (emphasis added). This narrow ruling does not control the instant case, however, as both sides admit there was not presented "independent evidence of the fact of injury," i.e., missing property. Further, the *Franklin* opinion makes clear that the *corpus delicti* of felony murder "is established by evidence of the death of a human being by criminal means . . . ." *Id.* at 692, 304 S.E. 2d at 585-86. We therefore did not abandon the rule that there must be some evidence of the *corpus delicti* in addition to the defendant's confession, we simply held that this rule is *fulfilled* in a felony murder prosecution when the fact of *death* is independently shown. The *element* which consists of the underlying felony may be proved by the defendant's confession when there is corroborative evidence tending to establish the reliability of the confession.

[3] Having determined that *Franklin* is not dispositive, we elect to make further inquiry as to whether our current approach to the *corpus delicti* rule is a sound one in consideration of the result which its application would produce under the facts presented in the instant case and in light of what we perceive to

be a judicial trend toward abandoning a strict application of the corroboration requirement.

Our research reveals that the rule is quite universal that an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime.[1] As to the extent and quality of corroborative evidence required, however, courts are in sharp disagreement. The legal commentators identify three basic formulations of the *corpus delicti* rule. *See Opper v. United States*, 348 U.S. 84 (1954); McCormick, *Evidence* § 145 (3rd ed. 1984); Note, *Confession Corroboration in New York: A Replacement for the Corpus Delicti Rule*, 46 Fordham L. Rev. 1205 (1978); *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935 (1966); Annot., 45 A.L.R. 2d 1316 (1956). These different approaches reflect the fact that there is marked divergence of opinion as to the quantum and type of corroboration necessary to ensure that a person is not convicted "of a crime that was never committed or was committed by someone else." *State v. Franklin*, 308 N.C. at 693, 304 S.E. 2d at 586.

The majority of American jurisdictions follow a formulation of the *corpus delicti* rule which requires that there be corroborative evidence, independent of the defendant's confession, which tends to prove the commission of the crime charged. *E.g.*, *People v. Cobb*, 45 Cal. 2d 158, 287 P. 2d 752 (1955); *People v. Willingham*, 89 Ill. 2d 352, 432 N.E. 2d 861 (1982). *See also* Annot., 45 A.L.R. 2d 1316, § 7 and cases cited therein. Under this approach, the independent evidence is sufficient only if it "touches or concerns the *corpus delicti*." *Lemons v. State*, 49 Md. App. 467, 472, 433 A. 2d 1179, 1182 (1981). North Carolina has always applied this version of the *corpus delicti* rule, *see State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960), and this approach was recently reaffirmed in *State v. Franklin*, 308 N.C. 682, 693, 304 S.E. 2d 579, 586 (requiring "independent proof of death, injury, or damage").

The second identifiable approach to this question is actually an extension of the above-stated rule. While the majority position

1. Massachusetts is the only jurisdiction that permits a conviction to rest upon the uncorroborated confession of the accused. *See Commonwealth v. Kimball*, 321 Mass. 290, 73 N.E. 2d 468 (1947).

requires that there be *some*[2] independent proof touching upon the *corpus delicti*, a few cases have held that the corroboration must consist of substantial evidence, independent of the accused's confession, which tends to establish each and every element of the crime. *E.g., Pines v. United States*, 123 F. 2d 825 (8th Cir. 1941); *Forte v. United States*, 94 F. 2d 236 (D.C. Cir. 1937). This is the version of the *corpus delicti* rule specifically rejected by this Court in *Franklin.*

The third approach to the *corpus delicti* issue has been denominated the "trustworthiness" version of corroboration and is generally followed by the federal courts and an increasing number of states. Under this rule, "[t]here is no necessity that [the] proof [independent of the defendant's confession] touch the *corpus delicti* at all. . . . [P]roof of any corroborating circumstances is adequate which goes to fortify the truth of the confession or tends to prove facts embraced in the confession." *Opper v. United States*, 348 U.S. 84, 92 (1954). *See also United States v. Abigando*, 439 F. 2d 827 (5th Cir. 1971); *United States v. Johnson*, 589 F. 2d 716 (D.C. Cir. 1978); *Moll v. United States*, 413 F. 2d 1233 (5th Cir. 1969); *Schultz v. State*, 82 Wis. 2d 737, 264 N.W. 2d 245 (1978); *State v. George*, 109 N.H. 531, 257 A. 2d 19 (1969); *State v. Kalani*, 3 Haw. App. 334, 649 P. 2d 1188 (1982). In *United States v. Johnson*, 589 F. 2d 716 (D.C. Cir. 1978), the court noted that while "[u]nder the conventional formulation of the corroboration requirement . . . the prosecution must introduce independent proof of the *corpus delicti* of the crime," under the trustworthiness version "the adequacy of corroborating proof is measured not by its tendency to establish the *corpus delicti* but by the extent to which it supports the trustworthiness of the admissions." 589 F. 2d at 718-19. While this third approach to the *corpus delicti* rule is stated in both commentary and cases, occasions for its full application have been rare.

2. Jurisdictions differ as to the quantum of independent evidence touching upon the *corpus delicti* and corroborative of the accused's extrajudicial statements which is necessary to sustain a conviction. *See, e.g., People v. Towler*, 31 Cal. 3d 105, 115, 641 P. 2d 1253, 1257 (1982) ("slight or prima facie proof is sufficient"); *State v. Allen*, 335 So. 2d 823, 825 (Fla. 1976) ("substantial evidence tending to show commission of the charged crime"); *State v. Ferry*, 2 Utah 2d 371, 372, 275 P. 2d 173, 173 (1954) (requiring "clear and convincing" independent evidence of *corpus delicti*); *Simmons v. State*, 234 Ind. 489, 493, 129 N.E. 2d 121, 122 (1955) (*corpus delicti* must be established by "clear proof" independent of confession).

Although grouping the methods of assessing the quantum and quality of corroborative evidence necessary to prove the *corpus delicti* into these three categories is appropriate, we hasten to recognize that it is at the same time an oversimplification. As the United States Supreme Court recognized in *Opper v. United States*, 348 U.S. 84, 93 (1954): "Whether the differences in quantum and type of independent proof are in principle or of expression is difficult to determine. Each case has its own facts admitted and its own corroborative evidence, which leads to patent individualization of the opinions." It is therefore very difficult to synthesize and harmonize the numerous decisions on this issue, and much confusion has been caused by failure to distinguish among the different formulations of the *corpus delicti* requirement.

In our view, however, the primary confusion in this area has been engendered by the courts' use of varying and inconsistent interpretations of what is meant by the term "*corpus delicti*." In his treatise on evidence, Wigmore notes that "[t]he meaning of the phrase *corpus delicti* has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning." 7 Wigmore on Evidence § 2072 at 524 (Chadbourn rev. 1978).

Literally, the phrase "*corpus delicti*" means the "body of the crime." McCormick, *Evidence* § 145 at 366 (3rd ed. 1984). To establish guilt in a criminal case, the prosecution must show that (a) the injury or harm constituting the crime occurred; (b) this injury or harm was caused by someone's criminal activity; and (c) the defendant was the perpetrator of the crime.[3] It is generally accepted that the *corpus delicti* consists only of the first two elements,[4] and this is the North Carolina rule. *See State v. Franklin*, 308 N.C. 682, 691, 304 S.E. 2d 579, 585 (1983).

3. It should be noted that in this case there is overwhelming evidence *aliunde* the confession to tie the defendant to any crimes shown to have been committed against Herring at the time in question.

4. In Wigmore's view, the *corpus delicti* in its most orthodox sense signifies only the first element, i.e., the fact of the specific loss or injury sustained. He offers that

> [t]his, too, is a priori the more natural meaning; for the contrast between the first and the other elements is what is emphasized by the rule; i.e., it warns us

Curiously, however, many courts have defined the *corpus delicti* as proof of each *element* of the crime charged. Plainly, independent evidence of the *corpus delicti,* defined as it is in this jurisdiction to include proof of injury or loss and proof of criminal agency, does not equate with independent evidence as to each essential element of the offense charged. Applying the more traditional definition of *corpus delicti,* the requirement for corroborative evidence would be met if that evidence tended to establish the essential harm, and it would not be fatal to the State's case if some elements of the crime were proved solely by the defendant's confession. It is therefore axiomatic that the results obtained through application of a rule requiring independent proof of the *corpus delicti* will not be consistent or comparable so long as *corpus delicti* is variously defined.

There is another problem which may account, in part, for the complexities of application of the *corpus delicti* rule. While defining the *corpus delicti* "may have been a relatively simple task when crimes were few and concisely defined, . . . modern statutes tend to define offenses more precisely and in greater detail than traditional case law. Defining the *corpus delicti* has thus become more complex." McCormick, *Evidence* § 145 at 371.

Finally, we note that a strict application of the *corpus delicti* rule is nearly impossible in those instances where the defendant has been charged with a crime that does not involve a tangible *corpus delicti* such as is present in homicide (the dead body), arson (the burned building) and robbery (missing property). Examples of crimes which involve no tangible injury that can be isolated as a *corpus delicti* include certain "attempt" crimes, conspiracy and income tax evasion. *See Smith v. United States,* 348 U.S. 147 (1954). The difficulty of applying the traditional *corpus delicti* rule of corroboration to these offenses may, in part, account for the shift in emphasis to a rule requiring corroboration of each essential element of the crime charged. Perceiving this

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> to be cautious in convicting, since it may subsequently appear that no one has sustained any loss at all; for example, a man has disappeared, but perhaps he may later reappear alive. To find that he is in truth dead, yet not by criminal violence—i.e., to find the second element lacking, is not the discovery against which the rule is designed to warn and protect. . . .

7 Wigmore on Evidence § 2072 at 525.

trend toward a broad interpretation of the *corpus delicti*, one author notes that:

> [T]he corpus delicti rule . . . is periodically misapplied, and its emphasis on the elements of the crime charged as opposed to the reliability of the confession has caused several courts and commentators to question the extent to which the corpus delicti version serves its original purposes, and to prefer the alternative trustworthiness version.

Note, *Confession Corroboration in New York: A Replacement for the Corpus Delicti Rule*, 46 Fordham L. Rev. 1205, 1216 (1978).

The quoted author's comments are generally reflective of the views expressed by a number of courts and commentators that the *corpus delicti* version of the corroboration requirement may have "outlived its usefulness." McCormick, *Evidence* § 145 at 370.

The foundation for the *corpus delicti* rule lies historically in the convergence of three policy factors:

> first, the shock which resulted from those rare but widely reported cases in which the "victim" returned alive after his supposed murderer had been convicted . . . ; and secondly, the general distrust of extrajudicial confessions stemming from the possibilities that a confession may have been erroneously reported or construed . . . , involuntarily made . . . , mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual . . . and, thirdly, the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.

46 Fordham L. Rev. at 1205.

As we have noted previously in this opinion, an increasing number of courts have become satisfied that the possibility of convicting a person for a crime which was not in fact committed may be adequately guarded against by requiring only that the prosecution produce evidence which corroborates "the essential facts admitted [in the defendant's confession] sufficiently to justify a jury inference of their truth." *United States v. Johnson*, 589 F. 2d 716, 718 (D.C. Cir. 1978), *quoting Opper v. United States*, 348 U.S. 84, 93 (1954). It has even been suggested by some that the trustworthiness version of the corroboration require-

ment, with its focus on whether the defendant was telling the truth when he confessed, provides greater assurance against the use of an unreliable confession to prove the defendant's guilt than does the *corpus delicti* version. This is so because the latter approach is directed only to preventing convictions for a crime which has not occurred. It does nothing, however, to ensure that the confessor is the guilty party. As the New Jersey Supreme Court noted in *State v. Lucas*, 30 N.J. 37, 57, 152 A. 2d 50, 60 (1959), "There seems to be little difference in kind between convicting the innocent where no crime has been committed and convicting the innocent where a crime has been committed, but not by the accused."

The second historical justification for the *corpus delicti* rule relates to the concern that the defendant's confession might have been coerced or induced by abusive police tactics. To a large extent, these concerns have been undercut by the principles enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966) and the development of similar doctrines relating to the voluntariness of confessions which limit the opportunity for overzealous law enforcement. These developments make it "difficult to conceive what additional function the *corpus delicti* rule still serves in this context." Comment, *California's Corpus Delicti Rule: The Case for Review and Clarification*, 20 U.C.L.A. L. Rev. 1055, 1089 (1973). *See also* Note, *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 1084 (1966) ("serious consideration should be given to elimination of the *corpus delicti* requirement"); Note, 46 Fordham L. Rev. 1205, 1235 (1978) (rule is duplicative of other confession doctrines).

Finally, it has been said that the *corpus delicti* rule encourages efficient law enforcement and thorough police investigations because the prosecution may not rely solely on the words of the defendant to obtain a conviction. In our review of this question, however, we have rarely seen this argument offered as a justification for the *corpus delicti* rule. It is "hardly a persuasive argument in favor of the *corpus delicti* rule inasmuch as the rule applies *only* to extrajudicial statements. . . . Carried to its logical extreme, the notion of law enforcement shouldering the entire burden of establishing the elements of a crime would lead to the prohibition of *all* confessions." Comment, 20 U.C.L.A. L. Rev. 1055, 1089 (1973) (emphasis in original).

We are persuaded by these criticisms directed to the *corpus delicti* version of corroboration and have concluded that we need not adhere to our strict rule requiring independent proof of the *corpus delicti* in order to guard against the possibility that a defendant will be convicted of a crime that has not been committed. We agree with the Supreme Court of Hawaii that:

> Whatever the difference in the quantum and the quality of proof required under the particular rules adopted in the various jurisdictions, the basic purpose of each in requiring corroboration of the confession by independent evidence before it may be admitted or used is to meet the possibility that the confession may have been falsely given through misunderstanding, confusion, psychopathic aberration or other mistake. [Citations omitted.] We are disposed to believe that the protection of the accused can be as well assured by the proper application of the flexible rule [that permits a confession to be relied on to prove the *corpus delicti* if the trustworthiness of the confession is established by corroborative evidence], as by the rigid rule which requires independent proof of all elements of the *corpus delicti* before the confession may be resorted to. With the additional safeguard requiring the voluntariness of a confession to be shown, preliminarily to the satisfaction of the court and ultimately to the satisfaction of the jury, before it may be considered, and the protection afforded by the fundamental requirement that the guilt of the accused be proven beyond all reasonable doubt, it appears to us that the possibility of misuse of a defendant's confession under the rule we favor is too remote to justify the additional restrictions of a more rigid rule.

State v. Yoshida, 44 Haw. 352, 357-58, 354 P. 2d 986, 990 (1960).

The federal courts are nearly unanimous in approving the trustworthiness version of corroboration. *See, e.g., United States v. Johnson*, 589 F. 2d 716, 718 (D.C. Cir. 1978) ("adequacy of corroborating proof measured not by its tendency to establish the *corpus delicti* but by the extent to which it supports the trustworthiness" of confession); *United States v. Wilson*, 436 F. 2d 122, 124 (3rd Cir.), *cert. denied*, 402 U.S. 912 (1971) (government must "introduce substantial evidence which would tend to establish the trustworthiness of the statement"); *United States v. Abigando*,

439 F. 2d 827, 833 (5th Cir. 1971) ("a confession can be corroborated by bolstering parts of it to show trustworthiness"); *Landsdown v. United States*, 348 F. 2d 405, 409 (5th Cir. 1965) (preferring "less stringent and more reasonable requirement of corroboration of the statement itself"). Also, the corroboration rule focusing on the sufficiency of independent evidence tending to demonstrate the trustworthiness of the defendant's confession has found favor with a number of state courts. *E.g.*, *State v. Kalani*, 3 Haw. App. 334, 649 P. 2d 1188 (1982); *People v. Brechon*, 72 Ill. App. 3d 178, 390 N.E. 2d 626 (1979); *State v. George*, 109 N.H. 531, 257 A. 2d 19 (1969). *Cf. Schultz v. State*, 82 Wis. 2d 737, 753, 264 N.W. 2d 245, 253 (1978) ("If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.").

We adopt a rule in non-capital cases that when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

We wish to emphasize, however, that when independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice. We emphasize this point because although we have relaxed our corroboration rule somewhat, we remain advertent to the reason for its existence, that is, to protect against convictions for crimes that have not in fact occurred.

[4] We turn now to the particular facts presented in the instant case to determine whether there is substantial independent evidence which would tend to establish that when the defendant confessed to the armed robbery of Ray Anthony Herring he was telling the truth.

An examination of the record reveals that the State's evidence parallels the defendant's confession as to the armed robbery and murder of Leslie Levon Thorbs and as to the murder of Ray Herring. The *corpus delicti* of the murders was proven by evidence independent of the defendant's confession.

In his confession, the defendant stated that he shot Thorbs three times and that he both shot and stabbed Herring. The victims' bodies were recovered from the Tar River. Both Thorbs and Herring died as the result of gunshot wounds to the head. Herring had also been stabbed. When the defendant was arrested in Newark, New Jersey, the police seized a knife from his jacket pocket, and defendant admitted it was the knife he used to stab Herring. The defendant also confessed that before he and Terry Best disposed of the bodies in the river, he tied a cinder block to Herring's leg with a green clothesline and a concrete block to Thorbs' ankle with a lightweight chain. When the bodies were located by police, they were in the condition described by the defendant. Also, when the defendant was arrested in New Jersey, Thorbs' stolen Cadillac was recovered, and an examination by Pitt County authorities revealed that there were bloodstains on newspapers in the automobile, on a blanket draped over the front seat, on the seats and on the passenger door. Blood on the door was consistent with Thorbs' blood type and that on the rear floorboard and front passenger seat was consistent with Herring's.

Other evidence corroborated the defendant's statement as to the manner in which he disposed of the victim's clothing and his own bloody attire. The defendant confessed to burning his shoes and clothes, Thorbs' bedroom slippers, and two bloody sheets and towels in a trash barrel in his girlfriend's yard. The police recovered in a trash barrel behind the girlfriend's residence the partially burned remains of a pair of bedroom slippers, a towel and a number of other pieces of cloth.

There was also plenary evidence presented by the State in addition to the defendant's extrajudicial confession tending to prove the *corpus delicti* of the armed robbery of Leslie Levon Thorbs. Thorbs' wallet was recovered by Robert Weaver, a neighbor of the defendant's girlfriend, at the back of his trailer beneath a window air conditioning unit. Thorbs' credit cards and some checks payable to him were inside the wallet.

Although there is no independent evidence tending to prove the *corpus delicti* of the Herring armed robbery, we are convinced that the trustworthiness of the defendant's confession that he robbed Herring of $10.00 has been amply established by the overwhelming amount and convincing nature of the corroborative

evidence just recited of more serious crimes committed against the victim and Thorbs at the time of the robbery. The evidence presented by the prosecution at trial mirrored almost precisely the defendant's version of how he committed the other crimes charged.

We note that in most of the cases we have reviewed the defendant was charged with only one offense, and the question for the court was whether there were sufficient facts and circumstances corroborative of the defendant's confession *to that single crime* to warrant a belief in the trustworthiness of his admissions. Only in *State v. Hunt*, 570 S.W. 2d 777 (Mo. 1978), conviction vacated on other grounds, 441 U.S. 901 (1979), have we found a case in which a court was presented with a factual situation similar to that presented in the instant case where the defendant was accused of more than one crime, the *corpus delicti* plainly was established as to one, and the issue was whether the defendant's confession to the other crime was sufficiently corroborated by independent evidence so as to engender a belief in its truth. In rejecting the defendant's argument that there was insufficient evidence of the *corpus delicti* of sodomy against the victim of a kidnapping to sustain a conviction for the sodomy offense, the Missouri court ruled:

> It is sufficient, in addition to the extrajudicial confessions, which in this instance in express terms admit all the indictment charges, that there be such extrinsic corroborative circumstances, as will, taken in connection with the confession, produce conviction of the defendant's guilt in the minds of the jury.

Id. at 781.

We therefore hold that under the particular facts presented in this case, where the defendant was charged with multiple crimes; the *corpus delicti* as to the more serious offenses was established independently of the defendant's confession; an element of the crime, use of a deadly weapon, was also established by independent evidence; and the State's evidence closely paralleled the defendant's statements as to the manner in which he committed the offenses, there was sufficient corroborative evidence to bolster the truthfulness of the defendant's confession and to sustain a conviction as to the Herring armed robbery even

though there was no independent evidence tending to prove the *corpus delicti* of that crime.

By this ruling, we expressly overrule language in *State v. Franklin*, 308 N.C. 682, 304 S.E. 2d 579 (1983), *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983) and other prior cases on the *corpus delicti* issue cited in those opinions which is inconsistent with our holding in the instant case.

Finally, on the issue of the death qualified jury, the defendant concedes that this Court has decided the issue against him in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980) and in *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983). The defendant asks that we reconsider our holding. This we decline to do.

The defendant was convicted by a jury after a fair trial, free of prejudicial error.

No error.

WALTER C. WALLS AND WIFE, SUSAN B. WALLS v. H. G. GROHMAN AND WIFE, CATHERINE H. GROHMAN

No. 96PA85

(Filed 10 December 1985)

Adverse Possession § 3— possession under mistake as to true boundary—return to prior rule—overruling of cases

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse, and if such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. This decision returns to the rule applicable in North Carolina prior to 1951 and overrules *Price v. Whisnant*, 236 N.C. 381, 72 S.E. 2d 851 (1952), *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630 (1951), and decisions of the Court of Appeals to the extent that they apply a different rule.

ON discretionary review of a decision of the Court of Appeals, 72 N.C. App. 443, 324 S.E. 2d 874 (1985), affirming a judgment for the plaintiffs entered 21 February 1984 in the District

Court, NEW HANOVER County. Heard in the Supreme Court on 15 October 1985.

Carr, Swails and Huffine, by James B. Swails, for plaintiff-appellees.

Addison Hewlett, Jr. and John F. Crossley for defendant-appellants.

BILLINGS, Justice.

Plaintiffs instituted this action to remove a cloud on the title to their property, the cloud being the defendants' claim to a fifty plus-foot-wide strip along the northern side of the property. The defendants claim the disputed strip by adverse possession.

The matter was submitted to a referee, but the first referee's report was set aside for failure of the referee to conduct a hearing. In a second report, after a hearing, the referee found that the plaintiffs had record title to the strip in question but that the defendants had acquired title by adverse possession for not less than twenty years. The plaintiffs filed exceptions to the referee's report. Following a hearing on the exceptions, Judge Tucker concluded that the report and order did not correctly apply the law of North Carolina. He therefore entered judgment for the plaintiffs, and the defendants appealed to the Court of Appeals, which affirmed the judgment.

All parties' claims of title derive from Mrs. Kittie Horne Lewis and husband, Henry G. Lewis. The defendants have claimed title since 28 October 1948 when Kittie Horne Lewis and Henry G. Lewis deeded to defendant Catherine H. Grohman a tract of land adjoining the disputed strip. Catherine Grohman thought the tract included the disputed strip.

As found by the referee, the plaintiffs' chain of title is a series of deeds as follows:

a) Kittie Horne Lewis and husband, Henry G. Lewis, to Bruce Lewis dated 21 June 1949.

b) Bruce Lewis and wife, Viola F. Lewis, to Paul Griffin, Jr. and wife, Amanda Griffin, dated 17 December 1955.

c) Amanda Griffin, widow, to Walter C. Walls and wife, Susan B. Walls, dated 9 November 1979.

The referee's finding numbered I 9 contains the following:

The Plaintiffs, although junior in time, have the better *record* title to that portion of land in dispute between them and the lands of the Defendants. (Emphasis in original.)

According to the referee's findings, the common source, Mrs. Kittie Horne Lewis and her husband, divided certain property known as Tract #5 of the Horne Division among five children, two of whom were defendant Catherine H. Grohman and Bruce Lewis, plaintiffs' predecessor in title. Tract #5 measured 1,083 feet on its eastern side, which bordered on the right-of-way of "New Federal Point Road," presently State Road 1492 and called Myrtle Grove Loop Road. The conveyances, which were intended to convey the entire Tract #5, were, in chronological order, as follows:

Date	Grantee	Road Frontage
17 December 1945	Alma Lewis Rouse	256 feet
18 June 1946	Andrew F. Dicksey	131 feet
8 December 1947	Phoenix T. Dicksey	190 feet
28 October 1948	Catherine H. Grohman	242 feet
21 June 1949	Bruce Lewis	212 feet
		1,031 feet

Note that the road frontage of the lots actually conveyed totals 1,031 feet, or 52 feet less than the total of Tract #5.

The beginning point of defendant Catherine Grohman's deed is 256 feet along the road south of the northeast corner of the tract, the point which corresponds to the southeast corner of the tract earlier conveyed to Alma L. Rouse. The Grohman deed then calls for a distance along the road of 242 feet. The Grohmans claim that their tract actually extends to a point 293-plus feet along the road from the beginning point, and that the deed conveys almost 52 feet less than they claim and than was intended.

The deed to Bruce Lewis calls for a beginning point at the Grohman southeast corner and runs along the road to the northeast corner of the property previously conveyed to Phoenix T.

Dicksey. The deed to Lewis states that distance as 212 feet; however, the distance between the *actually* conveyed Grohman tract and the Phoenix T. Dicksey tract is 266 feet, or 54 feet more than the deed to Lewis indicates. Thus, if the call had begun at the southeast corner of Bruce Lewis' tract, corresponding to the northeast corner of the Phoenix T. Dicksey tract, and run 212 feet north along the road, the resulting point would not be the southeast corner of the property described in the deed to the defendant Catherine H. Grohman, but would be slightly south of the southeast corner as *claimed* by the defendants.

The defendants contend that Catherine Grohman's parents intended to convey to her a tract of land which included the disputed strip. The referee's findings include the following:

> Mrs. Grohman does not know what road frontage distance her deed called for, but claims all lands to a stake her father showed her at the east terminus of the hedgerow, and running westerly toward the walnut tree. Neighbors and former employees of Griffin and Grohman agree to knowledge of that line as being the Grohman line.

Other findings of the referee further supported his conclusions that:

> 3. Mrs. Catherine H. Grohman has been in exclusive possession of that part of the Walls tract south of the line called for in her deed under a claim of right and title up to a point which runs south 26 degrees 54 minutes west from the Rouse southeast corner along the old right of way of the road for a distance of 293.6 feet, and extending westerly, north 48 degrees 3 minutes west 1,411 feet to an old iron in a ditch.
>
> 4. Such possession by the Grohmans has been actual, open, hostile, exclusive and continuous for a period of more than thirty years before the Plaintiffs were conveyed their tract. The possession has been characterized as that of an owner exercising exclusive dominion over the lands now in dispute up to a marked and known line in making such use of the land as it is reasonably susceptible of in its condition.

The referee then ordered that the disputed land, north of a line described in the order as the division line between the lands of the plaintiffs and the defendants, was the plaintiffs' land.

The District Court Judge found that the referee had incorrectly applied North Carolina law relating to adverse possession and ordered title to the disputed land quieted in plaintiff. The trial judge's order contains, *inter alia*, the following:

> It was testified to by Mrs. Grohman, one of the Defendants, that when the family division of the property of her mother and father was made, that it was her understanding that her land went to an iron stake and that it was her understanding that the property conveyed to her by her mother included the lands and premises which are the subject of this action. This testimony was apparently the basis of a conclusion by the Referee that the property claimed by Mrs. Grohman was within the boundaries of lands believed and claimed to be theirs as a matter of right and title from and after the deed to Mrs. Grohman from her mother. Item #3 under the Referee's Conclusions of Law finds that Mrs. Grohman has been in exclusive possession of that part of the Wall's tract south of the line called for in her deed under "a claim of right and title." *This finding is indicitive [sic] of a possession on the part of the Defendants which was not adverse, as adverse possession is defined under the laws of the State of North Carolina, but that the Defendant was under the impression that she was occupying property of her own and was claiming only to a line which she believed* to be a boundary of the lands conveyed to her by her parents. This contention of the Defendants is amply described under Section III Possession of the Disputed Area-Item 3 of the Referee's report and finding. It is plain from the findings of the referee that the contentions of the Defendants were that they believed the land claimed by them under a claim of adverse possession was land encompassed by the description in the deed given to Mrs. Grohman by her parents and recorded in Book 429, at Page 263. It is quite clear from the testimony of the Defendants and their witnesses that the Defendants occupied such portions of the land under controversy as were occupied by them, under the belief that they were asserting possession over lands conveyed to Mrs. Grohman by her parents and that such lands were encompassed in the boundaries of the deed to them. *Under the law of North Carolina this posses-*

> *sion does not meet the test of adverse possession as decided by the Courts of this State.* (Emphasis in original.)

The Court of Appeals agreed with the District Court's application of the law of adverse possession, citing *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E. 2d 527 (1978), *cert. denied*, 296 N.C. 411, 251 S.E. 2d 470 (1979); *Price v. Whisnant*, 236 N.C. 381, 72 S.E. 2d 851 (1952) and *Garris v. Butler*, 15 N.C. App. 268, 189 S.E. 2d 809 (1972). We allowed the defendants' petition for discretionary review of the decision of the Court of Appeals which held:

> there was sufficient evidence from which the district court could find and conclude that defendants exercised possession over the disputed area solely because they believed that it was in fact their land and that it was included in the description contained in their deed. Such possession may not be considered adverse.

72 N.C. App. at 449, 324 S.E. 2d at 877-78.

We reverse.

There is no question that for years the law in North Carolina has been understood as described in the following quotation from Hetrick, *Webster's Real Estate Law In North Carolina* § 293, (rev. ed. 1981):

> Contrary to the weight of American authority, a conscious intention to claim title to the land of the true owner is required to make out adverse possession in North Carolina if there is no color of title. In this state, if the possession is by mistake due to a mistaken boundary, or if the possession is equivocal in character, and without color of title, it is not adverse. The existence of mistake negates the requisite intent to establish adverse possession.

Id. at 320.

The quotation from Hetrick is supported by citations beginning with *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630 (1951). However, prior to that case, the North Carolina law clearly had been contra.

In the 1922 case of *Dawson v. Abbott*, 184 N.C. 192, 114 S.E. 15, this Court awarded a new trial to the plaintiff because the

trial judge instructed the jury: "If a man is mistaken as to where his line is, and gets over the line through mistake, and holds it thinking it is his own when in truth it is not, but without intending to claim beyond the true line, that would not be adverse possession." *Id.* at 194-95, 114 S.E. at 16. The Court said that even if that instruction was a correct statement of the law, it was error for the trial court to give it in view of the evidence in the case. The Court then summarized the plaintiff's testimony as follows:

> Plaintiff did say while testifying that he did not claim any land not rightfully belonging to him, but he added, very distinctly and firmly, and without the slightest equivocation, that he had not done so, but only claimed what he knew to be his land.

Id. at 195, 114 S.E. at 16. The following passage from 1 Cyc. pp. 1036-1038 was then quoted and applied as the law of this state:

> It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseizin. There must be an intention to claim title to all land within a certain boundary, whether it eventually be the correct one or not. Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another, believing it to be his own, up to a mistaken line, claiming title to it and so holding, the holding is adverse, and, if continued for the requisite period, will give title by adverse possession.

Id. at 196, 114 S.E. at 16.

The general rule throughout the United States regarding possession under mistake or ignorance is as stated in the following quotation from 3 Am. Jur. 2d *Adverse Possession* § 41 (1962):

> It is a widely accepted rule that where one, in ignorance of his actual boundaries, takes and holds possession by mistake up to a certain line beyond his limits, upon the claim and in the belief that it is the true line, with the intention to claim title, and thus, if necessary, to acquire "title by possession" up to that line, such possession, having the requisite duration and continuity, will ripen into title. Thus, the mere fact that the possession originated in a mistake or in ig-

> norance as to the location of the true boundary line will not prevent the running of the statute of limitations, for if the person in possession intends to claim the land to the line occupied by him as his own and his possession of it is open and exclusive for the statutory period, such possession will be held to be adverse and to vest the title in him under the statute, even though the land was not inclosed. But if, on the other hand, a party, through ignorance, inadvertence, or mistake, occupies up to a given line beyond his actual boundary, because he believes it to be the true line, but has no intention to claim title to that extent if it should be ascertained that such line is on his neighbor's land, an indispensable element of adverse possession is wanting. In such a case, the intent to claim title exists only upon the condition that the line acted upon is, in fact, the true line. The intention is not absolute, but provisional, and consequently, the possession is not adverse. Thus, where the possession is up to a fixed boundary under a mistake as to the true line and the intention is to hold only to the true line, such possession is not hostile and will not ripen into title. The gist of the cases is that merely claiming land to a boundary, believing it to be the true line, is not sufficient to constitute a basis for a claim by adverse possession, since the claim of right must be as broad as the possession.
>
> Where an occupant of land is in doubt as to the location of the true line it is reasonable to inquire as to his state of mind in occupying the land in dispute, and if, having such doubt, he intends to hold the disputed area only if that area is included in the land described in his deed, then it is reasonable to say that the requisite hostility is lacking; but if the occupation of the disputed area is under a mistaken belief that it is included in the description in his deed—a state of mind sometimes described as pure mistake to distinguish it from the cases of conscious doubt—then his possession is adverse.

See also 80 A.L.R. 2d 1161, § 3 (1961).

The case of *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630 (1951) seems to have intended to apply the above-quoted rule, for there the Court said that the plaintiff's evidence was insufficient

to support adverse possession because "he was not claiming it as against the true owner when he first discovered the error and went to see the defendant and then his own lawyer about fixing up papers to make it a joint driveway. Prior to this time, 'he did not intend to usurp a possession beyond the boundaries to which he had a good title.' *Bynum v. Carter*, 26 N.C. 310." *Id.* at 257, 63 S.E. 2d at 631. However, the Court went on to say: "His claim then was not one of adverse possession but one of rightful ownership. If his possession were exclusive, open and notorious, as he now contends, no one regarded it as hostile or adverse, not even the plaintiff himself, for he was not conscious of using his neighbor's land. 'I thought all the time it was mine.'" *Id.* at 258, 63 S.E. 2d at 631.

The next year in *Battle v. Battle*, 235 N.C. 499, 70 S.E. 2d 492 (1952) plaintiffs James H. Boddie and Julia Boddie Galloway's claim of title to certain property was dependent upon the adverse possession of their parents, Arcenia and Julius Boddie. The plaintiffs' contention and evidence was that when Arcenia Boddie's mother conveyed certain property to Arcenia and Julius Boddie, the disputed property, lot 817, was inadvertently omitted from the deed. In affirming judgment for the plaintiffs this Court said:

> The evidence of the investiture of Arcenia Boddie and her husband in possession of this lot and of the execution of a deed intended by the owner to convey it to them, was properly submitted to the jury to be considered with the other evidence of continuous and exclusive occupancy in the support of plaintiffs' contention that possession thereafter by them and those to whom their right descended was adverse, and that it was maintained with intent to claim against the former owner and all other persons.

Id. at 501, 70 S.E. 2d at 494.

However, a few months later in *Price v. Whisnant*, 236 N.C. 381, 72 S.E. 2d 851 (1952) this Court relied upon *Gibson* in concluding that adverse possession was not established. The Court in *Price* for the first time announced and applied the rule that has been followed since that time:

> The plaintiff makes it clear that when he went into possession of the Broyhill tract of land he intended to claim only

> the land described in his deed from Broyhill and he thought his deed covered the disputed area. There was no occasion for any change in his belief prior to his discovery in 1921 that the land now in dispute was not covered by his deed. *As a consequence, so long as he thought his deed covered the disputed area, his possession was not adverse but a claim of rightful ownership.* (Emphasis added.)
>
> . . .
>
> Therefore, no act of the plaintiff, however exclusive, open and notorious it may have been prior to the time he discovered the area now in dispute was not covered by the description in his deed, will be considered adverse.

Id. at 385, 72 S.E. 2d at 854.

The Court of Appeals has relied upon and repeated the rule stated in *Gibson* as amplified in *Price* in the later cases of *Garris v. Butler*, 15 N.C. App. 268, 189 S.E. 2d 809 (1972); *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E. 2d 527 (1978), *cert. denied*, 296 N.C. 411, 251 S.E. 2d 470 (1979) and the instant case. The rule was stated in *Garris* as follows:

> Where as here, a grantee goes into possession of the tract of land conveyed to him and also a contiguous tract not included in the conveyance under the mistaken belief that the contiguous tract was included within the description in his deed, no act of such grantee, however exclusive, open and notorious will constitute adverse possession of the contiguous tract so long as he thinks his deed covers the contiguous tract, since there is no intent on his part to claim adverse to the true owner.

15 N.C. App. at 270-71, 189 S.E. 2d at 810-11.

The rule as applied in the more recent North Carolina cases has been criticized as rewarding only the claimant who is a thief.[1]

1. This view "not only confers a premium upon conscious wrongdoing, but introduces into the law of adverse possession a requirement never otherwise asserted. Under such a rule there could be no adverse possession unless the possessor had the intention of claiming the land if his title is defective. Ordinarily a person who believes that he owns certain land, or land up to a certain boundary, has no thought as to what he will do if he is mistaken. Even assuming that he has an intention, such intention is necessarily difficult, and frequently impossible, of determination. If his own testimony concerning his motive is accepted a premium is placed on perjury." *Tiffany on Real Property*, § 551 (abr. 3rd ed. 1970).

We have concluded that a rule which requires the adverse possessor to be a thief in order for his possession of the property to be "adverse" is not reasonable, and we now join the overwhelming majority of states, return to the law as it existed prior to *Price* and *Gibson*, and hold that when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. We therefore overrule *Price v. Whisnant*, 236 N.C. 381, 72 S.E. 2d 851 (1952); *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630 (1951); *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E. 2d 527 (1978), *cert. denied*, 296 N.C. 411, 251 S.E. 2d 470 (1979); and *Garris v. Butler*, 15 N.C. App. 268, 189 S.E. 2d 809 (1972) to the extent that they apply a different rule.

Applying this rule to the facts before us, it is clear that the referee's findings support a conclusion that the defendants have acquired title to the disputed tract by adverse possession for more than twenty years.

Therefore, we reverse the Court of Appeals and remand this case to the Court of Appeals for further remand to the District Court of New Hanover County for entry of judgment in accordance with the referee's report.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MICHAEL LEE PARKER AND JAMES EDWARD PARKER

No. 344A84

(Filed 10 December 1985)

1. Criminal Law § 138.23— mitigating factor—passive participant—no error in refusal to find

The trial court did not err in a prosecution for murder, armed robbery, and kidnapping by failing to find the mitigating factor that Michael Parker

was a passive participant where Michael Parker did nothing to discourage his accomplices from stabbing the victim and dragging him into the woods, where he bled to death slowly; Michael Parker did nothing to counteract the ultimate effect of his accomplices' actions; there was evidence that Michael Parker was pleased with the result because he bore ill will for the victim; and Michael Parker participated to the extent that he was a lookout, covered up blood in the road, disarmed the victim after the stabbing when the victim gained control of the knife, and left the victim to die. Although Michael Parker did not plan or actually commit the murder, he was more than a passive onlooker and never remonstrated with his accomplices about it. N.C.G.S. 15A-1340.4(a)(2)c.

2. Criminal Law § 138.17— aggravating factor—motivated by desire to escape process of law—error

The trial court erred in a prosecution for murder, armed robbery, and kidnapping by finding as an aggravating factor that Michael Parker was motivated by the desire to escape the processes of the law where all of the evidence showed that Michael Parker participated based on ill will harbored toward the victim because the victim had in the past reported Michael's brother to the police and had accused both defendants of other crimes.

3. Criminal Law § 138.29— aggravating factor—no remorse—error

The trial court erred in a prosecution for murder, armed robbery, and kidnapping by finding in aggravation that Michael Parker showed a lack of remorse for the crimes where there was no evidence of any lack of remorse except at the very time he was committing the crime charged. It is not enough to show merely that there was no remorse at the very time the crime was being committed.

4. Criminal Law § 138.14— one aggravating factor outweighed three mitigating factors—no abuse of discretion

The trial court did not abuse its discretion when sentencing James Parker for murder, armed robbery, and kidnapping by finding that the aggravating factor outweighed the three mitigating factors and sentencing him to the maximum terms for all offenses. Only one mitigating factor weighed heavily in defendant's favor and the two non-statutory mitigating factors did not tilt the scales so heavily in defendant's favor that the weighing process was removed from the sentencing judge's discretion. N.C.G.S. 15A-1340.4(a)(1)f.

5. Criminal Law § 138.14— greater than presumptive term—one aggravating factor not always enough

The Court of Appeals' language in *State v. Baucom*, 66 N.C. App. 298, 302, that only one factor in aggravation is necessary to support a sentence greater than the presumptive term, will not always be true. In some cases, a single, relatively minor aggravating circumstance simply will not reasonably outweigh a number of highly significant mitigating factors.

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

APPEAL by defendants under N.C.G.S. § 15A-1444(a1) from life sentences imposed by *Johnson, J.*, presiding at the 23 Febru-

ary 1984 Session of ORANGE County Superior Court. Defendants' petitions to bypass the Court of Appeals as to sentences less than life allowed.

Rufus L. Edmisten, Attorney General, by Douglas A. Johnston and Norma S. Harrell, Assistant Attorneys General, for the state.

J. Kirk Osborn, Public Defender, for defendant appellant Michael Lee Parker.

Alonzo Brown Coleman, Jr., for defendant appellant James Edward Parker.

EXUM, Justice.

Upon defendants' pleas of guilty to second degree murder, first degree kidnapping and armed robbery and following a sentencing hearing pursuant to North Carolina's Fair Sentencing Act, N.C.G.S. §§ 15A-1340.1 to 1340.4 (1983), defendants received sentences of life imprisonment for second degree murder. The kidnapping and robbery cases were consolidated for judgment and sentences of 40 years were imposed on both defendants, the sentences to begin at the expiration of the life sentences. All sentences were in excess of the presumptive sentences allowed under N.C.G.S. §§ 14-17, 14-87, and 14-39.

I.

The state offered evidence tending to show the following:

On the morning of 7 July 1983, defendants went with Mark Bethea to the home of their sister, Belinda Noell, and remained there throughout the day. Late that evening, Michael Parker asked Noell's neighbor, Edwin Thomas ("Ned") Williams, Jr., the victim, for a ride. As defendants, Bethea and Williams were traveling north towards Chapel Hill on Highway 15-501, Michael Parker pulled a gun (later found to be a starter's pistol, incapable of firing bullets) on Williams and ordered him to stop the car. Williams pulled off onto Bennett Road, a dirt road off Highway 15-501, and stopped. James Parker and Bethea pulled Williams out of the car, and James Parker stabbed him with Bethea's knife. Williams removed the knife from his body, and Michael Parker kicked it out of his hand. Michael Parker went back to Highway

15-501 to make sure that no one drove down Bennett Road. James Parker and Bethea tied Williams' hands, dragged him into the woods and tied him to a tree, where he bled to death. Michael returned, did not see Williams sitting in the road, and did not ask his brother and Bethea what had happened to Williams because he "could care less." Michael was angry at Williams because the latter had reported James Parker to the police in the past, and had accused defendants of other break-ins as well.

Before leaving in Williams' car, the three kicked dirt over a large amount of blood in the road. They drove to Chapel Hill, visited some friends, gave a girl a ride home, and bought beer. The Parkers and Bethea eventually headed for Noell's house, intending to pick up their clothes and flee first to defendants' father's house in Troy, North Carolina, and then to New Jersey. Outstanding arrest orders against Michael and Bethea for failure to appear in court on fishing violations prompted their planned flight.

Defendants each had only one prior brush with the law. In April 1983 Michael pleaded guilty to two counts of misdemeanor breaking or entering and larceny and one count of damage to public property. He was placed on probation and ordered to pay costs and $250 restitution. In August 1981, James was convicted of attempted breaking or entering. The evidence showed he was caught by police on school grounds looking into a classroom window. The court imposed a six-month suspended sentence and a fine of $25.

For two or three weeks before the crimes now under consideration were committed, all three defendants had been planning to leave town, supposedly to avoid the arrest of Michael and Bethea for failure to appear in court on fishing violations. Michael and Bethea had taken the fishing violation ticket to the magistrate with $35, but $55 or $60 was required. Defendants planned to flee ultimately to New Jersey, where James Parker had acquaintances. Defendants had not planned to hurt anyone; they merely intended to straight-wire a car and leave the state. The state also introduced Michael Parker's statement that at the time of the stabbing he did not care what happened to the victim.

Michael Parker offered evidence from a clinical psychologist specializing in corrections that the defendant's statements indicat-

ing an apparent lack of remorse may have been a defense mechanism "for covering up great inner turmoil that he can't come to grips with." The witness noted, however, that in the defendant's case that phenomenon is merely a possibility, not a diagnosis.

After a sentencing hearing the trial court found as to Michael Parker one statutory aggravating factor, a prior conviction for an offense punishable by more than 60 days' confinement, N.C.G.S. § 15A-1340.4(a)(1)(o), and two nonstatutory aggravating factors: (1) defendant's motive in part was to escape from the processes of the law for failure to appear in court for certain fishing violations and (2) defendant made specific declarations of indifference to the victim's death, thus showing a lack of remorse. In mitigation the trial court found four factors, two statutory and two nonstatutory. These were: (1) defendant's limited mental capacity at the time of the commission of the offense significantly reduced his culpability, *id.* at (a)(2)(e); (2) defendant, at an early stage of the criminal process, voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer, *id.* at (a)(2)(1); (3) defendant came from an economically deprived home and lacked adequate supervision, clothing, and hygiene; and (4) defendant, at the time of the offenses, was 18 years of age. The trial court found that the aggravating factors outweighed the mitigating factors. All of the foregoing findings were made to apply to all offenses.

In sentencing James Parker, the trial court found one statutory factor in aggravation: defendant had a prior conviction for an offense punishable by more than 60 days' confinement, *id.* at (a)(1)(o). In mitigation, the trial court found one statutory and two nonstatutory factors: (1) defendant's limited mental capacity at the time of the offense significantly reduced his culpability, *id.* at (a)(2)(e); (2) defendant was a victim of child abuse and neglect raised in abject poverty in an unstable and chaotic home environment; and (3) defendant's background does not demonstrate a habitually violent nature. The trial court found that the aggravating factors outweighed those in mitigation. Again all findings were made to apply to all offenses.

The questions raised by defendant Michael Parker's appeal are first whether the trial court erred in finding as aggravating factors that: (1) defendant's motive for the murder was to escape

from the processes of the law for what he perceived to be outstanding arrest orders for failure to appear in court on fishing violations and (2) defendant made specific declarations of indifference to the victim's death, thus showing lack of remorse. Second, Michael contends the trial court erred in failing to find the following factors in mitigation of punishment: (1) defendant was a passive participant in all the crimes; (2) defendant could not reasonably foresee bodily harm to the victim; (3) despite defendant's record of committing property crimes, he had no record of committing violent crimes or carrying a weapon; (4) defendant did not use the knife which inflicted the fatal wound; (5) defendant did not assist in dragging the victim away and tying him to a tree; and (6) defendant was not armed with a deadly weapon throughout the entire matter.

Defendant James Parker contends it was an abuse of discretion for the trial court to find that the aggravating factor found against him outweighed three mitigating factors found in his favor.

II.

A.

[1] We first address defendant Michael Parker's contention that the trial court erred in failing to find as a statutory mitigating factor that he was only a passive participant in the murder of Williams. N.C.G.S. § 15A-1340.4(a)(2)c. We think there was no error in this determination by the trial court.

When evidence in support of a statutory mitigating factor "is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act." *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E. 2d 451, 454 (1983). Under N.C.G.S. § 15A-1340.4(a) judges must consider all aggravating and mitigating factors before imposing a prison term other than the presumptive term. "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,'" as required under

N.C.G.S. § 15A-1340.3. *State v. Jones*, 309 N.C. at 219, 306 S.E. 2d at 455. The state bears the burden of persuasion on aggravating factors and the defendant bears the burden of persuasion on mitigating factors. *Id.*

Thus when a defendant argues that the trial court erred in failing to find a statutory mitigating factor proved by uncontradicted evidence, he is asking the court to conclude that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn," and that the credibility of the evidence "is manifest as a matter of law." *Id.* at 219-220, 306 S.E. 2d at 455, citing *North Carolina National Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E. 2d 388, 395 (1979). "Determining the credibility of evidence is at the heart of the fact finding function. Nevertheless, in order to give proper effect to the Fair Sentencing Act, we must find the sentencing judge in error if he fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible." *State v. Jones*, 309 N.C. at 220, 306 S.E. 2d at 456.

In *State v. Jones* defendant played an active role in an armed robbery he planned with two women. After the robbery when defendant and the other two perpetrators were in the car ready to leave the store, one of the women decided to go back and kill the cashier. Defendant and the other perpetrator unsuccessfully tried to persuade her not to do so. As that evidence was uncontradicted, unimpeached and manifestly credible, we held the trial court erred in failing to find that the defendant played a passive role in the murder and remanded the case for a new sentencing hearing. *Id.* at 221, 306 S.E. 2d at 456.

Important for purposes of this decision is *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689, 698 (1983), in which we said:

> [I]n every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.

Although Michael Parker apparently played an active role in the armed robbery and kidnapping of Williams, his role in Williams'

murder is less clear. It is clear that Michael did not anticipate or plan the murder, did not use the murder weapon, and did not participate in dragging the victim away and tying him to a tree where he bled to death. Nevertheless, Michael's acts do not so disassociate him from the murder that *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983), is controlling. Jones actively attempted to persuade his cohort not to kill the victim. Granted Jones had more time to discuss the murder before its commission than did Michael Parker, but the victim in *Jones* died almost instantly from a single gunshot wound. Williams received one stab wound which would not necessarily have caused his death; the autopsy showed he bled to death slowly. Michael did nothing to discourage his brother and Bethea from stabbing Williams and dragging him into the woods and did nothing to counteract the ultimate effect of their actions. There is evidence that Michael was pleased with the result at the time because he bore ill will for the victim. Michael did participate in the murder to the extent that he was a lookout, covered up the blood in the road, disarmed Williams after the stabbing when Williams had gained control of the knife, and left Williams to die. Although Michael did not plan, anticipate or actually commit the murder, he was more than a passive onlooker and never, as defendant did in *Jones*, remonstrated with his accomplices about it.

The evidence, then, does not so clearly establish that Michael Parker was a passive participant in the murder that no reasonable inferences to the contrary can be drawn. Judge Johnson, therefore, did not err in failing to find this mitigating circumstance.

B.

[2] We next turn to Michael Parker's contention that the sentencing court erred in finding as an aggravating factor in the murder case that this crime was motivated by Michael's desire to escape the processes of the law for what Michael perceived to be arrest orders for failure to appear in court on fishing violations.

We agree that this finding was error. There is no evidence to support it. All evidence tends to show Michael did not plan, anticipate or actually commit the murder. To the extent he did participate in it, all the evidence shows it was because of ill will harbored toward Williams because Williams in the past had

reported his brother to police and had accused both defendants of other crimes as well. As noted above, each offense, even if consolidated for trial or hearing with another, must, unless consolidated also for judgment, be treated separately at sentencing in determining which aggravating and mitigating circumstances pertain to which offenses. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689. Thus, while Judge Johnson *properly* found this factor of Michael's motivation in aggravation of his punishment for robbery and kidnapping, he erred in finding it as an aggravating factor in the murder case.

C.

[3] We next consider whether the sentencing court erred in finding in aggravation of both of Michael's sentences that Michael showed a lack of remorse for the crimes. We think there is no evidentiary support for this finding.

The only possible evidentiary basis for the finding was defendant's statements to police the morning after the crime indicating that *at the time of the stabbing* he did not care what happened to the victim. Michael did not thereafter make similar statements of indifference and stressed in the statements he made that his indifference to the crimes existed *at the time they were committed.* At the sentencing hearing Michael also expressed his regret to the victim's father.

For the state to prove lack of remorse as an aggravating circumstance, it is not enough to show merely that there was no remorse at the very time the crime was being committed. Rarely does a defendant have remorse for a crime he is presently committing. Almost always remorse occurs, if at all, sometime after the commission when defendant has had an opportunity to reflect on his criminal deed. If after such time for reflection remorse does not come, and there is evidence of this fact, then lack of remorse properly may be found by the sentencing judge as an aggravating circumstance.

Here there is no evidence of any lack of remorse on Michael's part except at the very time he was committing the crime charged. This is not enough to support the aggravating circumstance of lack of remorse found by the trial court.

III.

[4] Defendant James Parker contends that the judge at the sentencing hearing erred in finding that the aggravating factor outweighed the three mitigating factors and in sentencing him to the maximum terms for all offenses. We disagree.

> The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. Presumptive sentences established for every felony provide certainty. Furthermore, no convicted felon may be sentenced outside the minimum/maximum statutory limits set out for the particular felony. The sentencing judge's discretion to impose a sentence within the statutory limits, but greater or lesser than the presumptive term, is carefully guarded by the requirement that he make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence; that is, by the greater weight of the evidence.

State v. Ahearn, 307 N.C. 584, 596, 300 S.E. 2d 689, 696-97. Thus a sentencing judge must justify a sentence which deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by a preponderance of the evidence. *Id.* at 597, 300 S.E. 2d at 697. In accordance with the Act a sentencing judge need not justify the weight he or she attaches to any factor. A sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa. "Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion." *State v. Ahearn*, 307 N.C. at 597, 300 S.E. 2d at 697, *quoting State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661 (1982).

The balance struck by the sentencing judge in weighing the aggravating against the mitigating factors, being a matter within his discretion, will not be disturbed unless it is "manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d

829, 833 (1985), or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E. 2d 450, 465 (1985). We will not ordinarily disturb the trial judge's weighing of aggravating and mitigating factors. When, however, there is no rational basis for the manner in which the aggravating and mitigating factors were weighed by the sentencing judge, his decision will amount to an abuse of discretion. *See State v. Brown*, 314 N.C. 588, 336 S.E. 2d 388 (1985), citing *White v. White*, 312 N.C. at 778, 324 S.E. 2d at 833.

Under the circumstances of this case we are compelled to conclude that the sentencing judge did not abuse his discretion. In examining the mitigating factors found, we note only one which weighs heavily in defendant's favor: that at the time of the offenses, he was suffering from a mental condition insufficient to constitute a defense but significantly reducing his culpability. Evidence supporting this finding was that James had an I.Q. of 57, low enough, according to defendant's expert in clinical psychology, to classify him as mentally handicapped, or retarded. The finding of limited mental capacity was the only statutory mitigating factor found in James' case.

Two nonstatutory factors were properly found in mitigation. One, that defendant suffered child abuse and neglect and was raised in an impoverished and unstable home, was supported by ample evidence of defendant's disadvantaged environment. This kind of upbringing is often but not always conducive to later criminal behavior. The second nonstatutory mitigating factor was that defendant's background did not demonstrate a habitually violent nature. While both of these factors may in this case be considered significant, they do not tilt the scales so heavily in defendant's favor that the weighing process was removed from the sentencing judge's discretion and determinable as a matter of law.

As already noted, the sentencing judge need not justify the weight accorded any factor supported by a preponderance of the evidence. The weighing process lies within his or her sound discretion, not to be overturned on appeal unless manifestly unsupported by reason. It is, after all, the sentencing judge who hears and observes the witnesses and the defendant firsthand. We have before us only the cold record. We are, therefore, reluc-

tant to overturn a sentencing judge's weighing of aggravating and mitigating factors even if, based solely on the record, we might have weighed them differently. We are not in this case willing to conclude that the weighing of the factors was manifestly unsupported by reason. We think rather that reasonable persons could differ as to how they should be weighed. We therefore find no error in the sentencing of James Parker.

Further, although the sentencing judge found only one aggravating factor in James' case, a prior conviction of attempted breaking and entering, we note, without so holding, the evidence might have supported an additional finding that the murder was heinous, atrocious or cruel. N.C.G.S. § 15A-1340.4(a)(1)f.

[5] We take this opportunity to comment on advice offered sentencing judges in *State v. Baucom*, 66 N.C. App. 298, 302, 311 S.E. 2d 73, 75 (1984); and *State v. Benfield*, 67 N.C. App. 490, 494, 313 S.E. 2d 198, 200 (1984). In those cases, the Court of Appeals said:

> [O]nly one factor in aggravation is necessary to support a sentence greater than the presumptive term. . . . [T]he trial judge may wish to exercise restraint when considering nonstatutory aggravating factors after having found statutory factors. This prudent course of conduct would lessen the chance of having the case remanded for resentencing.

Id.

The first of the above-quoted statements about sentencing under the Fair Sentencing Act will not always be true. In some cases a single, relatively minor aggravating circumstance simply will not reasonably outweigh a number of highly significant mitigating factors. Although the balancing of aggravating and mitigating circumstances is left to the sentencing judge's discretion, this decision is not totally insulated from all meaningful appellate review.

The Court of Appeals' advice should not be read to encourage sentencing judges to take a less than forthright approach to their responsibilities under the Fair Sentencing Act out of an undue concern that their sentences will be upset on appeal. A forthright approach requires that sentencing judges find all the statutory aggravating and mitigating circumstances they conclude are sup-

ported by the evidence. We agree, as the Court of Appeals advised, that it will be prudent to exercise restraint in finding questionable nonstatutory aggravating circumstances. But if there are nonstatutory aggravating or mitigating circumstances, which are supported by the evidence, relevant to the sentencing decision and peculiar to the case in that they would not be universally applicable to all sentences,* then sentencing judges should not hesitate to find them.

For the reasons stated only Michael Parker is given a new sentencing hearing. As to James Parker we find no error. The result is

As to Michael Parker in Case Nos. 83CRS8526, 83CRS8527, 83CRS8681, remanded for a new sentencing hearing.

As to James Parker in Case Nos. 83CRS8529, 83CRS8530, 83CRS8680, no error.

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

* *See, e.g., State v. Chatman,* 308 N.C. 169, 301 S.E. 2d 71 (1983), in which we held that the trial court erred in finding as factors in aggravation that the sentence was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. As neither factor relates to the character or conduct of the offender, and as both presumably were considered by the legislature in establishing the presumptive term for the offense involved, neither may form the basis for increasing a presumptive term. *Id.* at 180, 301 S.E. 2d at 78.

ROSE MARIE LEDFORD SMITH, RITA CARDEN AND FRANCES W. LEDFORD v. NATIONWIDE MUTUAL INSURANCE COMPANY AND SOUTH CAROLINA INSURANCE COMPANY

No. 130PA85

(Filed 10 December 1985)

Insurance § 95.1 — automobile liability insurance — premium notice — manifestation of willingness to renew — termination for nonpayment of premium — notice requirements inapplicable

The "Premium Notice" mailed by an automobile liability insurer to the insured constituted a manifestation of the insurer's willingness to renew the policy within the meaning of N.C.G.S. 20-310(g)(1) so that the notice requirements of N.C.G.S. 20-310(f) did not apply in order for the policy to be terminated for nonpayment of premium.

ON discretionary review pursuant to N.C.G.S. 7A-31 of a unanimous decision of the Court of Appeals, 72 N.C. App. 400, 324 S.E. 2d 868 (1985), affirming the order of *McLelland, J.*, entered at the 22 August 1983 session of Superior Court, ORANGE County, granting summary judgment for defendant South Carolina Insurance Company. Heard in the Supreme Court 16 October 1985.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill and Hargrave, by Douglas Hargrave, for plaintiff appellees.

Moore, Ragsdale, Liggett, Ray & Foley, by Peter M. Foley, for defendant appellant.

Holt, Spencer, Longest & Wall, by James C. Spencer, Jr., for defendant appellee.

MARTIN, Justice.

This appeal arises from the decision of the Court of Appeals on a petition to rehear this case. At the outset we note that the Court of Appeals withdrew the prior opinion in *Smith v. Nationwide Mut. Ins. Co.*, 71 N.C. App. 69, 321 S.E. 2d 498 (1984), and declared it no longer the law of this case. In its order granting the petition to rehear, the court stated:

> On rehearing, this Court will consider the question whether the trial court properly allowed summary judgment for the defendant South Carolina Insurance Company.

72 N.C. App. at 400, 324 S.E. 2d at 868.

The question before us is whether the Court of Appeals erred in affirming the trial court's entry of summary judgment in favor of defendant South Carolina Insurance Company on the issue of the insured's coverage under an automobile liability insurance policy. For the reasons set forth below, we answer in the affirmative.

A review of the record reveals that on 27 February 1979 Nationwide Mutual Insurance Company (Nationwide) issued to Paul Alan Smith a family automobile and comprehensive liability insurance policy covering a 1969 Chrysler automobile for a four-month period. On its face the policy provided that the policy period would run from 22 February 1979 to 22 June 1979,

> BUT ONLY IF THE REQUIRED PREMIUM FOR THIS PERIOD HAS BEEN PAID, AND FOR SIX MONTHS RENEWAL PERIODS, IF RENEWAL PREMIUMS ARE PAID AS REQUIRED. EACH PERIOD BEGINS AND ENDS AT 12.01 A.M. STANDARD TIME AT THE ADDRESS OF THE POLICYHOLDER.

On page nine of the policy, in a box headed in large bold type, "MUTUAL POLICY CONDITIONS," appeared the following statement: "PREMIUM NOTICE. Prior to the expiration of the term for which a premium has been paid, a notice of the premium required to renew or maintain this policy in effect will be mailed to the Named Insured at the address last known to the Company."

On 1 June 1979, Nationwide mailed to Smith at the address on the policy a "Premium Notice." Under this document's heading appeared the words, "SEMI-ANNUAL RENEWAL FOR POLICY TERM BEGINNING 06-22-79." It notified Mr. Smith to pay his premium due of $166.60 by 22 June 1979.[1] The back side of this notice listed the "RENEWAL PREM" amount as $166.60.

Smith did not send in his premium, and on 27 June 1979, Nationwide mailed an "Expiration Notice" to him. This notice informed Smith that his policy had expired as of 12:01 a.m. on 22

1. The actual renewal form sent to Mr. Smith is not before this Court; there is uncertainty as to whether the form used by Nationwide also stated on its face in capital letters, "THIS IS RENEWAL NOTICE FOR YOUR POLICY WHICH EXPIRES ON THE ABOVE DATE," above which appeared the date 6-22-79.

June 1979 as his premium of $166.60 had not been paid by 22 June 1979. The following language also appeared on the face of the notice:

> IMPORTANT—Your policy will be reinstated without interruption of protection, if payment is received within 16 days from the expiration date. Won't you take a minute now to send your payment? Make sure you have continuous protection against financial loss. If you've sent your payment, please accept this as our THANKS.

In a box immediately below this appeared the following:

> NORTH CAROLINA POLICYHOLDERS ONLY
>
> Financial responsibility is required to be maintained continuously throughout the registration period. The operation of a motor vehicle without maintaining financial responsibility is a misdemeanor, the penalty for which is loss of registration plate for 60 days and a fine or imprisonment in the discretion of the court.

The back side of this notice also stated the "RENEWAL PREM." was $166.60. Paul Smith does not deny having received the premium notice and the expiration notice.

On 5 July 1979, the day on which Mr. Smith returned to North Carolina from a Delaware vacation, his 1969 Chrysler automobile, driven with his permission by his common-law wife, Sherry Ann King, collided with a car which the plaintiff Rose Marie Ledford Smith was driving and in which plaintiff Rita Carden was a passenger. The accident was reported by telephone to a Nationwide agent on the afternoon of 5 July and in person by Mr. Smith at the agent's office on 6 July. There is deposition testimony to the effect that at this time Mr. Smith tendered $50, only a partial payment of the past-due premium to the agent, who refused to accept it but told Smith about a grace period and told him to come back and make the full payment. There is also testimony that on 11 July Paul Smith tendered full payment of the premium by check and Nationwide's agent again refused it, stating that the policy was going to be terminated for failure to pay the premium within the sixteen-day grace period after the policy's expiration date. Nationwide then sent a notice of insurance termination form (FS-4) to the North Carolina Division of

Motor Vehicles (DMV), which DMV entered into its computer on 19 July 1979. The Financial Security Unit of DMV on 20 July mailed to Mr. Smith an FS-5 form, advising him that it had received notification of the termination of his liability insurance. Also enclosed was a recertification form (FR-3) requiring Mr. Smith to certify to DMV his continuous and uninterrupted liability insurance coverage or to face a civil penalty. DMV received the FR-3 from Mr. Smith on 30 July 1979 advising that the license plate had been lost.

Plaintiffs obtained judgment on 8 October 1981 on a jury verdict against Paul Smith and Sherry King for damages in the amount of $10,000 for injuries to Rose Marie Ledford Smith and $1,500 for injuries to Rita Carden. Defendant Nationwide denied any coverage, alleging that the policy in question was not in effect at the time of the collision. Defendant South Carolina Insurance Company (South Carolina), whose uninsured motorists policy on judgment creditor Francis W. Ledford's automobile was in effect on the date of the collision, also denied coverage, alleging that Nationwide's policy was in full force and effect on 5 July 1979.

The trial court, in its order filed 6 September 1983, found that the liability insurance policy issued to Mr. Smith by Nationwide was in full force and effect on 5 July 1979 and that the uninsured motorists provisions of South Carolina's policy on Ledford's car were inapplicable and entered summary judgment for defendant South Carolina. Defendant Nationwide appealed to the Court of Appeals which, upon rehearing of the summary judgment issue, unanimously affirmed the trial court. We granted Nationwide's petition for discretionary review.

In its opinion filed 5 February 1985, the Court of Appeals found that before an insurer may cancel or refuse to renew a policy of automobile liability insurance for nonpayment of premium, the insurer must comply with the provisions of N.C.G.S. 20-310 and 20-309(e) (which require an insurer to notify DMV of the termination of an automobile liability insurance policy). *Insurance Co. v. Davis*, 7 N.C. App. 152, 171 S.E. 2d 601 (1970). N.C.G.S. 20-310 provides, in pertinent part:

> (f) No cancellation or *refusal to renew by an insurer* of a policy of automobile insurance shall be effective unless the in-

surer shall have given the policyholder notice at his last known post-office address by certificate of mailing a written notice of the cancellation or refusal to renew. Such notice shall:

(1) Be approved as to form by the Commissioner of Insurance prior to use;

(2) State the date, not less than 60 days after mailing to the insured of notice of cancellation or notice of intention not to renew, on which such cancellation or refusal to renew shall become effective, except that *such effective date may be 15 days from the date of mailing or delivery when it is being canceled or not renewed for the reasons set forth in* subdivision (1) of subsection (d) and in *subdivision (4) of subsection (e) of this section*;

(3) State the specific reason or reasons of the insurer for cancellation or refusal to renew;

(4) Advise the insured of his right to request in writing, within 10 days of the receipt of the notice, that the Commissioner of Insurance review the action of the insurer; and the insured's right to request in writing, within 10 days of receipt of the notice, a hearing before the Commissioner of Insurance;

(5) Either in the notice or in an accompanying statement advise the insured of his possible eligibility for insurance through the North Carolina Automobile Insurance Plan; and that operation of a motor vehicle without complying with the provisions of this Article is a misdemeanor and specifying the penalties for such violation.

(Emphases added.) N.C.G.S. 20-310(f)(2) refers to N.C.G.S. 20-310(e)(4) which states:

(e) No insurer shall refuse to renew a policy of automobile insurance except for one or more of the following reasons:

. . . .

(4) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installment thereof. . . .

The key to our determination on this issue, however, is subsection (g) of the same statute which provides:

Nothing in this section shall apply:

(1) *If the insurer has manifested its willingness to renew* by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, or has manifested such intention by any other means;

(2) If the named insured has notified in writing the insurer or its agent that he wishes the policy to be canceled or that he does not wish the policy to be renewed;

(3) To any policy of automobile insurance which has been in effect less than 60 days, unless it is a renewal policy or to any policy which has been written or written and renewed for a consecutive period of 48 months or longer.

(Emphasis added.)

Defendant Nationwide argued that its "Premium Notice" was a manifestation of its willingness to renew Paul Smith's liability insurance policy. Rejecting this contention, the Court of Appeals found that the notice only referred to the expiration date of the policy (22 June 1979), that it contained no warnings of the consequences of a failure to pay the premium, and that there was nothing in Nationwide's "Premium Notice" to make it an offer to renew a policy of insurance as contemplated by N.C.G.S. 20-310 (g)(1). Thus it found no impediment to the application of 20-310 (f)(2). Applying that subsection to the facts of this case, the Court of Appeals noted that (f)(2) provides that the fifteen-day notice period which the insurer is required to give the insured before terminating an automobile insurance policy begins on the date *the notice is mailed.* Nationwide's "Expiration Notice," however, gave a sixteen-day period from the date of the *expiration of the policy.* This, the Court of Appeals found, was improper: the requisite fif-

teen (per the statute) or sixteen (given by Nationwide) days should have commenced running as of 27 June when the notice was mailed. Therefore, the "Expiration Notice" did not comply with the statute. Moreover, the Court of Appeals said, the notice failed to advise the insured that he had a right to a hearing or to request a hearing and review by the Commissioner of Insurance and that he might be eligible for assigned risk insurance. For these reasons, the Court of Appeals held, Nationwide had failed to substantially comply with the provisions of 20-310(f) and therefore could not properly refuse to renew Paul Smith's policy pursuant to 20-310(e)(4).

Defendant Nationwide argued that it was not required to give any notice of the policy's termination to the insured because Smith's policy lapsed or expired on its own terms when he failed to pay his premium when due. While we agree that the expiration of a policy for nonpayment of premium is not a cancellation or refusal to renew under N.C.G.S. 20-310(f), our decision is based upon other grounds. We also need not resolve the question of whether this was a case of a rejection of an offer to renew by the insured.[2] Instead, we hold that Nationwide's "Premium Notice" constituted a manifestation of its willingness to renew Smith's policy; therefore N.C.G.S. 20-310(g)(1) is invoked and the requirements of 20-310(f) do not apply.

From the record before us it appears that when a policy premium is due Nationwide sends the insured a standard premium notice exactly like or similar to the one mailed to Paul Smith. This "Premium Notice" is subtitled, "SEMI-ANNUAL RENEWAL FOR POLICY TERM BEGINNING 06-22-79." (Emphasis added.) If the premium is not remitted, the policy automatically lapses and the insurance carrier then sends an "Expiration Notice" which gives the insured an opportunity to reinstate the expired policy if he pays the premium within sixteen days of the lapsed policy's expiration date—even if an accident has occurred in the interim between the policy's expiration and the end of the 16-day grace period, as it did here. Not only did the "Premium Notice" and the "Expiration Notice" give Smith adequate notice of his policy's ex-

2. This was clearly not a "cancellation" of the insured's policy because the policy was not unilaterally terminated by the insurer before the end of the stated term. *Scott v. Allstate Insurance Co.*, 57 N.C. App. 357, 291 S.E. 2d 277 (1982).

piration and afford him an opportunity to renew, but he was also specifically told in person by Nationwide's agent that his accident would be covered if he would just pay the full premium due. Smith did not do so. It can hardly be disputed that the premium notice taken in combination with the expiration notice and the interview with the carrier's agent comprised a sufficient manifestation of Nationwide's willingness to renew to justify invocation of the provisions of N.C.G.S. 20-310(g). In fact, in this case we find that the "Premium Notice" by itself was enough to constitute a manifestation of the carrier's willingness to renew.

Our decision is commanded by the facts of the case before us, prior holdings on similar issues, and our interpretation of the legislative intent behind the enactment of N.C.G.S. 20-310. Regarding the former, the Court of Appeals determined the case of *Insurance Co. v. Davis*, 7 N.C. App. 152, 171 S.E. 2d 601, to be controlling in their decision. *Davis* was decided prior to the 1971 amendment to N.C.G.S. 20-310 and is readily distinguishable on its facts. The contrast is brought into sharp focus by comparing the following exerpt from *Davis* with the situation before us:

> This premium notice makes no reference to the expiration date of the policy. It contains no warning regarding the consequences of a failure to pay the premium. The notice standing alone does not indicate that the policy is subject to renewal on 21 June 1967 but simply that a semi-annual premium payment is due on that date.

Id. at 159, 171 S.E. 2d at 605. In the instant case, the premium notice specifically tells Mr. Smith that his policy is going to expire and states in two places the date on which the policy will expire. It also states, in a prominent location, "This is renewal notice for your policy which expires on the above date," and is subtitled, "Semi-annual renewal for policy term beginning 6-22-79." On the back side of the form, the expiration date appears again, as well as an itemized list of the coverage type, policy limits, and premium, at the bottom of which the total "RENEWAL PREM" amount appears. This is more than "simply a statement of an account that will be due on the date indicated," as was found in *Davis*, 7 N.C. App. at 160, 171 S.E. 2d at 605; the notice in the present case clearly communicates to the insured that it is a

statement indicating the amount to be paid in the event the policy is renewed.

The result in this case is in accord with our prior decisions. In *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303 (1961), the insurance carrier notified the insured in January that his policy would expire on 22 February unless it was renewed by the payment of a premium by the "premium due date," 5 February. The insured did not ever pay or offer to pay the premium. The policyholder's automobile was involved in an accident approximately two hours after the liability coverage had expired by its own terms. The insurer contended that it had no duty to send an additional notice to the insured according to the provisions of N.C.G.S. 20-310, which at that time mandated that "[n]o contract of insurance or renewal thereof shall be terminated by cancellation or failure to renew by the insurer until at least fifteen (15) days after mailing a notice of termination by certificate of mailing to the named insured . . . ." In deciding that the nonrenewal was not by the insurer but was the unilateral act of the insured, the Court, via Justice Moore, said:

> The question in the instant case comes to this: Did plaintiff reject a renewal policy or did defendant terminate the policy coverage? It seems clear that renewal was rejected by plaintiff. He was offered a renewal upon the condition that he pay the premium by 5 February 1959. This was in accordance with the rules of the Assigned Risk Plan. He was told that unless he paid the premium by that date he would be required to apply to the Assigned Risk Plan if he desired further insurance. He did not pay the premium on the date specified and did not offer to pay it on any other date. . . .
>
> Under these conditions, we hold that there was no failure to renew on the part of defendant and it was under no obligation to give plaintiff further notice of termination under the provisions of G.S. 20-310.

254 N.C. at 59, 118 S.E. 2d at 311.

Defendant-appellee, South Carolina, attempts to distinguish *Faizan* from the case before us on the grounds that in *Faizan* the insured did not pay the premium and instead applied to the Assigned Risk Plan for other insurance. Thus in *Faizan* it was the

application for other insurance by the insured that constituted the rejection of the insurer's offer to renew. We find this argument unpersuasive. Not only is there no evidence indicating that Mr. Faizan ever notified the insurer that he was applying for insurance elsewhere, we think it is clear that the critical point decided in that case is that where the insurer gives timely notice to the insured of the expiration date of an automobile liability insurance policy along with an offer to renew the policy if the premium is paid by the due date, no further notice to the insured is required.

Our case of *Insurance Co. v. Cotten*, 280 N.C. 20, 185 S.E. 2d 182 (1971), also supports the result reached here. Although it differs from the instant case in the respect that the issue decided in *Cotten* involved the necessity for notice to the DMV under N.C.G.S. 20-309(e) and not notice to the policyholder under 20-310, the ultimate issue on which the case turned was the same. In that case, the insurer mailed a premium notice to Cotten forty-five days before his policy was due to terminate on 8 March. In the premium notice, Cotten was informed that he could renew his policy for another year by paying the premium by its due date, 14 February. Cotten never paid the premium. On 14 February, the carrier mailed to Cotten a notice of termination of the policy. Justice Lake cited *Faizan* for the proposition that when a policy terminates as a result of the insured's rejection of the insurer's offer to renew the policy as contained in a premium notice, "such termination is deemed a termination 'by the insured' and not a termination 'by the insurer,'" within the meaning of N.C.G.S. 20-310 and -309(e). *Cotten*, 280 N.C. at 27, 185 S.E. 2d at 186. The Court went on to hold that "the policy issued by Nationwide to Cotten was terminated 'by the insured,' . . . by his complete ignoring of the offer by the company to renew the policy contained in the notice of premium sent by it to Cotten and received by him." 280 N.C. at 29, 185 S.E. 2d at 188. Because Cotten disregarded the premium notice, demonstrating that he did not intend to pay the premium, his policy was not in effect and his 26 May accident was not covered.

The case of *Perkins v. Insurance Co.*, 274 N.C. 134, 161 S.E. 2d 536 (1968), relied upon heavily by defendant South Carolina, is distinguishable from *Faizan* and *Cotten* on its facts. In that case, where a substantial portion ($44) of the $55 renewal premium was

sent to the insurer by or on behalf of the insured, who was unsure as to whether the amount sent was the full amount due for renewal, the Court could find no evidence to support a conclusion that the policyholder had rejected the carrier's offer to renew and determined that the insured had indicated "a definite desire . . . to renew the policy." The Court therefore held that there was no rejection by the insured and that the policy had been improperly terminated by the insurer. 274 N.C. at 143, 161 S.E. 2d at 542. We do not find *Perkins* persuasive on the issue before us.

We recognize that where a compulsory automobile insurance policy is cancelled by the insurer mid-term or where the carrier refuses to renew a compulsory policy, it is a serious matter for the insured. The provisions of N.C.G.S. 20-310 exist for precisely such cases. They require the carrier to give the policyholder specific notice and in addition provide the insured with the opportunity for a hearing and the right to apply to the Insurance Commissioner for a review of the actions of the insurer in cancelling or refusing to renew the policy. However, such provisions were not intended to apply to the situation in which the policy is simply not renewed for nonpayment of premiums where, as here, the insurer's "Premium Notice" put the insured on notice of the need to renew and afforded him an opportunity to do so. Nationwide's premium notice clearly indicated the company's willingness to reinstate Smith's expired policy, and that is precisely what is contemplated by subsection (g) of N.C.G.S. 20-310. To hold otherwise would demand that the requirements of N.C.G.S. 20-310(f) be met in all cases where there is nonpayment of a premium. Insurers, then, could never have proper termination without complying with the formal termination requirements of 20-310(f) and, as a result, subsection (g) would be superfluous. Indeed, for it to have any effect, the insurer would have to manifest a willingness to renew with notices containing the very requirements subsection (g) seeks to avoid. Surely the legislature did not envision such a Catch-22. Here, Nationwide's manifestation of willingness to renew was evidenced by its "Premium Notice," which obviated the need for further notice, and we so hold.

As neither the trial court nor the Court of Appeals passed upon the punitive damages issue, it is not properly before us.

For the reasons stated here, defendant South Carolina was improperly granted summary judgment. Accordingly, the decision of the Court of Appeals is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ROY EVERETT BRUCE

No. 591A84

(Filed 10 December 1985)

1. Bills of Discovery § 6; Constitutional Law § 30— circumstances surrounding statements not discoverable

Defendant was not entitled to have the trial court order the prosecutor to provide him with a description of the facts and circumstances surrounding statements made by defendant. N.C.G.S. 15A-903.

2. Bills of Discovery § 6; Constitutional Law § 30— list of witnesses not discoverable

The trial court properly denied the part of defendant's discovery motion seeking to have the prosecutor ordered to disclose the "names of all persons known by the State to have information regarding the above-captioned matter and/or all persons interviewed regarding the matter" since this amounted to a request for a list of the State's witnesses and others having knowledge of the cases against defendant, and such information is not discoverable.

3. Bills of Discovery § 6; Constitutional Law § 30— notes of investigating officers —discovery properly denied

The trial court properly denied defendant's motion to discover "any notes taken or reports made by investigating officers which would tend to exculpate the defendant, mitigate the degree of the offense, or contradict other evidence presented by the State" where the State had specifically indicated that it would comply fully with the requirements of *Brady v. Maryland*, 373 U.S. 83, giving the defense the right, upon specific request, to obtain evidence in the prosecutor's possession which is material to guilt or punishment and favorable to the accused, since defendant's motion sought "work product" not subject to discovery to the extent that it sought information beyond what the State was required to disclose under *Brady*.

4. Bills of Discovery § 6; Constitutional Law § 30— criminal records of witnesses not discoverable

The criminal records of prospective witnesses were not subject to discovery.

5. **Criminal Law § 105.1— effect of offering evidence after motion to dismiss**

Where defendant offered evidence following the trial court's denial of his motion for dismissal at the close of the State's evidence, the trial court's denial of that motion was not properly before the appellate court for review.

6. **Incest § 1; Rape and Allied Offenses § 5— sufficient evidence of penetration**

The State introduced sufficient evidence of penetration to permit a rational trier of fact to find beyond a reasonable doubt that defendant committed the offenses of incest with and rape of his daughter where the child victim testified at trial that defendant had penetrated her. Discrepancies in the State's evidence concerning penetration were for the jury to resolve and did not warrant dismissal of the charges against defendant.

7. **Criminal Law § 162— waiver of objection to evidence**

Defendant waived his objection to testimony when testimony of a similar character was admitted without objection.

8. **Criminal Law § 102.3— improper jury argument cured by instruction**

In a prosecution for incest with and rape of defendant's nine-year-old daughter, possible prejudice from the prosecutor's reference to defendant's other daughter in a statement in the jury argument concerning "the life of another little girl" was removed by the court's curative instruction that the jury should not consider what might possibly happen in the future.

9. **Criminal Law § 102.6— prosecutor's jury argument—oath to uphold Constitution**

The trial court did not abuse its discretion in overruling defendant's objection to a remark by the prosecutor that she "took an oath of office to uphold the Constitution" since the remark, although not supported by the evidence, was relatively innocuous and did not rise to the level of gross impropriety.

APPEAL by the defendant from judgments entered on July 10, 1984, by *Judge Robert D. Lewis*, in Superior Court, BUNCOMBE County. Heard in the Supreme Court September 12, 1985.

Lacy H. Thornburg, Attorney General, by Clifton H. Duke, Assistant Attorney General, for the State.

John Byrd, Assistant Public Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant was convicted upon proper indictments for three counts of taking indecent liberties with a child, one count of first degree rape, and one count of incest. The trial court dismissed other charges against him at the close of the State's evi-

dence. The defendant was sentenced to life in prison for first degree rape, and on two of the indecent liberties convictions he was sentenced to separate prison terms of three years each. The trial court treated the third indecent liberties count as having merged into the rape conviction and arrested judgment on that indecent liberties count. A sentence of four years and six months was entered for incest.

The defendant gave notice of appeal of all convictions to the Appellate Division. The defendant's conviction for first degree rape came before this Court as a matter of right because a life sentence was imposed. The defendant's motion to bypass the Court of Appeals as to all remaining convictions was allowed by this Court on October 24, 1985.

By his assignments, the defendant contends that the trial court made several errors. He contends that the trial court erred by denying various portions of his discovery motion. Second, he says that the trial court erred by denying his motions to dismiss all charges because the evidence was insufficient to carry them to the jury. Third, he asserts that the trial court erred by allowing a witness to answer a question that assumed facts not in evidence. Finally, he contends that the trial court erred by denying his motion for mistrial on the ground that the prosecutor's closing argument was improper. We find no error.

The State's evidence tended to show that at the time of the trial the defendant Roy Everett Bruce was thirty-nine years old. The victim is the defendant's daughter and was ten years old at the time of trial. The defendant also has a son and a two-year-old daughter. The defendant and his second wife Debra had custody of all three children prior to the events leading to his convictions.

The child victim testified that before Christmas 1983 she was in her room doing a math problem. The defendant came in to help her. He took his "part" out and told her to touch it, but she refused. He then unzipped her pants and tried to touch her between her legs. On a second occasion she went into her father's room where he laid her on his bed on a towel, removed her pants and panties, got on top of her and put his penis inside her vagina "halfway, not all the way." He did this once and then rubbed vaseline on her. On another occasion her father entered her bed-

room at night and raised her nightgown and rubbed her between her legs.

She testified on cross-examination that on one occasion in the past she had been told by her "real mother" to say that the defendant had tried to put his hands between her legs so that he would be "sent to jail." She said that prior to October, 1983, she had lied in this fashion but had later admitted the lie to her stepmother. In the past she had lived with her "real mother" and had been beaten by her mother's boyfriend and locked in a closet. She said that she had received treatment at a mental health facility prior to October, 1983. Mary Young and Dianne Livingstone, the child's school teachers, gave testimony tending to corroborate that of the child.

Marianna Williams, a social worker, testified that she had worked with the Bruce family since June, 1982. She interviewed the child with regard to the rape charge. The child said that her father had held her down and removed her "britches" and "stuck his thing up in me and kept doing it," and said that he would "whip my ass if I told Mama." The child also said that on a prior date her father had taken her pants down, rubbed her and exposed himself to her.

Cynthia Van Deusen, a public health nurse, testified that she examined the child's vagina on October 17, 1983, and found "a little bit of redness, but not a marked amount." Otherwise, she testified to nothing abnormal. During the examination the child said that her father had unzipped her pants and rubbed her genital area.

Cynthia McCants, a social worker, testified that the child told her about three occasions of misconduct. The child said that her father tried to touch her on two occasions, and on the third, he raped her.

Beverly Smith, a public health nurse, testified that she examined the child on November 3, 1983, and found that her external genitalia were very red and irritated. Mrs. Smith observed a white discharge, and she was able to insert her index finger into the vagina up to the second joint, past the hymen. This examination took place four to five days after the alleged rape.

Dr. Mary Helen McConnell, a pediatrician, examined the child on November 29, 1983, twelve days after the alleged rape and two weeks before the examination by the defendant's medical expert, Dr. Catherine Wilson. Dr. McConnell testified that the child's vaginal opening was red, inflamed and tender. She also testified that this condition was caused by an irritating object that had been rubbed in that area, and it could have been a male penis.

Jeanne Myers, a social worker, testified that the child was in her group for sexually abused children following November 23, 1983. She was qualified as an expert in the area of sexual abuse and opined that the child's behavior was typical of a sexually abused child.

The defendant also introduced evidence. Dr. Catherine Wilson testified for the defense that she specializes in obstetrics and gynecology. Acting under a court order, she examined the child on December 12, 1983. Dr. Wilson found no evidence of recent or previous trauma to the child's vagina. Dr. Wilson was of the opinion that intromission had not occurred and defined intromission as "the insertion of the penis into the vagina beyond the hymen." On cross-examination Dr. Wilson stated that slight penetration of the child's vagina would be consistent with a lack of intromission.

David Evers, a psychologist, testified that he examined the child in December, 1981. He diagnosed her as suffering from "an adjustment reaction with mixed emotional features." He stated that she had been in a very chaotic home situation and under a lot of stress and that she was showing the results. She was quite anxious, chewed her nails, and had difficulty sleeping.

Becky Angel, a social worker, testified that she first worked with the child in 1981 when the child lived with her mother and Richard Johnson, the mother's boyfriend. The child had been beaten by the boyfriend and was very nervous.

Gerald H. Lambert, a detective with the Asheville Police Department, testified that he began an investigation of the case in December, 1983. He interviewed the child, and she told of two separate occasions of sexually abusive treatment by the defendant which occurred in October and November, 1983.

Gary Cash, an attorney, testified that he heard the child's testimony in juvenile court in January, 1984. She testified there

to three occasions of sexual misconduct on the part of her father. One involved sexual intercourse and two involved indecent liberties.

Wayne Dickens, investigator for the Public Defender's Office, testified that he, John Byrd, and Shirley Brown interviewed the child on February 15, 1984. A tape recording of the interview was offered by the defendant as a prior inconsistent statement of the child. During the interview she told of two rapes and two occasions of indecent liberties.

The defendant testified and denied ever having or attempting to have sexual intercourse with his daughter. He denied ever making any sexual advances toward her.

In his first two assignments of error, the defendant contends the trial court erred by denying various parts of his discovery motion. By his motion the defendant sought *inter alia* to have the trial court order the State to disclose the "facts and circumstances surrounding any . . . statement made by the defendant . . . ." Marianna Williams, a witness for the State, testified during trial that the defendant had "agreed to go to counseling, to make no advances toward" the child "of a sexual nature, and to avoid situations in which there might be a temptation to do this." She testified that the defendant agreed to this by signing a written contract with the Buncombe County Health Department containing those specific terms. This contract was entered into during an interview held to determine whether there had been any kind of sexual contact between the defendant and the child.

[1] The defendant contends that he was prevented from filing a motion under N.C.G.S. 15A-977 to suppress the statements in the contract because the trial court denied the part of his discovery motion seeking disclosure of the "facts and circumstances surrounding any . . . statement made by the defendant . . . ." We find no merit in this contention.

N.C.G.S. 15A-903 requires the trial court to order the prosecutor to disclose certain statements made by the defendant and in the possession, custody or control of the prosecutor. Nothing in the statute, however, entitles a defendant to have the trial court order the prosecutor to provide him with a description of the "facts and circumstances surrounding his statements."

[2] The defendant also assigns as error the trial court's denial of the part of his discovery motion seeking to have the prosecutor ordered to disclose the "names of all persons known by the State to have information regarding the above-captioned matter and/or all persons interviewed regarding the matter." This amounted to a request for a list of the State's witnesses and others having knowledge of the cases against the defendant. As we have previously pointed out, such information simply is not discoverable. *State v. Alston*, 307 N.C. 321, 335-36, 298 S.E. 2d 631, 641 (1983). Further, we find no indication in the record on appeal that the denial of this part of the defendant's motion in any way encouraged or permitted the prosecutor to ignore the dictates of *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963).

[3] The defendant additionally sought by his motion to discover "[a]ny notes taken or reports made by investigating officers which would tend to exculpate the defendant, mitigate the degree of the offense, or contradict other evidence to be presented by the State." This request for information was properly denied by the trial court. The State had specifically indicated that it would comply fully with the requirements of *Brady*, which gives the defense, upon specific request, the right to obtain evidence in the prosecutor's possession which is material to guilt or to punishment and favorable to the accused. To the extent this part of the defendant's discovery motion sought information beyond that the State was required to disclose under *Brady*, it sought "work product" not subject to discovery. *Alston*, 307 N.C. at 336, 298 S.E. 2d at 642.

[4] The defendant also contends that the trial court erred by denying a part of his discovery motion seeking a "copy of any prior criminal record of any State witness or prospective witness, and any additional information which could reflect on the credibility of such witnesses . . . ." Such information is not subject to discovery. *State v. Brown*, 306 N.C. 151, 176, 293 S.E. 2d 569, 585, *cert. denied*, 459 U.S. 1080 (1982).

The defendant further contends that the trial court erred by denying his motion to discover the circumstances surrounding certain oral statements made by him which were disclosed to him by the State prior to trial and were used against him at trial. The statements provided to the defendant prior to trial were: "I

haven't sexually bothered [the child] since I signed this contract." "I haven't sexually abused [her] at all." "Is [she] still in therapy?"

N.C.G.S. 15A-903(a)(2) requires the trial court, upon motion by the defendant, to order the prosecutor to disclose "the substance of any oral statement" by the defendant. As used in the statute, "substance" means: "Essence; the material or essential part of a thing, as distinguished from 'form.' That which is essential." Black's Law Dictionary 1280 (rev. 5th ed. 1979). Prior to trial in the present case, the State fully divulged the substance of the oral statements in question. The trial court did not err in refusing to require the State to attempt to describe the circumstances surrounding the making of those statements.

The defendant next assigns as error the trial court's denial of his motions to dismiss all charges at the close of the State's evidence and at the close of all of the evidence. He contends in this regard that the State's evidence was contradictory and insufficient to prove penetration beyond a reasonable doubt. Since penetration is not an element of the offense of taking indecent liberties with a child, we treat the defendant's contentions in this regard as relating only to his convictions for incest and first degree rape.

[5] A defendant's motion to dismiss under N.C.G.S. 15A-1227(a)(1) for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under N.C.G.S. 15-173. *State v. Greer,* 308 N.C. 515, 519, 302 S.E. 2d 774, 777 (1983); *State v. Earnhardt,* 307 N.C. 62, 65, 296 S.E. 2d 649, 651 (1982). Under N.C.G.S. 15-173, "[i]f the defendant introduces evidence," following the denial of his motion for nonsuit, "he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." *See State v. Leonard,* 300 N.C. 223, 231, 266 S.E. 2d 631, 636, *cert. denied,* 449 U.S. 960 (1980). Because the defendant offered evidence following the trial court's denial of his motion for dismissal at the close of the State's evidence, the trial court's denial of that motion is not properly before us for review.

We turn, then, to the defendant's contention that the failure of the State to establish penetration required the trial court to allow his motion to dismiss at the close of all of the evidence.

When a defendant moves under N.C.G.S. 15A-1227(a)(2) or under N.C.G.S. 15-173 for dismissal at the close of all of the evidence, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E. 2d 649, 651-52 (1982). The trial court is to view all of the evidence in the light most favorable to the State and give the State all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The trial court must determine as a matter of law whether the State has offered "substantial evidence of all elements of the offense charged so any rational trier of fact *could* find beyond a reasonable doubt that the defendant committed the offense." *State v. Thompson*, 306 N.C. 526, 532, 294 S.E. 2d 314, 318 (1982).

[6] Applying the foregoing principles, we conclude that the State introduced sufficient evidence of penetration to permit a rational trier of fact to find beyond a reasonable doubt that the defendant committed the offenses of incest and rape. The child victim testified at trial that her father had penetrated her. Although there were discrepancies in her extrajudicial statements to others and in her trial testimony with regard to the manner, extent and frequency of the penetration of her vagina by her father's penis, she clearly testified that he had penetrated her. No more was required to permit the jury to find beyond a reasonable doubt that the penetration had in fact occurred.

The defendant's contention that his motion to dismiss should have been allowed because of discrepancies in the State's evidence concerning penetration and other crucial questions of fact is without merit. Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). Further, "[t]he trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." *Id.* at 101, 261 S.E. 2d at 118.

The general rule is that "[t]he slightest penetration of the sexual organ of the female by the sexual organ of the male

amounts to carnal knowledge in a legal sense." *State v. Sneeden*, 274 N.C. 498, 501, 164 S.E. 2d 190, 193 (1968). The evidence in this case was sufficient to support a finding beyond a reasonable doubt of such penetration. Therefore, the evidence was sufficient to support the jury in finding the existence of this element during its consideration of the cases against the defendant for incest and first degree rape.

[7] The defendant also assigns as error the trial court's ruling allowing the prosecutor to ask Dr. Wilson, a witness for the defendant, a hypothetical question that the defendant contends assumed facts not yet in evidence. On cross-examination of Dr. Wilson the record reflects the following:

> Q. What if there had been penetration, say, of about half an inch or an inch of the male's penis into the child's vagina?
>
> MR. BYRD: Objection.
>
> COURT: I don't know what the question is yet.
>
> Q. If the allegations were that the penis was placed just a half an inch or an inch into the vagina, would that be consistent with your findings?
>
> MR. BYRD: Objection.
>
> COURT: Overruled.
>
> EXCEPTION NO. 11
>
> A. The penis, as one knows, is rounded on the end and not a blunt end, and it might have gone a millimeter or two, but it could not go—Such as ice cream, a ball of ice cream sitting on a cone, it may protrude slightly into the cone, but the larger ball of ice cream cannot go through that cone without melting—

Even if it is assumed *arguendo* that a proper hypothetical question was necessary and that the question asked assumed facts not in evidence, the defendant is entitled to no relief. This Court said in *State v. Campbell*, 296 N.C. 394, 399, 250 S.E. 2d 228, 231 (1979) that: "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." After the admission into evidence of the testimony objected to, the State,

without objection by the defendant, asked the following question: "Dr. Wilson, if a male penis had touched the opening and slipped inside, is it your testimony that it could have gone perhaps one millimeter or two millimeters and still be consistent with your findings? Was that your testimony?" The witness answered, without objection, that: "The rounded end might have, but the hymen itself was not penetrated." This testimony is certainly similar in character to the testimony that the defendant objected to and now assigns as error. Since the defendant waived his prior objection, this assignment is without merit.

The defendant next assigns as error the trial court's denial of his motion for mistrial on the grounds that the prosecutor's closing argument was grossly improper and prejudicial. This argument is without merit.

Trial counsel should be given wide latitude to argue to the jury all of the law and the facts presented by the evidence and all reasonable inferences therefrom. *State v. McCall*, 289 N.C. 512, 223 S.E. 2d 303, *death sentence vacated*, 429 U.S. 912 (1976). But counsel may not travel outside of the record and argue facts not supported by the evidence. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

[8] During her closing argument to the jury, the prosecutor said: "We are not talking about just that man's life. We are talking about the life of a nine-year-old child and possibly about the life of another little girl." The defendant's objection was sustained "as to 'possibly.' " At the defendant's request, the trial court then instructed the jury: "Yes, you are not to consider what might possibly happen in the future members of the jury at any point in your deliberations."

The defendant contends that the prosecutor's statement concerning "the life of another little girl" was a reference to the defendant's baby daughter. Since there was no evidence of any wrongdoing by the defendant with regard to the baby, the defendant contends that this argument could only have served to improperly inflame the jury. Assuming *arguendo* that the defendant is correct, the trial court's prompt curative instruction was sufficient to remove any possible prejudice that may have resulted from this brief remark by the prosecutor.

[9] The defendant also complains that the prosecutor stated to the jury: "I took an oath of office to uphold the Constitution . . ." The trial court overruled the defendant's objection to this remark. The defendant now contends that the remark was improper and prejudicial since it made the prosecutor appear as an "unbiased truth-teller." Arguments of counsel "must ordinarily be left to the sound discretion of the judge who tries the case and this Court will not review his discretion unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury." *State v. Locklear*, 291 N.C. 598, 603-04, 231 S.E. 2d 256, 260 (1977). The remark complained of was not supported by the evidence, but it was relatively innocuous and did not rise to the level of gross impropriety. The trial court did not abuse its discretion by overruling the defendant's objection.

The defendant also contends that several other portions of the prosecutor's closing argument were improper and prejudicial. He contends that each of the arguments complained of were expressions of the prosecutor's personal opinions and beliefs unsupported by any evidence. It suffices to say that we have reviewed each of the statements complained of and have concluded that they either were contentions of counsel and not statements of fact or that they were inferences which legitimately could have been drawn from the evidence introduced at trial. The jury arguments of the prosecutor did not involve any gross impropriety calculated to prejudice the jury such as would require us to hold that the trial court abused its discretion in denying the defendant's objections.

The defendant's final assignment of error is directed to the trial court's denial of his motion to set aside the verdicts on the ground that they were against the weight of the evidence. "A motion to set aside the verdict for the reason that it is against the greater weight of the evidence is addressed to the discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion." *State v. Gilley*, 306 N.C. 125, 131, 291 S.E. 2d 645, 648 (1982). No such abuse of discretion has been shown here.

The defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JERRY WAYNE MIZE

No. 97A85

(Filed 10 December 1985)

1. Homicide § 7— directed verdict of not guilty by reason of insanity denied—no error

The trial court did not err in a prosecution for first degree murder by not directing a verdict of not guilty by reason of insanity where defendant presented strong evidence that he suffered from a serious mental disorder, but the State produced evidence of defendant's sanity in that an S.B.I. special agent testified that defendant understood his questions and responded in complete sentences less than four hours after the slaying; defendant reviewed his statement with the agent and read it aloud to the agent as they checked for errors; Broughton Hospital records included a report that defendant was neat and attentive, knew who he was and where he was, had good insight and a good ability to interpret things, and that there was no evidence of psychotic thought process or defective disorder; defendant had obtained a driver's license and had gone to the office of a federal district court judge a few days prior to this incident to get advice on bringing an action against the sheriff's department for a violation of his civil rights; and defendant stated that basically the murder was a result of his anger about being put in jail and anger over the victim's homosexual remarks towards him.

2. Criminal Law § 112.6— murder—evidence of insanity—jury instructed to consider only after determination of guilt—no error

The trial court did not err in a prosecution for murder by instructing the jury to consider evidence of defendant's insanity only if it found that the State had proved beyond a reasonable doubt all the elements of the crimes submitted to it. Defendant was not entitled to an affirmative instruction that in determining whether or not the defendant acted with premeditated and deliberated malice the jury must consider his mental condition.

3. Criminal Law § 5.1— murder—burden of proof on insanity placed on defendant—State not unconstitutionally relieved of burden of proof

The State is not unconstitutionally relieved of its burden of proof in a prosecution for murder by placing the burden of proof on the issue of insanity on the defendant; the trial court properly instructed the jury that in order to convict defendant of first degree murder the State must have shown beyond a reasonable doubt that the slaying was committed intentionally and with premeditation, deliberation and malice.

4. Criminal Law § 63.1— murder—insanity—defendant's hospital records—door opened by defendant

The trial court did not err in a prosecution for murder at which defendant claimed insanity by admitting into evidence the contents of a report by a doctor at Broughton Hospital who did not testify at trial. A doctor who testified for defendant stated on direct examination that he relied on information from several sources, including all of defendant's records at Broughton Hospital.

The specific use of the Broughton records on direct examination opened the door for the State's use of the report on cross-examination; furthermore, N.C.G.S. 8C-1, Rule 705, gives the opposing party the right to require disclosure of the underlying facts or data of an expert's opinion prior to his testimony and on cross-examination. N.C.G.S. § 8C-1, Rule 703.

Justice MARTIN concurring.

Justice FRYE joins in the concurring opinion.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from the judgment entered by *Owens, J.*, at the 22 October 1984 Criminal Session of Superior Court, RUTHERFORD County. Heard in the Supreme Court 14 October 1985.

Defendant was charged in an indictment, proper in form, with first degree murder. The district attorney did not seek the death penalty because of the absence of any aggravating circumstance.

At trial, the State's evidence tended to show that defendant was jailed on 17 August 1984 on trespassing charges instigated by his mother. Defendant was placed in the "three man south" cell of the Rutherford County Jail. This cell contains three separate sleeping compartments and a large common area called the "run-around." Each sleeping cell has a lavatory and commode of its own. On 18 August 1984, defendant occupied this cell with Charles Barnes and George Parsons.

John Oliver, the Rutherford County Jail trustee, testified that at approximately 7:00 p.m. on the evening of 18 August 1984 defendant called him back to his cell. When Oliver arrived at the cell, he saw defendant standing in the run-around and holding a large pipe, two feet long and four inches in diameter, wrapped in a towel. Oliver immediately asked defendant for the pipe. Defendant replied, "No, I just killed that son-of-bitch with it," and pointed towards Charles Barnes who appeared to be sleeping in the bed in his own compartment. Oliver called out to Barnes but received no response.

By this time, the jailer, Mike Wallace, had come back to defendant's cell. He ordered defendant to hand him the pipe and called Charles Barnes's name several times. When Barnes failed to answer, Wallace went to find the magistrate. While Wallace

was gone, Oliver convinced defendant to set the pipe on the floor by the cell door.

Wallace thereafter returned with the magistrate and ordered defendant to go back into his sleeping cell. Defendant complied. Wallace then unlocked the cell door and went over to Barnes. Wallace testified that he shook Barnes and spotted blood oozing out of Barnes's right ear and the front of his face. Wallace instructed the magistrate to call for an ambulance. Dr. Michael Wheeler testified at trial that Barnes died from being struck with a blunt object causing skull fractures which extensively damaged the right portion of his brain.

Later that same evening around 10:20 p.m., defendant gave a statement to SBI Special Agent Bruce Jarvis admitting that he had killed Barnes. Defendant stated that two weeks prior to this occasion he had been jailed with Barnes and that they had fought. During their latest incarceration together, Barnes had threatened defendant with a razor blade. Because of these incidents, defendant was afraid of Barnes.

Defendant further explained in this statement that he built a fire underneath some sewer pipes that ran along the wall of his sleeping cell in order to melt the lead surrounding the pipes. The fire sufficiently loosened the pipes to enable him to pull one of them from the wall. He stated that he wrapped a towel around one end of the pipe and used an orange band he tore from the towel to tie it onto the pipe. He then laid the pipe at the end of his bed and smoked two cigarettes while deciding whether or not to kill Barnes. When defendant had decided that he did want to kill Barnes, he picked up the pipe, went into Barnes's cell while he was asleep, and hit him three times with the pipe on the right side of his head.

Agent Jarvis further testified that during the interview defendant understood his questions and responded in complete sentences. After his statement had been reduced to writing, defendant, in checking for errors, read the statement out loud to Jarvis.

In his defense, defendant offered considerable evidence of his insanity at the time of the incident. His mother, Rosalee Mize, testified that she had him committed to the mental facilities at

Broughton Hospital for the first time in 1979. Defendant was released after a few weeks when it was determined that he was not a danger to himself or to others. He was readmitted to Broughton four times in 1981. The last time he was admitted to Broughton was in mid-July 1984, approximately a month before the Barnes killing. Mrs. Mize testified that she received a telephone call from Broughton Hospital officials concerning whether she had any insurance coverage for defendant or whether he had a source of income. When she replied no to both inquiries, the hospital officials informed her that defendant would be released and sent home.

Mrs. Mize further testified that several days prior to the incident in the Rutherford County Jail she returned home from work and found that defendant who lived with her had taken her belongings, including her clothes, pictures, mirrors, and the family Bible, out of her house and put them in the yard. The next day she observed him in her front yard digging graves for his daughter who had died from crib death eight years earlier and for his brother who had been dead two years. Mrs. Mize again attempted to have defendant committed and returned to Broughton for help. She stated at trial that after talking with a magistrate she took out a warrant against the defendant for trespassing so that he would be placed in jail over the weekend until she could talk to the doctor at Broughton on Monday about admitting defendant.

Defendant, testifying on his own behalf, stated that while he was in jail on the trespassing charges the victim, Charles Barnes, made several homosexual overtures toward him. Defendant related that several years earlier while in jail on other charges, he had been gang-raped by three men. Defendant testified that although Barnes had not yet sexually assaulted him he was afraid of him and what he might do. Defendant admitted that before he realized it he had the pipe in his hand and had struck Barnes on the head with it. State's witnesses, Magistrate Samuel Lee Ramsey and SBI Agent Bruce Jarvis, testified in corroboration of defendant's testimony that on the night of the incident he was afraid of Barnes's homosexual advances.

Defendant offered other evidence of his insanity, including the testimony of Dr. Bob Rollins, a forensic psychiatrist at Dorothea Dix Hospital. He examined and interviewed defendant

from 20 August to 3 September 1984 and from 4 September to 7 October 1984. In making his diagnosis, Dr. Rollins talked with others who knew defendant and reviewed all of his records from Broughton Hospital. Dr. Rollins concluded that defendant was primarily suffering from a schizo-affective disorder with a secondary diagnosis of an anti-social personality trait. In Dr. Rollins's opinion, defendant was incapable of distinguishing right from wrong on 18 August 1984.

The jury returned a verdict of guilty of first degree murder. The trial court sentenced the defendant to life imprisonment.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant contends that the trial court erred in failing to direct a verdict of not guilty by reason of insanity. Basically, defendant argues that his evidence of insanity was uncontroverted and so overwhelming that he was entitled to have the issue of his guilt not submitted to the jury. We do not agree, however, that his evidence was uncontroverted.

The test of insanity as a defense to a criminal charge in this State is the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation. *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976). When the defense of insanity is interposed, certain principles and presumptions apply. In this jurisdiction, every person is presumed sane until the contrary is shown. This presumption of sanity gives rise to the firmly established rule that the defendant has the burden of proving that he was insane during the commission of the crime. *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948). The defendant, however, unlike the State, which must prove his guilt beyond a reasonable doubt, is merely required to prove his insanity to the satisfaction of the jury. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975).

At trial, defendant made a motion for nonsuit at the close of the State's evidence and again at the close of all the evidence.

The motion to dismiss at the close of the State's evidence was waived when defendant elected to offer evidence. *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980). Although defendant did not categorize his request of the court as a motion for a directed verdict, it is well settled that the two motions have the same effect. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975). On a motion for judgment of nonsuit or a motion for a directed verdict of not guilty, "the evidence for the State is taken to be true, conflicts and discrepancies therein are resolved in the State's favor and it is entitled to every reasonable inference which may be drawn from the evidence." *Id.* at 568, 213 S.E. 2d at 318. "All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975).

This Court has previously been faced with the question of whether the trial court erred in refusing to direct a verdict of not guilty by reason of insanity. *See State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631, *cert. denied*, 449 U.S. 960, 66 L.Ed. 2d 227, 101 S.Ct. 372 (1980); *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976), *overruled on other grounds*, *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983); *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976); and *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975).

The rule applied in *Harris*, *Hammonds*, and *Cooper* provided that "in all cases there is a presumption of sanity, and when there is other evidence to support this presumption, this is sufficient to rebut defendant's evidence of insanity on a motion for nonsuit or for a directed verdict." *Harris*, 290 N.C. at 726, 228 S.E. 2d at 430. *See also Hammonds*, 290 N.C. at 7, 224 S.E. 2d at 599, and *Cooper*, 286 N.C. at 570, 213 S.E. 2d at 319. In *Hammonds*, the defendant shot a storeowner over his month-old accusation that the defendant had stolen some pepper from his store. Dr. Rollins from Dorothea Dix Hospital and another privately retained psychiatrist testified that the defendant could not distinguish right from wrong. Two police officers, however, stated that the defendant appeared and acted normal immediately after the shooting. The testimony of the police officers, coupled with the presumption of sanity, was held sufficient evidence to have the case submitted to the jury. *Id.* at 7, 224 S.E. 2d at 599.

In *Harris*, the defendant shot and killed four women who were involved in a lye-throwing incident months earlier that had severely injured the defendant. Two experts in the fields of psychology and psychiatry stated that, although they had no opinion as to whether the defendant could distinguish right from wrong, the defendant did not understand the nature and quality of his acts on the day of the shootings. The husband of one of the victims testified that prior to the murder of his wife the defendant acted friendly. The arresting officer added that the defendant did not give the police any trouble when apprehended. There was also no evidence that the defendant acted abnormally immediately after the commission of the crimes. We held that this evidence of sanity, when combined with the presumption of sanity, was sufficient to overcome the defendant's motion for a directed verdict. *Id.* at 726-27, 228 S.E. 2d at 430.

In *Cooper*, the defendant killed his wife and four of their five children (ages 7 months to 6 years) because he thought that they were from outer space and were trying to kill him. The brutality of the slayings, the defendant's fantastic motive for his actions, and expert testimony that due to his mental illness the defendant could not apply his knowledge of right and wrong appeared to be overwhelming evidence of his insanity. This Court held, however, that the defendant's motion for a directed verdict of not guilty by reason of insanity was properly denied. The State presented evidence that in the opinion of the attending physician, the nurse, the hospital attendant, all of whom observed the defendant within 24 hours of the murders, and the State's psychiatric expert, the defendant was in his right mind and could distinguish right from wrong. *Id.* at 569-70, 213 S.E. 2d at 319. Their testimony constituted sufficient evidence of sanity to require submission of the case to the jury.

The evidence offered at trial in the present case is similar to that admitted in the foregoing cases. Defendant presented strong evidence that he suffered from a serious mental disorder. He offered as witnesses his relatives, members of his community, and two psychiatric experts who testified that he had been admitted to mental hospitals numerous times, continuously exhibited bizarre behavior, and could not distinguish right from wrong.

Nevertheless, the record also reveals that the State did produce some evidence of the defendant's sanity. Bruce Jarvis, a special agent with the SBI, testified that less than four hours after the slaying defendant understood his questions and responded in complete sentences. He also related that defendant reviewed his statement and read it aloud to Jarvis as they checked for errors.

One of defendant's psychiatric experts, Dr. Rollins, stated on direct examination that in making his diagnosis he reviewed all of defendant's Broughton Hospital records. On cross-examination it was brought out that these records included a report by Dr. Norman Boyer, a Broughton psychiatrist, concerning his observations of defendant on 15 July 1984. According to Boyer's report, defendant was neat and attentive, knew who he was and where he was, and had good insight and a good ability to interpret things. In Dr. Boyer's opinion, there was "no evidence of psychotic thought process or defective disorder." Defendant was released from Broughton with no follow-up care arranged or medication prescribed.

Defendant on cross-examination further revealed that he had obtained a driver's license, and that several days prior to this incident he had gone to the office of a federal district court judge to get advice on bringing an action against the sheriff's department for a violation of his civil rights. Moreover, defendant stated that basically the murder was a result of his anger about being put in jail and over Barnes's homosexual remarks towards him. We hold this evidence coupled with the presumption of sanity was sufficient to have the case submitted to the jury. Therefore, defendant's motion to dismiss at the close of all the evidence was properly denied.

[2] Defendant's second assignment of error challenges the trial court's instructions to the jury. Defendant contends that by placing the burden of proof on the issue of insanity on the defendant the State's burden of proving every element of the offense beyond a reasonable doubt has been eased in violation of his constitutional right to due process.

Defendant specifically attacks the portion of the trial court's charge which instructs the jury to consider the evidence of defendant's insanity "only if you find that the State has proved

beyond a reasonable doubt each of the things about which I have already instructed you in connection with first degree murder, second degree murder and voluntary manslaughter." Defendant asserts that this instruction effectively lessened the prosecution's burden of proving premeditation, deliberation, and malice by essentially directing the jury to disregard his insanity evidence even though it might have some effect on the jury's determination of these elements.

Essentially, this instruction directs the jury to first determine whether the State has proved beyond a reasonable doubt all the elements of the crimes submitted to it before it considers the insanity issue. This instruction merely reflects the order of the issues which would be submitted to the jury as approved by this Court in *State v. Linville*, 300 N.C. 135, 265 S.E. 2d 150 (1980), and *State v. Boone*, 302 N.C. 561, 276 S.E. 2d 354 (1981). The reasoning behind these decisions is "that the jury should establish defendant's guilt or innocence of the crime first and reach the insanity issue only if it first found defendant guilty of the crime." *Id.* at 568, 276 S.E. 2d at 359. This Court has previously held that the defendant is not entitled to an affirmative instruction that in determining whether or not the defendant acted with premeditated and deliberated malice the jury must consider his mental condition. *See Harris*, 290 N.C. at 724, 228 S.E. 2d at 429; *Hammonds*, 290 N.C. at 10-11, 224 S.E. 2d at 600-01; *Cooper*, 286 N.C. at 572-73, 213 S.E. 2d at 320-21. We also note that the trial judge clearly stated throughout his instructions that with regard to first degree murder the State had to prove premeditation, deliberation, and malice beyond a reasonable doubt. We hold that defendant's argument is without merit and that this portion of the charge was free from error.

[3] In a similar sense, defendant also argues that assigning him the burden of proof on the issue of insanity relieves the State of its duty of establishing that the act was committed with the requisite *mens rea*. This contention must likewise be rejected. *See generally Hammonds*, 290 N.C. at 7-11, 224 S.E. 2d at 599-601. The *mens rea* or the criminal intent required for first degree murder is proven through the elements of premeditation and deliberation. *Cooper*, 286 N.C. at 572, 213 S.E. 2d at 320. The trial court in this case properly instructed the jury that in order to convict defendant of first degree murder the State must have shown beyond a

reasonable doubt that the slaying was committed intentionally and with premeditation, deliberation and malice. We hold that the State is not unconstitutionally relieved of any burden by the rule placing the burden of proof on the issue of insanity on defendant.

We recognize that all of defendant's arguments concerning the trial court's instructions essentially ask us to again question the propriety of placing the burden of proof of insanity on defendant. We reconsidered this issue in *State v. Heptinstall*, 309 N.C. 231, 306 S.E. 2d 109 (1983), and refused to change our rule. Defendant's present arguments have failed to convince us that the rule should be changed at this time.

[4] Defendant's final assignment of error contests the admission into evidence of the contents of a report by Dr. Norman Boyer who did not testify at trial. The substance of the Boyer report was revealed to the jury during the State's cross-examination of Dr. Bob Rollins. The report stated that when defendant was examined at Broughton in July of 1984 he was neat, oriented, and cooperative and that there was no evidence that he was suffering from a psychotic thought process or defective disorder. Although the report was never formally introduced into evidence, the trial court summarized the contents of the report to the jury in its instructions. Defendant failed to object to the State's use of the report during its cross-examination of Dr. Rollins. He now argues, however, that the admission of the report was in violation of his right of confrontation and constituted plain error.

In support of his contention, defendant relies upon *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, 103 S.Ct. 3552 (1983). In *Taylor*, the same method of cross-examination was permitted by the trial court during the penalty phase of the defendant's trial. The district attorney was allowed to cross-examine the defendant's psychiatrist using a psychiatric evaluation prepared by a second psychiatrist not called as a witness. This Court expressly disapproved of this procedure, stating it was "improper for the simple reason that it allowed the State to get [the second psychiatrist's] testimony before the jury at the same time it cross-examined [the defendant's psychiatrist]." *Id.* at 281, 283 S.E. 2d at 781. We held, however, that this improper admission of evidence was cured when substantially the same evidence was admitted on redirect examination by the defendant.

We believe that the present situation is distinguishable from *Taylor*. On direct examination, Dr. Rollins testified that in making his diagnosis and in forming his opinion as to defendant's mental condition, he relied on information from several sources, including "all of the records at Broughton Hospital." Dr. Boyer was a staff psychiatrist at Broughton and the report in question was a part of the Broughton records. Dr. Rollins was allowed, over the State's objection, to read directly from the Broughton records which catalogued defendant's conduct during his hospital stays prior to and including his July 1984 visit, the subject of the Boyer report used by the State on cross-examination.

Consequently, the specific use of the Broughton records on direct examination opened the door for the State's use of the Broughton-Boyer report on cross-examination. Before inquiring into the actual findings of the report, the State asked Dr. Rollins if he had a copy of the Boyer-July 1984 report, if he knew Dr. Boyer and his signature, and if he relied on this report in forming his opinion. To all of these questions, Dr. Rollins replied affirmatively. In contrast, the testifying psychiatric expert in *Taylor* had not used the report of the second doctor in making his evaluation of the defendant and therefore the reference to the report by the State was a new matter brought out on cross-examination.

Furthermore, this case was tried after the North Carolina Evidence Code became effective. N.C. Gen. Stat. § 8C-1, *et seq.* N.C.G.S. § 8C-1, Rule 703, allows an expert to base his opinion testimony on "facts or data . . . perceived by or made known to him at or before the hearing [which] . . . need not be admissible in evidence." N.C.G.S. § 8C-1, Rule 705, gives the opposing party the right to require disclosure of the underlying facts or data of the expert's opinion prior to his testimony and on cross-examination. We hold, therefore, that the discussion of the Boyer report on cross-examination was proper. Defendant's contention that the admission of this evidence constituted plain error is without merit.

For the reasons stated above, we find defendant received a fair trial, free from prejudicial error.

No error.

Justice MARTIN concurring.

I concur wholeheartedly with the majority opinion. I write only to state that had the defendant requested that the jury be instructed to consider the evidence of defendant's mental condition in connection with his ability to form the specific intent to kill, I would vote to hold it error to fail to so instruct. My opinion is based upon the scholarly and accurate dissent of Justice (later Chief Justice) Sharp in *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975). Here, defendant made no such motion; therefore I concur in the majority opinion.

Justice FRYE joins in this concurring opinion.

COUNTY OF DURHAM v. MADDRY AND COMPANY, INC., THOMAS E. MADDRY, INDIVIDUALLY AND AS AN OFFICER OF MADDRY AND COMPANY, INC., AND JAMES A. MADDRY, INDIVIDUALLY AND AS AN OFFICER OF MADDRY AND COMPANY, INC.

No. 135PA85

(Filed 10 December 1985)

Municipal Corporations § 30.14— zoning ordinance—automotive repair garage—operation in Highway Commercial district—remand of case for further determination

The record did not support the conclusion of the Court of Appeals that defendants' performance of automotive repairs not in conjunction with a gasoline service station in a Highway Commercial zoning district was not in violation of the Durham County Zoning Ordinance where there was no evidence as to whether the repairs performed by defendants are of the type permitted by the Ordinance to be conducted in conjunction with gasoline service stations. The case is remanded for a determination of whether the repairs being performed by defendants on their premises are of the same type, and are no greater in scope than, those repairs permitted or customarily performed by gasoline service stations located in Highway Commercial districts in Durham County and, if so, whether the rationale of *In re Couch*, 258 N.C. 345, 128 S.E. 2d 409, applies to permit defendants to perform such repairs on their premises.

ON plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 72 N.C. App. 671, 325 S.E. 2d 298 (1985), reversing the order entered by

McLelland, J., at the 29 February 1984 Civil Session of DURHAM Superior Court, permanently enjoining defendants' operation of an automotive repair service on their premises in a Durham County "Highway Commercial" zone. Heard in the Supreme Court 14 October 1985.

Thomas Russell Odom, Assistant County Attorney, for plaintiff-appellant.

Winston, Blue & Rooks, by David M. Rooks, III, for defendant-appellees.

MEYER, Justice.

Defendants are the owners of a tract of land in Durham County, the relevant portion of which is zoned "Highway Commercial." In the spring of 1981, defendants applied for a permit to build an automotive repair garage on this property. Defendants were advised by Durham County Supervisor of Inspections, L. F. Chamberlain, that an automotive repair garage was not a permitted use in the Highway Commercial district, but that such a use was permitted in areas zoned "Village Commercial." In May 1981, defendants applied to the Durham County Planning Commission for rezoning of 0.64 acres of their property from "Highway Commercial" to "Village Commercial." This request was denied by the Planning Commission on 8 June 1981, and defendants did not appeal the denial.

On 17 February 1982, defendants applied for a building permit to erect a "farm building" on their property. Recognizing that "farm buildings" were exempt from building permit requirements of the State Building Code, Mr. Chamberlain was reluctant to issue a permit for that purpose. Defendants, however, insisted on a permit to construct a "farm building." It is apparent on the record before us that Mr. Chamberlain questioned the good faith of this request and was suspicious of an attempt to obtain a permit for the construction of a "farm building" which would ultimately be used as an automotive repair garage and thus to circumvent the zoning ordinance. At the request of Mr. Chamberlain, defendants submitted a letter of intent stating that they intended to "use this building for farm purposes" and reserving the "right to engage in any other lawful venture . . . in accordance with Durham County Zoning Ordinance . . . Section XIII." De-

fendants were informed that a building permit was not required by either State law or the Durham County Zoning Ordinance to build any building for farm purposes. However, defendants insisted upon obtaining the permit so that the structure could be constructed according to commercial standards in the event they could later convert the building to commercial use. Defendants indicated that they also wanted to have all inspections made to ensure the building's suitability for conversion to commercial use. Mr. Chamberlain issued the building permit upon receipt of defendants' letter of intent, and the permit included a notation, "Not for use other than farm! or must comply with zone on property."

Several inspections were made of the building at the request of defendants during construction, including the electrical inspection, the only inspection required for a farm building. However, no final inspection was made as required by the State Building Code for the issuance of the Certificates of Compliance and Occupancy for buildings the construction of which requires a permit.

In April 1983, defendants began using the building on their property as an automotive repair garage without obtaining a Change of Use Permit required by the State Building Code, Section 105.3(f). Upon receiving complaints from individuals in the community, officials in the Planning and Inspections Department investigated the premises on 11 August 1983. On that date, the building inspector observed five vehicles inside the building where defendant James Maddry and another man were working and sixteen vehicles parked outside the building. The inspector also observed signs on the building. Plaintiff's exhibits 7 and 8 reveal a large on-building sign "Maddry & Co. Inc.—Auto Repairs," with a telephone number, and a ground sign advertising NAPA parts. Deryl Bateman, Director of Planning and Inspections, and Mr. Chamberlain prepared a letter dated 11 August 1983 informing defendants that they were in violation of the Zoning Ordinance and advising defendants to cease and desist from the use of the premises as an automotive repair garage. Defendants responded by letter on 19 August 1983 admitting that they were operating an automotive repair service allegedly according to Mr. Bateman's personal interpretation of the Zoning Ordinance verbally communicated to them.

On 6 September 1983, Supervisor of Inspections Chamberlain wrote to defendant Thomas E. Maddry reviewing the circumstances surrounding the issuance of the building permit for the "farm building" and containing the following:

> It is obvious from the circumstances, including your own admission in your letter of August 19, 1983 that the building is being used for the commercial purpose of automotive repairs. You have been informed previously on several occasions, the most recent of which being a letter dated August 11, 1983 from me, that this use does not conform to the Durham County Zoning Ordinance and the zone for this property. As of this time there is no evidence that any effort has been made to bring the use into conformity with the zoning ordinance, nor is there any evidence that you are complying with the letter of August 11, 1983 to cease and desist the operation of the garage. In addition, because the building is being used commercially and no final inspections as required by Section 105.6(b) were made and no Certificate of Occupancy issued, the building does not comply with the North Carolina Building Code as adopted by Durham County.
>
> Finally, because you stated your intentions were to use the building for farm purposes, but have obviously made no effort to do so, it is our position that the permit was obtained through misrepresentation. Therefore, for the reasons stated herein, the Permit #20118 issued February 18, 1982 is revoked effective immediately under the authority provided in Section 308 of the Administrative Provisions for Durham County and the State Building Codes, a copy of which is attached hereto. You are hereby notified to surrender the permit to the Durham County Building Inspections Department immediately.

On 20 January 1984, Judge John B. Lewis issued a preliminary injunction against defendants on the grounds that the automotive repair garage was constructed in violation of N.C.G.S. § 153A, Article 18, Part 4 (Building Inspections), and the State Building Code, Section 105.3(f), in that defendants failed to obtain a Change of Use Permit before converting the structure from a farm building to an automotive repair garage and that defendants had not obtained Certificates of Occupancy or Compliance. Judge

Lewis further concluded that the evidence was insufficient to permit a determination of whether defendants were also in violation of the Durham County Zoning Ordinance.

The matter was tried before Judge McLelland on 29 February 1984. Judge McLelland concluded that defendants' automotive repair service was in violation of Section XIII of the Durham County Zoning Ordinance in that (1) automobiles awaiting repairs were parked on the premises for more than one day, and (2) the repair service was not "incidental" to the operation of a gasoline service station. In addition, defendants were found to be in violation of the State Building Code, Sections 105.3(f) (permit required whenever the use of an existing building is changed), 105.5(d) (no deviations from terms of permit without written approval from Inspection Department), and 105.6(h) (inspection required before existing building converted to another use). Defendants were permanently enjoined from operating the automotive repair service on the premises. Defendants appealed to the Court of Appeals which reversed the trial court on the authority of *In re Couch*, 258 N.C. 345, 128 S.E. 2d 409 (1962).

The sole issue before us is whether the Court of Appeals erred in concluding that defendants' use of the premises is not in violation of the Durham County Zoning Ordinance, Section XIII, subsection 2(b)(1). The defendants do not contest the trial court's finding them in violation of the State Building Code, nor do they contest that they are in violation of Section XIII, subsection 3(a) of the Durham County Zoning Ordinance. In pertinent part, Section XIII, at the times relevant to this matter, provided:

> 2. USES PERMITTED
>
> . . . .
>
> b. Gasoline service stations where in [sic] the sales and services are those customarily required by motorists, whether local or transient; provided that (1) the repair, replacement or adjustment to vehicles shall be limited to minor accessory parts . . . .
>
> . . . .

3. USES PROHIBITED

a. The parking or storage of automobiles or similar vehicles which is not incidental to the operation of a principal use as permitted in subsections 1 and 8 herein. Automobiles or similar vehicles shall not be parked or stored for the purpose of removing parts or for the purpose of making major or extensive repairs.

Defendants do not contend that they are operating the automotive repair garage in conjunction with a "gasoline service station." However, on the authority of *In re Couch*, 258 N.C. 345, 128 S.E. 2d 409 (1962), defendants contend that, because "gasoline service stations" are permitted to repair, replace, or adjust minor accessory parts under subsection 2(b)(1) of Section XIII of the Durham County Zoning Ordinance, they must be permitted to perform the same types of "repair, replacement or adjustment" within the Highway Commercial district regardless of the fact that they do not also sell gasoline.

In *Couch*, petitioners sought to construct a car wash service station in a C-1 "Local Community Commercial Zone." Among the permitted uses in a C-1 zone was "3. Automobile service stations for the sale of gasoline, oil, and minor accessories only, where no repair work is done except minor repairs made by the attendant. . . ." The intention of the ordinance was to limit uses "to those uses properly incidental to the needs of the local residential neighborhood." The petitioners in *Couch* were denied a permit to build the car wash apparently because it was not associated with a service station which sold "gasoline, oil, and minor accessories," a use which was permitted in the C-1 zone. The Court noted that in 1951 when this ordinance was passed, "a service station devoted *exclusively* to washing automobiles was unknown. Practically every filling station performed this service . . . ." *Id.* at 346, 128 S.E. 2d at 410 (emphasis added). The Court found that, although not specifically mentioned in the ordinance, the washing of automobiles was a permitted use on the part of automobile service stations which also sold gasoline, oil, and minor accessories. Thus, the Court noted, "[a]pparently if the proprietor were to sell gasoline, oil and minor accessories, and to make minor repairs and wash cars, the petitioners would be entitled to the permit." Therefore, "[o]n the theory that the whole includes all the parts,

we think the petitioners have the right to erect a building for *any one or more of the permitted uses*." *Id.* at 346, 128 S.E. 2d at 411 (emphasis added).

Defendants here liken their plight to that of the petitioners in *Couch* in that, they contend, should their business become a "gasoline service station" by the installation of a gasoline pump outside the garage, the "repair, replacement or adjustment to vehicles . . . limited to minor accessory parts" would become a permitted use under Section XIII, subsection 2(b)(1). Defendants argue that the *Couch* decision controls the issue presented here.

Plaintiff, County of Durham, on the other hand, contends that the defendants' and the Court of Appeals' reliance on *Couch* is misplaced. First, the Court in *Couch* was faced with a city ordinance which did not have an ascertainable legislative history regarding the questioned use. Indeed, the Court noted that when the ordinance was passed in 1951, a service station devoted exclusively to washing automobiles was unknown. Therefore, it was the task of this Court in *Couch* to interpret the legislative intent "in the light of surrounding circumstances." It was clear to the Court that the drafters of the ordinance in *Couch* had not contemplated a service station devoted exclusively to washing automobiles.

Plaintiff argues that here, in sharp contrast, the legislative intent of the permitted uses under Section XIII is clear. In 1956, both the Highway Commercial district and the Village Commercial district permitted "gasoline service stations *and repair garages*." (Emphasis added.) In 1960, both provisions were amended to add, "including body and fender repairs." On 15 February 1965, the Board of Durham County Commissioners enacted, *inter alia,* the provisions now referred to as Highway Commercial district, Section XIII, subsections 2(b) and 3(a). The provision permitting "repair garages" was deleted from permissible uses in Highway Commercial districts. Automotive repair garages continue to be permissible uses in Village Commercial districts. Therefore, plaintiff argues, there exists a clear statement of the legislative intent to exclude automotive repair garages from the Highway Commercial district, and the Court is not compelled, as it was in *Couch,* to infer legislative intent regarding permitted and prohibited uses.

Even assuming, *arguendo*, that *Couch* would control the situation here, an issue we do not now decide, we are unable to conclude from the record before us whether the repairs conducted by the defendants are of the type permitted to be conducted in conjunction with gasoline service stations pursuant to Section XIII, subsection 2(b)(1) ("repair, replacement or adjustment to vehicles . . . limited to minor accessory parts"). First, the term "minor accessory parts" is nowhere defined in the ordinance. Second, there is no evidence of the types of repairs defendants were conducting on the premises. Defendants contend that they have at all times conducted their business in conformity with the verbal interpretation of "minor repairs" given to them by Deryl Bateman, Director of Planning and Inspection. Bateman allegedly told defendants that the types of minor repairs which might be performed by a gasoline service station in a Highway Commercial district were those which could be completed in one day. Defendants contend that, since beginning their operations, they have limited their business to repairs which could be completed within eight hours according to a flat-rate workbook; defendants do not contend that they have completed all repairs within one day and acknowledge that vehicles are sometimes parked outside the building overnight when the two employees cannot "get to them" on the day the vehicles were brought in.

Even under the rationale of *Couch*, in order for defendants' automotive repair garage to be a permissible use in a Highway Commercial district, the types of repairs performed by defendants must be no greater in scope than the types permitted to be performed or actually performed by "gasoline service stations" subject to the same zoning provisions. The record before us and before the Court of Appeals in this matter is devoid of any evidence of the types of repairs performed on defendants' premises. Likewise, there is no evidence of the types of permissible "minor accessory parts" repairs permitted to be performed or customarily performed by "gasoline service stations" located within the Highway Commercial district. Thus, even assuming, *arguendo*, that *Couch* controls, there is no basis in the record upon which the Court of Appeals could have concluded that defendants' operations were permissible under *Couch* as being the same as, or lesser in scope than, those allowed to be performed by "gasoline service stations."

We hold, therefore, that the record does not support the portion of the Court of Appeals' decision reversing the trial court's order of a permanent injunction based on defendants' alleged violation of the Durham County Zoning Ordinance, Section XIII, subsection 2(b)(1) by performing automotive repairs not in conjunction with a gasoline service station. That portion of the Court of Appeals' decision is vacated and the case is remanded to the Court of Appeals for further remand to the Superior Court, Durham County, for a determination, first, of whether the automotive repairs being performed by defendants on the premises are of the same type, and are no greater in scope than, those repairs permitted to be performed, or are customarily performed, by gasoline service stations located in Highway Commercial districts in Durham County. If the trial court determines that defendants' repairs are of the permissible type for gasoline service stations under the Durham County Zoning Ordinance, Section XIII, subsection 2(b)(1), the court must then determine whether the rationale of the *Couch* opinion is applicable to these facts.

We affirm that portion of the Court of Appeals' decision directing that defendants may be enjoined from the operation of a minor automotive repair garage for as long as defendants remain in violation of the State Building Code or the Durham County Zoning Ordinance, Section XIII, subsection 3(a).

Vacated in part, affirmed in part, and remanded.

STATE OF NORTH CAROLINA v. MATTHEW EDWARDS, JR.

No. 544PA84

(Filed 10 December 1985)

Constitutional Law § 65; Criminal Law § 73.1— admission of search warrant affidavit—hearsay—denial of right of confrontation—prejudicial error

The trial court in a prosecution for felonious possession of cocaine erred in permitting a police officer to read into evidence the contents of a search warrant affidavit because statements contained in the affidavit were incompetent hearsay evidence which denied defendant his rights of confrontation and cross-examination of the witnesses against him. Furthermore, such error was prejudicial where the affidavit permitted the State to show through the hearsay statements of an unnamed informant that defendant on a previous occasion

had a large quantity of cocaine in his residence and sold some of it to the informant.

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

ON discretionary review, pursuant to N.C.G.S. § 7A-31, of a decision of the Court of Appeals, 70 N.C. App. 317, 319 S.E. 2d 613 (1984), finding no error in defendant's conviction of felonious possession of between 200 and 400 grams of cocaine, sentence of fourteen years' imprisonment and fine of $100,000, entered after a jury trial at the 16 May 1983 Criminal Session of DURHAM County Superior Court, *McLelland, J.*, presiding.

Lacy H. Thornburg, Attorney General, by Alfred N. Salley, Assistant Attorney General, for the state.

Loflin & Loflin by Thomas F. Loflin, III, for defendant appellant.

EXUM, Justice.

We granted defendant's petition for discretionary review limited to the following two questions: (1) whether the trial court erred in permitting a police witness to read into evidence the search warrant and supporting affidavit in this case; and (2) whether the trial court erred in requiring defendant to proceed to trial with insufficient notice when his case was not on the trial calendar. After considering the first question, we find reversible error and remand for a new trial. We therefore find it unnecessary to reach the second question.

Pursuant to a search warrant, Durham police officers found over 200 grams of a white powder containing cocaine in the right-hand duplex located at 819 Arnette Avenue, Durham, North Carolina, on 30 July 1982. Eight people, including defendant, were in the house at the time. The name on the utilities bill was not defendant's, but a cable television receipt bore the name "Matthew Edwards." The state presented no evidence that defendant leased or owned the premises. Investigating officers found various materials in the kitchen often used in the cocaine trade, including scales, corners of small plastic bags, twist ties, scissors, and playing cards. One of the empty plastic bags lay open in the sink in soapy water. Officers testified that these items and tech-

niques are virtually exclusive to the local cocaine trade. When arrested, defendant was wearing a bathrobe. Some white powder observed on the front of the robe was later determined to be cocaine, and $550 was found in the robe's pocket.

The state also offered in evidence the contents of the affidavit used to obtain the search warrant. This evidence tended to show that a confidential source considered reliable by B. H. Millan, a Durham police officer, contacted Officer E. J. Kolbinsky, an investigator in the Department's Organized Crime Division, during the week of 25 July 1982. The confidential source informed Officer Kolbinsky that defendant Matthew Edwards, Jr., also known as "Steelbottom," had a large quantity of cocaine in his residence, identified as the right side of a duplex at 819 Arnette Avenue, Durham. Shortly thereafter, while under surveillance by Kolbinsky and another police officer, the confidential source entered the right-hand duplex at 819 Arnette Avenue and returned, stating that he or she had purchased cocaine from a man known to him or her as Matthew Edwards, Jr., and that Edwards had a "large quantity" of cocaine on the kitchen table. The state introduced the affidavit into evidence by permitting the affiant, Officer Kolbinsky, to read it verbatim to the jury, over defendant's objection.

Defendant offered no evidence.

We conclude the trial court committed reversible error in permitting the witness to read the entire search warrant affidavit to the jury.

This Court consistently has held that:

> It is error to allow a search warrant together with the affidavit to obtain search warrant to be introduced into evidence because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his rights of confrontation and cross-examination. *See State v. Oakes*, 249 N.C. 282, 106 S.E. 2d 206.

State v. Spillars, 280 N.C. 341, 352, 185 S.E. 2d 881, 888 (1972). In *Spillars* the affidavit in question contained hearsay statements indicating defendant's complicity in another crime without showing that he had been convicted of that crime. We said: "[T]he effect of admitting the search warrant and affidavit into evidence was to

allow the State to strengthen its case by the use of obviously incompetent evidence." *Id.* at 353, 185 S.E. 2d at 889. We concluded in *Spillars* that the error was reversible.

Spillars was based on our holding in *State v. Oakes*, 249 N.C. 282, 106 S.E. 2d 206 (1958), in which we found that the trial court reversibly erred in admitting a peace warrant and the supporting affidavit the victim, defendant's wife, made two days before defendant shot and killed her. We held that the warrant and affidavit constituted improper hearsay statements and precluded defendant from confronting or cross-examining the witness. Despite the trial court's jury instruction limiting the purpose of the peace warrant's introduction, the error was held to be reversible. *State v. Oakes*, 249 N.C. at 285, 106 S.E. 2d at 208.

In later cases we have followed consistently the decision in *Spillars*. We held in *State v. Jackson*, 287 N.C. 470, 215 S.E. 2d 123 (1975), that the trial court committed reversible error by admitting into evidence without restriction the complaint and warrant for defendant's arrest. The arrest warrant and complaint strengthened the state's case with incompetent hearsay evidence and denied defendant his right to confront witnesses against him.

Thus in *Spillars*, *Oakes* and *Jackson*, this Court held the error in admitting similar affidavits at trial was reversible. These cases treated the error as one of constitutional dimension because the effect of it was to deprive defendant of his constitutional right to cross-examine and confront witnesses against him. Such errors are reversible unless "harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b). The burden is upon the state to demonstrate that the error was harmless under the statutory standard. *Id.*

We cannot say here that the state has demonstrated beyond a reasonable doubt that the error was harmless. Although the case against defendant was relatively strong, the evidence that defendant knowingly, constructively possessed a quantity of cocaine necessary for a trafficking conviction was entirely circumstantial; and there were seven other people present at the time of defendant's arrest. The hearsay evidence contained in the affidavit was also quite devastating to defendant. It permitted the state to show through the hearsay statements of some unnamed informant that defendant on a previous occasion had a

large quantity of cocaine in his residence and sold some of it to the informant.

The state argues the affidavit was offered properly to show the background of the raid which resulted in defendant's arrest and the trial court admitted the evidence solely for this purpose and not for the truth of the matters stated therein.

Because of the extremely damaging nature of the admitted hearsay statements, we reject this contention. In *Oakes* a limiting instruction to the jury failed to cure the error in admitting a similarly damaging affidavit against defendant because ". . . the whole was before the jury, and it is feared that the impression was not so easily removed from the minds of the jurors." *State v. Oakes*, 249 N.C. at 284-85, 106 S.E. 2d at 208.

We conclude defendant must be given a new trial. We therefore reverse the decision of the Court of Appeals and remand the case to that court for remand to the Superior Court of Durham County for further proceedings consistent with this opinion.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. ERNEST LEON MYERS

No. 269A85

(Filed 10 December 1985)

APPEAL by defendant pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 73 N.C. App. 650, 327 S.E. 2d 276 (1985), which found no error in the trial and conviction of defendant before *Howell, J.*, at the 7 November 1983 session of Superior Court, BUNCOMBE County. Heard in the Supreme Court 20 November 1985.

Lacy H. Thornburg, Attorney General, by Evelyn M. Coman, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, for defendant.

PER CURIAM.

The trial court has again erroneously admitted completely irrelevant testimony as to defendant's whereabouts on the morning of 21 February 1975. On the authority of *State v. Myers*, 309 N.C. 78, 305 S.E. 2d 506 (1983), defendant is entitled to a new trial. The decision of the Court of Appeals is

Reversed.

VIRGINIA M. FARR v. THE BOARD OF ADJUSTMENT OF THE CITY OF ROCKY MOUNT, NORTH CAROLINA

No. 206A85

(Filed 10 December 1985)

APPEAL by defendant from a decision of the Court of Appeals, 73 N.C. App. 228, 326 S.E. 2d 382 (1985), one judge dissenting, vacating and remanding judgment entered by *Lewis, J.*, at the 5 August 1983 Civil Session of Superior Court, NASH County. Heard in the Supreme Court 18 November 1985.

Dill, Fountain & Hoyle, by William S. Hoyle, for respondent-appellant.

Fitch & Butterfield, by G. K. Butterfield, Jr., for petitioner-appellee.

PER CURIAM.

Our review of the decision of the Court of Appeals reveals that the case was decided by that court on the basis of the principle of "prior non-conforming use," an issue not raised or briefed by the parties to this action and not supported by the record. Accordingly, the decision of the Court of Appeals is vacated and the

case is remanded to that court for further consideration of the issues raised by the appellant in her brief filed in the Court of Appeals.

Vacated and remanded.

STATE OF NORTH CAROLINA v. HERMAN WILLIAMS, JR.

No. 50A84

(Filed 7 January 1986)

1. Searches and Seizures § 40— padlock not listed in search warrant—relevant to crime—lawfully seized

In a prosecution for first degree murder, a padlock was lawfully seized from the motel room where defendant was arrested and the trial court did not err in denying defendant's motion to suppress that evidence where the lock was found as the result of a search carried out under a warrant specifying items of bloody clothing as the items to be seized; the padlock was found under a telephone directory and it is not beyond reason that pieces of clothing could be found under, behind or even inside a telephone book; the telephone book was on a table beside the bed and the facts tended to show that defendant was awakened by the police and would support an inference that incriminating evidence may have been hurriedly hidden in close proximity to the bed; the crime scene technician who found the padlock testified at trial that he was unaware of the contents of the warrant but defendant failed to point to any evidence before the judge at the suppression hearing that indicated that the technician did not know the scope of the warrant; this lack of knowledge at the time of the search would not render an otherwise lawful search invalid; the discovery of the padlock was inadvertent because there was no indication that any officer had probable cause to believe the padlock was in the motel room; and it was immediately apparent upon discovery that the padlock constituted evidence in the case in that an officer knew that a padlock was missing from the victim's house, stated that it was relevant to the case, and immediately tried to open the lock with a key which was discovered near the body of the victim. N.C.G.S. 15A-253.

2. Jury § 7.11; Constitutional Law § 63— death-qualified jury—constitutional

The practice of death qualifying the jury did not deprive defendant of a fair trial.

3. Criminal Law § 87.4— redirect examination—testimony concerning investigator's suspicions—admissible as explanation of cross-examination

The trial court did not err in a prosecution for first degree murder by admitting on redirect examination testimony by an investigator that he believed defendant's girlfriend suspected defendant of some involvement in the killing

where the officer had been asked on cross-examination if he had become suspicious of the girlfriend prior to her inculpatory statements and had responded that he was suspicious of her knowledge, not her actions. Evidence explanatory of testimony brought out on cross-examination may be elicited on redirect examination even though it might not have been admissible in the first instance; furthermore, the jury already had before it evidence tending to indicate that the girlfriend did in fact suspect that defendant had murdered her mother.

4. Homicide § 30— first degree murder—no instruction on second degree—no error

The trial court did not err in a first degree murder prosecution by refusing to instruct the jury on second degree murder where the evidence showed defendant and his girlfriend had discussed killing the victim in order to collect her life insurance; the victim was severely beaten about the head and strangled with a telephone cord; the medical examiner characterized the strangulation as a finishing type of assault, done to silence the individual; defendant presented no evidence which would rebut the State's theory of the murder; and a finding that defendant perpetrated the killing in the heat of passion would require a piecemeal acceptance of the State's evidence.

5. Homicide § 25— first degree murder—instructions on murder weapon—no error

The trial court did not err in its instructions to the jury in a first degree murder prosecution by instructing the jury to consider whether a frying pan or a telephone cord were dangerous weapons where the evidence showed that a telephone cord was found wrapped around the victim's neck and mouth, a frying pan was sitting on a bar area near the body, broken pieces of the frying pan were found on the floor near the body, a glass ashtray was also discovered near the body, no blood or fingerprints were found on the frying pan, the ashtray was found near it, and defendant's girlfriend's fingerprints were found on the ashtray along with bloodstains. Under the State's theory of the case, defendant's guilt depended on whether he utilized the frying pan and telephone cord to perpetrate the killing; the fact that the ashtray could also have been used to kill the victim and that it was linked to another person was merely evidence favorable to defendant which was thoroughly reviewed in the court's summation of the evidence.

6. Criminal Law § 122.2— failure to reach a verdict—incomplete additional instructions—no plain error

There was no prejudicial error in a prosecution for first degree murder where the jury began its deliberations at 2:04 p.m. on 3 October; the evening recess was taken at 5:25 p.m.; the jury resumed deliberating the next morning at 9:05 p.m., returned to the courtroom at 9:50 p.m. and announced that they had been unable to reach a verdict; the court inquired into the numerical division of the jury and instructed them to resume deliberations at 9:53 a.m.; the jury deliberated throughout the day and was allowed to examine certain exhibits in the courtroom; the jury returned to the courtroom at 5:37 p.m. and handed the judge a written list of questions asking for an examination of additional exhibits and a review of certain testimony; the court was recessed for

the evening; the next morning the jury was permitted to examine certain items of evidence and was instructed to return to the jury room and continue deliberations; and the jury returned with a verdict of guilty of first degree murder twenty minutes later. The trial court's inquiry into the jury's numerical division was not error *per se*, but the court erred by giving the instructions set out in N.C.G.S. 15A-1235(b)(1) and (2), but not the instructions set out in N.C.G.S. 15A-1235(b)(3) and (4); however, defendant did not object to the incomplete instruction and it was not "plain error" entitling defendant to a new trial.

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

BEFORE *Allen, J.*, at the 19 September 1983 Criminal Session of Superior Court, MECKLENBURG County, defendant was convicted of first-degree murder. Following a sentencing hearing conducted pursuant to N.C.G.S. § 15A-2000, the jury found the existence of both aggravating and mitigating circumstances and concluded that, although the mitigating circumstances were insufficient to outweigh the aggravating circumstances, the aggravating circumstances were not sufficiently substantial to call for the imposition of the death penalty. Based upon the jury's recommendation, the trial court entered judgment sentencing the defendant to life imprisonment. The defendant appeals as a matter of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 11 April 1985.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Assistant Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

MEYER, Justice.

The defendant brings forward several assignments of error relating to the admission of evidence, the jury instructions, and the practice of permitting the State to impanel a "death-qualified" jury at the guilt-innocence phase of his first-degree murder trial. We conclude that the defendant received a fair trial, free from prejudicial error.

The State's evidence tended to show that Bobbie Elizabeth Fowler worked as a nurse's aid at the Nalle Clinic in Charlotte, North Carolina. On the afternoon of 7 February 1983, Fowler obtained a ride home from a co-worker at the clinic. She was

dropped off at her duplex at 1025 Holland Avenue at approximately 5:45 p.m.

Shortly after 9:00 p.m., some of Fowler's relatives called the Charlotte Police Department and stated that they had been unable to get her to answer her door. Officer D. L. Powell was dispatched to the scene and met a number of people in front of the house, including Mrs. Fowler's daughter, Sheila Fowler. Powell checked the outside of the building and discovered a side door standing slightly ajar. Powell entered the residence and discovered Mrs. Fowler lying on the living room floor. He observed a pool of blood under her head and a telephone cord stretching from the wall which was wrapped around her neck and through her mouth. A check for vital signs revealed that Mrs. Fowler was dead. Powell then notified the dispatcher of his discovery and requested assistance.

A search of the residence revealed a state of general disarray, as though the apartment had been ransacked. Drawers had been pulled out, a number of items were lying on the floor, mattresses were displaced, clothes had been pulled out of closets, and the victim's purse was found near the body with its contents dumped on the floor. Evidence indicated that there had been a considerable struggle between Mrs. Fowler and the attacker. Blood was splattered on the living room walls and on the living room furniture. The telephone cord was wrapped around her neck and her mouth. A frying pan was sitting on a bar area near the body. Broken pieces of the frying pan and of a ceramic ashtray were discovered on the floor near the victim's head.

Initially, the police were of the opinion that Mrs. Fowler had been killed during the perpetration of a burglary. However, later, the police concluded that there had been no burglary and that the residence had been ransacked in order to make it appear as though a break-in had occurred. The police based this belief in part on the fact that there were no signs of a forced entry and the front door was locked from the inside. Also, many items which might ordinarily be taken in a burglary were left in the residence.

Dr. Hobart Wood, the Mecklenburg County Medical Examiner, performed an autopsy on the body of the victim. During the course of the autopsy, Dr. Wood discovered that Mrs. Fowler

had suffered two lacerations to the head and a fractured skull. These injuries caused considerable hemorrhaging of the brain. He also observed a number of abrasions on her face. Dr. Wood testified that, in his opinion, Mrs. Fowler died as a result of ligature strangulation and an acute head injury. Dr. Wood placed the time of death at some time between 6:00 p.m. and 9:00 p.m. on 7 February 1983.

On the night that her mother's body was discovered, Sheila Fowler went to the Law Enforcement Center and gave a statement as to what she had observed at the scene prior to calling the police. Two days later, she agreed to meet with the officers to go over her statement. The meeting soon became an interrogation, and Miss Fowler eventually gave a statement implicating herself and the defendant in the murder of her mother. The officers obtained a warrant for the defendant's arrest and subsequently apprehended him at a local motor lodge.

At trial, Sheila Fowler testified that she had been charged with first-degree murder and that she was testifying pursuant to a plea agreement under which she would be permitted to plead guilty to second-degree murder in exchange for her truthful testimony at the defendant's trial. Sheila stated that she was originally from Charlotte, but had lived for the past several years in California. She testified that she had met the defendant in California the previous summer. They became romantically involved and lived together for seven months until she returned to Charlotte in November 1982.

Upon her return to Charlotte, Sheila began living with her mother during the week and spending the weekends with her grandmother. Sheila testified that she and her mother argued quite often, usually in regard to her inability to find employment and the financial burden that she was placing on her mother. She stated that approximately a week before the killing, they got into an argument and her mother struck her in the neck with a hacksaw.

The defendant arrived in Charlotte a week before the killing. When he arrived, Sheila told the defendant about the argument in which her mother hit her with the hacksaw, as well as other incidents which had occurred over the years. At some point, she and the defendant began to discuss the possibility of killing her

mother. Sheila stated that she told the defendant that her mother had approximately $10,000 of life insurance. She testified that upon being informed of the existence of this insurance money, the defendant stated, "You realize what we could do with that $10,000?"

Sheila saw the defendant every day from then until 7 February. On the afternoon of 7 February, she and the defendant were at her mother's house when Mrs. Fowler called. Sheila and her mother had a violent argument. After the call, Sheila told the defendant, "We should have went on and did what we talked about." She also told him that she did not care how he "did it"; she just wished he would "do it."

Subsequently, Mrs. Fowler called back. Sheila told her that she was going to visit her (Sheila's) son at his father's parents' house and that she would leave the house key in the mailbox. At approximately 3:30 p.m., the defendant left to return to his motel. Sheila left about an hour later. While at the home of her son's grandparents, Sheila was informed that people had been trying unsuccessfully to reach her mother. She called her mother's house, but was unable to get an answer. She left her son's grandparents' house at approximately 8:30 p.m. and returned home. After being unable to get her mother to answer the door, Sheila contacted the police. Mrs. Fowler's body was subsequently discovered in the apartment.

The next day, Sheila met with the defendant. She testified that the defendant told her that he had killed her mother and that he had made it look like a robbery. The defendant said that there had been a struggle and indicated that the frying pan had been broken during the fight.

The State also presented evidence that one of the defendant's fingerprints was found on the telephone whose cord was found wrapped around the victim's neck. The State also introduced as evidence a padlock that was discovered in the defendant's motel room shortly after his arrest. A key found near the body of the victim opened the padlock.

Stroud Johnson, who lived across the street from Mrs. Fowler, testified for the defendant. He stated that at some point between 8:00 and 8:30 p.m. on the night in question, he saw Mrs.

Fowler's boyfriend drive up and go inside her house. Johnson stated that the boyfriend stayed inside for a few minutes, came out, quickly got in his car, and raced away. The defendant also presented evidence that Sheila Fowler's fingerprints were discovered on a bloodstained, glass ashtray found lying next to the victim and that heel prints discovered on the kitchen floor were inconsistent with the shape and size of the heels of his boots.

Based on this evidence, the jury found the defendant guilty of first-degree murder. Following a sentencing hearing, the jury recommended that the defendant be sentenced to life imprisonment, and the trial court entered judgment accordingly.

[1] The defendant initially argues that the trial court erred in denying his motion to suppress the introduction into evidence of the padlock which was discovered in the motel room. He contends that the padlock was seized as a result of a search which was outside the scope of the search warrant and that it was therefore inadmissible. We do not agree.

Prior to trial, the defendant moved to suppress the introduction of the padlock into evidence. Evidence presented at the suppression hearing tended to show that after Sheila Fowler gave a statement implicating herself and the defendant in the killing, the police obtained a warrant for the defendant's arrest. During the early morning hours of 10 February 1982, Investigator S. C. Cook and other law enforcement officers proceeded to a local motel where the defendant was staying. The officers knocked on the motel room door, and the defendant answered wearing only a blanket wrapped around him. The defendant was placed under arrest, allowed to dress, and transported to the Law Enforcement Center. Cook determined that the room should be searched, and an officer was instructed to stand watch outside the motel room while a search warrant was obtained.

Cook subsequently obtained a warrant to search the motel room, and he and several other police officers then proceeded to the motel to execute the warrant. The only items specified in the warrant for seizure were items of bloody clothing.

One of the members of the search team was crime scene technician Thomas Griffith. Shortly after entering the room, Griffith walked over to an end table beside the bed. He observed a tele-

phone directory on the bottom shelf and picked it up. He discovered the padlock underneath the telephone book and asked the other officers if a padlock had any relevance to the case. Cook responded affirmatively, as he was aware that the padlock that had been on the victim's front door was missing. The padlock was then photographed and seized.

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation and *particularly describing the place to be searched and the persons or things to be seized.* (Emphasis added.)

N.C.G.S. § 15A-253 provides in part "[t]hat the scope of the search may be only such as is authorized by the warrant and is reasonably necessary to discover the items specified therein." The defendant argues that the padlock was not discovered as a result of a search for bloody clothing and that the evidence should have been excluded.

The fourth amendment's requirement that warrants must particularly describe the items to be searched for and seized is designed to prevent law enforcement officials from engaging in general searches. *See Marron v. United States*, 275 U.S. 192, 72 L.Ed. 231 (1927). However, in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, *reh'g denied*, 404 U.S. 874, 30 L.Ed. 2d 120 (1971), the U.S. Supreme Court held that the police may seize without a warrant the instrumentalities, fruits, or evidence of crime which is in "plain view" if three requirements are met. First, the initial intrusion which brings the evidence into plain view must be lawful. *Id.* at 465, 29 L.Ed. 2d at 582. Second, the discovery of the incriminating evidence must be inadvertent. *Id.* at 469, 29 L.Ed. 2d at 585. Third, it must be immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are otherwise subject to seizure. *Id.* at 466, 29 L.Ed. 2d at 583. We conclude that these requirements were clearly met and that the padlock was therefore lawfully seized pursuant to the "plain view" exception to the fourth amendment's warrant requirements.

First, as to the requirement that the initial intrusion which brings the evidence into view be lawful, the Supreme Court specifically stated in *Coolidge* that the "plain view" doctrine was applicable to a situation where, in the course of a search pursuant to a warrant authorizing a search for specific items, the police discovered other evidence. *Coolidge*, 403 U.S. at 465, 29 L.Ed. 2d at 582. Furthermore, a warrant authorizing a search for particular items gives authority to search anywhere the items might reasonably be expected to be found. *See United States v. Ross*, 456 U.S. 798, 72 L.Ed. 2d 572 (1982); *United States v. Wright*, 704 F. 2d 420 (8th Cir. 1983); *United States v. Newman*, 685 F. 2d 90 (3rd Cir. 1982); *Briscoe v. State*, 40 Md. App. 120, 388 A. 2d 153 (1978); *State v. Thisius*, 281 N.W. 2d 645 (Minn. 1978). N.C.G.S. § 15A-253 incorporates this view.

The defendant, however, argues that it should not have been reasonably expected that the items specified in the warrant—bloody clothing—would be found under a telephone book. We disagree. It is common knowledge that telephone directories are often quite bulky. It is not beyond reason that a bloody sock, tie, belt, or undergarment—all pieces of clothing—could be hidden under, behind, or even inside a telephone book. Additionally, we feel it is important to note the surrounding circumstances preceding the search. The defendant was arrested in the early morning hours after the police had knocked on his door. When he answered the door, he was wearing only a blanket. The telephone book was located on a table beside the bed. These facts tend to show that the defendant was awakened by the police and would support an inference that incriminating evidence may have been hurriedly hidden in a location in close proximity to the bed.

The defendant argues that Officer Griffith had not read the search warrant nor had he been told that the warrant limited the search to one for bloody clothing. The defendant appears to contend that this somehow converted Griffith's actions into an impermissible general search. We do not agree. We note that Griffith did not testify at the suppression hearing, and the defendant has failed to point to any evidence before the judge at the suppression hearing that indicated that Griffith did not know the scope of the warrant. It therefore appears that the judge did not have an opportunity to pass upon this question at the hearing. In addition, although Griffith did testify at the trial that he was unaware of

the contents of the warrant, this lack of knowledge at the time of the search would not render an otherwise lawful search invalid. *See United States v. Bugarin-Casas*, 484 F. 2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136, 38 L.Ed. 2d 762 (1974). Since Griffith did, in fact, search in a location where the items specified in the warrant might have been reasonably expected to be found, his lack of knowledge as to the scope of the warrant will not render the seizure and subsequent admission of the padlock invalid.

As for the requirement that the discovery of the evidence be inadvertent, the Supreme Court stated in *Coolidge* that discovery of evidence is inadvertent when it is not anticipated that the evidence will be found. In interpreting this requirement, some courts have said that inadvertence means the police must be without probable cause to believe that the evidence would be discovered and the mere suspicion that discovery would occur is insufficient to preclude application of the "plain view" doctrine. *United States v. Liberti*, 616 F. 2d 34 (2nd Cir.), *cert. denied*, 446 U.S. 952, 64 L.Ed. 2d 808 (1980); *United States v. Hare*, 589 F. 2d 1291 (6th Cir. 1979). This Court has interpreted the requirement as meaning that there must be no intent on the part of the investigators to search for and seize the contested items not named in the warrant. *State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844 (1978).

Although Cook knew the padlock was missing from the victim's house, there is nothing to indicate that he or any other officer had probable cause to believe the item was in the motel room. At most, the evidence only raised a mere suspicion that the padlock might be discovered there. Also, there is no indication that the officers intended to search for and seize the padlock.

Finally, we consider the question of whether it was immediately apparent upon discovery that the padlock constituted evidence in the case and was therefore subject to seizure. In *Texas v. Brown*, 460 U.S. 730, 75 L.Ed. 2d 502 (1983), the Supreme Court appeared to say that the "immediately apparent" requirement was met where the police had probable cause to associate the property with criminal activity. The facts clearly show that this standard was met here. Cook knew that a padlock was missing. As soon as Griffith announced that he discovered the padlock, Cook stated that it was relevant to the case. Cook immediately at-

tempted to open the lock with a key which was discovered near the body of the victim. This evidence clearly shows that Cook recognized the evidentiary importance of the padlock immediately upon its discovery.

For the foregoing reasons, we conclude that the padlock was lawfully seized from the motel room and that the trial court did not err in denying the defendant's motion to suppress the evidence. This assignment of error is overruled.

[2] The defendant next argues that the practice of "death-qualifying" the jury prior to the guilt-innocence determination phase of his trial resulted in a jury biased in favor of the prosecution on the issue of guilt and therefore constituted a deprivation of his constitutional right to a fair trial. We have consistently rejected such arguments. *E.g., State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, --- U.S. ---, 84 L.Ed. 2d 369, *reh'g denied*, --- U.S. ---, 85 L.Ed. 2d 342 (1985); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, --- U.S. ---, 83 L.Ed. 2d 299 (1984). This assignment of error is without merit.

[3] The defendant's next assignment of error concerns the admission of certain testimony by Investigator Rick Sanders. During redirect examination, the prosecutor asked Sanders what he suspected Sheila Fowler knew about the killing. Over objection, the officer testified that, based on information he had, he believed that Sheila suspected the defendant of some involvement. The defendant argues that this testimony was irrelevant and that its prejudicial effect entitles him to a new trial.

Initially, we note that during cross-examination, Sanders was asked if it was not true that prior to the time of Sheila Fowler's inculpatory statement, he had become suspicious of some of her actions. Sanders responded that his suspicions were not in regard to her actions, but were directed at her knowledge of the killing. It is well settled that evidence explanatory of testimony brought out on cross-examination may be elicited on redirect even though it might not have been properly admissible in the first instance. *E.g., State v. Love*, 296 N.C. 194, 250 S.E. 2d 220 (1978). We feel that Sanders' testimony on redirect was designed to explain his cross-examination testimony.

Furthermore, assuming, *arguendo*, that the testimony was irrelevant, its erroneous admission was clearly harmless in light of Sheila Fowler's testimony. Prior to Sanders' testimony, Sheila stated that she and the defendant had previously discussed killing her mother; that after the discovery of the body, she asked the defendant if he killed her mother; and that he admitted killing her. Therefore, prior to Sanders' objected-to testimony, the jury had before it evidence tending to indicate that Sheila Fowler did, in fact, suspect that the defendant had murdered her mother. It is therefore clear that the admission of Sanders' testimony, if error, could not have influenced the verdict against the defendant. This assignment of error is overruled.

[4] The defendant next contends that the trial court erred by refusing to instruct the jury concerning the lesser-included offense of second-degree murder. He argues that the evidence could have raised a reasonable doubt in the minds of the jurors as to whether the killing was committed with premeditation and deliberation and that he was therefore entitled to an instruction on second-degree murder. We disagree.

In *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983), we held that a trial judge is not required to give an instruction on second-degree murder in all first-degree cases, but may only instruct on second-degree murder when the evidence supports such a charge. In discussing the evidentiary requirement necessary to support an instruction on second-degree murder, we stated:

> We emphasize again that although it is for the jury to determine, from the evidence, whether a killing was done with premeditation and deliberation, the mere possibility of a negative finding does not, in every case, assume that defendant could be guilty of a lesser offense. Where the evidence belies anything other than a premeditated and deliberate killing, a jury's failure to find all the elements to support a verdict of guilty of first degree murder must inevitably lead to the conclusion that the jury disbelieved the State's evidence and that defendant is not guilty. The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is

> *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Id. at 293, 298 S.E. 2d at 657-58.

Applying this standard to the facts of the case, it is clear that the defendant was not entitled to an instruction on second-degree murder. The State's evidence shows that the defendant and Sheila Fowler had discussed killing the victim in order to collect her life insurance. The victim was severely beaten about the head and was strangled with a telephone cord. Dr. Wood characterized the strangulation as a "finishing type of assault, done to silence the individual." The evidence clearly supports a finding of premeditation and deliberation. The defendant presented no evidence which would rebut the State's theory of the murder. He did not testify in his own behalf, and his defense consisted of attempts to discredit Sheila Fowler and to raise the possibility that someone else, specifically the victim's boyfriend, perpetrated the killing. In other words, the only evidence tending to negate the required elements of first-degree murder was the defendant's silent, yet implicit, denial that he committed the crime. Under *Strickland*, this does not entitle him to an instruction on second-degree murder.

The defendant argues, however, that the evidence could support a finding that he perpetrated the killing in a heat of anger brought on by his concern over the victim's treatment of his girlfriend, Sheila Fowler. Such a finding would require the jury to accept the State's evidence that the defendant was the killer, but reject the evidence tending to show that he acted with premeditation and deliberation. The mere possibility of the jury's piecemeal acceptance of the State's evidence will not support the submission of an instruction on a lesser-included offense. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954). This assignment of error is overruled.

[5] The defendant's next assignment of error concerns the trial court's instruction regarding the possible murder weapon. The evidence showed that a telephone cord was found wrapped around the victim's neck and mouth. A frying pan was sitting on a bar area near the body. Broken pieces of the frying pan were

found on the floor near the body. A glass ashtray was also discovered near the body. No blood or fingerprints were found on the frying pan. However, the ashtray was bloodstained, and Sheila Fowler's fingerprints were discovered on it.

The trial judge instructed the jury to consider whether the telephone cord or the frying pan were dangerous weapons, but did not mention the ashtray as a possible murder weapon. The defendant argues that because the ashtray tended to link another person to the crime, the trial court erred by failing to instruct the jury to consider whether the ashtray was a possible murder weapon. We find this argument to be meritless. At no time did the State contend that the defendant used the ashtray to commit the murder. Under the State's theory of the case, the defendant's guilt depended on whether he utilized the frying pan and/or the telephone cord to perpetrate the killing. The fact that the ashtray could have also been used to kill the victim and that it was linked to another person was merely evidence favorable to the defendant, which was thoroughly reviewed by the trial court in its summation of the evidence.[1] This assignment of error is overruled.

[6] In his final assignment of error, the defendant claims that the trial court made statements to the jury during its deliberations which tended to coerce a verdict in favor of the prosecution. We do not agree.

The jury retired to begin its deliberations at 2:04 p.m. on 3 October 1983. The evening recess was taken at 5:25 p.m. The jury resumed deliberating the next morning at 9:05 a.m. At 9:50 a.m., the jury returned to the courtroom, and the foreman announced that the jury had been unable to reach a verdict. The following exchange then took place:

> THE COURT: Now, I want to ask you some questions. I want to know numbers. I don't want to know on which side the numbers are. All I want to know is the numbers. Do you understand what I'm referring to?
>
> FOREMAN: Yes.

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1. We note that N.C.G.S. § 15A-1232 was recently amended so as to no longer require trial judges to state, summarize, or recapitulate the evidence or to explain the application of the law to the evidence. 1985 N.C. Sess. Laws ch. 537, § 1. They may, however, elect to do so through the exercise of their discretion.

THE COURT: When did you take your first vote yesterday?

FOREMAN: About 5:00.

THE COURT: What was the vote at that time?

FOREMAN: The vote at that time was—

THE COURT: Just the numbers.

FOREMAN: Ten and one.

THE COURT: And one abstention?

FOREMAN: One undecided.

THE COURT: Now, when did you take your first vote this morning?

FOREMAN: We did not specifically take a vote.

THE COURT: All right, but the one vote did not change?

FOREMAN: Right.

THE COURT: All right. You all resume your deliberations. Thank you.

The jury resumed its deliberations at 9:53 a.m. The defendant then moved for a mistrial based on the grounds that the foreman had expressly stated that the jury had been unable to reach a verdict. The motion was denied.

The jury continued to deliberate throughout the day and, at one point, was allowed to examine certain exhibits in the courtroom. At 5:37 p.m., the jury returned to the courtroom and handed the judge a written list of questions asking for an examination of additional exhibits and a review of certain testimony. The judge told the jury he would review the requests and recessed court for the evening.

The next morning, the defendant renewed his motion for a mistrial based on the fact that the jury had deliberated for a day and a half without reaching a verdict. The motion was again denied. The court then permitted the jury to examine certain items of evidence. The trial judge went on to state:

> Now, Members of the Jury, the Court has not summarized all of the evidence in this case, but it is your duty to remember all of the evidence, whether it's been called to your attention or not, and if your recollection of the evidence differs from that of the Court or differs from that of the defense attorney or the District Attorney, you are to rely solely on what your recollection is in your deliberation. You all have a duty to consult with one another to deliberate with a view to reaching an agreement, if it can be done without violence to your individual judgment, and each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. I will ask you to return to the jury room and continue your deliberations, please.

Approximately twenty minutes later, the jury returned with a verdict finding the defendant guilty of first-degree murder.

The defendant initially contends that the trial court's inquiry into the numerical division of the jurors constituted *per se* reversible error. The defendant acknowledges that this issue was decided against him in the recent case of *State v. Fowler*, 312 N.C. 304, 322 S.E. 2d 389 (1984), but nevertheless urges us to reconsider our decision in that case. He has failed to present any arguments in support of this request, and we decline to depart from former Justice Copeland's well-reasoned opinion in *Fowler*.

The defendant next argues that the trial court's failure to instruct the jury in accordance with N.C.G.S. § 15A-1235 had the effect of coercing a verdict in favor of the prosecution. N.C.G.S. § 15A-1235 provides:

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

The defendant's argument centers on the fact that when instructing the jury prior to the commencement of their deliberations on the morning the verdict was returned, the trial judge failed to give the instructions set out in N.C.G.S. § 15A-1235(b)(3) and (4) (i.e., that during the course of deliberations, a juror should not hesitate to reexamine his views and change his opinion if convinced it is erroneous and that no juror should surrender his honest conviction solely because of the opinions of other jurors or merely for the purpose of returning a verdict).

We have said that this statute is the "proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict." *State v. Easterling*, 300 N.C. 594, 608, 268 S.E. 2d 800, 809 (1980). We have also noted that the language of N.C.G.S. § 15A-1235(c) is permissive rather than mandatory, as the trial judge *may* give the instructions delineated in N.C.G.S. § 15A-1235(a) and (b) if he believes the jury is unable to agree upon a verdict. *State v. Peek*, 313 N.C. 266, 328 S.E. 2d 249 (1985). It is clearly within the sound discretion of the

trial judge as to whether to give an instruction pursuant to N.C.G.S. § 15A-1235(c).

However, in the official commentary to N.C.G.S. § 15A-1235, the Criminal Code Commission expressed its opinion that once the trial judge gives any of the instructions set out in N.C.G.S. § 15A-1235(b), he must give all of the instructions. Although the official commentary was not drafted by the General Assembly, we believe its inclusion in The Criminal Procedure Act is some indication that the legislature expected and intended for the courts to turn to it for guidance when construing the Act. We consider the official commentary to be merely persuasive authority, *see, e.g., State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978), and it is therefore not binding on us.

In this case, we find the logic of the official commentary to be persuasive and therefore hold that whenever the trial judge gives the jury any of the instructions authorized by N.C.G.S. § 15A-1235(b), whether given before the jury initially retires for deliberation or after the trial judge concludes that the jury is deadlocked, he must give all of them.

The State argues that, here, the instruction was not given pursuant to N.C.G.S. § 15A-1235(c) because there was no indication that the jury was deadlocked. We disagree. The previous morning, the jury foreman had informed the trial judge that after deliberating for several hours, there was a ten to one split, with one abstention. The jury deliberated for the remainder of the day and, immediately prior to the evening recess, asked to examine some exhibits and to have certain testimony reviewed. We believe that at the time the instruction was given, the trial judge quite reasonably believed the jury was still deadlocked. The fact that he gave two of the four instructions authorized by N.C.G.S. § 15A-1235(b) is some evidence of the fact that he felt the jury remained deadlocked. Since the trial judge gave the instruction after forming the opinion that the jury was deadlocked, he committed error when he gave the instructions set out in N.C.G.S. § 15A-1235(b)(1) and (2), but failed to give the instructions set out in N.C.G.S. § 15A-1235(b)(3) and (4).

This error does not, however, automatically entitle the defendant to a new trial. We have recognized "that every variance from the procedures set forth in the statute does not require the

granting of a new trial." *Peek*, 313 N.C. at 271, 328 S.E. 2d at 253; *see also State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). Furthermore, as the State points out, the defendant failed to object to the incomplete instruction. Our review is therefore limited to a determination of whether the omission constituted "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). As stated in *Odom*:

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

Id. at 660, 300 S.E. 2d at 378 (1983) (*quoting from United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)). In order to determine whether an erroneous instruction constitutes "plain error," we must review the entire record and ascertain whether the defective instruction had a probable impact on the jury's finding of guilt. *Odom*, 307 N.C. 655, 300 S.E. 2d 375.

In this case, our review of the entire record convinces us that this error does not constitute "plain error" entitling the defendant to a new trial. The State presented overwhelming evidence of the defendant's guilt. Furthermore, before the jury initially retired to begin its deliberations, the trial judge gave all four instructions set out in N.C.G.S. § 15A-1235(b). Each juror was therefore clearly aware that he should not hesitate to reexamine his views and change his opinion if convinced they were erroneous and that he should not surrender his honest conviction solely because of the opinions of fellow jurors or merely to reach a verdict. Also, a close examination of the actual instruction given clearly shows that it could not have had a prejudicial impact. The judge instructed the jurors that they had a "duty to consult with

one another to deliberate with a view to reaching an agreement, *if it can be done without violence to your individual judgment.*" This portion of the instruction conveyed to the jurors the unmistakable message that they were not to sacrifice their individual beliefs in order to reach a verdict.

The defendant also appears to contend that a review of the entire record indicates that the trial judge coerced a verdict in favor of the State. This argument is meritless. As noted above, neither the court's inquiry into the numerical division of the jury nor the incomplete instruction tended to be coercive. The jury was not required to deliberate for an inordinate amount of time, and at no point did the jurors indicate that they were hopelessly deadlocked. The trial judge also granted the jury's requests to review exhibits introduced at trial. The record also reveals that the trial judge was polite, considerate, and accommodating toward the jury. Defendant has failed to point to any statement, act, or omission by the court which could be remotely interpreted as coercive.

We conclude that the defendant received a fair trial, free from prejudicial error.

No error.

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

SHARON ROWE STEPHENSON, SANDRA ROWE FAULKNER, SHEILA ROWE AND MAXINE ROWE AS GUARDIAN AD LITEM FOR SYLVIA PAULETTE ROWE, A MINOR, ANGELA ALINE ROWE, A MINOR, KATHERINE LOUISE ROWE, A MINOR, AND AARON WILLIAM ROWE, A MINOR, AND JOHN J. SCHRAMM, AS GUARDIAN AD LITEM FOR UNBORN PERSONS v. LUCILLE JONES ROWE, INDIVIDUALLY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF AARON WILLIAM ROWE AND AS TRUSTEE UNDER THE WILL OF AARON WILLIAM ROWE

No. 515A85

(Filed 7 January 1986)

1. Wills §§ 1.4, 56— devise of acres out of larger tract—not void for vagueness

A devise of a specified number of acres, not described by metes and bounds, out of a larger tract is not void for vagueness. The contrary decision of *Hodges v. Stewart*, 218 N.C. 290, 10 S.E. 2d 723 (1940) is overruled.

2. Wills § 56— devise of acres out of larger tract—reasonable selection by devisee

It is reasonable to infer that the testator intended that his wife have the power to make a reasonable selection of a 30-acre tract "immediately surrounding the homeplace" where testator devised to his wife the homeplace they occupied at the time of his death "together with thirty (30) acres of real estate immediately surrounding the homeplace"; the wife was the primary beneficiary of his will and the principal object of his bounty; testator named his wife as both executor of his estate and trustee of his residuary devise and gave her absolute power to deal with property in the estate or trust; before his death, testator had purchased enough split rail fencing to go around 30 acres and had actually installed part of the fence; and testator and his wife both undoubtedly knew precisely what metes and bounds would be necessary to lay off thirty acres "immediately surrounding" their home. Furthermore, the wife's selection of a 30-acre tract was reasonable where the home itself is almost exactly in the center of the tract selected.

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

APPEAL of right by defendant under N.C.G.S. § 7A-30 from the decision of a divided panel of the Court of Appeals (opinion by *Johnson, J.*, concurred in by *Wells, J.*, *Becton, J.*, dissenting), 69 N.C. App. 717, 318 S.E. 2d 324 (1984), vacating summary judgment for defendant entered by *Helms, J.*, presiding at the 1 November 1982 Session of IREDELL County Superior Court. Defendant's petition under N.C.G.S. § 7A-31 for discretionary review as to additional issues denied, 312 N.C. 89, 321 S.E. 2d 907 (1984).

William T. Graham for plaintiff appellees.

Rudisill & Brackett, P.A., by J. Richardson Rudisill, Jr.; Tharrington, Smith & Hargrove, by Wade M. Smith, for defendant appellant.

EXUM, Justice.

This is a declaratory judgment action for the construction of a will. The question is whether a devise of a specified number of acres, not described by metes and bounds, out of a larger tract is too vague to be valid. The Court of Appeals, relying on *Hodges v. Stewart*, 218 N.C. 290, 10 S.E. 2d 723 (1940), concluded that it was and vacated the trial court's summary judgment for defendant which sustained the devise. We overrule *Hodges v. Stewart*, reverse the Court of Appeals' decision and reinstate the judgment of the trial court. We conclude under the circumstances of this case that the devisee has the power to make a reasonable selection of the specified number of acres devised out of the larger tract and that the selection made by the devisee was reasonable. Therefore, the trial judge properly entered judgment declaring that the devisee holds fee simple title to the acreage she selected.

I.

[1] The testator, Aaron William Rowe, had been twice married. Plaintiffs are the children of Maxine Rowe, to whom testator was first married. This marriage was not a happy one and ended in divorce on 27 August 1973. Later testator married defendant, Lucille Jones, to whom he remained happily married until his sudden and untimely death on 28 April 1981.

At his death testator owned a tract consisting of approximately 164 acres. After his marriage to defendant, testator and defendant selected a site on testator's 164-acre tract on which they built their home. Together they cleared this site and did much of the construction work on the home themselves. Testator had also purchased enough split rail fencing to encompass 30 acres and had erected this fencing around a part of the tract.

Testator's will, executed 30 November 1976, devised to his wife, Lucille Rowe,

> the home place occupied by us at the time of my death, together with thirty (30) acres of real estate immediately sur-

> rounding the home place, to be hers in fee simple, absolutely and forever.

After providing for the payment of debts and expenses, the will left the remainder of testator's property to his wife, Lucille Rowe, "in trust for her and for my seven children. . . ." The will directed Lucille Rowe to hold "said property as trustee for my seven children, until they reach the age of twenty-five years, and for herself, who are to share equally." Testator named Lucille Rowe as his executor and gave her broad powers with which to administer both the trust and the estate. The will provided that as executor and trustee Lucille Rowe had "absolute power to deal with any property, real or personal, held in my estate or in trust, as freely as I might in the handling of my own affairs." The will gave Lucille Rowe as trustee and executor "full and complete power, without orders of any court . . . to sell, exchange, assign, transfer, and convey any . . . property, real or personal, held in my estate, and to hold said funds for the purposes herein enumerated." Finally the will gave Lucille Rowe as trustee and executor "full authority and power of sale over any and all property of every kind and description in order to carry out the provisions and conditions of this will . . . ." The will authorized Lucille Rowe to serve as executor and trustee without bond.

A codicil to testator's will, executed 24 February 1977, excluded from the trust and bequeathed instead to Lucille Rowe "all of the household and kitchen furniture, farm equipment, cows and other livestock owned by me at the time of my death. . . ."

In May 1981, after testator's death, Lucille Rowe employed a surveyor to lay off 30 acres of land out of testator's 164-acre tract. The 30 acres laid off by the surveyor does in fact immediately surround the residence occupied by the testator and Lucille Rowe at the time of testator's death, and this residence is situated approximately in the center of the 30-acre tract so surveyed. On 25 June 1981 Lucille Rowe, in her capacity as executor of testator's estate, conveyed to herself individually the 30 acres of real estate described in the survey.

Plaintiffs seek a declaration that the 30-acre devise fails for vagueness. Defendant answered, taking the position that the devise was not void for vagueness and that she was entitled to the 30 acres contained in the executor's deed. Both plaintiffs and

defendant moved for summary judgment. Defendant's uncontradicted evidentiary forecast tended to show that the facts were as set out above. Plaintiffs made no evidentiary forecast. Judge Helms, concluding there was "no genuine issue as to any material fact and that defendant is entitled to judgment in her favor as a matter of law," entered summary judgment for defendant. He determined that the 30-acre devise did not fail and that Lucille Rowe individually held title to the 30-acre tract described in the executor's deed. On plaintiffs' appeal, the Court of Appeals, on the authority of *Hodges v. Stewart*, 218 N.C. 290, 10 S.E. 2d 723 (1940), vacated this judgment and remanded the matter for further proceedings.

The Court of Appeals held that under *Hodges*, it was constrained to invalidate the devise for uncertainty, despite the testator's unequivocally expressed intention to give his wife Lucille their home and the 30 acres immediately surrounding it. *Stephenson v. Rowe*, 69 N.C. App. 717, 720-21, 318 S.E. 2d 324, 326 (1984). Noting that ". . . we should not lightly disregard such clearly expressed wishes," *id.* at 720, 318 S.E. 2d at 326, the Court of Appeals felt compelled to reach a result "contradictory to the express intent of the testator" because "*Hodges* must supply the rule of decision." *Id.* at 722-23, 318 S.E. 2d at 327.

In *Hodges*, the testator died owning two tracts of land, an 82-acre tract known as the home tract, and another 83-acre tract. He devised to his son, Jesse, "twenty-five acres of the home tract of land including the building and outhouses, and the remainder of my real estate to be divided equally among all my children." This Court stated:

> We are of opinion, and so hold, that the devise to the defendant Jesse C. Stewart of twenty-five acres out of a larger tract of 82 acres is void for vagueness and uncertainty in the description of the property attempted to be devised. The will furnishes no means by which the twenty-five acres can be identified and set apart, nor does the will refer to anything extrinsic by which the twenty-five acres can be located. The will fixes no beginning point or boundary. It is too vague and indefinite to admit of parol evidence to support it. There is nothing to indicate where or how the testator intended the twenty-five acres should be set apart out of

> the 82 acres in the home tract. The principle is firmly established in our law that a conveyance of land by deed or will must set forth a subject matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the instrument refers. It is essential to the validity of a devise of land that the land be described with sufficient definiteness and certainty to be located and distinguished from other land. The language in which the devise to Jesse C. Stewart is expressed contains no reference to anything extrinsic which by recurrence thereto is capable of making the description certain under the principle *id certum est quod certum reddi potest.*

Hodges v. Stewart, 218 N.C. at 291, 10 S.E. 2d at 724.

In concluding that *Hodges* controlled its decision, the Court of Appeals said:

> The only difference between this case and *Hodges* lies in the words 'immediately surrounding.' These fix no beginning point or boundary, however. They do not indicate how the 30 acres are to be separated from the other land, except by mathematical speculation. They are thus too vague and indefinite 'to admit of parol evidence to support them.' *Id.* Therefore, the trial court erred in implicitly ruling, as it must have to consider defendant's parol evidence, that the devise was only latently ambiguous. *A fortiori*, the summary judgment based thereon also constituted error.

69 N.C. App. at 721, 318 S.E. 2d at 326.

Judge Becton dissented on the ground that *Hodges* "overlooks the fundamental distinction between the sufficiency of descriptions required in deeds as opposed to devises under wills. . . ." *Id.* at 723, 318 S.E. 2d at 327 (Becton, J., dissenting). Judge Becton noted that Judge Robert Martin had earlier in dissent questioned on similar grounds the soundness of *Hodges* and urged this Court to reconsider it. *Taylor v. Taylor*, 45 N.C. App. 449, 263 S.E. 2d 351, *rev'd on other grounds*, 301 N.C. 357, 271 S.E. 2d 506 (1980) (Martin, Robert, J., dissenting).

II.

After carefully examining *Hodges*, we agree with Judges Becton and Robert Martin that the case was wrongly decided.

Where it is clear, as in this case and in *Hodges*, that a testator intends for a devisee to have a specified number of acres out of a larger tract but does not provide a metes and bounds description of those acres, courts have generally been able to save the devise rather than declare it void for vagueness. It is, after all, the courts' duty if possible to render the will "operative rather than invalid," *Faison v. Middleton*, 171 N.C. 170, 173, 88 S.E. 141, 143 (1916), and to give effect to the testator's intent "if it is not in contravention of some established rule of law or public policy. Such intention is to be determined by an examination of the will, in its entirety, in light of all surrounding facts and circumstances known to the testator." *Bank v. Home for Children*, 280 N.C. 354, 359-60, 185 S.E. 2d 836, 840 (1972).

It is generally agreed that devises in wills are to be interpreted more liberally than conveyances in deeds in order, if possible, to give effect to the testator's intent.

> While both deeds and wills are to be given a liberal interpretation, it is said that a will is construed more liberally than a deed. The greater liberality in construing wills seems completely sound. Wills, as well as donative deeds, are unilateral transactions upon which the conveyee has no grounds upon which to claim reliance. It is the subjective intent of the testator that should therefore be allowed to control. In the case of deeds for consideration, contracts, and two-party commercial transactions the conveyor receives something of value from the conveyee and the conveyee has certain grounds for asserting the doctrine of reliance. Therefore, in these two-party transactions the conveyor ought to be bound by the meaning which he reasonably should have anticipated that the conveyee would derive from the language employed. In other words, it is the establishment of an objective meaning that is sought.

4 W. Page, *Law of Wills* § 30.2 at 8 (W. Bowe & D. Parker rev. ed. 1961) (citations omitted). Judge Becton noted one practical reason for a more liberal construction for wills than for deeds: "[T]he parties may correct an improperly drawn deed, while a testator, after death, cannot remedy technical mistakes in drafting." *Stephenson v. Rowe*, 69 N.C. App. at 723-24, 318 S.E. 2d at 328 (Becton, J., dissenting). *See also Wade v. Sherrod*, 342 S.W. 2d 17 (Tex. Civ. App. 1960).

Cases from the several jurisdictions which have addressed the issue also support the rule that wills should be treated more liberally in effectuating the testator's intent than should deeds, contracts and other instruments. *See Dickey v. Walrond*, 200 Cal. 335, 253 P. 706 (1927); *Wise v. Potomac National Bank*, 393 Ill. 357, 65 N.E. 2d 767 (1946); *Wallace v. Noland*, 246 Ill. 535, 92 N.E. 956 (1910); *Hamlyn v. Hamlyn*, 103 Ind. App. 333, 7 N.E. 2d 644 (1937); *Friedmeyer v. Lynch*, 226 Iowa 251, 284 N.W. 160 (1939); *Davis v. Corabi*, 421 S.W. 2d 677 (Tex. Civ. App. 1967); *In re Johnson's Estate*, 64 Utah 114, 228 P. 748 (1924).

Descriptions similar to the one in the case at bar are generally held valid and enforceable in wills even if void for vagueness in deeds. *Compare* Annot., 117 A.L.R. 1071 (1938); *with* Annot., 157 A.L.R. 1129 (1945) (noting that *Hodges* contradicts the established rule and earlier North Carolina cases which the Court apparently overlooked. *Id.* at 1130, 1137).

To save devises of parts of larger tracts when the parts have not been described by metes and bounds, courts have employed three methods:

One is to permit evidence of circumstances which tend to fit the description in the will to land intended to be devised. *Stockard v. Warren*, 175 N.C. 283, 95 S.E. 579 (1918) (contract to will beneficiary "two hundred acres of land on homeplace"); *Fulwood v. Fulwood*, 161 N.C. 601, 77 S.E. 763 (1913) (devise of "homestead tract"); *Boddie v. Bond*, 158 N.C. 204, 73 S.E. 988 (1912) (devise to wife of "the house where we now live, with all the outhouses and premises, embracing the peach and apple orchard"); *In re Will of McIlhattan*, 198 Wis. 518, 224 N.W. 713 (1929) (devise of "the west half of the northeast quarter, less three acres"); *see* 1 Wiggins, *North Carolina Wills* § 138 (2d ed. 1983); *see also Caudle v. Caudle*, 159 N.C. 53, 74 S.E. 631 (1912).

Another is to consider devisees of specified numbers of acres out of larger tracts to be tenants in common of the entire tract in proportion to their devises. If unable to agree among themselves to an appropriate division of the devised land, the devisees could petition the court for the appointment of commissioners to divide it fairly among them. *Caudle v. Caudle*, 159 N.C. 53, 74 S.E. 631 (1912) (testator devised to each of her five children a specified number of acres totaling 347 out of 347-acre tract, of which one

devise included "the old home place where I now live"); *Wright v. Harris*, 116 N.C. 462, 21 S.E. 914 (1895) (50 acres "at some suitable place" out of 1,200-acre tract); *Harvey v. Harvey*, 72 N.C. 570 (1875) (two sons each given 250 acres; one tract to include testator's home, the other, buildings occupied by devisee; both to come out of two tracts owned by testator consisting, respectively, of 705 acres and 68¾ acres). *Caudle*, *Wright* and *Harvey* predated *Hodges* but were not referred to in that case. Courts from other jurisdictions have also resorted to the tenants in common solution, which our cases have recognized, and have denied a devisee's right to select where the relationships of all devisees to the testator were substantially the same. *Smith v. Burt*, 388 Ill. 162, 57 N.E. 2d 493 (1944) (nephew and niece given, respectively, 80 acres including farm buildings and remaining 135 acres); *Lambert v. Lambert*, 243 S.W. 623 (Tex. Civ. App. 1922) (100 acres each to two granddaughters; 50 acres each to two other granddaughters).

Finally, although this Court has not yet employed this method,[1] courts from other jurisdictions have found in appropriate circumstances an intent on the part of the testator to empower the devisee to make a reasonable selection of the acreage. *Baumhauer v. Jones*, 224 Ala. 484, 140 So. 425 (1932) (devise of homeplace and 300 surrounding acres to daughter, who made a fair and reasonable selection); *Prater v. Hughston*, 202 Ala. 192, 79 So. 564 (1918) (devise of forty acres out of a 153-acre tract; devisee "primary object of testator's bounty"); *Nichols v. Swickard*, 211 Iowa 957 (1931) (devisee had lived on land for many years); *Youmans v. Youmans*, 26 N.J. Eq. 149 (1875) (devisee was testator's widow); *Matter of Turner*, 206 N.Y. 93, 99 N.E. 187, *remittitur ordered*, 206 N.Y. 676, 99 N.E. 1018 (1912) (devise of "one house" to each of testator's children; held, each child had the right to select in the order in which they were named in the will); *Young v. Young*, 109 Va. 222, 63 S.E. 748 (1909) (devisees, testator's daughter and grandson, given specified number of acres, respectively, out of larger tract). *See* 4 W. Page, *Law of Wills*, § 36.3 at 552-53 (W. Bowe & D. Parker rev. ed. 1961).

1. Our Court of Appeals has recognized the validity of an express power of selection. *Cable v. Hardin Oil Co.*, 10 N.C. App. 569, 179 S.E. 2d 829, *cert. denied*, 278 N.C. 521, 180 S.E. 2d 863 (1971).

In *Hodges* this Court sought to justify its holding by citing eleven North Carolina cases thought to support the decision. *Hodges*, 218 N.C. at 291-92, 10 S.E. 2d at 724. Of these cases involving sufficiency of description of land, eight dealt with conveyances by deed,[2] two with mortgages,[3] and one with tax foreclosure.[4] None dealt with testamentary conveyances. Two further cases were cited in *Hodges* for the proposition that:

> [A]n attempted invalid devise, one which the law decrees void, affords no legal evidence of an intention in the testator to devise. The court cannot make a will for the testator nor add to the valid portions of his will provisions which are not therein expressed. Having stricken down the devise as void, the court will not resurrect it and give it vitality in order to effectuate a purpose not expressed in the will.

Id. at 292, 10 S.E. 2d at 724. Both of these cases cited, however, dealt with the sufficiency of execution formalities and attestation rather than the sufficiency of description of land. *McGehee v. McGehee*, 189 N.C. 558, 127 S.E. 549 (1925); *Melchor v. Burger*, 21 N.C. 634 (1837).

Agreeing with the Court of Appeals that if *Hodges* remains good law it controls this case to the detriment of the testator's intent, we are faced squarely with the question we did not reach in *Taylor v. Taylor*, 301 N.C. 357, 271 S.E. 2d 506 (1980)—should *Hodges* be overruled?[5] We do not lightly overrule our precedents, particularly those which may affect title to real property, *Mims v.*

2. *North Carolina Self-Help Corp. v. Brinkley*, 215 N.C. 615, 2 S.E. 2d 889 (1939); *Katz v. Daughtrey*, 198 N.C. 393, 151 S.E. 879 (1930); *Higdon v. Howell*, 167 N.C. 455, 83 S.E. 807 (1914); *Beard v. Taylor*, 157 N.C. 440, 73 S.E. 213 (1911); *Cathey v. Buchanan Lumber Co.*, 151 N.C. 592, 66 S.E. 580 (1909); *Smith v. Proctor*, 139 N.C. 314, 51 S.E. 889 (1905); *Kennedy v. Maness*, 138 N.C. 35, 50 S.E. 450 (1905); and *Deaver v. Jones*, 114 N.C. 649, 19 S.E. 637 (1894).

3. *Bissette v. Strickland*, 191 N.C. 260, 131 S.E. 655 (1926); and *Harris v. Woodard*, 130 N.C. 580, 41 S.E. 790 (1902).

4. *Johnston County v. Stewart*, 217 N.C. 334, 7 S.E. 2d 708 (1940).

5. Whether *Hodges* should have been overruled was the question which divided the Court of Appeals not only in the instant case but also in *Taylor*. On appeal in *Taylor* this Court concluded the testator's widow, having dissented from his will, could not take advantage of the disputed devise. The Court, therefore, did not reach the issue of whether *Hodges* should be reconsidered.

Mims, 305 N.C. 41, 286 S.E. 2d 779 (1982); but if the circumstances are compelling, this Court "possesses the authority to alter judicially created common law when it deems it necessary in light of experience and reason." *Id.* at 55, 286 S.E. 2d at 788, *quoting State v. Freeman*, 302 N.C. 591, 594, 276 S.E. 2d 450, 452 (1981); *accord*, *Walls v. Grohman*, 315 N.C. 239, 337 S.E. 2d 556 (1985) (overruling precedents on law of adverse possession).

Because *Hodges* (1) relies on cases dealing with, and seems to apply principles of construction more appropriate to, inter vivos conveyances than to testamentary devises, (2) seems contrary to earlier authority in our own jurisdiction construing similar devises, and (3) is contrary to the great weight of authority in other jurisdictions on the subject, we conclude compelling reasons exist to declare the case no longer authoritative on the point it decided. It is hereby overruled.

The question remains as to which of the available methods identified above is most appropriate for carrying out the testator's intent in this case. Our examination of the cases supporting each of the methods reveals: Courts generally permit evidence of circumstances outside the will to save a devise when there are both objective references in the devise, such as "homestead tract," "homeplace," "the house where we live," etc., and competent evidence of circumstances tending to show that these references can be fitted to a particular piece of property with readily ascertainable boundaries which the testator must have had in mind when he used the references. *See, e.g., Fulwood v. Fulwood*, 161 N.C. 601, 77 S.E. 763 (1913). In the absence of such evidence or objective references, courts nevertheless save the devise by treating the devisees as tenants in common who may resort to court-supervised division of the property. This method is generally used when there are a number of devisees of similar relation to the testator and who are treated more or less equally in the will. *See, e.g., Caudle v. Caudle*, 159 N.C. 53, 74 S.E. 631 (1912). Finally, an intent on the part of the testator to give a devisee the power to make a reasonable selection of the tract is usually found in those cases where the devisee is the primary beneficiary, or principal object of the testator's bounty, or is in such relationship with the testator or the devised property itself that it is reasonable to infer the testator intended the devisee to have the power

of reasonable selection. *See, e.g.*, *Prater v. Hughston*, 202 Ala. 192, 70 So. 564 (1918); *Nichols v. Swickard*, 211 Iowa 957 (1931).

[2] In the case at bar the circumstances are such that it is reasonable to infer from them that the testator intended Lucille Rowe to have the power to make a reasonable selection of a 30-acre tract "immediately surrounding the home place." Lucille Rowe was the testator's widow to whom he had been happily married for a number of years before his death. She was the primary beneficiary of his will and the principal object of his bounty. He named her both executor of his estate and trustee of his residuary devise and gave her "absolute power to deal with any property, real or personal, held in my estate or in trust, as freely as I might in the handling of my own affairs." Both testator and Lucille Rowe worked together on their "home place," clearing the land for it, and actually doing much of the construction work themselves on the house. Before his death, testator had purchased enough split rail fencing to go around 30 acres and had actually installed part of the fence. Undoubtedly, both testator and Lucille Rowe knew precisely what metes and bounds would be necessary to lay off 30 acres "immediately surrounding" their home; and testator knew that Lucille Rowe was, therefore, capable of making the mutually desired selection.

Lucille Rowe had a 30-acre tract "immediately surrounding" her home surveyed. The home itself is almost exactly in the center of this tract as surveyed. As executor she executed a deed to this tract to herself, individually as devisee. Clearly her selection was reasonable. The trial court has adjudged her entitled to the tract conveyed.

The judgment of the trial court is correct and should be reinstated. That it may be reinstated, the decision of the Court of Appeals vacating it is

Reversed.

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

AMERICAN TOURS, INC. v. LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION, AND EMPIRE INSURANCE COMPANY, A CORPORATION

No. 373PA84

(Filed 7 January 1986)

1. **Insurance § 87— rental car—underaged daughter of lessee driving—violation of rental agreement—coverage required by statute**

An automobile liability insurance policy issued to a rental car company covered the nineteen-year-old daughter of a lessee despite a provision in the rental agreement which prohibited use of the vehicles by drivers under twenty-one without the lessor's approval because a liability policy issued to an automobile owner in the business of renting cars must comply with the requirements of both N.C.G.S. 20-281 and N.C.G.S. 20-279.21 and provide all the coverages required by those sections. The provision of N.C.G.S. 20-281 requiring an automobile lessor's insurance to cover lessees and their agents is incorporated into defendant's policy to the same extent as if it were written there.

2. **Principal and Agent § 1— underage driver of leased car—violation of rental agreement—driver as agent of lessee**

The nineteen-year-old daughter of an automobile lessee was the agent of the father under the provisions of N.C.G.S. 20-281, even though the father knowingly violated the rental agreement when he allowed her to operate the rented car, where he asked her to follow him to work so he would have a way home after he returned his employer's truck.

3. **Insurance § 110— rented car—underaged driver—liability of insurance company—statutory minimum**

Defendant was liable for only $5,000 of property damage under an automobile insurance policy where it had provided coverage to a car rental company, a lessee asked his nineteen-year-old daugher to drive the car in violation of the rental agreement, the daughter was involved in an accident in which the plaintiff's bus was damaged, the policy provided $25,000 in property damage coverage, and N.C.G.S. 20-281 required a minimum coverage of $5,000. When an automobile insurance policy providing coverage in amounts in excess of that statutorily required contains some substantive coverages less than those statutorily required, the insurer's liability for an accident for which the statute requires coverage not provided by the policy is limited to the minimum amount required by the statute.

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

ON discretionary review of the decision of the Court of Appeals, 68 N.C. App. 668, 316 S.E. 2d 105 (1984), affirming a declaratory judgment for plaintiff entered by *Gaines, J.*, at the 23 August 1982 Session of Superior Court in MECKLENBURG County.

Myers, Ray, Myers, Hulse & Brown by R. Lee Myers for plaintiff appellee.

Golding, Crews, Meekins, Gordon & Gray by John G. Golding, David N. Allen and Harvey L. Cosper, Jr., for Liberty Mutual Insurance Company, defendant appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready by James H. Kelly, Jr. for Nationwide Mutual Insurance Company, amicus curiae.

EXUM, Justice.

Plaintiff seeks a declaratory judgment that defendant Liberty Mutual Insurance Company[1] (hereinafter Liberty) is obligated to pay a judgment plaintiff obtained in another action against Beverly Ann Mobley for damages to plaintiff's bus arising out of an automobile accident on 11 August 1977. Plaintiff alleges that Mobley was insured under a policy written by defendant and issued to the lessor of the rental car she was driving. Defendant claims Mobley, who was nineteen at the time of the accident, was not insured because her father, the lessee, permitted her to drive in violation of his rental agreement in which he agreed not to permit drivers under age twenty-one to use the car.

The trial court awarded judgment for plaintiff. It ruled that N.C.G.S. § 20-281 (1975) (amended 1979)[2] requires insurance policies insuring automobile lessors to provide coverage for agents of lessees and that Mobley was such an agent. It further ruled that Mobley was covered to the full extent of the $25,000 coverage for property damage provided in the policy and not just the $5,000 minimum coverage required by § 281. The Court of Appeals affirmed the judgment of the trial court in its entirety.

On discretionary review in this Court, defendant raises three issues: (1) Does § 281 require policies insuring automobile lessors to cover agents of lessees? (2) Was Mobley an agent of her father,

1. The only defendant which remains a party to this appeal is Liberty Mutual Insurance Company. Plaintiff dismissed with prejudice its action against Empire Insurance Company on 26 August 1982.

2. All statutes referred to in this opinion are in Chapter 20 of the General Statutes of North Carolina. Hence further statutory references will be only to section numbers within Chapter 20.

the lessee? (3) Was Mobley covered for property damage in excess of the $5,000 coverage statutorily required? Although we answer the first two questions in the affirmative, as to the third issue we conclude that Mobley was covered for only the $5,000 minimum coverage for property damage required by § 281. Adding this modification, we affirm the judgment of the Court of Appeals.

I.

The facts are not disputed. Liberty issued a policy of liability insurance to Borough Leasing, Inc. (hereinafter Borough), a corporation engaged in the rental car business. In addition to the coverage it provided for Borough, the policy also provided coverage for certain of Borough's potential lessees including:

> [A]ny other person using an owned automobile or a temporary substitute automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission . . . .

Robert Mobley was not a named insured.

On 24 March 1974 Robert Mobley leased one of Borough's rental cars. He signed a rental agreement which provided, "In no event shall the Vehicle be used, operated, or driven by any person other than . . . qualified licensed drivers over twenty-one years of age who have Customer's advance permission to use the vehicle . . . ." The parties stipulated that Robert Mobley was aware his lease did not permit persons under twenty-one years old to use the vehicle. Despite this knowledge, Mobley requested his 19-year-old daughter, Beverly, to follow him in the rental car to the place where he worked while he drove his employer's truck there. Mobley needed his daughter to follow him to work so he would have a way home after he returned his employer's truck. While Beverly was driving her father's rental car, she was involved in a collision with a bus owned by plaintiff, American Tours, Inc.

Beverly Mobley filed suit against American Tours, and American Tours counterclaimed for damages to its bus. Although American Tours obtained a judgment against Mobley, Liberty declined to pay it. Liberty claimed the damages of American Tours was outside the scope of its coverage because Mobley's

rental agreement with Borough did not permit his 19-year-old daughter to use the rental car.

II.

[1] When a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written in it. *Insurance Co. v. Casualty Co.*, 283 N.C. 87, 194 S.E. 2d 834 (1973); *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610 (1953). Section 281 provides:

> From and after July 1, 1953, it shall be unlawful for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public for operation by the rentee or lessee unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee, in such an amount as is hereinafter provided, from an insurance company duly licensed to sell motor vehicle liability insurance in this State. *Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee and their agents and employees* while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such motor vehicle, *subject to the following minimum limits*: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident, and fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and *ten thousand dollars ($10,000) because of injury to or destruction of property of others* in any one accident.[3] [Emphases supplied.]

Plaintiff contends this statute is applicable to terms of policies insuring automobile leasing agencies and requires all such policies to include a term insuring lessees' agents while in the performance of their duties. Liberty and amicus curiae Nationwide Mu-

3. At the time of the accident the minimum amount of coverage for property damage required by § 281 was $5,000. N.C.G.S. § 20-281 (1975) (amended 1979).

tual Insurance Company argue § 281 merely requires lessors of automobiles to purchase liability insurance but does not specify terms which must be contained in the insuring agreements. The mandatory terms for policies insuring automobile lessors are found, they say, in § 279.21(2), which provides:

> A 'motor vehicle liability policy' as said term is used in this Article shall mean an owner's or an operator's policy of liability insurance . . . .
>
> (b) Such owner's policy of liability insurance:
>
> . . . .
>
> (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, *or any other persons in lawful possession*, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles . . . . [Emphasis supplied.]

Defendants rely on this Court's interpretation of § 279.21 in *Insurance Co. v. Broughton*, 283 N.C. 309, 196 S.E. 2d 243 (1973).

Broughton involved facts similar to those before us. In *Broughton*, a lessee, Carraway, deliberately transferred possession of his rental car to a driver under age twenty-one in violation of his rental agreement. After Carraway rented the car he drove it to a service station a few miles away from the rental agency and by prior arrangement turned the car over to Elijah Z. Massey who was nineteen years old. Massey collided with another vehicle and the lessor's insurance company denied coverage for the collision. This Court held "neither the . . . insurance policy nor the requirements of State law provided coverage." *Id.* at 315, 196 S.E. 2d at 247. The Court stated that while § 279.21 requires liability insurance policies to extend coverage to the named insured and any other person in lawful possession of the vehicle, Massey was not in lawful possession within the meaning of that section. The lessee "could not, in violation of his own agreement," reasoned the Court, "make the owner responsible for Massey's negligence." *Id.* at 314, 196 S.E. 2d at 247.

The avowed purpose of the Financial Responsibility Act, of which § 279.21 is a part, is to compensate the innocent victims of financially irresponsible motorists. *Insurance Co. v. Casualty Co.*, 283 N.C. 87, 194 S.E. 2d 834 (1973). The restrictive meaning we ascribed in *Broughton* to "lawful possession," as that term is used in § 279.21, arguably runs counter to the Act's purpose. Even if we would give the same restrictive interpretation to "lawful possession" if we decided *Broughton* today, Liberty overlooks this Court's reliance in *Broughton* upon not only § 279.21 but also § 281 in concluding that "the requirements of State law provided no coverage . . . ." *Broughton*, 283 N.C. at 315, 196 S.E. 2d at 247. After determining that § 279.21 required no coverage, the Court held:

> Likewise, Massey was not within *the coverage required by G.S. 20-281*. G.S. 20-281 required coverage for the owner, rentee, lessee and their agents and employees while in the performance of their duties. There is neither evidence nor finding that Massey at any time was a rentee or lessee or an agent or employee and hence was not performing duties as such. The coverage required by this section extended coverage to Carraway, but not to Massey. [Emphasis supplied.]

Id. In stating that § 281 "required coverage for the owner, rentee, lessee and their agents" and that "the coverage required by this section extended coverage to the lessee but not to Massey," the Court recognized that § 281 is a source of mandatory terms for automobile liability insurance policies in addition to and independent of § 279.21. The Court held that § 281 provided no coverage to Massey because Massey was not an agent of the lessee, Carraway.

We continue to follow *Broughton* insofar as it recognized that both § 281 and § 279.21 prescribe mandatory terms which become part of every liability policy insuring automobile lessors. Section 281, which applies specifically to automobile owners who lease their cars for profit, is a companion section to and supplements § 279.21, which applies to automobile owners generally. Section 281 was enacted six days before § 279.21. *See* 1953 N.C. Sess. Laws ch. 1017, § 6; 1953 N.C. Sess. Laws ch. 1300, § 43. Subsequent amendments have on three occasions been made to both

statutes simultaneously in one bill. *See* 1967 N.C. Sess. Laws ch. 277; 1973 N.C. Sess. Laws ch. 745; 1979 N.C. Sess. Laws ch. 832. Both statutes are part of one legislative package dedicated to protecting innocent motorists from financially irresponsible motorists. One of the ways § 281 attempts to do this is by requiring policies which insure automobile lessors to provide coverage for lessees *and* their agents. This requirement is reasonable in light of the statute's purpose. A lessor's insurance should cover lessees because lessees are unlikely to purchase insurance on account of what may be the temporary nature of a rental arrangement. A lessor's insurance also should cover lessees' agents because, being mere agents, they are also unlikely to obtain their own insurance.

Liberty argues that the legislature never intended for § 281 to become part of the terms of policies insuring automobile leasing agencies because that section is much less detailed than § 279.21. It warns that § 281 will permit insurance companies to exclude liability under circumstances in which § 279.21 would not permit them to do so. While § 281 requires coverage for "agents," it contains no comparable language to that contained in § 279.21 requiring coverage of the owner's permittees. Liberty suggests that an insurance company could exclude coverage for damage caused by persons who are neither agents of the lessor or lessee but who, nevertheless, use a rented vehicle with the lessor's permission.

The answer to this argument is, as we have already noted, that the two sections are not mutually exclusive. Section 281 does not stand alone in prescribing required terms for automobile liability policies insuring leased vehicles. Rather, § 281 supplements § 279.21, which applies more generally to every policy insuring any automobile owner whether or not that owner leases vehicles. A liability policy issued to an automobile owner in the business of renting cars must comply with the requirements of both § 281 and § 279.21 and provide all coverages required by both sections.

Liberty contends, finally and somewhat obscurely, that if the lessee's agent is afforded coverage, the lessee "is allowed to appoint an agent for an unlawful act and he is able to better himself by breaking his contract." Liberty says public policy should not condone such a result.

We find Liberty's argument unpersuasive. We fail to see how lessees "better themselves" by selecting agents in violation of the rental agreement. If a lessee selects an agent in compliance with the rental agreement, the policy would provide coverage for both the lessee and the agent. The lessee and the agent are in no better position because the statute requires coverage even if the lessee selects his agent contrary to the terms of the rental agreement. The question is are the lessee and his agent then deprived of coverage. Under § 281 the answer is no because the statute does not except from coverage agents whom the lessor selects to drive in violation of the rental agreement. The public policy expressed in § 281 is that even where automobile rental agreements are violated it is preferable to provide coverage for innocent motorists rather than to deny such coverage because of the violation.

We hold, therefore, that in every automobile liability policy insuring automobile lessors, § 281 provides coverage to lessees and lessees' agents.

Liberty's coverage was not as comprehensive as that required by § 281. Liberty's policy provided coverage for Borough and any other person using one of its autos with its permission. Liberty's policy provided no coverage for rental cars used under authority granted by the lessee but without the lessor's permission. Section 281 requires coverage of automobiles used by a lessee's agents whether or not that agent has the lessor's permission to use the automobile. The rule governing conflicts between terms of insurance policies required by law and the actual terms of policies is stated in *Insurance Co. v. Casualty Co.*, 283 N.C. 87, 194 S.E. 2d 834 (citations omitted) (1973):

> It is well recognized in North Carolina that the provisions of a statute applicable to insurance policies are a part of the policy to the same extent as if therein written, and when the terms of the policy conflict with statutory provisions favorable to the insured, the provisions of the statute will prevail.

283 N.C. at 91, 194 S.E. 2d at 837.

The provision in § 281 requiring an automobile lessor's insurance to cover lessees and their agents is incorporated into Liberty's policy to the same extent as if it were written there. If Beverly Mobley was an agent of her father, the lessee, this provi-

sion requires that she be covered even though she did not have Borough's permission to use the car.

III.

[2] Thus Liberty contends that even if § 281 extends coverage to agents of a lessee, Beverly Mobley was not under the circumstances of this case an agent of her father. When Mr. Mobley allowed his daughter to operate the rented car knowing full well he was violating his rental agreement, Liberty contends he did not create an agency relationship.

We have said an agent is one who acts for or in the place of another by authority from the other. *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980). The uncontroverted facts of this case are that Robert Mobley asked his daughter, Beverly, to follow him to work so he would have a way home after he returned his employer's truck. It cannot be disputed that he conferred authority on her to drive the car for his benefit.

IV.

[3] Defendant and *amicus* argue that even if § 281 extends coverage to agents of lessees, and Beverly Mobley was such an agent, Liberty's liability is limited to the amount of coverage for property damage required by that statute. Section 281 required at the time of the accident $5,000 coverage for property damage. *See* N.C.G.S. § 20-281 (1975) (amended 1979). The Court of Appeals disagreed with this argument and held that Liberty is liable to the full extent of its $25,000 coverage for property damage in its policy. It observed that while § 279.21(g) specifically excepts coverage "in excess of or in addition to" the minimum coverages required by § 279.21 from the "provisions of this Article,"[4] no comparable provision appears in § 281. Because § 281 is codified in Article 11 of the General Statutes and § 279.21(g) is codified in a separate article, 9A, the Court of Appeals held § 279.21(g) does not except coverage amounts in excess of the minimum amounts required by § 281 from the mandatory coverage provisions of this section.

4. Section 279.21(g) provides: "Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article."

Plaintiff argues the Court of Appeals correctly decided that Liberty is liable for the full amount of its coverage for property damage. It contends that by omitting a provision comparable to § 279.21(g) in § 281, the legislature intended for insurance companies to be liable under § 281 for whatever amounts of coverage they voluntarily provided. Both statutes were passed in the same legislative session. Had the legislature seen fit to allow insurance companies to limit their liability for coverages required by § 281 to the minimum amounts also required in § 281, plaintiff contends it certainly could and would have done so expressly.

Although the limiting provision of Article 9 is not expressly applicable to Article 11, the principle embodied in the former article must as a matter of contract law be applicable to the latter. An insurance company cannot be liable for any greater amount of coverage than that provided by operation of law or voluntarily in its policy. Furthermore, an insurance company has the right to enter into whatever insuring agreements it wishes to limit its voluntary coverages as opposed to those statutorily required.

> "Freedom of contract, unless contrary to public policy or prohibited by statute, is a fundamental right included in our constitutional guarantees. Const., Art. I, sec. 17; *Alford v. Insurance Co.*, 248 N.C. 224, 103 S.E. 2d 8." *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474.

Insurance Co. v. Casualty Co., 283 N.C. at 93, 194 S.E. 2d at 838.

Applying these principles, we hold that when an automobile insurance policy providing coverage in amounts in excess of that statutorily required contains substantive coverages less than those statutorily required, the insurer's liability for an accident for which the statute requires but the policy does not provide coverage is limited to the minimum amount of coverage required by statute. The statute determines not only the fact but also the extent of the insurer's liability. Although the appellate courts of this state have never been presented with this precise question, other jurisdictions which have addressed it have recognized the foregoing rule. *See Virginia Surety Co. v. Wright*, 114 F. Supp. 124 (W.D.N.C.) (applying North Carolina law); *DeWitt v. Young*, 229 Kan. 474, 625 P. 2d 478 (1981); *Estate of Neal v. Farmer's Ins. Exch.*, 93 Nev. 348, 566 P. 2d 81 (1977). *See also*, Annot. "Liability

of insurer, under compulsory statutory vehicle liability policy, to injured third persons, notwithstanding insured's failure to comply with policy conditions, as measured by policy limits or by limits of financial responsibility act," 29 A.L.R. 2d 817 (1953).

In this case the amount of coverage for property damage required by § 281 at the time of plaintiff's accident was $5,000. Liberty provided the remaining $20,000 property damage coverage voluntarily. The required amount of coverage could not because of § 281 be limited to situations where the automobile was used with the named insured's permission. Coverage, however, in excess of the required $5,000 minimum could be. Here, all amounts of coverage in excess of the $5,000 minimum statutorily required were limited to persons "using an owned vehicle . . . with the permission of the named insured . . . ." Borough, the named insured, did not give Beverly Mobley permission to use its car. The $20,000 of coverage Liberty voluntarily provided, therefore, did not cover Beverly Mobley. She as an agent of Borough's lessee but operating the car without Borough's permission was covered only to the extent of the $5,000 minimum amount required by § 281.

Plaintiff, however, argues the 21-year-old age limitation in Liberty's policy is invalid as against public policy. Plaintiff concedes this Court found "a sound legal reason" for such a limitation in *Insurance Co. v. Broughton*, 283 N.C. 309, 313, 196 S.E. 2d 243, 246 (1973). Twenty-one was the age at which one became legally responsible for his contractual obligations at the time of the accident in *Broughton*. Presently the age of majority is eighteen. Plaintiff argues twenty-one is an arbitrary and capricious age limitation and warns that rental agencies could insert any age restriction in its rental agreements and reduce to nothing insurance companies' liability.

If a rental agreement contained such a high age restriction that almost no one other than the lessee would be permitted to drive, we might wonder why the agreement did not simply deny permission to drive to all except the lessee. The restriction against use by drivers less than twenty-one is not, however, such a restriction. The lessor reasonably may have included this provision because it believed more accidents are caused by younger drivers who are more inexperienced than by older ones. Liberty's

exclusion of coverage for vehicles used without the insured lessor's permission under circumstances where the lessor regularly withheld permission to use its vehicles to anyone less than twenty-one is not invalid as against public policy.

For the reasons given, then, Liberty is liable under § 281 to plaintiff for up to $5,000 of plaintiff's property damage and no more.

The decision of the Court of Appeals is affirmed as modified.

Modified and affirmed.

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

STATE OF NORTH CAROLINA v. TOMMIE DEION COVINGTON

No. 15A85

(Filed 7 January 1986)

1. **Criminal Law § 90.2— impeachment of own witness—Rules of Evidence—prior law**

Where a State's witness testified on *voir dire* in response to a question by the court that his identification of defendant was based on his prior photographic identification, the State had the right under G.S. 8C-1, Rule 607 to elicit contradictory testimony that he based his identification on having seen defendant a week before the crimes and at the time of the crimes. Even under the law as it existed prior to the effective date of the Rules of Evidence, the trial court would have acted well within its discretion in permitting the prosecutor's reexamination of the witness where it is apparent that the witness did not fully comprehend the court's question and that the prosecutor's subsequent questioning was merely an attempt to call facts to the witness's attention which would clear up any confusion and enable him to testify correctly as to the basis of his identification of defendant.

2. **Criminal Law § 78— inability to identify assailants—stipulation not violated**

A stipulation that the female victim would be unable to identify either of her two assailants at trial but would be able to differentiate between the two assailants by referring to them as the "taller" one and the "shorter" one was not violated when the State examined the victim as to whether she had ever seen defendant prior to the night of the offenses or when the victim continually referred to defendant as "the tall one."

3. **Criminal Law § 162— evidence violating stipulation—absence of objection—no plain error**

Assuming that a witness's reference to a codefendant by name and by description as "the short one" was objectionable as violating a stipulation that the witness was unable to identify her assailants at trial, defendant's failure to object constituted a waiver of objection under App. Rule 10(b)(1), and the testimony did not constitute plain error entitling defendant to a new trial despite his failure to object.

4. **Criminal Law § 66.1— in-court identification—opportunity for observation**

The male victim had sufficient opportunity to observe defendant to permit his in-court identification of defendant where the victim testified that the two persons who intruded into his home had come to his home a week before the incident in question seeking directions to a local business; they were in the victim's presence for approximately fifteen to twenty minutes on that occasion; on the date of the crimes, the two intruders were in his home for approximately two and one-half hours, and defendant was in his presence for thirty to forty-five minutes; and the lighting conditions inside the victim's home were good and he could see defendant's face clearly. Any discrepancies between the victim's *voir dire* testimony and his testimony at trial go to the weight to be accorded his testimony rather than to its admissibility.

5. **Burglary and Unlawful Breakings § 5.8; Larceny § 7.8; Rape § 5; Robbery § 4.3— first degree rape—breaking or entering—larceny—armed robbery—sufficiency of evidence**

The State's evidence was sufficient to support submission to the jury of charges against defendant for first degree rape, armed robbery, felonious breaking or entering and larceny, and larceny of an automobile where it tended to show that two men entered the victims' house after assaulting the male victim; the male victim positively identified defendant as one of the intruders; the men carried large bolts as potential weapons and later displayed a firearm; both of the intruders engaged in vaginal intercourse with the female victim against her will after threatening to kill her unless she cooperated; while the victims were tied up in the bathroom, they could hear the two men ransacking their home; after the intruders left, the victims discovered that several items of personal property and their automobile were missing; shortly after the crimes occurred, a witness saw defendant riding in the victims' automobile; when the occupants of the automobile discovered that they were being followed, they drove away at a high rate of speed; the occupants eventually abandoned the car and fled on foot; before being apprehended, defendant ran from the arresting officer; and defendant's fingerprints were discovered inside the victims' car.

BEFORE *Albright, J.*, at the 3 September 1984 Criminal Session of Superior Court, FORSYTH County, defendant was convicted of first-degree rape, robbery with a dangerous weapon, felonious breaking or entering and larceny, and larceny of an automobile. Defendant was sentenced to the mandatory term of life imprison-

ment for the first-degree rape, forty years for the robbery, six years for the felonious breaking or entering and larceny which were consolidated for judgment, and three years for the larceny of an automobile, all sentences to be served consecutively. Defendant appeals the first-degree rape conviction as a matter of right pursuant to N.C.G.S. § 7A-27(a). On 15 January 1985, this Court allowed defendant's motion to bypass the North Carolina Court of Appeals on his appeal in the armed robbery, breaking or entering and larceny, and larceny of an automobile cases.

Lacy H. Thornburg, Attorney General, by Walter M. Smith, Assistant Attorney General, for the State.

Gail F. Miller for defendant-appellant.

MEYER, Justice.

The defendant brings forward assignments of error relating to the victims' in-court identification of him as one of the perpetrators of the offenses against them. He also contends that the evidence was insufficient to support the submission of the cases against him to the jury. We find no error.

The State's evidence tended to show that on the afternoon of 27 June 1983, Mr. Thomas Puryear and his wife, Wanda, were at their home in Winston-Salem. Shortly after 6:00 p.m., two men, one of whom Mr. Puryear identified as the defendant, came to the back door seeking directions to the Schlitz Brewery employment office. Puryear testified that the same two men had come to his house the previous week asking directions to the brewery. After conversing for approximately ten minutes, the other man, who was shorter than the defendant, suddenly struck Puryear in the head and threw him to the kitchen floor. The intruders proceeded to remove his glasses and class ring. At that time, Puryear noticed that the intruders were carrying bolts approximately sixteen inches in length, weighing about one pound. When Puryear attempted to warn his wife, the defendant struck him in the throat with the bolt. The two men then demanded that Puryear tell them where he kept his money and firearms. When he told them that he had no money or guns, Puryear was taken into the front bedroom and tied up.

The defendant then left the room while the other intruder stood watch over Puryear. A few minutes later, the defendant

came back to the bedroom and the other intruder left the room. The defendant stayed in the bedroom approximately ten minutes and made a remark to Puryear which tended to indicate that he had engaged in intercourse with Mrs. Puryear.

Mrs. Puryear testified that she was asleep on a couch in the living room when she was awakened by the taller of the two intruders. She saw that he had a large bolt in his hand. The man proceeded to lead Mrs. Puryear to the bathroom where he undressed her and tied her feet. She was then taken to the rear bedroom. At that point, the intruder displayed a pistol which Mrs. Puryear recognized as belonging to her husband. The man placed the gun to her head and threatened to kill her unless she got on the bed. The man proceeded to engage in vaginal intercourse with Mrs. Puryear. He then ransacked the bedroom closets.

The shorter of the two intruders then entered the room and took possession of the gun. He also engaged in vaginal intercourse with the victim. Mrs. Puryear was then taken to the bathroom. Shortly thereafter, Mr. Puryear was brought into the bathroom, and the two men tied the victims together. The intruders then ransacked the house. Approximately an hour later, the victims were blindfolded and had a soft drink poured on them. The two men left shortly thereafter.

Mr. Puryear was soon able to free himself and his wife. He then climbed out the bathroom window and went to a local establishment where the police were notified. A number of items were missing from the Puryears' home, including two television sets, an air conditioner, watches, guns, clothing, and Mrs. Puryear's wedding ring. The Puryears' car, a blue 1966 Dodge Coronet 440, was also missing. Mr. Puryear gave a description of the two intruders to the police upon their arrival.

C. S. Poteat, a licensed private investigator, testified that during the early evening hours of 27 June 1983, he was driving in the vicinity of the Puryears' home when he heard a stolen vehicle report come over his police scanner. The report was for a 1966 blue Dodge Coronet. Approximately five minutes later, Poteat saw the car and began following it. Poteat testified that two men were inside the car, with the defendant being seated on the passenger side. Poteat called the police from his mobile telephone, in-

formed them that he was following the vehicle in question, and requested assistance in stopping the car.

The occupants of the car soon discovered that they were being followed and made gestures to Poteat which he interpreted as warnings or threats. The Coronet then took off at a high rate of speed, ran several stop signs, and made several evasive turns. Police vehicles soon converged on the car, and it eventually stopped behind a local high school. The occupants fled the scene, and police officers gave chase on foot. The car that was abandoned behind the school was the 1966 Dodge automobile which had been stolen from the Puryears' residence.

Officer Bobby Holcombe of the Winston-Salem Police Department testified that while on patrol on the evening of 27 June 1983, he received a radio message concerning the stolen automobile. Holcombe soon spotted a man matching the description of one of the suspects. However, when he pulled up in front of him, the man, whom Officer Holcombe identified as the defendant, ran into the woods. Shortly thereafter, Holcombe saw and apprehended a man matching the description of the other suspect. The man Officer Holcombe apprehended was Calvin Baker.

That night, Mr. Puryear was shown a photographic lineup. He immediately picked out a photograph of Baker as being the photograph of one of the intruders. Two days later, Mr. Puryear was shown another photographic lineup. He picked out a photo of the defendant as being a photograph of the other intruder.

The State also introduced evidence showing that the defendant's fingerprints were found inside the Dodge automobile. Baker's fingerprints were also discovered in the vehicle.

The defendant presented no evidence.

[1] The defendant initially argues that the trial court erred by permitting the prosecution to impeach the testimony of one of its witnesses, Mr. Puryear. The questioning which is the subject of this assignment of error took place at a *voir dire* hearing which was held to determine the admissibility of in-court identification testimony of Mr. Puryear. During the *voir dire*, Puryear testified about the events which occurred on the evening of 27 June, and he related the fact that the two intruders had come to his house a week earlier. Puryear identified the defendant as one of the in-

truders. After the defense had concluded its cross-examination, the following exchange took place:

> COURT: Just a minute. Now, when you pointed out the defendant some moments ago, what did you base that on?
>
> WITNESS: The photographic identification.
>
> COURT: All right. Anything else?
>
> . . . .
>
> [PROSECUTOR]: Are you picking him out in court because of how you saw him in the photograph or how you saw him that day?
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Overruled.
>
> [WITNESS]: Well, seeing in the flesh.
>
> [PROSECUTOR]: When?
>
> [WITNESS]: The week previous to the entrance and also at the time of the entrance.
>
> [PROSECUTOR]: Okay.
>
> [WITNESS]: That's how I was able to identify the photographs immediately.

The defendant contends that this questioning constituted impermissible impeachment by the prosecution of its own witness. We do not agree. Prior to the adoption of the North Carolina Rules of Evidence, the general rule was that the State was prohibited from impeaching its own witness. *E.g.*, *State v. Oxendine*, 303 N.C. 235, 278 S.E. 2d 200 (1981); *State v. Squire*, 302 N.C. 112, 273 S.E. 2d 688 (1981); *State v. Austin*, 299 N.C. 537, 263 S.E. 2d 574 (1980). However, Rule 607 of the Rules of Evidence provides that a witness may be impeached by any party, including the party who called him. The new rules were in effect at the time of the defendant's trial. Therefore, after Puryear testified that his identification of the defendant was based on his prior photographic identification, the State had the right under Rule 607 to elicit contradictory testimony.

Furthermore, we note that even under the old impeachment rule, this evidence would have been admissible. Under the old rule, it was well settled that the trial court could, in its discretion, permit a party to cross-examine its own witness who surprises him by his testimony, for the purpose of refreshing the witness' recollection so that he could testify correctly. *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954); *State v. Grainger*, 19 N.C. App. 181, 198 S.E. 2d 189 (1973). Here, it is quite apparent that Puryear failed to fully comprehend the judge's question. The prosecutor's subsequent questioning was merely an attempt to call facts to the witness' attention which would clear up any confusion and enable him to correctly testify as to the basis of his identification of the defendant as one of the perpetrators of these offenses. Therefore, even under the law as it existed prior to the effective date of the Rules of Evidence, the trial court would have been acting well within its discretion in permitting the prosecution to reexamine Puryear. This assignment of error is overruled.

[2] The defendant next argues that the trial court erred by allowing Mrs. Puryear to give identification testimony after the State had stipulated that she would be unable to make any identification at trial. After Mr. Puryear's *voir dire* testimony, the prosecutor made the following statement to the court:

> State would stipulate as to Mrs. Puryear. She was also shown State's Voir Dire Exhibit Number 1 and Number 2 [the two photographic lineups]. State will stipulate that her identification as to Covington, she simply could not pick out Mr. Covington's photograph, so I will not have her identify any one, Mr. Baker or Mr. Covington, in the courtroom.
>
> She will be able to say the taller and shorter of the two. She will be able to identify them that way.

The defendant contends that, at several points in her testimony, Mrs. Puryear identified him as one of the intruders and thus violated this stipulation. We find this argument to be without merit.

The defendant first argues that his identification was improperly implied when the State examined Mrs. Puryear as to whether she had ever seen him prior to the night of the offenses, implying that he was indeed present at the house that night. We fail to see how this testimony could be interpreted as identifying

the defendant as one of the intruders. The defendant also argues that the stipulation was violated when Mrs. Puryear continually referred to him as "the tall one." Initially, we note that, although the defendant did enter one objection to a reference by Mrs. Puryear to "the tall one," the defendant failed to object to her subsequent references to "the tall one." Where evidence is admitted without objection, the benefit of a prior objection to the same evidence is lost and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985); *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984). Furthermore, in the stipulation, the prosecutor stated that Mrs. Puryear would be able to differentiate between the two intruders by referring to them as the "taller" one and the "shorter" one. Mrs. Puryear's references to "the tall one" were therefore clearly admissible.

[3] The defendant also contends that Mrs. Puryear improperly referred to his codefendant, Baker, by name and specifically stated that Baker was "the short one." The implication, defendant argues, was that the other intruder was "the tall one," and defendant, being obviously taller, was the other intruder. The defendant failed to object to this testimony, and the objection is deemed waived under Rule 10(b)(1) of the Rules of Appellate Procedure. However, in *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983), we held that the "plain error" rule adopted in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), regarding error in the jury instructions would be equally applicable to the erroneous admission of evidence. Assuming, *arguendo*, that this testimony was objectionable, it is clear that its admission did not constitute "plain error." Mrs. Puryear did not at any time identify the defendant by name or otherwise as one of the intruders. The single reference to the codefendant, Baker, by name and by description as "the short one" could not have "had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E. 2d at 379.

[4] The defendant next contends that Mr. Puryear's identification testimony should have been suppressed due to inconsistencies between his *voir dire* testimony and his testimony at trial concerning the identity of the two intruders. He goes on to argue that since Mr. Puryear's identification testimony was the only evidence linking him to the crime scene, the trial court should have granted his motions to dismiss the charges against him and

to set aside the verdicts as being against the greater weight of the evidence. We do not agree.

It is well settled that, as a general rule, the jury determines the credibility of witnesses and the weight to be accorded their identification testimony. *E.g., State v. Turner*, 305 N.C. 356, 289 S.E. 2d 368 (1982); *State v. Green*, 296 N.C. 183, 250 S.E. 2d 197 (1978). This rule is inapplicable, however, "where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred." *State v. Miller*, 270 N.C. 726, 731, 154 S.E. 2d 902, 905 (1967). However, "where there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury." *Id.* at 732, 154 S.E. 2d at 906.

With these principles in mind, we conclude that the trial court did not err in admitting Mr. Puryear's identification testimony. During the *voir dire*, Puryear testified that the intruders had come to his house a week before the incident seeking directions to a local business. They were in Puryear's presence for approximately fifteen to twenty minutes on that occasion. Mr. Puryear further testified that on 27 June, the two men were in his home for approximately two and one-half hours, and the defendant was in his presence for thirty to forty-five minutes. He stated that the lighting conditions inside the house were good and that he could see the defendant's face clearly. This evidence establishes that Puryear had sufficient opportunity to observe the defendant to permit him to subsequently identify the defendant as one of the intruders. It was therefore up to the jury to determine the credibility of, and the weight to be accorded to, his testimony. Any discrepancies between Puryear's *voir dire* testimony and his testimony at trial go to the weight to be accorded his testimony, not its admissibility. *See State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977). The defendant had the opportunity to cross-examine the witness as to any inconsistencies between his *voir dire* testimony and his testimony at trial, and it was up to the jury to resolve any discrepancies which may have arisen. Furthermore, Puryear's identification testimony was not "the only evidence identifying the defendant as the perpetrator of the of-

fense." Shortly after the crimes occurred, Mr. Poteat saw the defendant riding in the car that was stolen from the Puryears. The defendant's fingerprints were also found in the vehicle.

For the above-stated reasons, we hold that the trial court did not err in admitting Mr. Puryear's identification testimony.

[5] Finally, we turn to the question of whether the trial court erred in denying the defendant's motion to dismiss the charges against him and his motion to set aside the verdicts as being against the greater weight of the evidence. Prior to submitting the issue of a defendant's guilt 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. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). In considering a motion to dismiss, the trial court must consider 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).

In the present case, the State introduced evidence that two men entered the Puryears' house after assaulting Mr. Puryear. Mr. Puryear positively identified the defendant as one of the intruders. The men carried large bolts as potential weapons. They later displayed a firearm. Mrs. Puryear testified that both of the intruders engaged in vaginal intercourse with her against her will after threatening to kill her unless she cooperated. While the Puryears were tied up in the bathroom, they could hear the two men ransacking their home. After the intruders had left, the Puryears discovered that several items of personal property were missing. Their automobile was also missing. Shortly after the crimes occurred, Mr. Poteat saw the defendant riding in the Puryears' automobile. When the occupants discovered that they were being followed, they attempted to flee at a high rate of speed. They eventually abandoned the car and fled on foot. Before eventually being apprehended, the defendant ran from Officer Holcombe. His fingerprints were discovered inside the Puryears' car. We find that this evidence was clearly sufficient to support the submission of the cases against the defendant to the jury. Therefore, the trial court did not err in denying the defendant's motion to dismiss the charges against him.

We also conclude that the trial court did not err in denying the defendant's motion to set aside the verdicts as being against the greater weight of the evidence. The decision whether to grant or deny a motion to set aside the verdict is vested in the discretion of the trial judge and is not reviewable absent a showing of an abuse of discretion. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *modified*, 429 U.S. 912, 50 L.Ed. 2d 278 (1976). A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985). In light of the overwhelming evidence against the defendant, the trial court did not abuse its discretion in refusing to set aside the jury's verdicts.

The defendant received a fair trial, free from prejudicial error.

No error.

ALAMANCE COUNTY HOSPITAL, INC. v. PRICE NEIGHBORS AND BETTE HOWARD, JOINTLY AND SEVERALLY

No. 328PA84

(Filed 7 January 1986)

1. **Parent and Child § 7— non-custodial parent—payment of court-ordered child support—action by a third party for necessaries furnished to child**

A non-custodial parent's payment of court-ordered child support does not as a matter of law bar a third party from seeking reimbursement from the non-custodial parent, under the common law "Doctrine of Necessaries," for non-emergency medical services furnished to the child.

2. **Parent and Child § 7— recovery for necessaries furnished to child—showing required**

Because the third party provider's right to recovery against a parent for "necessaries" furnished to the parent's child is based upon the child's right to support, the third party provider must show that the services or goods provided were legal necessaries and that the parent against whom relief is sought has failed or refused to provide them. Any payment a non-custodial parent has made for the support of his or her child would be a factor for the trial judge to consider in deciding whether the parent has in fact met the obligation to support that child.

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

ON discretionary review of a decision of the North Carolina Court of Appeals, 68 N.C. App. 771, 315 S.E. 2d 779 (1984), affirming summary judgment for defendant father entered by *Allen, J.*, at the 12 May 1983 Civil Session of Superior Court, ALAMANCE County. Heard in the Supreme Court 12 March 1985.

Vernon, Vernon, Wooten, Brown & Andrews, by Wiley P. Wooten and T. Randall Sandifer for plaintiff-appellant.

William T. Hughes for defendant-appellee.

FRYE, Justice.

[1] The sole issue before this Court is whether a non-custodial parent making child support payments pursuant to a judicial decree or order cannot as a matter of law be liable to a third party provider of non-emergency medical services given to that parent's minor child in the absence of a contractual agreement between the non-custodial parent and the third party provider. We hold that the payment of child support does not necessarily bar such a suit.

I.

The defendants in this action, "Price Neighbors"[1] and Bette Howard, were divorced in 1970. Defendant mother was awarded sole custody of the couple's daughter, Kimberly, and defendant father was ordered to pay $26.50 per week "for the support and maintenance of the child of the marriage." He fell into arrears, and in 1976 the amount was raised to $35 until the arrearage was paid. Finally, in 1978, he was ordered to pay $30 per week in a criminal support order. A copy of this order was not included in the record on appeal. All payments were current when plaintiff filed its suit.

Kimberly Neighbors was hospitalized on 4 June 1982 and again on 17 June 1982. Her bill for both stays totaled $4,205.69. "Price Neighbors" is the name that appears in the "responsible

1. Defendant father's name is actually Bryce Neighbours, not Price Neighbors as shown in the complaint and as shown in the caption herein.

party" block on the admission form for the first stay; "Bette Howard" appears in that block on the second admission form. Defendant mother signed the hospital admission forms and, later, two promissory notes for the payment of the bill. Nothing in the record indicates that defendant father signed anything, or that he even knew that his daughter had been hospitalized. As of 7 March 1983, the entire bill remained unpaid.

Plaintiff hospital brought this suit 7 March 1983 seeking judgment against both parents jointly and severally. Plaintiff's complaint alleged that the patient was defendants' minor child, that defendants were lawfully married, that the services provided were both reasonable and necessary for the child's health, and that defendant parents had not paid the bill.

On 7 April 1983, defendant father filed an answer wherein he admitted that Kimberly was his child but stated that he was without information about any treatment given to his daughter and denied that he was still married to co-defendant Bette Howard and that he owed plaintiff hospital anything. As affirmative defenses, he claimed that plaintiff had no cause of action against him and that there was a misjoinder of parties. He also filed motions to dismiss for failure to state a claim upon which relief could be granted and to drop his name as a party to the action on the grounds that the hospital had no direct right of action against him because he was paying court-ordered child support to the custodial parent and therefore had no further liability for Kimberly's expenses.

After a hearing on 12 May 1983, the trial judge granted defendant father's motions, and the hospital appealed to the Court of Appeals. The Court of Appeals upheld the trial court's decision on the grounds that a non-custodial parent could not be directly liable to a third party for non-emergency care in the absence of any contract between the two. We now review the correctness of that decision.

Defendant mother has failed to make any appearance at any stage of this action.

II.

The Court of Appeals correctly noted in its opinion that since the trial court considered matters outside the pleadings in grant-

ing defendant father's Rule 12(b)(6) motion, the ruling thereby became one of summary judgment for that defendant. The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh'g denied*, 281 N.C. 516 (1972). As this Court remarked in *Koontz*, "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz*, 280 N.C. at 518, 186 S.E. 2d at 901. All inferences are to be drawn against the moving party and in favor of the opposing party. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379; *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh'g denied*, 281 N.C. 516. As the moving party, defendant father has failed to show that he is entitled to judgment as a matter of law.

It has long been the law in North Carolina that a father has a duty to support his unemancipated minor children. *See Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1963); *see also Walker v. Crowder*, 37 N.C. (2 Ire. Eq.) 478, 487 (1843). "Support" in this context includes but is not limited to the provision of necessaries. *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227. Precisely what is meant by the term "necessaries" can change with the times and the family's station in life, *id.*, but medical treatment has traditionally been included and regarded primarily as the father's responsibility. *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482, *reh'g denied*, 301 N.C. 727, 274 S.E. 2d 228 (1980); *Price v. Railroad*, 274 N.C. 32, 161 S.E. 2d 590 (1968); and *Bethea v. Bethea*, 43 N.C. App. 372, 258 S.E. 2d 796, *cert. denied*, 299 N.C. 119, 261 S.E. 2d 922 (1979); *see also Bitting v. Goss*, 203 N.C. 424, 166 S.E. 302 (1932). As plaintiff hospital cogently argued in its brief, "medical treatment" has never been limited to emergency care only. The father's duty of support is not a debt but an obligation imposed by law which arises from his status as father. A father cannot contract away or transfer to another his responsibility to support his children. *Ritchie v. White*, 225 N.C. 450, 35 S.E. 2d 414 (1945); *see also Wells v. Wells*, 227 N.C. 614, 44 S.E. 2d 31 (1947). The obligation survives divorce and continues even

though custody of the children is awarded to the mother. *Becker v. Becker*, 273 N.C. 65, 159 S.E. 2d 569 (1968); *Story v. Story*, 221 N.C. 114, 19 S.E. 2d 136 (1942).

The cases cited above were decided before the 1981 amendment to N.C.G.S. § 50-13.4(b). Prior to that amendment, a father's responsibility for support of his children was primary and a mother's was only secondary. *In re Register*, 303 N.C. 149, 277 S.E. 2d 356 (1981). The mother was not required to furnish any support at all unless the father was unable to provide the entire amount needed or had died. *Id.* The 1981 amendment made both parents primarily liable. N.C.G.S. § 50-13.4(b) now reads:

> (b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child, and any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. The preceding sentence shall not be construed to prevent any court from ordering the support of a child by an agency of the State or county which agency may be responsible under law for such support.

N.C.G.S. § 50-13.4(b) (1985). This statute as amended does not diminish a father's responsibilities. Rather, it enlarges a mother's responsibilities by making both parents primarily liable for the support of their children. *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985).

Although the normal vehicle today for enforcing this obligation is undoubtedly the payment of court-ordered support pursuant to statute, *see, e.g.*, N.C.G.S. § 50-13.4 (1985), the common law provided another through the so-called "Doctrine of Necessaries." As Professor Clark described the process in his *Law of Domestic Relations*:

> At common law the customary method for enforcing the husband's duty to support his family was for the wife or child to buy what they needed and charge it to the husband . . . . [T]he husband was thereby made responsible directly to the merchant who supplied goods to the wife or child.

H. Clark, *Law of Domestic Relations*, § 6.3 at 191 (1968) (footnote omitted). The burden of proof was upon the supplier to show first, that the goods supplied were "necessaries," and second, that the husband or father had failed or refused to provide them. Liability under this theory was quasi-contractual in nature. H. Clark, *Law of Domestic Relations*, § 6.3.

North Carolina accepts this process for enforcing a parent's obligation to support minor children. *See* 3 R. Lee, *North Carolina Family Law*, § 230 (4th ed. 1985). However, few cases involving it exist in this state. *See, e.g., Howell v. Solomon*, 167 N.C. 588, 83 S.E. 609 (1914) (grandmother sued for reimbursement for money spent supporting defendant's minor children; recovery was denied because defendant was at all times willing and ready to provide a home for his children, and grandmother wrongfully kept them away from him); and *Hunnycutt & Co. v. Thompson*, 159 N.C. 29, 74 S.E. 628 (1912) (father held liable for son's funeral expenses where father had wrongfully driven son from his home). *See also Bitting v. Goss*, 203 N.C. 424, 166 S.E. 302 (although allowing the third party provider to sue a child, the court noted that suit against the father who had failed to pay for emergency treatment rendered to his son would also have been appropriate). Most cases dealing with a parent's duty to support minor children do so either in the context of court-ordered child support, *see, e.g., Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863, or the question of the proper party to sue for these expenses in tort actions, *see, e.g., Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482, *reh'g denied*, 301 N.C. 727, 274 S.E. 2d 228.

The hospital in this action appears to be claiming restitution from defendant father under the common law doctrine previously described.[2] The hospital does not allege and has produced no evidence of any contract with defendant father. Any contract that existed was apparently made with defendant mother, although the evidence in the record is not clear on this point.[3] Plaintiff's complaint alleged that the services it provided were necessary and reasonable and that defendant parents have refused to pay them.

Defendant father's defense appears to be one of first impression before this Court. While not disputing his responsibility to support his daughter, defendant father contends that his liability is limited to the amount set forth in his support orders. In defense of this contention, he notes that the original support order does not require him to pay any additional amounts for Kimberly's medical expenses but names a single sum for "support and maintenance." He argues that his contribution to Kimberly's medical expenses is therefore included in his weekly payment.

Other jurisdictions that have considered this defense are sharply divided in their results. Several (Arkansas, California, Maine, Massachusetts, Nebraska, New York, Ohio, Oregon) apparently hold that a judicial decree or order is the absolute limit of a non-custodial parent's liability for support of a minor child except as the order or decree itself may be subsequently modified. *See* Annot., 7 A.L.R. 2d 481 (1949 & Supp. 1985). Others have allowed recovery above the amount fixed by the decree or order either by the custodial parent or by a third party provider of necessary services (Arizona, Iowa, Missouri, Texas (third party), Colorado, Kentucky, Mississippi (custodial parent), and Tennessee (both)). *Id.* At least three of these jurisdictions decided this question in part on the grounds that the minor children had not been parties to the divorce action and that therefore their rights as

2. While plaintiff hospital cites in its brief considerable authority for the proposition that a father has an obligation to provide necessaries and not simply emergency care for a minor child, the hospital fails to cite any authority to support its own right to collect from the father in the absence of a contract.

3. While defendant mother's name was signed to the promissory notes, she seems also to have listed defendant father as the responsible party for her daughter's first hospital stay and promised to get him to co-sign the note.

against their parents were not affected. *See Barrett v. Barrett*, 44 Ariz. 509, 39 P. 2d 621 (1934); *Graham v. Graham*, 38 Colo. 453, 88 P. 852 (1906); and *Rose Funeral Home v. Julian*, 176 Tenn. 534, 144 S.W. 2d 755 (1940). *See also Thompson v. Perr*, 238 S.W. 2d 22 (Mo. Ct. App. 1951) (rights of third party provider of dental services not foreclosed by parents' divorce action).

We find the view expressed long ago by the Arizona court in *Barrett* to be the better one:

> The provisions in the decree of divorce . . . are binding, as between the father and mother, until by a direct proceeding modified, but they do not extend to the minor children. The court under the statutes retains jurisdiction to amend, change, or alter any provision of the decree respecting the care, custody, or maintenance of the children of the parties, as the circumstances of the parents and the welfare of the children may require . . . . If this action were by the mother, it could well be said that her remedy would be to apply for a modification of the decree . . . . But neither the statute nor the decree thereunder is the full measure of the duty of the parent to his minor children. If it were, the children's right to support could not be enforced for lack of a remedy, provided the parent failed to act.

44 Ariz. at 515-6, 39 P. 2d at 623 (citation omitted). In North Carolina, the provisions of Chapter 50 for obtaining support from a non-custodial parent and the criminal sanctions of Chapter 14 provide the basic statutory remedies against the failure or refusal of a child's parents to support the child. The common law provided a different remedy by giving a third party provider of necessaries a right of action against a parent who failed or refused to provide. We do not believe that the statutory remedies were intended to be exclusive; therefore, the common law remedy remains available as a vehicle for enforcing the obligation of a parent to support a minor child in addition to the remedies provided by statute. Because the child's right to support continues unimpaired despite the divorce of his or her parents, *Story v. Story*, 221 N.C. 114, 19 S.E. 2d 136; *Sanders v. Sanders*, 167 N.C. 319, 83 S.E. 490 (1914), the right of the third party provider of goods or services to claim against the non-custodial parent also continues, unimpaired by contracts or judicial decrees or orders affecting the relations between the parents.

[2] Therefore, we cannot agree that, as a matter of law, the payment of court-ordered child support bars a third party from seeking reimbursement directly from a non-custodial parent for "necessaries" provided to that parent's minor child. Because the third party provider's right to recover against the parent is based upon the child's right to support, the third party provider must still show that the services or goods provided were legal necessaries and that the parent against whom relief is sought has failed or refused to provide them. In this context, any payment a non-custodial parent has made for the support of his or her child would be a factor for the trial judge to consider in deciding whether the parent has in fact met the obligation to support that child. *See Morton F. Plant Hosp. Ass'n v. McDaniel*, 425 So. 2d 1213 (Fla. Dist. Ct. App. 1983). The bare fact that defendant father in this case has made his court-ordered support payments does not, by itself, conclusively prove that he has met his full obligation to his daughter, and therefore summary judgment was improper. It must also follow that the trial court erred by allowing the motion to drop the father as a party defendant.

We note that the question of responsibility of Kimberly's parents as between themselves for the cost of her hospitalization is not before this Court, and we do not address it.

The decision of the Court of Appeals is reversed, and the case is remanded to that court for remand to Superior Court, Alamance County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. JACQUELINE RUTH HUNTER

No. 10A85

(Filed 7 January 1986)

1. **Assault and Battery § 15.2— assault with a deadly weapon—instruction on self-defense not required**

 The trial court did not err in a prosecution for assault with a deadly weapon by refusing to instruct on self-defense where defendant's evidence showed at most that the victim committed nonfelonious assaults and employed only nondeadly force against defendant; immediately prior to the stabbing defendant, who was safely away from the victim and perfectly free to remain in a safe place, borrowed a knife and returned to the victim's presence displaying the knife; and there was no evidence that at the time defendant attacked the victim she was in actual or apparent danger of death or great bodily harm.

2. **Criminal Law § 146.2— lack of findings to support probation condition—not raised on appeal by defendant—presented on the face of the record**

 The issue of whether the trial court erred when sentencing defendant for assault with a deadly weapon by failing to make findings of fact when imposing a condition for probation was properly presented for appellate review because defendant's appeal standing alone presented the face of the record for review, the judgment is a part of the record, and the judgment disclosed the lack of findings. N.C. Rule of App. Procedure 9(a)(3)(vii).

3. **Criminal Law § 142.2— restitution as condition of probation—no findings—no error**

 The trial court did not err when sentencing defendant for assault with a deadly weapon by including without findings a condition of probation that defendant pay the victim's medical bills not covered by insurance. The court knew the defendant's age, her relationship to the victim, that she resided with her mother, that she was indigent for legal purposes, and that the victim's family had insurance of uncertain scope. N.C.G.S. 15A-1343 does not require the trial judge to find and enter facts when imposing a judgment of probation; rather, it requires the court to take into consideration the resources of the defendant, her ability to earn, her obligation to support dependents, and other such matters pertaining to her ability to make restitution or reparation. N.C.G.S. 15A-1341(c), N.C.G.S. 15A-1345(e).

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of the Court of Appeals (*Judge Eagles* with *Judge Braswell* concurring and *Judge Webb* dissenting) reported in 71 N.C. App. 602, 323 S.E. 2d 43 (1984), reversing judgment of *Allsbrook, J.*, entered at the 28 July 1983 Criminal Session of PITT County Superior Court. We allowed the Attorney General's petition for writ of certiorari on 7 May 1985.

Defendant was charged in a bill of indictment with assault upon Sam Ward with a deadly weapon with intent to kill resulting in serious injury. The trial judge submitted possible verdicts of guilty of assault with a deadly weapon or not guilty. The jury returned a verdict of guilty of assault with a deadly weapon. Judge Allsbrook imposed a sentence of six months imprisonment, suspended the sentence, and placed defendant under supervised probation for a period of three years. One of the conditions of probation was that defendant pay the medical expenses incurred by Sam Ward which were not paid by medical insurance, not to exceed $806.25 to Pitt Memorial Hospital and $113.00 to Dr. John Winstead. All costs were to be paid by defendant under the supervision and direction of defendant's probation officer. Defendant appealed and the Court of Appeals reversed and remanded for rehearing as to the award of restitution for medical expenses. The State brought forward the sole question of whether the Court of Appeals erred by reversing the trial judge's restitution order.

Lacy H. Thornburg, Attorney General, by Michael Smith, Associate Attorney, for the State.

Arthur M. McGlauflin, Attorney for defendant-appellee.

BRANCH, Chief Justice.

Defendant's appeal presents the question of whether the Court of Appeals erred in failing to find error in the trial judge's refusal to instruct on self-defense. The State offered evidence tending to show that on the night of 11 March 1983 Sam Ward was sitting at a table with Loretta Cameron in a disco club called "The Cave." Defendant, a sixteen year old girl, was Ward's former girlfriend and he was the father of her sixteen month old child. Ward testified that he "felt somebody hitting in his side" and when he looked around he observed defendant swinging her arm. He pushed her to the floor and noticed that defendant had a three inch lock blade knife in her hand. The victim then saw a wound in his thigh and at that point he slapped defendant.

Defendant testified that Ward had assaulted her several times on that day. She further testified:

> [Ward] saw me talking to Nicky and called me over there to him. I wouldn't go because I knew what he was going to do.

> And he came up there to me and hit me beside of the head with his fist. . . . Then I told him I was going to get him because I was tired of him hitting on me. . . . Aaron asked me to dance. And when I came back and sat down I started talking and chatting with Nicky. I came to [Ward]—because he hollered clear over there—and I went over there to him, and then he started punching me in my stomach. And I said, . . . I am going to get you because I am tired of this. . . . I was tired of [Ward] beating on me. I went to see some dude I had met that night. I asked him did he have a pocketknife. I said I had to cut something off my shirt. I went to [Ward], and [he] was looking at me when I went to him. And then as soon as I got to him [Ward] saw the knife and then that is when he punched me in my face. I fell.

When asked why she cut Ward she replied, "I was tired of him beating on me."

[1] Under the law of this State, there is a distinction between a person's right of self-defense in repelling a felonious assault and a misdemeanor assault. *State v. Anderson*, 230 N.C. 54, 51 S.E. 2d 895 (1949). More specifically, this difference lies in the amount of force which may be used to fend off an attack. Except for certain assaults against "handicapped persons" which are deemed felonious under N.C.G.S. § 14-32.1(e), a felonious assault involves the use of a deadly weapon and the intent to kill or the infliction of serious injury. N.C.G.S. § 14-32 (1981). Other assaults are nonfelonious. N.C.G.S. § 14-33 (1981 & Cum. Supp. 1985).

To repel a felonious assault, a defendant may employ deadly force in his defense but only if it reasonably appears necessary to protect himself against death or great bodily harm. *State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979), *overruled on other grounds*, *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982). Deadly force has been defined as "force likely to cause death or great bodily harm." *Id.* at 563, 256 S.E. 2d at 182. Although a defendant need not submit in meekness to indignities or violence to his person because the affront does not threaten death or great bodily harm, he may not resort to the use of deadly force to protect himself from mere bodily harm or offensive physical contact. *Id. See also*, *State v. Anderson*, 230 N.C. at 56, 51 S.E. 2d at 897. The use of deadly force to prevent harm other than death or great bodily

harm is therefore excessive as a matter of law. *Clay*, 297 N.C. at 563, 256 S.E. 2d at 182.

Applying the above principles to the facts of this case, we find that the evidence when taken in the light most favorable to defendant does not require an instruction on self-defense. The knife with a three-inch blade used by defendant against Ward amounted to deadly force since it was likely to cause death or great bodily harm. Even if defendant's evidence regarding Ward's despicable conduct on the day and the night of the stabbing is believed, defendant's evidence shows that he at most committed nonfelonious assaults and employed only nondeadly force against defendant. Immediately prior to the stabbing, defendant, who was safely away from the victim and perfectly free to remain in a safe place, borrowed a knife and returned to the victim's presence displaying the knife. There is no evidence at the time defendant attacked Ward that she was in actual or apparent danger of death or great bodily harm justifying her use of a deadly weapon. Defendant testified that she told Ward that she was going "to get him because I was tired of him hitting on me." When asked by her counsel on direct examination why she cut Ward, she replied, "I was tired of him beating on me and he knocked me up beside my head." Thus, defendant's own evidence reveals that the amount of force she used against Ward was excessive and that in any event she was not acting in self-defense when she attacked Ward.

Furthermore, a person is entitled under the law of self-defense to harm another only if he is "without fault in provoking, or engaging in, or *continuing a difficulty with another.*" *State v. Anderson*, 230 N.C. at 56, 51 S.E. 2d at 897 (emphasis added). The uncontradicted evidence produced at trial reveals that after Ward's assault had ended defendant armed herself and marched back over to him to continue the difficulty between them. It was only after Ward had seen defendant come at him with a knife that he was provoked into assaulting her further.

Because there was no evidence presented which tended to show that defendant was entitled under the law of self-defense to attack Ward with the force and at the time chosen by her, we hold that the trial court properly refused to instruct the jury on the law of self-defense. This assignment of error is overruled.

[2] The State argues that the Court of Appeals erred by reversing and remanding for hearing the question of restitution. The first prong of the State's argument is that defendant did not properly preserve or present the issue of restitution for appellate review. We disagree.

Defendant's appeal, standing alone, presents the face of the record for review. *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970). The judgment is, of course, a part of the record. N.C. R. App. P. 9(a)(3)(vii). Examination of the judgment in the instant case unquestionably discloses that the trial judge did not make and enter findings of fact in adjudging that defendant make restitution as a part of the probationary judgment. Whether the court erred by failing to make findings as to defendant's ability to pay is a question of law and is determinative of this assignment of error. We turn to that question.

[3] Section 15A-1343(d) of the General Statutes in pertinent part provides:

> (d) Restitution as a Condition of Probation.—As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution or reparation. The amount must be limited to that supported by the record, and the court may order partial restitution or reparation when it appears that the damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay.

The Court of Appeals, finding error in the restitution order, stated:

> The trial court ordered defendant to pay a total of $919.25 for the medical expenses of the victim Ward. The trial court made no findings of fact or conclusions of law as to defendant's ability to earn, her resources, her obligation to

> support dependents or any other matters that might affect her ability to make restitution. By the clear terms of G.S. 15A-1343(d) this was error.

71 N.C. App. at 605, 323 S.E. 2d at 45.

As previously noted, the trial court ordered defendant to pay medical expenses *not paid by medical insurance* in an amount not to exceed $806.25 to Pitt Memorial Hospital and $113.00 to Dr. John Winstead. These payments were to be made under the supervision and direction of defendant's probation officer during the three year probationary period.

Probation or suspension of sentence is not a right guaranteed by either the federal or state constitutions but is a matter of grace conferred by statute. *State v. Hewitt*, 270 N.C. 348, 154 S.E. 2d 476 (1967); N.C. Gen. Stat. § 15A-1341 (1983) *et seq.*

We do not interpret N.C.G.S. § 15A-1343 to require the trial judge to find and enter facts when imposing a judgment of probation. Rather it requires the court to *take into consideration* the resources of the defendant, her ability to earn, her obligation to support dependents, and such other matters as shall pertain to her ability to make restitution or reparation.

This record clearly shows that these matters were considered by Judge Allsbrook in his judgment ordering restitution. He knew defendant's age, her relationship to the victim, that she resided with her mother, that she was indigent for legal purposes, and that the victim's family had insurance of an uncertain amount in scope at the time of the sentencing hearing. The court's action in remitting the original fine and delegating the determination and scheduling of payments in restitution to the probation officer evidenced the trial judge's full recognition of the matters to be considered pursuant to N.C.G.S. § 15A-1343(d).

Our interpretation of N.C.G.S. § 15A-1343(d) is buttressed by other provisions of Article 82 of the General Statutes. In this regard we note that N.C.G.S. § 15A-1341(c) provides:

> (c) Election to Serve Sentence or Be Tried on Charges.—Any person placed on probation may at any time during the probationary period elect to serve his suspended sentence of imprisonment in lieu of the remainder of his probation. Any

person placed on probation upon deferral of prosecution may at any time during the probationary period elect to be tried upon the charges deferred in lieu of remaining on probation.

Even more persuasive are the provisions of N.C.G.S. § 15A-1345(e) to wit:

> (e) Revocation Hearing.—Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing. At the hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed. Formal rules of evidence do not apply at the hearing, but the record or recollection of evidence or testimony introduced at the preliminary hearing on probation violation are inadmissible as evidence at the revocation hearing. When the violation alleged is the nonpayment of fine or costs, the issues and procedures at the hearing include those specified in G.S. 15A-1364 for response to nonpayment of fine.

Section 15A-1345 of the North Carolina General Statutes guarantees notice, bail, a preliminary hearing and a revocation hearing with counsel present. At the revocation hearing, the trial judge must make findings to support his decision on whether to revoke or extend probation. He must also make a summary record of the proceedings. Thus, it appears that a defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, the statute guarantees full due process before there can be a revocation of probation and a resulting prison sentence.

For the reasons stated, the decision of the Court of Appeals is affirmed in part and reversed in part. The judgment entered in Pitt County Superior Court on 28 July 1983 remains in full force and effect.

Affirmed in part; reversed in part.

IN RE SUPERIOR COURT ORDER DATED APRIL 8, 1983

No. 532PA84

(Filed 7 January 1986)

Banks and Banking § 3; Criminal Law § 80.2— disclosure of customer's records to prosecutor—order of confidentiality—required showing

The superior courts of this state have the inherent power to order a banking corporation to disclose to the district attorney a customer's bank account records upon a finding that an examination of such records would be in the best interest of justice, and to order the bank not to disclose the examination for a specified period upon a proper finding that disclosure could impede the investigation and interfere with the enforcement of the law. However, before such an order may be issued, the State must present to the trial judge an affidavit or similar evidence setting forth facts or circumstances sufficient to show reasonable grounds to suspect that a crime has been committed and that the records sought are likely to bear upon the investigation of that crime.

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

ON discretionary review of a decision of the Court of Appeals, 70 N.C. App. 63, 318 S.E. 2d 843 (1984), affirming an order entered 8 April 1983 by *Walker, J.*, in Superior Court, GUILFORD County, requiring appellant NCNB National Bank of North Carolina to make available to the State certain records regarding one of its customers.

Lacy H. Thornburg, Attorney General, by Daniel C. Higgins, Assistant Attorney General, for the State.

Smith, Moore, Smith, Schell & Hunter, by Benjamin F. Davis, Jr., for appellant.

Edmond D. Aycock, for Amicus Curiae, North Carolina Bankers Association.

FRYE, Justice.

In this case we must decide whether superior courts of this State have the inherent power to order a banking corporation to disclose to the district attorney a customer's bank account records upon a finding that an examination of such records would be in the best interest of justice, and to order the bank not to disclose the examination for a specified period upon a proper finding that disclosure could impede the investigation and interfere with the enforcement of the law. We hold that a superior court judge has the inherent power to issue such an order, provided sufficient facts or circumstances are presented to show the reason that disclosure is in the best interest of justice. Because the petition in the instant case did not set forth such facts or circumstances, and because the record does not disclose any affidavit or other evidence from which the judge could properly make an independent determination that disclosure of the customer's records was in the interest of justice, the trial judge erred by issuing the order.

On 7 April 1983, the district attorney for the Eighteenth Judicial District filed a petition in the Superior Court, Guilford County, seeking an order directing the appropriate officials of NCNB National Bank of North Carolina [hereinafter "NCNB"] to make available to Detective E. O. Cherry, "or his designate:"

> Copies of any and all records of all accounts in the name of St. James Baptist Church during the period of January 1, 1979 through December, 1982 including statements, ledger cards or other documents designed to show a record of deposits and withdrawals.

In the petition, the district attorney stated under oath:

> that he has reason to believe that the examination of certain records in the offices of NCNB of North Carolina, in Greensboro, North Carolina, would be in the best interest of justice . . . .

On the following day, 8 April 1983, Judge Russell G. Walker issued an order, *ex parte*, in which he found that "it is in the best interest of law enforcement and the administration of justice" that the requested information be made available "to Detective E. O. Cherry or his designate," and ordered that the records be made available and that "this examination is not to be disclosed

for a period of 90 days from the date of this request." The court further found that "[a]ny such disclosure could impede the investigation being conducted and thereby interfere with the enforcement of the law." On 18 April 1983, NCNB gave Notice of Appeal to the Court of Appeals. The Court of Appeals affirmed the decision of the trial court. 70 N.C. App. 63, 318 S.E. 2d 843 (1984). NCNB's petition for discretionary review was allowed by this Court on 4 December 1984.

NCNB contends that the trial judge erred in entering the order since there is no statutory or case law authority supporting the issuance of the type of order involved here. The Court of Appeals determined that while there is no statutory provision either authorizing or prohibiting orders of the type here involved, such authority exists in the inherent power of the court to act when the interests of justice so require. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, *reh'g denied*, 448 U.S. 918 (1980); *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 256 S.E. 2d 818, *disc. rev. denied*, 298 N.C. 297, 259 S.E. 2d 298 (1979); *English v. Brigmon*, 227 N.C. 260, 41 S.E. 2d 732 (1947); *Ex parte McCown*, 139 N.C. 101, 51 S.E. 957 (1905); Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 20-23 (1974). We agree. As amply demonstrated in the opinion of the Court of Appeals, other options available to the district attorney at the investigatory stage of the proceeding provide inadequate means of obtaining the desired information. We find it unnecessary to repeat that discussion here. It is sufficient to note that situations occasionally arise where the prompt and efficient administration of justice requires that the superior court issue an order of the type sought here by the State. Accordingly, we agree with the Court of Appeals that the superior court does have the inherent power to issue such an order.

We therefore move to a consideration of what the State must show in order to provide a basis for the trial court to make the requisite finding to support the issuance of such an order. NCNB suggests that we adopt the standard set out in the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401, *et seq*. That act sets forth the procedure for controlling federal government access to bank records. While the General Assembly may wish to consider the enactment of legislation of this nature, this Court will not engraft upon state law the requirements of this detailed federal

statutory scheme. Nor will we engraft upon the inherent power of the court to issue such an order the fourth amendment standard of probable cause.[1] Nevertheless, the trial judge must be presented with something more than the complainant's bare allegation that it is in the best interest of justice to allow the examination of the customer's bank account records. At a minimum the State must present to the trial judge an affidavit or similar evidence setting forth facts or circumstances sufficient to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime.[2] With this evidence before it, the trial court can make an independent decision as to whether the interests of justice require the issuance of an order rather than relying solely upon the opinion of the prosecuting attorney. Because no such evidence was presented to the trial judge in this case, the order directing the bank to make the records available was not properly issued. For the same reason, that portion of the order directing the bank not to disclose the examination for ninety days was also erroneous.

We note that although the Court of Appeals upheld the order as issued in this case even though the record failed to establish a factual basis from which the judge could realistically determine whether it was in the best interest of justice that the records be examined, the court stated that "in future cases of this type it will undoubtedly facilitate review and increase cooperation on the part of those examined if the State makes a more complete statement of the circumstances underlying its petition and the reasons the administration of justice requires an order allowing examination." 70 N.C. App. at 69, 318 S.E. 2d at 846. Thus, the Court of Appeals recognized the importance of having all of the pertinent facts and circumstances available before the judge issues an order of the type involved here. While the Court of Appeals merely sug-

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1. A corporation does not enjoy complete fourth amendment protection when confronted with a request for the production of documents. *See California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974). Nor can a corporation assert the fourth amendment rights of its customer against whom the information is sought. *See Rakas v. Illinois*, 439 U.S. 128 (1978), *reh'g denied*, 439 U.S. 1122 (1979).

2. For a similar application of "reasonable suspicion" in a different setting, *see State v. Thompson*, 296 N.C. 703, 706, 252 S.E. 2d 776, 779, *cert. denied*, *Thompson v. North Carolina*, 444 U.S. 907 (1979).

gested that the State make a more complete statement of the circumstances underlying its petition, we hold that it is mandatory that the State present to the judge, by affidavit or similar evidence, sufficient facts or circumstances to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime. For the reasons indicated, the decision of the Court of Appeals affirming the order entered herein by the trial court must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

IN THE MATTER OF: ALLEGHANY COUNTY DEPARTMENT OF SOCIAL SERVICES v. TAMI W. REBER AND CRAWFORD D. REBER

No. 469A85

(Filed 7 January 1986)

PETITIONER appeals as a matter of right, pursuant to N.C.G.S. § 7A-30(2), from a decision of a divided panel of the Court of Appeals, 75 N.C. App. 467, 331 S.E. 2d 256 (1985), reversing the order terminating respondent Tami W. Reber's parental rights to Tiffany Reber. Heard in the Supreme Court 18 December 1985.

Lacy H. Thornburg, Attorney General, by Assistant Attorney General Jane Rankin Thompson, for petitioner-appellant.

Legal Services of the Blue Ridge, by Andrea B. Young and Bruce Kaplan, for respondent-appellee, Tami W. Reber.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

CLAUDE EUGENE MEADOWS AND BERNICE JENKINS MEADOWS v. CRAIG JOHN LAWRENCE

No. 391A85

(Filed 7 January 1986)

APPEAL of right under N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 75 N.C. App. 86, 330 S.E. 2d 47 (1985), affirming summary judgment for defendant entered by *Helms, J.*, on 2 April 1984 in Superior Court, IREDELL County. Heard in the Supreme Court 17 December 1985.

Harris & Pressly, by Edwin A. Pressly and Gary W. Thomas, for plaintiff appellants.

Sowers, Avery & Crosswhite, by William E. Crosswhite, for defendant appellee.

PER CURIAM.

Affirmed.

JOHN H. JOHNSON v. CITY OF WINSTON-SALEM

No. 387A85

(Filed 7 January 1986)

APPEAL by defendant from a decision of a divided panel of the Court of Appeals, 75 N.C. App. 181, 330 S.E. 2d 222 (1985), which reversed summary judgment for defendant entered at the 20 August 1984 Session of FORSYTH County Superior Court, *Albright, J.*, presiding.

The Law Firm of Billy D. Friende, Jr., by Donald R. Buie for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr. and Gusti W. Frankel for defendant appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion of Whichard, J., the decision of the Court of Appeals is

Reversed.

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

PATRICIA MCLEAN DRUMMOND v. EARL CORDELL, D/B/A CORDELL'S BODY SHOP, AND MELODY M. CORDELL

No. 196A85

(Filed 7 January 1986)

APPEAL of right by plaintiff and defendant Earl Cordell pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 73 N.C. App. 438, 326 S.E. 2d 292 (1985), which vacated the judgment entered by *Downs, J.*, on 13 January 1984 in Superior Court, HAYWOOD County, and remanded the cause to that court for a new trial. Heard in the Supreme Court 17 December 1985.

McLean & Dickson, P.A., by Russell L. McLean III, for plaintiff.

Roberts, Cogburn, McClure & Williams, by Max O. Cogburn and Allan P. Root, for defendant Earl Cordell.

PER CURIAM.

Affirmed.

GUSS ALSTON v. ANNE H. HERRICK

No. 540A85

(Filed 7 January 1986)

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, 76 N.C. App. 246, 332 S.E. 2d 720 (1985), ordering a new trial for failure of the trial court to submit to the jury the question of contributory negligence. Heard in the Supreme Court 19 December 1985.

Epting & Hackney, by Joe Hackney, for plaintiff-appellant.

Bryant, Drew & Patterson, P.A., by Lee A. Patterson, II, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. PEARL ALFREDA WEST

No. 545PA85

(Filed 7 January 1986)

WE granted the State's petition for discretionary review pursuant to N.C.G.S. § 7A-31 on 26 September 1985 to review the decision of the Court of Appeals (*Arnold, J., Hedrick, Chief Judge,* and *Cozort, J.,* concurring) reported at 76 N.C. App. 459, 333 S.E. 2d 522 (1985). The Court of Appeals held that defendant's motion to dismiss "for insufficiency of the evidence should have been granted." In so holding the Court of Appeals reversed the judgment of *Pope, J.,* sentencing defendant to imprisonment for twenty-five years upon the jury verdict of guilty of second degree murder entered at the 9 April 1984 Session of DUPLIN County Superior Court.

Lacy H. Thornburg, Attorney General, by Lucien Capone, III, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, for defendant-appellee.

Jane M. Edmisten, William A. Friedlander and Crombie J. D. Garrett, Attorneys, Amici Curiae.

PER CURIAM.

Having carefully considered the opinion of the Court of Appeals, the records, briefs and oral arguments in the case before us, we conclude that our order of 26 September 1985 allowing the State's petition for discretionary review was improvidently allowed.

Discretionary review improvidently allowed.

IN THE MATTER OF THE FORECLOSURE OF THE PROPERTY OF ESTELLE C. JOHNSON

No. 123PA85

(Filed 7 January 1986)

ON discretionary review of a decision of the Court of Appeals, 72 N.C. App. 485, 325 S.E. 2d 502 (1985), affirming order entered by *Johnson (E. Lynn), J.*, at the 30 January 1984 session of Superior Court, CHATHAM County. Heard in the Supreme Court 16 December 1985.

Parker & Smith, by Daniel E. Smith and Gerald C. Parker, for petitioner appellants.

Edwards & Atwater, by Phil S. Edwards, for respondent appellee.

PER CURIAM.

The record discloses that the trial judge was unable to properly settle the record on appeal: the record did not show nor did the trial judge have any independent recollection of whether several critical documents were offered into evidence. Therefore, in the interests of justice and pursuant to our constitutional supervisory power and Rule 2 of the North Carolina Rules of Appellate Procedure, the decision of the Court of Appeals and the order of the superior court are vacated, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Chatham County, for a de novo hearing.

Vacated and remanded.

BAKER v. COX

No. 698P85.

Case below: 77 N.C. App. 445.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 January 1986.

BARKER v. HIGH

No. 668P85.

Case below: 77 N.C. App. 227.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 January 1986.

BLIZZARD BUILDING SUPPLY v. SMITH

No. 737P85.

Case below: 77 N.C. App. 594.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 7 January 1986.

BROWN v. BROWN

No. 673P85.

Case below: 77 N.C. App. 206.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 January 1986.

BRYANT v. ROSE CRAFT BOATWORKS

No. 605P85.

Case below: 76 N.C. App. 542.

Petition by defendant (Boatworks) for discretionary review under G.S. 7A-31 denied 7 January 1986.

CAMPBELL v. BOARD OF EDUCATION OF CATAWBA COUNTY

No. 607P85.

Case below: 76 N.C. App. 495.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 January 1986.

CANDID CAMERA VIDEO v. MATHEWS

No. 637P85.

Case below: 76 N.C. App. 634.

Petition by defendants and third-party plaintiff-appellees for discretionary review under G.S. 7A-31 denied 7 January 1986.

ELMORE v. BROUGHTON HOSPITAL

No. 636P85.

Case below: 76 N.C. App. 582.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

IN RE TERRY

No. 726PA85.

Case below: 76 N.C. App. 529.

Petition by Sandra K. Kinder for writ of certiorari to the North Carolina Court of Appeals allowed 7 January 1986.

LESSARD v. LESSARD

No. 663A85.

Case below: 77 N.C. App. 97.

Petition by defendant for discretionary review under G.S. 7A-31 allowed as to additional issues 7 January 1986.

LIVERMON v. BRIDGETT

No. 686P85.

Case below: 77 N.C. App. 533.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 January 1986.

N. C. COASTAL MOTOR LINE, INC. v. EVERETTE TRUCK LINE, INC.

No. 681P85.

Case below: 77 N.C. App. 149.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

REID v. DURHAM HERALD COMPANY

No. 639P85.

Case below: 76 N.C. App. 680.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 January 1986.

RIVENBARK v. SOUTHMARK CORP.

No. 675P85.

Case below: 77 N.C. App. 225.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. APOSTOLOPOULOS

No. 697P85.

Case below: 77 N.C. App. 459.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. BARE

No. 721P85.

Case below: 77 N.C. App. 516.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. BARNES

No. 671P85.

Case below: 77 N.C. App. 212.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. BLAKELY

No. 643P85.

Case below: 76 N.C. App. 680.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. BROWN AND GOODING

No. 722P85.

Case below: 76 N.C. App. 542.

Petition by defendant (Brown) for writ of certiorari to the North Carolina Court of Appeals denied 7 January 1986.

STATE v. CURLEE

No. 689P85.

Case below: 77 N.C. App. 460.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. DAVIDSON

No. 695P85.

Case below: 77 N.C. App. 540.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. HARPER

No. 739P85.

Case below: 56 N.C. App. 643.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 January 1986.

STATE v. HENSLEY

No. 677P85.

Case below: 77 N.C. App. 192.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. HICKLIN

No. 696P85.

Case below: 77 N.C. App. 460.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. McQUAIG

No. 680P85.

Case below: 77 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. MANN

No. 755PA85.

Case below: 77 N.C. App. 654.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 7 January 1986. Petition by Attorney General for writ of supersedeas is denied upon the condition that defendant post an appearance bond in an amount determined by the superior court to be reasonable.

STATE v. MARTIN

No. 617P85.

Case below: 76 N.C. App. 682.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. NEAL

No. 613P85.

Case below: 76 N.C. App. 518.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. O'QUINN

No. 630P85.

Case below: 76 N.C. App. 682.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. PEELE

No. 644P85.

Case below: 76 N.C. App. 682.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. REDFEARN

No. 712P85.

Case below: 77 N.C. App. 239.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 January 1986.

STATE v. RUIZ

No. 674P85.

Case below: 77 N.C. App. 425.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. STEWART

No. 539P85.

Case below: 76 N.C. App. 346.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. UZZELL

No. 684P85.

Case below: 77 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. VANHORN

No. 683P85.

Case below: 77 N.C. App. 460.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. WALLER

No. 664P85.

Case below: 77 N.C. App. 184.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. WASHINGTON

No. 734P85.

Case below: 71 N.C. App. 767.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 January 1986.

STATE v. WATTS

No. 666P85.

Case below: 77 N.C. App. 124.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. WILLIAMS

No. 672P85.

Case below: 77 N.C. App. 136.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 January 1986.

STATE v. WRIGHT

No. 646P85.

Case below: 76 N.C. App. 673.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

THREATT v. HIERS

No. 596P85.

Case below: 76 N.C. App. 521.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 January 1986.

TOM TOGS, INC. v. BEN ELIAS INDUSTRIES CORP.

No. 649PA85.

Case below: 76 N.C. App. 663.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 7 January 1986. Motion by defendant to dismiss appeal for lack of substantial constitutional question denied 7 January 1986.

STATE OF NORTH CAROLINA v. WILLIE JAMES GLADDEN

No. 342A83

(Filed 18 February 1986)

1. **Bills of Discovery § 6— in-custody statement—differences from statement disclosed to defendant—failure to impose sanctions**

The trial court did not err in failing to suppress portions of defendant's in-custody statement made to a detective which were not included in a statement disclosed to defendant pursuant to his discovery request or, in the alternative, to grant a continuance and compel disclosure of the differences in and additions to the disclosed statement where the prosecutor orally informed defense counsel of one difference two or three weeks prior to the trial; defendant failed to object to any portions of the detective's testimony during the trial and did not request sanctions at the time the testimony was given; defendant had a full opportunity to cross-examine the detective and to bring any discrepancies to the attention of the jury; and a review of the detective's testimony reveals that it was substantially the same as the statement provided by the State to defendant.

2. **Criminal Law § 45.1— pattern search—inability to find knife—evidence not prejudicial**

Assuming the inadmissibility of a detective's testimony concerning his pattern search for a knife allegedly used by deceased after throwing a metal object simulating a knife into the woods at the crime scene and his inability to find a knife during the search, the admission of such testimony did not prejudice defendant where the evidence showed that a knife was subsequently discovered in the crime scene area, and the knife was identified by defendant as the one used by deceased on the night in question.

3. **Criminal Law § 43— photographs admitted as substantive evidence—prerequisites for illustrative photographs not required**

Where photographs of defendant and deceased's wife were admitted as substantive evidence of defendant's motive for killing deceased and not as illustrative evidence, admission of the photographs was not improper because no witness testified that they fairly and accurately represented the scene described by the testimony, because they did not illustrate the testimony of any witness, or because the court failed to instruct the jury that they were admitted for illustrative purposes.

4. **Criminal Law § 43.4— number of photographs of defendant and victim's wife —absence of prejudice**

A defendant charged with homicide was not prejudiced by the number of photographs of defendant and the victim's wife admitted into evidence because he is black and the photographs revealed to the jury that the victim's wife was white since several photographs could not be more prejudicial than one in that the jury would be aware of the race of the victim's wife after the introduction of the first photograph; there was no evidence indicating that the jury was

prejudiced against defendant because he was involved in an interracial love affair; and defendant objected only to testimony identifying the photographs and failed to renew his objection at the time they were offered and received into evidence.

5. **Homicide § 15.2— laughter after shooting—competency to show mental state**

A witness's testimony that, while five hundred to one thousand yards from the scene of the shooting, he heard masculine laughter coming from the scene shortly after the shots were fired was admissible against defendant to show his mental state at the time of the shooting where there was evidence that defendant and the victim's wife were the only people other than the victim who were present at the time of the shooting.

6. **Criminal Law § 88.4— cross-examination of defendant—use of poem written by defendant**

Where defendant testified on direct examination as to the nature of his relationship with the victim's wife, the prosecution could properly cross-examine defendant through use of a poem he had written in which he professed his love for the victim's wife and stated that he did not intend to break off their relationship even though the poem contained profanity and descriptions of sexual activity.

7. **Criminal Law § 165— capital case—opening statement by prosecutor—absence of objection—appellate review**

In capital cases, an appellate court may review the prosecution's opening statement even though no objection was made at trial, but review is limited to an examination of whether the statement was so grossly improper that the trial judge abused his discretion in failing to intervene *ex mero motu.*

8. **Criminal Law § 102.4— opening statement by prosecutor supported by evidence**

Assertions made in the prosecutor's opening statement in a murder case that defendant was very upset because he was unable to see the victim's wife on a regular basis, that the victim's wife was also charged with the victim's murder, and that defendant offered a friend one thousand dollars to kill the victim were a fair and substantially accurate preview of the actual evidence.

9. **Criminal Law § 102— capital case—jury arguments—number of counsel—right to final argument**

N.C.G.S. § 84-14 is construed to mean that, although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish and each may address the jury as many times as he desires. However, if the defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument.

10. **Criminal Law § 102.7— prosecutor's jury argument—comment on credibility of witnesses**

The prosecutor's jury argument expressing a personal opinion as to the credibility of the sheriff, while improper, was not so grossly improper as to re-

quire the trial court to intervene *ex mero motu.* Furthermore, the prosecutor's argument concerning a detective that "it's an insult to my integrity and I hope to yours too, for anyone to say [the detective] would ever, in his entire life, falsify something under oath" and that "he has experiences in the past that help him in a stressful situation to remember things and keep going" was in response to defense counsel's attacks on the detective as a witness and was not improper.

11. Criminal Law § 102.6— prosecutor's jury argument supported by evidence or inferences therefrom

In this prosecution for first degree murder, the prosecutor's jury argument that the evidence showed that the bullet that struck the victim between the eyes was fired while he was lying in the ditch was supported by the evidence; the prosecutor's argument that there was no evidence to substantiate defendant's assertion that the victim stabbed him was a reasonable inference from the evidence presented; the prosecutor's argument that the victim's wife tried to establish an alibi through a friend was a reasonable inference from the evidence presented; and the prosecutor's argument that defendant had offered an acquaintance one thousand dollars to "knock off" the victim was supported by the evidence.

12. Criminal Law § 102.6— jury argument—statement not supported by evidence —thrust of argument supported by evidence

Although the defendant did not make a statement attributed to him by the prosecutor that he had told a fellow inmate to instruct the victim's wife to lie, the trial court was not required to intervene *ex mero motu* since the thrust of the prosecutor's argument was that defendant had attempted to tell the victim's wife to lie, and this assertion was amply supported by defendant's own testimony.

13. Criminal Law § 102.9— jury argument—comment on defendant's credibility

The prosecutor's jury argument that "The only logical inference is that [defendant] is not telling you the truth today, and I submit if I was in his shoes, I probably wouldn't either . . ." was not so grossly improper as to require the trial judge to intervene *ex mero motu.*

14. Criminal Law § 102.7— jury argument—misstatement of law cured by instruction

Any prejudice from the prosecutor's misstatement of the law that ". . . prior inconsistent statements show that a person is not credible or believable" was cured when the trial judge properly instructed the jury concerning the weight to be accorded to prior inconsistent statements.

15. Criminal Law § 102.6— awareness of dying victim—jury argument supported by evidence

The prosecutor's jury argument to the effect that the wounded and dying murder victim could hear his wife and defendant laughing at him was supported by a detective's testimony that defendant stated that, as he was leaving the scene, he knew the victim was dying because he heard the "death

gurgle," and by defendant's testimony on cross-examination that the victim was still alive and in pain when he and the victim's wife left the scene.

16. Criminal Law § 113.1— recapitulation supported by evidence

The trial court did not err in instructing the jury that the State offered evidence tending to show that "defendant made a statement to one of the officers that he was wearing black pants" at the time the victim died when the officer stated at one point that defendant said he was wearing *black* pants and at another point that defendant told him he was wearing *dark* pants.

17. Criminal Law § 114.2— no expression of opinion in statement of evidence

The trial court's statement that the State offered evidence tending to show that defendant told a detective "that he went into the ditch and crouched or lay down" while waiting for the victim was in substantial accord with the actual testimony and did not amount to an improper expression of opinion by the trial court.

18. Criminal Law § 113.1— recapitulation of evidence—minor discrepancy not prejudicial

The trial court's statement in summarizing the evidence that the State offered evidence tending to show that defendant told another Marine "that his girlfriend and he wanted [the victim] dead" when the Marine testified only that defendant told him that the victim's wife had asked him to kill her husband constituted a minor discrepancy not prejudicial to defendant where another witness had testified that defendant told him that "he and his girlfriend" wanted the victim killed.

19. Criminal Law § 113.1— omission from recapitulation of evidence—error cured by subsequent instruction

In this prosecution for first degree murder, the trial court's failure to include in its recapitulation of the evidence in the original charge any reference to defendant's claim that the victim initially attacked him with a knife was cured when the trial court subsequently instructed the jury that defendant offered evidence tending to show that "there was an initial attack upon [defendant] by [the victim] out there."

20. Homicide § 18— premeditation and deliberation—circumstances considered

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; (6) evidence that the killing was done in a brutal manner; and (7) the nature and number of the victim's wounds.

21. Homicide § 21.5— first degree murder—premeditation and deliberation—sufficiency of evidence

There was sufficient evidence of premeditation and deliberation to support defendant's conviction for first degree murder where there was evidence

tending to show that defendant and the victim's wife were engaged in an affair; defendant and the victim's wife lured the victim to a deserted rural location by having the wife call the victim under the pretense that she had car trouble and was in need of assistance; defendant was armed with a knife and a gun; defendant slashed the victim's throat and shot him four times; after the first two gunshots had felled the victim, defendant dragged him into a ditch and shot him twice more; prior to the shooting, defendant had told a friend that the victim's wife had said she wished her husband were dead, and defendant had attempted to find someone to kill the victim; a witness who was in the area of the shooting heard male laughter coming from the vicinity of the shooting after the last two shots were fired; after the shooting, defendant disposed of certain items of evidence and attempted to hide the body and to establish an alibi for himself; and, following his arrest, defendant told a fellow inmate that if he had the chance, he would kill the victim again "for the pleasure of it."

22. Criminal Law § 135.8— first degree murder—especially heinous, atrocious or cruel aggravating circumstance—when permitted

A finding of the especially heinous, atrocious or cruel aggravating circumstance for first degree murder is permissible only when the level of brutality involved exceeds that normally found in first degree murder crimes, when the first degree murder in question was conscienceless, pitiless or unnecessarily torturous to the victim, or when the killing demonstrates an unusual depravity of mind on the part of defendant beyond that normally present in first degree murder. N.C.G.S. § 15A-2000(e)(9).

23. Criminal Law § 135.8— first degree murder—especially heinous, atrocious or cruel aggravating circumstance—sufficiency of evidence

Evidence tending to show that a first degree murder victim did not die instantaneously but lingered for some undetermined period of time and suffered extreme pain and anxiety prior to death supported submission to the jury of the especially heinous, atrocious or cruel aggravating circumstance on the ground that the murder was physically agonizing for the victim. Furthermore, evidence tending to show that defendant laughed following the two final shots and that he told a fellow inmate that he would kill the victim again "for the pleasure of it" indicates an unusual depravity of mind which would also support submission of the especially heinous, atrocious or cruel aggravating circumstance.

24. Criminal Law § 135.9— first degree murder—failure to instruct peremptorily on mitigating circumstance

The trial court did not err in failing peremptorily to instruct the jury on the existence of the statutory mitigating circumstance that defendant had "no significant history of prior criminal activity" and properly submitted this mitigating circumstance to the jury where, in addition to convictions for traffic offenses, evidence was introduced from which the jury could find that defendant engaged in other criminal activity, including carrying a concealed weapon. N.C.G.S. § 15A-2000(f)(1).

25. Criminal Law § 135.9— first degree murder—failure to instruct peremptorily on mitigating circumstance

The trial court did not err in failing peremptorily to instruct the jury under N.C.G.S. § 15A-2000(f)(3) that the victim was a voluntary participant in defendant's homicidal act where the State produced ample evidence to contradict the defendant's claim that the victim initially attacked him with a knife.

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

A sentence of death imposed in a first degree murder case was not disproportionate to the penalty imposed in similar cases where the evidence showed that defendant attempted to hire someone to kill the victim and, when he failed, planned and participated in a scheme whereby he lured the victim, his lover's husband, to a secluded rural area; defendant slashed the victim's throat, shot him twice, dragged him into a ditch, and then shot him twice more in the face; the victim did not die instantaneously but lingered for some undetermined period of time and suffered extreme pain and anxiety prior to death; following the attack, defendant went back to his apartment and changed clothes; defendant then returned to the scene of the killing and dragged the victim's body into the woods; after disposing of the victim's wallet and watch, defendant went back to his apartment where he spent the night with the victim's wife; and the next day, defendant talked with a friend about providing him with an alibi for the previous evening.

Justice MITCHELL dissenting.

Justices EXUM and FRYE join in this dissenting opinion.

BEFORE *Tillery, J.*, at the 16 April 1982 Criminal Session of Superior Court, ONSLOW County, defendant was convicted of first-degree murder. Following a sentencing hearing held pursuant to N.C.G.S. § 15A-2000, the jury recommended that the defendant be sentenced to death. From the imposition of a sentence of death, defendant appeals as a matter of right. N.C.G.S. § 7A-27(a) (1981 and Cum. Supp. 1985). Heard in the Supreme Court 6 February 1985.

Lacy H. Thornburg, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State.

Gene B. Gurganus for defendant-appellant.

MEYER, Justice.

The defendant was convicted of the first-degree murder of Jorge Delgado and sentenced to death. He brings forward assignments of error relative to the guilt-innocence phase and the sen-

tencing phase of his trial. Having considered the entire record and each of the assignments, we find no prejudicial error in either phase of the defendant's trial. Therefore, we leave undisturbed the defendant's conviction and sentence of death.

Evidence for the State tended to show that between 4:30 and 5:00 p.m. on 8 December 1982, a body was discovered in a wooded area approximately forty feet off of Highway 172. The body was subsequently identified as that of Marine Sergeant Jorge Delgado, a helicopter mechanic, stationed at the New River Air Station in Jacksonville, North Carolina.

Dr. Charles Garrett, an Onslow County medical examiner, performed an autopsy on the body of the victim. The autopsy revealed three gunshot wounds to the head and one to the left shoulder. The victim had also received a slash wound on the left side of the neck. Dr. Garrett testified that, in his opinion, the victim died as a result of multiple gunshot wounds to the head with the slash wound to the throat being a contributing cause of death.

Onslow County Sheriff Billy Woodward testified that on the evening of 8 December, he and other members of his staff interviewed Delsenia Delgado, the victim's wife. Early on the morning of 9 December, Sheriff Woodward and other law enforcement officials went to the defendant's residence. The officers informed the defendant that they were investigating the death of Jorge Delgado. The defendant was informed of his constitutional rights. The officers then asked for and received permission from the defendant to search his residence for weapons and bloody clothing. As a result of the search, the officers discovered a pair of shorts and a T-shirt, both of which had blood on them, and one pair of black trousers. The trousers were not cut or torn. A photo album containing a number of photographs of Mrs. Delgado alone and of Mrs. Delgado together with the defendant was also discovered. The officers also found a wrapped package which was addressed to a New York address. The package was opened with the consent of the defendant. Among other items, the package contained the disassembled parts of a .25-caliber pistol.

Detective William F. Deaton, a detective with the Onslow County Sheriff's Department, testified that he was assigned to investigate the Delgado killing. In the early morning hours of 9 December, Deaton interviewed Delsenia Delgado. After talking

with Mrs. Delgado, Detective Deaton interviewed the defendant. After being informed of his constitutional rights the defendant made a statement. Deaton testified that the defendant told him that he was with Mrs. Delgado during the early evening hours of 6 December 1982. At that time, the defendant told Mrs. Delgado that he wanted to talk with Sgt. Delgado about the two of them. The defendant and Mrs. Delgado proceeded to drive her Triumph TR-7 down Highway 24 to the intersection with Highway 172. At that point, Mrs. Delgado went into a grocery store and made a phone call. The defendant stated that Mrs. Delgado told him that she had called her husband and told him that her car was broken down on Highway 172 and that she was in need of assistance. They proceeded to drive down Highway 172, eventually stopping and pulling off the side of the road. The defendant stated that he raised the hood of the car to make it appear as though there was something wrong with the car and then crouched in the ditch alongside the shoulder of the road to await the arrival of Sgt. Delgado.

Deaton further testified that the defendant stated that Sgt. Delgado arrived driving a Mercury Cougar and was carrying a flashlight as he walked toward the TR-7. The defendant stated that he then got out of the ditch and confronted Sgt. Delgado. According to the defendant, Sgt. Delgado attacked him with a knife, striking him in the right leg. The defendant said he then pulled out a knife and slashed at Delgado, knocking him to the ground. When Delgado got back up the defendant shot him twice. He then pulled Delgado into the ditch and shot him twice more. The defendant then told Mrs. Delgado to get back into the car and leave. When asked by Mrs. Delgado if her husband was dead, the defendant told her that he was still alive but that he was dying. He stated that he knew Sgt. Delgado was dying because he had heard the "death gurgle."

Deaton further testified that the defendant stated that Mrs. Delgado drove away in the Mercury and he left driving the TR-7. At some point the TR-7 developed engine trouble and he was forced to park it near a grocery store on Highway 24. Mrs. Delgado then drove the defendant back to his apartment. Later, the defendant returned to where Sgt. Delgado's body was located. He proceeded to take the body into the woods. He also took Sgt. Delgado's wallet and watch in order to make it appear as though

he had been the victim of a robbery. He also stated that he took the knife which Sgt. Delgado had stabbed him with and threw it into the woods. The defendant said that he disposed of the watch by throwing it into some water as he crossed a bridge on Highway 17. He proceeded to the New River Air Station where he disposed of the wallet in a trash dumpster and attempted to establish an alibi. Later, he returned to his apartment. Mrs. Delgado subsequently joined him there, and they spent the night together. The defendant also stated that he was wearing a black pair of pants and a dark shirt when the incident occurred.

Steven Carpenter, a firearms technician with the State Bureau of Investigation, was tendered and accepted by the court as an expert in the field of ballistics. Mr. Carpenter stated that he compared test bullets fired from the .25-caliber pistol seized at the defendant's apartment with the bullets retrieved from the body of Sgt. Delgado. He testified that, as a result of this comparison, it was his opinion that the bullets taken from Delgado's body were fired from the gun seized at the defendant's apartment.

Corporal Benjamin Daniels testified that he met the defendant in October 1981 and that they became good friends. Daniels stated that, at some point, the defendant began seeing Mrs. Delgado. He stated that the defendant had told him that he loved Mrs. Delgado. Daniels further testified that in late May or early June 1982, the defendant told him that Mrs. Delgado had asked him to kill her husband. Daniels stated that the defendant lived with him at the trailer for a portion of the summer of 1982. According to Daniels, Mrs. Delgado would visit the defendant at the trailer two or three times a week.

Paul Peters testified that he had been recently discharged from the Marines. While in the Marines he had been assigned to the same unit as the defendant and had become acquainted with him. Peters testified that in October 1982, the defendant approached him and asked if he knew anyone who would be willing to perform a contract killing. Peters told him that he might be able to find someone. Subsequently, the defendant inquired on at least two other occasions as to whether Peters had been able to find someone to do the killing. Peters testified that, during one of these discussions, the defendant told him that the intended victim

was one Sgt. Delgado. Peters stated that the defendant told him that he and his girlfriend wanted Sgt. Delgado killed. Peters also stated that the defendant offered him $1,000 to kill Delgado, which he refused. Peters did, however, explain to the defendant two methods by which a car could be made to explode. Peters testified that the defendant took some preliminary steps to carry out one of these methods.

Corporal John Irvine testified that he was a close friend of the defendant. At the request of the defendant, Irvine went by to see the defendant on the morning of 7 December. Irvine testified that the defendant told him that he had gotten into an argument with someone the previous night and that it had been necessary for him to "defend himself" when the person tried to stab him. Irvine stated that the defendant asked that he provide him with an alibi for the night of 6 December.

David Harris testified that he was incarcerated in the Onslow County Jail in February 1983. He was placed in a cell directly across from the one occupied by the defendant. Harris stated that on one occasion they discussed Jorge Delgado. Harris testified that during the course of the conversation the defendant told him that if he could kill Delgado again, he would do so for the pleasure of it.

Lieutenant David Hunter testified that he had occasion to be in a wooded area off Highway 172 around 7:30 p.m. on 6 December 1982. Hunter stated that he heard two gunshots fired in rapid succession, followed by a scream. After a pause of approximately five to ten seconds, he heard two more shots. Hunter testified that he then heard what appeared to be laughter. He stated that while it sounded as though one person may have been laughing, he was definitely able to distinguish a masculine-sounding laugh. Hunter then got into his truck and drove down Highway 172 for a few hundred yards. At that point he came upon two vehicles, a dark colored Mercury Cougar and a black TR-7. Hunter stated that as he approached the scene the cars were driving away. Hunter followed the Cougar for some distance back toward Highway 24 going toward Jacksonville. He subsequently identified the Mercury Cougar registered to Sgt. Delgado as being one of the vehicles he observed on the evening of 6 December.

The defendant testified in his own behalf. He stated that he was transferred to Jacksonville in October 1981, after a tour of duty in Japan. He met Mrs. Delgado in February 1982, while her husband was overseas. Within a short period of time, the defendant and Mrs. Delgado began having an affair.

During the course of the affair Mrs. Delgado told the defendant that her husband physically abused her on many occasions. Other acquaintances of Mrs. Delgado also told the defendant that Sgt. Delgado physically abused her. The affair continued on a regular basis until Sgt. Delgado returned in June 1982. At that time the defendant told Mrs. Delgado that she should try to get back together with her husband. Mrs. Delgado agreed. However, Mrs. Delgado soon began calling the defendant and telling him of beatings inflicted upon her by her husband. In September 1982, they began seeing one another again. Mrs. Delgado told the defendant that her husband had found out about their affair and had threatened to kill the defendant. The defendant subsequently obtained a knife and a handgun for protection. The defendant and Mrs. Delgado continued to see each other through the fall of 1982.

The defendant testified that he and Mrs. Delgado went for a drive in her TR-7 around 6:30 p.m. on 6 December. During the drive they discussed the instances of physical abuse carried out against Mrs. Delgado by her husband. The defendant offered to go and have a talk with Sgt. Delgado. After some initial hesitation, Mrs. Delgado agreed to have the defendant talk with her husband. The defendant wanted to have a meeting in private, as he did not want people at the base to discover that he was involved with a married woman.

They decided to arrange a meeting by having Mrs. Delgado call Sgt. Delgado and tell him that her car was broken down along Highway 172. Mrs. Delgado proceeded to call her husband from a roadside grocery store. They then drove down Highway 172 and eventually stopped, parking the car on the shoulder of the road. The defendant stated that he pulled up the hood to make it appear as though they were experiencing engine trouble. The defendant testified that while he was crouched in a ditch behind the car urinating, Sgt. Delgado drove up. The defendant got out of the ditch and walked toward Sgt. Delgado. The defendant stated that Delgado shined a flashlight in his face for a few moments and

then came at him with a knife, stabbing him in the hip. The defendant testified that they struggled for a short period of time until he managed to grab his own knife and slash Delgado. Delgado momentarily dropped to his knees and then began to get back up. The defendant stated that, at this point, he fired the gun until Delgado stopped and fell. He proceeded to drag Delgado's body into the ditch. He and Mrs. Delgado then left—he driving the TR-7; she, the Mercury Cougar which Sgt. Delgado had driven to the scene. The defendant testified that the TR-7 developed engine trouble and he had to hitchhike back to his apartment.

Later that evening, the defendant went back to the scene. He proceeded to drag Delgado's body into the woods. He testified that he threw Sgt. Delgado's knife into the woods. He also took Delgado's wallet, which he later disposed of. The next day the defendant talked with John Irvine in an attempt to establish an alibi for the previous evening.

In response to evidence presented by the State, the defendant stated that he was wearing camouflage pants at the time of the incident. He also denied asking Paul Peters to kill Sgt. Delgado and testified that Peters gratuitously offered to perform the killing after learning that Delgado had threatened the defendant. He also denied telling David Harris that, if possible, he would kill Sgt. Delgado again or that he got any pleasure out of the killing. The defendant denied that he had planned or intended to kill Sgt. Delgado.

The defendant also produced witnesses who testified to his good reputation, good character, and general good nature and demeanor. The defendant also introduced the testimony of two former neighbors of the Delgados who testified that Sgt. Delgado often physically abused his wife. Also, the defendant produced three fellow inmates at the Onslow County Jail who testified that they had never heard the defendant talk about killing Delgado or that he would kill him again for the pleasure of it.

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.

At the sentencing phase, the State introduced the testimony of Dr. Garrett. He testified that the slash wound to Sgt. Delgado's

throat contributed to his death by causing him to slowly choke to death. Dr. Garrett stated that the sensation of choking produces extreme anxiety on the part of the victim and that it is extremely painful. He also testified that one of the bullet wounds to the head was not fatal, but would have produced extreme pain due to the tissue tearing and the breaking of facial bones that resulted. He further testified that the bullet wound to the chest area would not have been fatal, but would have produced intense pain. Finally, Dr. Garrett testified that the sound which had been described as a "gurgle" was produced by the fact that there was blood in Sgt. Delgado's lungs and that as he attempted to breathe, air moved through the blood causing the gurgling sound.

The defendant offered no evidence at the sentencing phase.

Based upon the evidence introduced during the sentencing phase of the trial, the trial court instructed the jury on one possible aggravating circumstance: whether the murder was especially heinous, atrocious, or cruel. The trial court also instructed the jury on two mitigating factors: whether the defendant had no significant history of prior criminal activity and whether the victim was a voluntary participant in the homicidal act. The jury found the aggravating factor but did not find any mitigating factor and returned a recommendation that the defendant be sentenced to death. Following the recommendation, the trial court entered judgment sentencing the defendant to death.

I.

Guilt-Innocence Determination Phase

[1] The defendant initially contends that the trial court erred by failing to suppress certain statements allegedly made by the defendant to Detective Deaton. Prior to the trial the defendant filed a request for voluntary discovery which requested, among other things, that the State disclose all oral statements made by the defendant which the State intended to offer into evidence. The State answered by stating that with regard to statements made by the defendant, it did intend to offer into evidence the oral statement made by the defendant to Detective Deaton. The State did not attach the substance of the oral statement because the defendant had previously been provided with a copy of the statement.

On the day of the trial, the defendant learned that there was a possibility that the prosecution might offer other statements allegedly made by the defendant which were not disclosed in response to his request for discovery. The next day the defendant filed a motion to suppress all statements of the defendant not contained in the written statement previously supplied to him or, in the alternative, for a continuance and a request that the court order the State to divulge the substance of other statements made by the defendant which it intended to offer into evidence. These motions were denied.

The defendant argues that Detective Deaton's testimony concerning the defendant's statement differed from the disclosed statement in several important respects. First, according to the disclosed statement, the defendant said that he had told Mrs. Delgado that "he wanted to talk to him [Sgt. Delgado] about himself and his wife." In his testimony, Detective Deaton stated that the defendant said he told Mrs. Delgado "that he wanted to talk with Sgt. Delgado, her husband, about the two of them *and have it out.*" Second, according to the disclosed statement, "Gladden then stated he got down in the ditch by the rear of the TR-7 Triumph." At the trial, Detective Deaton testified that the defendant said he "got down into the ditch alongside the shoulder of the road *awaiting the arrival of Sgt. Delgado.*" Third, according to the disclosed statement, "Gladden stated that he came out of the ditch and walked alongside the TR-7 on the highway side and stood there and stared at Sgt. Delgado." However, in his testimony, Detective Deaton stated that the defendant had said he "*glared*" at the deceased. Fourth, in the disclosed statement, the defendant said he "grabbed Delgado by the feet and dragged him down into the ditch and then shot him twice more in the face." On the stand Deaton testified that the defendant stated that he "grabbed him by his feet . . . pulled him down into the ditch, took his pistol and shot him twice more; *once between the eyes and once in the—next to the nose.*" Finally, the defendant points out that there is no reference in the disclosed statement as to the color of the pants he was wearing at the time of the shooting. However, Deaton testified that the defendant said he was wearing a pair of black trousers at the time of the incident. The defendant contends that these additions and discrepancies support the State's contention that he planned to kill Delgado more

strongly than do the parallel portions of the disclosed statement. The defendant asserts that the added details and embellishments provided by Deaton tended to enhance Deaton's credibility with the jury. He therefore contends that the trial court erred by failing to suppress these portions of the statement or, in the alternative, to grant a continuance and compel disclosure of the differences in and additions to the statement. We do not agree.

We have held that the State's failure to comply with a discovery order pursuant to N.C.G.S. § 15A-903 will not automatically require the exclusion of the undisclosed evidence. *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981); *State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978). A variety of sanctions is authorized under N.C.G.S. § 15A-910 for failure to comply with a discovery order. The choice of which sanction to apply, if any, rests in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion. *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984); *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983); *State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978). A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985).

We feel that the record clearly indicates that the trial court did not abuse its discretion in failing to apply any sanction pursuant to N.C.G.S. § 15A-910. With regard to Deaton's testimony concerning the black pants, the record shows that although not contained in the statement, the prosecutor orally informed defense counsel two to three weeks prior to the trial that the defendant had stated that he was wearing a pair of black pants at the time of the shooting. Furthermore, the prosecutor permitted defense counsel to examine the pants. With respect to the other discrepancies between the disclosed statement and Deaton's testimony, we note that the defendant failed to object to any of these portions of Deaton's testimony during the trial and did not request sanctions at the time the testimony was given. Furthermore, the defendant had a full opportunity to cross-examine Detective Deaton and to bring these discrepancies to the attention of the jury. Finally, a review of the testimony in question reveals that it was substantially the same as the information provided by the State to the defendant. This assignment of error is overruled.

[2] The defendant's next argument centers on testimony by Detective Deaton concerning his attempt to locate the knife allegedly used by the deceased against the defendant. Deaton testified that the defendant told him that after returning to the scene of the shooting, he picked up the knife which Sgt. Delgado had stabbed him with and threw it into the woods along the side of the road. Deaton testified that he went to the crime scene and conducted a pattern search for the knife. Deaton stated that the first step in performing the pattern search was to throw a metal object simulating a knife into the woods. The object was retrieved and a pattern search was begun, emanating from the location of the metal object. Deaton testified that he did not discover a knife during the search. However, later in the investigation, a knife was discovered in the area where the shooting took place. That knife was identified by the defendant as the knife Delgado used to attack him. The defendant contends that the circumstances existing at the time Deaton conducted the "experiment" were not substantially similar to those existing at the time he disposed of the knife. He therefore argues that the trial court committed prejudicial error in admitting testimony concerning the throwing of the metal object into the woods, the search, and the fact that no knife was recovered as a result of the search. This argument is meritless.

Assuming, *arguendo*, that this testimony was inadmissible, it clearly could not have prejudiced the defendant. Subsequent to Deaton's search, a knife was discovered in the general area of the scene of the shooting. The defendant identified the knife as the one used by Sgt. Delgado on the night in question. The knife was admitted into evidence and passed to the jury. Clearly there was evidence before the jury in support of the defendant's contention that Delgado attacked him with a knife. This assignment of error is overruled.

[3] In his next assignment of error the defendant contends that the trial court committed prejudicial error by permitting the State to introduce into evidence certain photographs of Mrs. Delgado, some of which showed her with the defendant. The photographs in question were seized during a search of the defendant's apartment on the night that he was arrested.

The defendant initially argues that the photographs were inadmissible because the State failed to lay an adequate foundation for their admission, the photographs did not illustrate the testimony of any witness, and the court failed to instruct the jury that the photographs were introduced for illustrative purposes only. It is clear, however, that these photographs were not introduced in order to illustrate the testimony of any witness, but were instead admitted as substantive evidence tending to show a motive for the killing. Several of the photographs show the defendant and Mrs. Delgado embracing or holding hands. This tended to support the State's contention that the defendant and Mrs. Delgado were having an affair and corroborated the testimony of other prosecution witnesses who testified to this fact. Evidence that the defendant and Mrs. Delgado were romantically involved would tend to establish a motive for the killing. Since the photographs were not admitted as illustrative evidence, it was not necessary to have a witness testify that they fairly and accurately represent the scene described by the testimony. *See State v. Kistle*, 59 N.C. App. 724, 297 S.E. 2d 626 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E. 2d 694 (1983). Also, since the photographs were not introduced as illustrative evidence, the defendant's arguments that their admission was improper due to the fact that they did not illustrate the testimony of any witness and because the court failed to instruct the jury that they were admitted solely for illustrative purposes are equally without merit.

[4] The defendant also contends that the number of photographs admitted was excessive. This argument is apparently based on the defendant's claim that he was prejudiced by the introduction of the photographs because he is black and the photographs revealed to the jury that Mrs. Delgado was white. Initially, we note that we fail to comprehend how several photographs could be said to be more prejudicial in this regard than one since the jury would be aware of Mrs. Delgado's race after the introduction of the first photograph. More importantly, however, the defendant has failed to bring to our attention any evidence which would indicate that the jury was prejudiced against him because of the fact that he was involved in an interracial love affair.

Furthermore, assuming that the admission of the photos was improper, the defendant may not now be heard to complain. While the defendant did object to the testimony identifying the

photographs, he failed to renew the objection at the time they were offered and received into evidence. We have said that a defendant is not entitled to relief where there was no objection made *at the time the evidence was offered. State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972). For these reasons, this assignment of error is overruled.

[5] The defendant next contends the trial court erred in permitting Lieutenant Hunter to testify that he had heard what appeared to be male laughter emanating from the vicinity of where he had heard four gunshots. The defendant argues that because Hunter was five hundred to one thousand yards from the scene, it was impossible for him to know whether the sounds he heard were laughter. He therefore asserts that the testimony was incompetent and should have been suppressed. We disagree.

"It is well established that 'in a criminal case every circumstance calculated to throw any light on the supposed crime is admissible . . . .' " *State v. Hunt*, 297 N.C. 258, 261, 254 S.E. 2d 591, 594 (1979). Hunter testified that he was between five hundred to one thousand yards from the scene of the shooting and heard what appeared to be laughter coming from the vicinity of the shooting. This testimony tends to show the mental state of the deceased's assailant at the time of the shooting. It is therefore admissible. The defendant had an adequate opportunity to cross-examine the witness concerning his distance from the sounds. Any uncertainty as to their nature would go to the weight to be accorded the testimony, not its admission.

The defendant attempts to analogize this situation to cases dealing with the admissibility of telephone conversations where the voice on the other end of the line can be identified. *E.g., State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Gardner*, 227 N.C. 37, 40 S.E. 2d 415 (1946). These cases held, however, that even if the witness could not positively identify the person speaking as the defendant, circumstantial evidence could be used to make the identification so that the person's statements could be admitted against the defendant. The defendant points out that Hunter did not identify the laughter as coming from the defendant, and therefore the testimony should have been excluded. While it is true that Hunter did not testify that he could identify the defendant or any other specific person as the source of the

laughter, he did testify that he heard masculine-sounding laughter coming from the very scene of the shooting shortly after the shots were fired. There was evidence by way of defendant's statement to Detective Deaton, previously admitted, and by defendant's testimony, subsequently admitted, that defendant and Mrs. Delgado were the only people, other than the victim, who were present at the time of the shooting. These circumstances are enough to support a reasonable inference that the laughter came from the only male present at the shooting, i.e., the defendant, and to render the testimony concerning the laughter admissible against him. *See State v. Walden*, 311 N.C. 667, 319 S.E. 2d 577 (1984). It was the responsibility of the jury to determine the proper weight to be accorded the testimony in light of the fact that there was no positive identification of the defendant as being the source of the laughter. This assignment of error is overruled.

[6] The defendant next argues that the trial court erred by permitting the prosecutor to read to the jury a poem written by him. The poem, which is actually a rhyme known colloquially as a "rap," comprised five and one-half pages of the trial transcript. It contained profanity and descriptions of sexual activity. The defendant contends that the rhyme was irrelevant and only served to prejudice the jury against him. We do not agree.

In the rhyme, the defendant professed his love for Mrs. Delgado and stated that he did not intend to break off their relationship. The rhyme was evidence of a material issue in the case—the defendant's feelings toward the deceased's wife—and tended to show a motive for the killing. As noted previously, we have said, "It is well established that 'in a criminal case every circumstance calculated to throw any light on the supposed crime is admissible . . . .' " *Hunt*, 297 N.C. at 261, 254 S.E. 2d at 594. The defendant claims, however, that the reading of the rhyme had no probative value because he had already testified on both direct and cross-examination as to the nature of his relationship with Mrs. Delgado. He contends the rhyme added nothing to the State's case and served only to inflame the jury's prejudice against him. However, a party has a right to cross-examine a witness as to facts which were the subject of his direct examination. *State v. Stone*, 226 N.C. 97, 36 S.E. 2d 704 (1946). *See also State v. Ziglar*, 308 N.C. 747, 304 S.E. 2d 206 (1983). Since the defendant testified on direct examination as to the nature of his relationship with

Mrs. Delgado, the prosecution was entitled to cross-examine him regarding this testimony through the use of the rhyme.

In his next assignment of error the defendant contends that the prosecutor's opening statement contained assertions of fact which were not subsequently established by the evidence. The defendant specifically points to three statements made by the prosecutor: (1) that the defendant was very upset because he was unable to see Mrs. Delgado on a regular basis, (2) that Mrs. Delgado was also charged with the murder of Sgt. Delgado, and (3) that the defendant offered a friend one thousand dollars to kill Sgt. Delgado. The defendant submits that these statements were not supported by evidence admitted at the trial.

The purpose of an opening statement is to permit the parties to present to the judge and jury the issues involved in the case and to allow them to give a general forecast of what the evidence will be. *Hays v. Missouri Pacific Railroad Company*, 304 S.W. 2d 800 (Mo. 1957); *Blackwell v. State*, 278 Md. 466, 365 A. 2d 545 (1976), *cert. denied*, 431 U.S. 918, 53 L.Ed. 2d 229 (1977); *Hilyard v. State*, 90 Okla. Crim. 435, 214 P. 2d 953 (1950); *Winter v. Unaitis*, 123 Vt. 372, 189 A. 2d 547 (1963). Trial counsel is generally afforded wide latitude in the scope of the opening statement, *Hays v. Missouri Pacific Railroad Company*, 304 S.W. 2d 800, and is generally allowed to state what he intends to show so long as the matter may be proved by admissible evidence. *Green v. State*, 172 Ga. 635, 158 S.E. 285 (1931).

[7] Initially, it must be noted that the defendant failed to lodge an objection to those portions of the opening statement of which he now complains. In capital cases, an appellate court may review the prosecution's closing argument, notwithstanding the fact that no objection was made at trial. However, review is limited to an examination of whether the argument was so grossly improper that the trial judge abused his discretion in failing to intervene *ex mero motu*. *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). Reason dictates that the same standard apply to situations where no objection was made to the opening statement and we so hold.

[8] We conclude, however, that the prosecutor's statement was entirely proper. His recitation of the evidence in the opening

statement was substantially the same as the actual evidence presented. Concerning the statement that the defendant was upset because he had been unable to see Mrs. Delgado on a regular basis, there was testimony to the effect that after Sgt. Delgado's return, the defendant said he wanted to spend more time with Mrs. Delgado. In light of the other evidence presented, there is an inference that the defendant was upset due to the infrequency of his contacts with Mrs. Delgado. As for the prosecutor's statement that Mrs. Delgado was also charged with the murder of her husband, it is true that the State did not introduce the indictment into evidence. However, there was testimony tending to show that Mrs. Delgado was being held in the Onslow County Jail at the same time as the defendant.[1] Regarding the statement that the defendant had offered a friend a thousand dollars to kill Sgt. Delgado, Paul Peters testified that the defendant spoke with him concerning the possibility of killing Sgt. Delgado. Peters stated that they discussed a figure of one thousand dollars to perform the killing, though he could not recall which one first mentioned the amount. We conclude that the complained-of portions of the prosecutor's opening statement were a fair and substantially accurate preview of the actual evidence. This assignment of error is overruled.

[9] The defendant next assigns as error the trial court's denial of his motion to be allowed more than one jury argument. Since the defendant presented evidence, the State had the right to give the final closing argument pursuant to Rule 10 of the General Rules of Practice for the Superior and District Courts. However, the defendant contends that since this is a capital case, N.C.G.S. § 84-14 gives him the right to respond to the State's argument. N.C.G.S. § 84-14 provides:

> In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: to not less than one hour on each side in misdemeanors and ap-

1. Mrs. Delgado was tried in Case No. 82-CRS-18705 in Superior Court, Onslow County, for the murder of her husband. She was found not guilty on 9 June 1983.

> peals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.

N.C.G.S. § 84-14 places two restraints on a trial court's ability to limit jury arguments in capital felonies. First, the statute prohibits the trial court from limiting the number of addresses which can be made to the jury. Second, although the court may limit the number of attorneys who may address the jury to no less than three on each side, the statute prevents the trial court from imposing a limit on the length of the arguments. The defendant contends that the language prohibiting the limitation of the number of addresses should be interpreted to mean that a defendant in a capital case has the right to respond to the prosecutor's argument. We do not feel that this is the proper construction to be accorded this language.

In order to resolve this issue, it is necessary to examine the statutory provisions which were the forerunners of N.C.G.S. § 84-14. Our starting point is 1854 Revised Code of North Carolina ch. 31, § 57(15), which provided:

> The plaintiff or defendant may employ several attorneys in his case, but more than one shall not speak thereto, unless allowed by the court; and in jury trials they may argue to the jury the whole case, as well of law as of fact.

This provision clearly limited the number of attorneys who could make the final argument.

In *State v. Collins*, 70 N.C. 241 (1874), this Court upheld the action of the trial court in limiting a defendant to an hour and a half for closing argument in a capital case. The General Assembly then enacted 1874-75 Laws of North Carolina ch. 114, § 1, which provided:

> The General Assembly of North Carolina do enact, That any counsel appearing in any civil or criminal case in any of the courts of this State shall be entitled to address the court or the jury for such a space of time as in his opinion may be necessary for the proper development and presentation of his case.

This provision was interpreted by the Court in *State v. Miller*, 75 N.C. 73 (1876). In that case, the defendant argued that the trial court erred by refusing to allow more than one of his attorneys to address the jury. We held that this provision gave a defendant the right to have more than one or all of his attorneys address the judge and jury. In interpreting the provision, this Court stated:

> It is suggested that the control of the subject is divided between the court and the counsel—that the court may limit the *number* of counsel speaking to *one*, and then that *one* may speak as long as he pleases.
>
> The foundation for this suggestion is Rev. Code, chap. 31, sec. 15: "The plaintiff or defendant may employ several attorneys in his case, but more than one shall not speak thereto unless allowed by the court."
>
> . . . .
>
> . . . [W]hen we have an act, the avowed object of which is to give the defendant *unlimited time*, it would be discreditable by an evasion to deprive him of the benefit of it by saying that "unlimited time" means as long as one frail counsel, already worn out with a long trial, can stand up and speak. . . . Judge Watts, in *Collins's case, supra*, thought he was the judge, and undertook directly and avowedly to limit the time to an hour and a half, to be occupied by two counsel. And the Legislature immediately said that shall not be, but any counsel appearing in the case may speak as long as he pleases. And then Judge Kerr, in this case, thought he would be the judge, and that he would do indirectly what the act prohibited from being done directly—limit the *time* by limiting the *number*. Why limit the number except to limit the time?

Id. at 75-77 (emphasis in original).

The code provision was later altered to read:

> Any attorney appearing in any civil or criminal action shall be entitled to address the court or the jury for such a space of time as in his opinion may be necessary for the proper development and presentation of his case; and in jury trials he may argue to the jury the whole case as well of law as of fact.

1883 Code of North Carolina ch. 4, § 30. This provision was repealed and replaced by 1903 Public Laws of North Carolina ch. 433. The new provision gave each party the right to make two addresses to the jury and authorized the judges to set specified time limits on arguments in all cases except capital felonies. Two years later, the law was amended to provide, in pertinent part: "In all trials in the superior courts there shall be allowed two addresses to the jury for the state or plaintiff and two for the defendant, *except in capital felonies when there shall be no limit as to number.*" 1905 Revisal ch. 5, § 216. This sentence was carried forward verbatim into N.C.G.S. § 84-14.

The forerunners of N.C.G.S. § 84-14 did not in any way regulate the order in which closing arguments were to be given. Instead, these early laws merely served as constraints on the trial court's ability to restrict the defense in a capital case from using all the time it deemed necessary to fully argue the case to the jury. We construe N.C.G.S. § 84-14 to mean that, although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish and each may address the jury as many times as he desires. Thus, for example, if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury and may, upon being refreshed, rise again to make another address during the defendant's time for argument. However, if the defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument.

To hold as defendant suggests—that a defendant in a capital case has the right to respond to the State's argument—could, in our view, disrupt the order of capital trials. If the defendant were given the opportunity to respond to the State's argument, the State would still have the right to give the final closing argument

under Rule 10 of the General Rules of Practice for the Superior and District Courts. However, acceptance of the defendant's contention would also entail giving him the right to respond to that argument, which the State could then respond to, which the defendant could respond to, *ad infinitum.* Such a result would destroy the orderliness of the trial and could not have been intended by the legislature. We acknowledge that there is the potential for infinite argument under N.C.G.S. § 84-14 as we have interpreted it. However, common sense would dictate that the potential for limitless or, at the very least, extremely long argument is greatly increased by the opportunity to continually respond to an adversary's address. This assignment of error is overruled.

In his next assignment of error, the defendant contends that he was prejudiced by certain portions of the prosecutor's closing argument. Specifically, he claims that certain statements were based on facts not in the record, were designed to inflame the passions and prejudices of the jury, and constituted expressions of personal belief and opinion by the prosecutor. Initially, we note that the defendant failed to object to any of 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,* 464 U.S. 908, 78 L.Ed. 2d 247 (1983).

Although the closing arguments of counsel are largely within the control and discretion of the trial court, it is well established that counsel is to be afforded wide latitude in the argument of fiercely contested cases. *State v. Lynch,* 300 N.C. 534, 268 S.E. 2d 161 (1980); *State v. King,* 299 N.C. 707, 264 S.E. 2d 40 (1980). Counsel for both sides may argue the law and the facts in evidence, along with all reasonable inferences to be drawn from them. *State v. Lynch,* 300 N.C. 534, 268 S.E. 2d 161 (1980); *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975). Counsel may not, however, raise incompetent and prejudicial matters nor refer to facts not in evidence. *State v. Hamlet,* 312 N.C. 162, 321 S.E. 2d 837 (1984). Counsel is also prohibited from placing before the jury his own knowledge, beliefs, and personal opinions not supported by the evidence. *State v. Locklear,* 294 N.C. 210, 241 S.E. 2d 65 (1978).

[10] Initially, the defendant contends that the trial court erred in permitting the prosecutor to personally vouch for the credibility of two of the State's witnesses, Sheriff Woodward and Detective Deaton. With regard to Sheriff Woodward, the prosecutor stated, "Let's talk about Sheriff Billy Woodward now. The Sheriff testified; one of the finest Sheriffs that I've ever met, Ladies and Gentlemen, right here. You're not going to find a finer person, a finer Sheriff." This expression of personal opinion by the prosecutor, while improper, was not, however, so grossly improper as to require the trial court to intervene *ex mero motu*. With regard to Detective Deaton, the prosecutor said

> Detective Deaton Ladies and Gentlemen, I'm sure you noticed his demeanor on the witness stand. And I think it's an insult to my integrity and I hope to yours too, for anyone to say Mr. Deaton would ever, in his entire life, falsify something under oath . . . . Moreover, he has experiences in the past that help him in a stressful situation to remember things and to keep going.

With regard to the prosecutor's argument concerning Deaton, we conclude that the defendant "opened the door" to this line of argument. *See State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984); *State v. Fearing*, 304 N.C. 471, 284 S.E. 2d 487 (1981). In his closing argument, defense counsel stated that Detective Deaton "could not possibly remember . . . every detail in this case," and he insinuated that Deaton's testimony had not been truthful. The thrust of the prosecutor's argument was to refute what he perceived as an attack upon the credibility of the State's case. We hold that this portion of the argument was in response to the defense counsel's attacks on a key State witness and was not improper.

Next the defendant argues that there was no evidence to support the prosecutor's statements that after Sgt. Delgado's return from overseas, Mrs. Delgado and the defendant continued to spend nights together and went on a trip to New York and that Sgt. Delgado was making the payments on Mrs. Delgado's automobile. Evidence was introduced from which it could be inferred that the defendant and Mrs. Delgado had spent some nights together following Sgt. Delgado's return. The prosecutor's statement that Sgt. Delgado was making the payment on his

wife's car was a logical inference from the testimony of one witness that Sgt. Delgado *owned* the Triumph TR-7. There is no evidence, however, to support the prosecutor's statement that Mrs. Delgado accompanied the defendant to New York after the return of her husband. The defendant admitted traveling to New York with Mrs. Delgado *prior* to Sgt. Delgado's return, but denied taking her there after his return in June. This argument, however, was not so grossly improper as to require the court to intervene *ex mero motu.*

[11] The defendant next contends that, in his argument, the prosecutor deliberately misled the jury concerning the position of the deceased's body when one of the shots was fired. The prosecutor argued that the evidence showed that the bullet that struck Delgado between the eyes was fired while he was lying in the ditch. Detective Deaton testified that the defendant told him that after he had shot the deceased twice, he pulled him into a ditch and shot him twice more, once between the eyes and once next to his nose. Dr. Garrett also gave testimony which tended to support the prosecutor's argument. We find nothing improper with this portion of the argument.

The defendant next contends the trial court erred by permitting the prosecutor to state, "There's no evidence to substantiate the defendant's claim that Jorge Delgado cut him. None whatsoever." The defendant points out that the State introduced his statement that Delgado cut him on the right leg and produced a witness who testified that, on the night the defendant was arrested, he observed a cut on the defendant's right leg. The State, however, is not bound by the exculpatory portions of the defendant's statement if substantial contradictory evidence is introduced. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982). There was substantial evidence that the defendant was *not* cut by Sgt. Delgado. The evidence tended to show that the defendant was wearing a pair of black trousers at the time of the incident. However, there was no cut or puncture in the only pair of black pants found in a search of the defendant's apartment. We hold that the prosecutor's argument that there was no evidence to sub-

stantiate the defendant's assertion that Sgt. Delgado stabbed him was a reasonable inference from the evidence presented.

The defendant's next contention concerns the prosecutor's statement regarding the testimony of Rosa Kelly, a friend of Mrs. Delgado. The prosecutor stated, "Rosa Kelly. She said that Del [Mrs. Delgado] came by the house and she tried to establish an alibi through Rosa. They went to the base looking for her husband." The defendant claims that there was no evidence to support this statement. We disagree. Ms. Kelly testified that on the night of 6 December 1982, Mrs. Delgado came to her apartment. She testified that, later that evening, she and her boyfriend rode with Mrs. Delgado to the air base in an attempt to find Sgt. Delgado. In light of the fact that Mrs. Delgado already knew her husband was dead, Ms. Kelly's testimony raised a reasonable inference that Mrs. Delgado was attempting to establish an alibi. We find nothing improper with this portion of the argument.

The defendant next contends that the prosecutor improperly added significance to the testimony of Paul Peters when he stated, "We know that Gladden went to Peters in October and offered him a thousand dollars to 'knock off,' in his words, Jorge Delgado." The evidence previously reviewed herein relating to the discussions Peters had with the defendant about killing Sgt. Delgado supports this portion of the prosecutor's statement.

[12] The defendant's next contention relates to the prosecutor's statement concerning the defendant's testimony on cross-examination about what he said to David Harris in the Onslow County Jail. The prosecutor stated:

> He [defendant] tells you that he wouldn't tell David Harris anything, but then again, he tells you he passed notes to David Harris to tell Del to lie when she testifies about seeing him shoot Jorge Delgado in the ditch. Remember him saying that? He said "Yeah, I told him to tell her to lie". Didn't he?

The defendant argues that this was a flagrant misrepresentation of the actual testimony and required the trial court to intervene *ex mero motu*. We disagree. It is true that the defendant emphatically denied telling Harris to instruct Mrs. Delgado to lie. However, he did admit that he told Mrs. Delgado to say that she did not see him shoot Sgt. Delgado in the ditch. In essence, he

asked Mrs. Delgado to lie for him. Although the defendant did not make the exact statement attributed to him by the prosecutor, the thrust of the prosecutor's statement was that the defendant was attempting to tell Mrs. Delgado to lie. This assertion was amply supported by the defendant's own testimony.

[13] The defendant next contends that the prosecutor improperly expressed his opinion as to the defendant's credibility when he stated, "The only logical inference is that this man is not telling you the truth today, and I submit if I was in his shoes, I probably wouldn't either, Ladies and Gentlemen." Assuming, *arguendo*, that this statement was improper, it was not so grossly improper as to require the trial judge to intervene *ex mero motu*.

[14] The defendant next claims that the trial court erred by permitting the prosecutor to incorrectly state the law concerning prior inconsistent statements. In his argument, the prosecutor stated, "His Honor will instruct you that prior inconsistent statements show that a person is not credible or believable." This statement is not entirely correct since prior inconsistent statements are admissible merely for the consideration of the jury in ascertaining the credibility of the witness. 1 Brandis on North Carolina Evidence § 46 (1982). Subsequently, the trial judge properly instructed the jury concerning the weight to be accorded prior inconsistent statements and cured any possible prejudice to the defendant which may have been caused by the prosecutor's misstatement of the law. *See State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

[15] The defendant next contends that the prosecutor misstated the facts and improperly appealed to the passions and prejudices of the jury when he stated:

> And I want you to think about and put yourselves in the shoes of Jorge Delgado as he lay, writhing in that ditch, with those bullet wounds in his head, with his trachea slashed open, and looking up, Ladies and Gentlemen, in his last gasping seconds, his wife and her lover looking over him and they were laughing at him. Think about that.

The defendant argues there was no evidence the deceased was conscious after he was shot, that he saw or heard anything, or that he made any movements. However, Detective Deaton testi-

fied that the defendant stated that as he was leaving the scene, he knew Delgado was dying because he heard the "death gurgle." On cross-examination, the defendant testified that Delgado was still alive and in pain when he and Mrs. Delgado left. The evidence supported the prosecutor's argument to this effect.

The defendant's final contention concerning the prosecutor's argument relates to the fact that the prosecutor referred to the photographs of Mrs. Delgado alone and of Mrs. Delgado with the defendant which had been introduced. As noted previously, the photographs were properly admitted into evidence. The prosecutor was, therefore, entitled to refer to and display the photographs during his closing arguments.

The defendant next argues that the trial judge erred in his summation of the evidence by inaccurately stating the evidence, by stating facts not shown in evidence, and by expressing an opinion concerning the evidence.

At the time of the defendant's trial, N.C.G.S. § 15A-1232 required the trial judge, when instructing the jury, to state the evidence to the extent necessary to explain the application of the law to the evidence. N.C.G.S. § 15A-1232 was recently amended so as to no longer require trial judges to state, summarize, or recapitulate the evidence or to explain the application of the law to the evidence. 1985 N.C. Sess. Laws ch. 537, § 1. This amendment left undisturbed the prohibition contained in N.C.G.S. § 15A-1232 against a trial judge expressing an opinion as to whether a fact has been proved. *Id.* This amendment is not applicable to the defendant's case, and we must analyze this issue in light of the law as it existed at the time of the trial.

Under the old law, the trial court was required to summarize the evidence in the jury charge to the extent necessary to apply the law applicable to the evidence. N.C.G.S. § 15A-1232 (1983); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). The court, however, was not required to give a verbatim recital of the evidence. A recapitulation sufficiently comprehensive to present every substantial and essential feature of the case was sufficient. *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976). Minor discrepancies between the evidence and the court's summation were required to be called to the attention of the court in time to afford an ade-

quate opportunity for correction. Otherwise, they were to be considered waived and would not be considered on appeal. *Id.*

Initially, we note that the trial judge instructed the jury that it was the sole judge of the facts and that he had no opinion as to what the verdict should be. He also prefaced his summary of the State's evidence by saying what the evidence "would tend to prove."

[16] The defendant first contends the trial court erred when it stated, "The State has further offered evidence which in substance would tend to show . . . . [that] the defendant made a statement to one of the officers that he was wearing black pants on the occasion when Mr. Delgado died." The defendant claims that the court improperly gave its own interpretation to Detective Deaton's testimony. At one point, Deaton stated the defendant said he was wearing a pair of *black* pants; while at another point, he testified that the defendant told him that he was wearing a pair of *dark* pants. The trial court's summation on this point was sufficiently comprehensive and was in substantial accord with the actual testimony. If the defendant had desired a more comprehensive statement of the evidence, he could have requested it. *Id.*

[17] The defendant's next claim centers on the trial court's statement that "[t]he State further offered evidence which, in substance, tends to show . . . . [t]hat the defendant told Mr. Deaton that he went into the ditch and crouched or lay down . . . ." He argues that the summation on this point constituted an improper expression of opinion in favor of the State's "ambush" theory. This contention is meritless. Deaton testified, "[H]e [the defendant] stated that he got down into the ditch alongside the shoulder of the road awaiting the arrival of Sgt. Delgado." We find that the court's summary of the evidence on this point was in substantial accord with the actual testimony. We also hold that the statement did not amount to an improper expression of opinion by the trial judge.

[18] The defendant next contends that the trial court erroneously summarized the evidence when it stated, "The State has further offered evidence, which in substance would tend to show . . . . [t]hat he told another Marine that his girl friend and he wanted Mr. Delgado dead." From a close reading of the summa-

tion, it appears that the court was referring to the testimony of Benjamin Daniels. The defendant correctly points out that Daniels did not testify that the defendant said he wanted Sgt. Delgado killed, but only testified that the defendant had told him that Mrs. Delgado had asked him to kill her husband. However, Paul Peters did testify that the defendant had told him that "he and his girl friend" wanted Sgt. Delgado killed. The trial court's summary was, therefore, substantially correct. At most, there existed a minor discrepancy which was not prejudicial to the defendant. *See State v. Roberts*, 310 N.C. 428, 312 S.E. 2d 477 (1984); *State v. Freeman*, 295 N.C. 210, 244 S.E. 2d 680 (1978). We also note that the defendant failed to object to the trial court's summary of the evidence.

[19] Finally, the defendant contends the trial court erred when it failed to include in its recapitulation of the State's evidence any reference to his claim that Sgt. Delgado initially attacked him with a knife. However, after the jury charge, the prosecutor brought to the trial court's attention the fact that the summary failed to mention that the defendant told Detective Deaton that Delgado had initiated the attack. The trial court immediately instructed the jury that "Mrs. Delgado also offered evidence, which in substance, would tend to show that there was an initial attack upon Mr. Gladden by Sgt. Delgado out there." We hold that this subsequent correction cured the omission. *State v. Corbett*, 307 N.C. 169, 297 N.C. 553 (1982).

Having examined in detail the trial judge's summary of the evidence in his charge to the jury, we find that he accurately summarized the facts to the extent necessary to apply the law applicable to the case and that it contained no expression of opinion. The few slight misstatements of the trial judge in his charge to the jury are clearly insufficient to invoke the "plain error" exception to Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure.

The defendant next 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 the evidence introduced at trial was insufficient to prove the elements of premeditation and deliberation. We do not agree.

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. 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 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*, 464 U.S. 865, 78 L.Ed. 2d 117, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (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).

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 (1981 and Cum. Supp. 1985); *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. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969). 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).

[20] 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. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984); *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). We have also held that the nature and number of the victim's wounds are circumstances from which premeditation and deliberation can be inferred. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982).

[21] 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. The evidence indicates that the defendant and Mrs. Delgado were engaged in an affair. In both his statements and his trial testimony, the defendant acknowledged that he and Mrs. Delgado had decided to "lure" the deceased to a deserted rural location by having Mrs. Delgado call her husband under the pretense that she had car trouble and was in need of assistance. The defendant was armed with a knife and a gun. The defendant slashed Sgt. Delgado's throat and shot him four times. In his statement, the defendant said that after the first two gunshots had felled Delgado, he dragged him into a ditch and shot him twice more. This would tend to rebut the defendant's claim of self-defense and would be some evidence tending to show the killing was premeditated and deliberate.

There was evidence that, prior to the shooting, the defendant had told a friend that Mrs. Delgado had said she wished her husband were dead and that the defendant had attempted to find someone to kill Sgt. Delgado. Lieutenant Hunter was in the area when the shooting occurred. He heard two shots followed several seconds later by two more shots. After the last shot, he heard what appeared to be male laughter coming from the vicinity of the shooting. Also after the shooting, the defendant disposed of certain items of evidence and attempted to hide the body and to

establish an alibi for himself. Finally, there was testimony that, following his arrest, the defendant told a fellow inmate that if he had the chance, he would kill Delgado again "for the pleasure of it." These statements and this conduct by the defendant prior to and after the event support 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. Further, we note that the defendant was engaged in a romantic relationship with the deceased's wife and that there was evidence that the deceased had threatened to kill the defendant. This tended to show ill-will between the parties. In light of this evidence, we hold that there was sufficient evidence of premeditation and deliberation to take the case to the jury on the theory of premeditation and deliberation and to support the defendant's conviction for first-degree murder.

II.

Sentencing Phase

The defendant presents two assignments of error relative to the sentencing phase of his trial. The first assignment of error 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) (1983 and Cum. Supp. 1985). 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.

[22] Although 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 or *especially* atrocious or *especially* cruel. N.C.G.S. § 15A-2000(e)(9) (1983 and Cum. Supp. 1985). 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 crimes 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). We have also

said that this aggravating factor is appropriate where the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder. *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984).

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 the infliction of psychological torture by leaving the victim in his last moments aware of, but helpless to prevent, impending death.

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. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984); *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984). Under such an analysis, the evidence in the present case was sufficient to support the submission of the aggravating factor to the jury.

[23] The evidence tends to show that the defendant carried out a deliberate and premeditated plan to kill his lover's husband. Through the use of a ruse, the defendant lured the victim to a secluded area where he was ambushed. The deceased received three gunshot wounds to the head and one gunshot wound to the shoulder, and he suffered a slash wound to the neck which partially severed his trachea. The defendant gave a statement to the police in which he said that he slashed Sgt. Delgado's throat, shot him twice, dragged him into a nearby ditch, and then shot him twice more in the head. The defendant testified that Delgado was still alive when he and Mrs. Delgado drove away. Dr. Garrett testified that, in his opinion, the victim died as a result of the gunshot wounds to the head, with the slash wound to the throat being a contributing cause of death. Dr. Garrett further testified that the slash wound contributed to Delgado's death by causing him to slowly choke to death and that a choking sensation pro-

duces a feeling of extreme anxiety on the part of the victim and causes great pain. He also stated that although two of the bullet wounds were not fatal, they would have produced a great deal of pain. There was also evidence tending to show that the defendant laughed for several seconds after the last two shots were fired. Finally, there was testimony that, after his arrest, the defendant told a fellow inmate that if possible he would kill Sgt. Delgado again "for the pleasure of it."

Taken in the light most favorable to the State, the evidence shows that the victim did not die instantaneously, but lingered for some undetermined period of time and suffered extreme pain and anxiety prior to death. This would support a conclusion that the murder was physically agonizing for Delgado. Also, the evidence tending to show that the defendant laughed following the final two shots and that he told a fellow inmate that he would kill Delgado again "for the pleasure of it" indicates an unusual depravity of mind. *See State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

The defendant argues that this case is indistinguishable from three cases in which either this Court or the United States Supreme Court held that it was error to submit this (or a substantially similar) aggravating factor to the jury. We now examine those cases briefly. In *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398 (1980), the defendant went to the mobile 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 mobile home and struck and injured his fleeing daughter with the barrel of the shotgun. He then shot his mother-in-law, killing her instantly. The jury found as an aggravating circumstance that the murder "was outrageously or wantonly vile, horrible and inhuman." The Supreme Court of Georgia affirmed the death sentence, holding the verdict was supported by the evidence. The Supreme Court of the United States held that the Supreme Court of Georgia had unconstitutionally construed the aggravating factor and stated, "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." *Id.* at 443, 64 L.Ed. 2d at 409.

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 remained conscious throughout the entire attack, we noted that there was no evidence that she suffered a torturous death. Relying in large measure upon the holding in *Godfrey*, we 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. In *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984), the defendant, while driving a pickup truck, began to closely follow another vehicle. Eventually, the car pulled off the road into the parking lot of the drugstore. The defendant followed the car into the parking lot, pulled up beside it, and shot the victim in the head with a shotgun. We held that the evidence was insufficient to support a finding of the aggravating factor that the murder was especially heinous, atrocious, or cruel.

The defendant argues that these cases compel a finding in the case *sub judice* that it was error for this aggravating factor to be submitted to the jury. We do not agree. In these cases, there was no evidence that the victim suffered extreme pain prior to death. This is in direct contrast to the evidence here. We hold that the evidence justified submission to the jury of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

The defendant next argues that the trial court erred in failing to peremptorily instruct the jury on the existence of two statutory mitigating factors submitted by the court—that the defendant had no significant history of prior criminal activity and that the deceased was a voluntary participant in the defendant's homicidal act. This argument is without merit.

We have said that where all the evidence in a case, if believed, tends to show that a particular statutory mitigating factor exists, a peremptory instruction is proper. However, a peremptory instruction is not appropriate when the evidence surrounding that issue is conflicting. *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, --- U.S. ---, 84 L.Ed. 2d 369, *reh'g denied*, --- U.S. ---, 85 L.Ed. 2d 342 (1985).

In support of his claim that the court should have peremptorily instructed the jury that he had "no significant history of prior criminal activity," N.C.G.S. § 15A-2000(f)(1), the defendant points out that he presented uncontradicted evidence that he had no prior criminal convictions other than for traffic violations. These violations resulted in a sixty-day suspension of his license. During this period of suspension, he drove his car, was stopped, and was subsequently convicted of driving while his license was revoked. He contends that in a capital case these activities do not as a matter of law constitute a significant history of prior criminal activity within the meaning of N.C.G.S. § 15A-2000(f)(1).

[24, 25] However, N.C.G.S. § 15A-2000(f)(1) does not speak in terms of "criminal convictions," but rather in terms of "criminal activity." Therefore, this provision does not limit the jury's inquiry to only prior convictions. *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, --- U.S. ---, 84 L.Ed. 2d 369, *reh'g denied*, --- U.S. ---, 85 L.Ed. 2d 342 (1985). In addition to the convictions for traffic offenses, evidence was introduced from which the jury could find that the defendant engaged in other criminal activity including carrying a concealed weapon. This mitigating factor was submitted to the jury. Whether this evidence was sufficient to constitute a significant history of prior criminal activity, thereby precluding the finding of this mitigating factor, was for the jury to decide. Additionally, we hold that the trial court did not err in refusing to peremptorily instruct the jury under N.C.G.S. § 15A-2000(f)(3) that Sgt. Delgado was a voluntary participant in the defendant's homicidal act. The State produced ample evidence to contradict the defendant's claim that Delgado initially attacked him with a knife.

Furthermore, we note that the defendant failed to request the trial court to give these peremptory instructions. The failure of the defendant to make a timely request for such instructions is an additional reason for concluding that no error was committed by the trial court. *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). This assignment of error is overruled.

We find no error in the guilt-innocence phase or the sentencing phase of defendant's trial.

III.

Statutory Review of Sentence by Supreme Court

Having determined that the defendant's trial was free from prejudicial error during the guilt-innocence and sentencing phases, we now turn to the duties reserved by statute to this Court in reviewing the judgment and sentence of death. Pursuant to N.C.G.S. § 15A-2000(d)(2) we are required to ascertain whether the record supports the jury's finding of the aggravating factor 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. We have also closely examined the exhibits which were forwarded to this Court. As analyzed and stated previously, we find that the record amply supports the submission of the aggravating factor which was considered and found by the jury. Also, we find nothing to indicate that the sentence of death was imposed under the influence of passion, prejudice, or arbitrary factors.

[26] We now undertake our final statutory duty of proportionality review. This task 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. In conducting the proportionality review, we use the "pool" of similar cases announced in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). The "pool" consists of all cases arising since the effective date of North Carolina's capital punishment statute, 1 June 1977, which have been tried as capital cases and have been 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.

In *Williams*, we expressly rejected any approach that would utilize "mathematical or statistical models involving multiple

regression analysis or other scientific techniques, currently in vogue among social scientists." *Id.* at 80, 301 S.E. 2d at 355.

After a careful review of the record, transcripts, and exhibits, and other similar cases, we conclude that the defendant's sentence of death is not excessive or disproportionate. The evidence supports the view that the defendant attempted to hire someone to kill the victim and, when he failed, planned and participated in a scheme whereby he lured the victim, his lover's husband, to a secluded rural area. There, the defendant slashed the victim's throat, shot him twice, dragged him into a ditch, and then shot him twice more in the face. The evidence would indicate that the victim did not die instantaneously but lingered for some undetermined period of time and suffered extreme pain and anxiety prior to death. Following the attack, the defendant went back to his apartment and changed clothes. He then returned to the scene of the killing and dragged the victim's body into the woods. After disposing of the victim's wallet and watch, he went back to his apartment where he spent the night with the victim's wife. The next day, he talked with a friend about providing him with an alibi for the previous evening.

The record before us reveals a brutal and especially torturous murder. We cannot say that it does not fall within the class of first-degree murders in which we have previously upheld the death penalty. *See State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, --- U.S. ---, 86 L.Ed. 2d 267 (1985); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). We conclude that the facts of this case fully support the jury's decision to recommend a sentence of death.

IV.

Preservation Issues

The defendant raises six additional issues which he concedes have been recently decided against him by this Court. They are: (1) the imposition of a death sentence by a jury drawn from a venire from which potential jurors were excluded because of their

scruples against the death penalty is an unconstitutional deprivation of his right to due process of law and trial by jury; (2) the trial court erred in failing to instruct the jury during the penalty phase of the trial that if it were deadlocked a life sentence would be imposed; (3) the aggravating factor that the murder was especially heinous, atrocious, or cruel is unconstitutionally vague and overbroad as construed and applied in North Carolina; (4) the trial court erred in failing to instruct the jury that the State had the burden of proving the nonexistence of each mitigating factor beyond a reasonable doubt and in placing the burden on the defendant to prove each mitigating circumstance by a preponderance of the evidence; (5) the North Carolina death penalty statute is unconstitutional, is imposed in a discriminatory manner, and involves subjective discretion; and (6) the aggravating factor that the murder was especially heinous, atrocious, or cruel is unconstitutionally vague on its face and violates the due process clause of the fourteenth amendment.

Defense counsel, with commendable candor, admits that these issues are raised here merely to give this Court an opportunity to reexamine our previous holdings and, if we adhere to these holdings, to preserve the issues for later review by the federal courts. Having considered the defendant's arguments on these issues, we find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

In conclusion, 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 was not imposed under the influence of passion, prejudice or any arbitrary factor and was not disproportionate. We, therefore, leave the sentence of death undisturbed.

No error.

Justice MITCHELL dissenting.

I believe that the trial court committed reversible error requiring a new trial when it denied the defendant's motion to be allowed more than one jury argument. Therefore, I respectfully dissent.

The statute later to be codified as N.C.G.S. § 84-14 was enacted in 1903. At that time it provided that the State or plaintiff and the defendant would each be allowed two addresses to the jury in any given case. 1903 Public Laws of North Carolina ch. 433, § 2. The first sentence of the statute, which I find controlling in the present case, was amended two years later by the addition of a clause so that it now provides that: "In all trials in the superior courts there shall be allowed two addresses to the jury for the state or plaintiff and two for the defendant, *except in capital felonies when there shall be no limit as to number.*" Revisal of 1905, § 216 (emphasis added to 1905 addition). The quoted sentence from the statute has remained unchanged in the eighty years since the 1905 revision, although other sentences in the statute have been amended.[1] Therefore, the statute for eighty years has provided that "there shall be no limit as to number" of addresses to the jury for the State or for the defendant in cases tried as capital felonies.[2]

The majority construes the statute to mean only that the trial court in a capital case must allow all counsel for the defendant (subject to the trial court's power to limit them to three in number) to argue for as long as they wish and as many times as

1. The entire statute now is as follows:

§ 84-14. Court's control of argument.

In all trials in the superior court there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there *shall be no limit as to number.* The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: to not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; *in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side.* Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.

(Emphasis added.)

2. The term "capital felonies" as used in the statute is synonymous with the term "capital case" as defined in *State v. Barbour*, 295 N.C. 66, 70, 243 S.E. 2d 380, 383 (1978).

they wish. However, the majority holds that when the defendant has presented evidence, all such addresses by his counsel must be made *prior to the prosecution making a closing argument* to the jury. The majority points to no specific language requiring any such result, either in the statute or in Rule 10 of the General Rules of Practice for the Superior and District Courts, and there is none. Instead, the majority seems to base its holding upon its concern that giving the defendant and the State the right to respond to each other in capital cases by truly applying "no limit as to number" of their addresses to the jury might "destroy the orderliness of the trial and could not have been intended by the Legislature." I disagree with the majority's view of the statute.

The statute clearly provides that every party to any case "shall be allowed two addresses to the jury . . . ." This language seems to have been consistent with an established practice of the time permitting every party to a case to make a preliminary address to the jury before the presentation of evidence and to make at least one closing address. *See State v. Sheets*, 89 N.C. 543 (1883). The legislature went on to state in the same sentence, however, that in cases of capital felonies there "shall be no limit" on the number of addresses to the jury by the defendant or the State. The phrase "no limit" is plain English and means just what it says: *no limit.* Nothing in the language of the statute even hints at the limitation announced today by the majority that "all such addresses must be made prior to the prosecution's closing argument."

To apply the limitation the majority adopts to cases such as this in which the defendant is represented by only one counsel, requires this Court to evade the statutory commandment by saying that "no limit" means "as long as one frail counsel, already worn out with a long trial, can stand up and speak . . . ." *State v. Miller*, 75 N.C. 73, 76 (1876). One hundred and ten years ago this Court specifically disapproved any such approach stating that:

> It is always uncomely in anybody, and especially in a court to try how near they can come to disregarding a law without incurring responsibility. It is due to every law that it should have its full effect, not grudingly given. And then if seen to be mischievous, it may be the sooner corrected.

Id. I find any such approach as "uncomely" today as when disapproved by the foregoing language of this Court in 1876. I would apply the plain English used in the statute and hold that the trial court erred by refusing to permit the defendant to make more than one address to the jury in this case.

The majority has reduced the provision that there shall be "no limit as to number" of jury addresses in capital cases to a useless redundancy, since other provisions of the statute already require that the defendant be allowed at least three counsel and that the length of their arguments may not be limited. In so doing, the majority seems to have lost sight of the fact that the intent of the legislature controls in the interpretation of statutes and that:

> In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose.

State v. Harvey, 281 N.C. 1, 19-20, 187 S.E. 2d 706, 718 (1972). In my view the 1905 addition of the provision that there shall be no limit as to the number of jury addresses in capital felonies was intended by the General Assembly to add something to N.C.G.S. § 84-14, which until then provided—and still provides in non-capital cases—that each party "shall be allowed two addresses to the jury . . . ." The majority has failed to so construe the 1905 addition and has construed it, instead, as adding nothing.

After all of the evidence had been introduced during the guilt-innocence phase of the present case, counsel for the defendant specifically moved that he "be allowed more than one argument" to the jury. Even had the trial court allowed the motion and permitted the defendant to address the jury both before and after the State's "closing" argument, the State still would have been given the *final argument to the jury* during the guilt-innocence phase, as required by Rule 10 when the defendant has introduced evidence. Therefore, there is no conflict between N.C.G.S. § 84-14 and Rule 10 of the General Rules of Practice for the Superior and District Courts.

Section 13(2) of Article IV of the Constitution of North Carolina provides in pertinent part that:

> The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, ... If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule or procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.

Thus, the General Assembly had the authority to enact N.C.G.S. § 84-14.

It is clear to me that by adopting N.C.G.S. § 84-14 the General Assembly intended to grant the full benefit of counsel to defendants, plaintiffs and the State. As this Court has stated in a related but somewhat different context:

> It certainly cannot be supposed to be the policy of the Legislature to embarrass the courts so that they cannot dispatch business. Nor can it be supposed that it would, from any pique subject the judge to indignity. What we have to suppose is, that it is to be left to the discretion of *counsel*, instead of to the discretion of the *presiding judge*, how they shall address themselves to the court and jury. It must be left either to the judge or the counsel; and the Legislature has left it with the counsel. It may be that the confidence is not misplaced . . . . At any rate, the law is plain, and the experiment has to be made whether it is prudent to entrust the discussion in the courts to the *counsel* instead of to the *judge*.

State v. Miller, 75 N.C. 73, 75 (1876). *Cf. State v. Hardy*, 189 N.C. 799, 128 S.E. 152 (1925) (concerning the antecedents of N.C.G.S. § 84-14). Even though Rule 10 gave the State the right to open and close the arguments to the jury at the end of the guilt-innocence phase of this capital case, the defendant nevertheless had a right under N.C.G.S. § 84-14 to make addresses to the jury with "no limit as to number." Nothing in either the statute or Rule 10 requires that all such addresses by the defendant be made before the State addresses the jury. Rule 10 only requires in this regard that the State be allowed *the final argument* when the defendant has introduced evidence. Therefore, the trial court committed error requiring a new trial when it denied the defendant's motion.

Justices EXUM and FRYE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. FRANKLIN D. GARDNER, JR.

No. 390A84

(Filed 18 February 1986)

1. **Criminal Law § 161— failure to make timely objection or exception at trial—procedure for review**

When a defendant contends that an exception was deemed preserved or taken without objection made at trial, he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error. He must alert the appellate court that no action was taken by counsel at trial and thus establish his right to review by asserting the manner in which the exception was preserved or how the error may be noticed although not brought to the attention of the trial court. N.C. Rules of App. Procedure 10(b)(1).

2. **Constitutional Law § 74; Criminal Law § 88.4— cross-examination about statement to officer—no constitutional plain error**

Neither cross-examination questions nor defendant's responses constituted an impermissible comment upon defendant's invocation of his constitutional right to remain silent where the cross-examination was an inquiry into an admitted conversation between defendant and a police officer; defendant's response was that he didn't know anything about the break-in that was the subject of the detective's inquiry, clearly implying that he told the detective that he knew nothing of the break-in under investigation; and defendant's testimony was totally consistent with his position at trial and had no impeaching effect. Moreover, there was no prejudice because the evidence presented by the State was very convincing and, even without the alleged error, the jury probably would have reached the same result. N.C.G.S. 15A-1443(b) (1983).

3. **Constitutional Law § 34; Criminal Law § 26.5— felonious breaking or entering and felonious larceny—sentenced for each—not double jeopardy**

Defendant's conviction and sentencing for both felonious breaking or entering and felonious larceny did not violate the prohibitions against double jeopardy in the Fifth Amendment to the U.S. Constitution or in the North Carolina Constitution, Art. I, § 19, where defendant was tried for both offenses at a single trial and the contention was that he was subjected to multiple punishments for the same offense. Even if the elements of the two statutory crimes are identical and neither requires proof of a fact that the other does not, defendant may in a single trial be convicted of and punished for both crimes if it is found that the Legislature so intended; the Legislature intended that the crimes of breaking or entering and felonious larceny pursuant to that breaking or entering be separately punished. *State v. Midyette*, 270 N.C. 229, is overruled. N.C.G.S. 14-72(b)(2), N.C.G.S. 14-72(a).

Justice EXUM dissenting as to Part II.

Justices MARTIN and FRYE join in this dissenting opinion.

DEFENDANT appeals from a decision of a divided panel of the Court of Appeals, 68 N.C. App. 515, 316 S.E. 2d 131 (1984), finding no error in defendant's convictions of felony breaking or entering and felony larceny. Judgments were entered by *Ferrell, J.*, at the 17 January 1983 Criminal Session of Superior Court, GASTON County. Pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, we allowed defendant's petition for certiorari to review an issue which was not the basis of the dissent in the lower court. Heard in the Supreme Court on 7 February 1985.

Lacy H. Thornburg, Attorney General, by Henry T. Rosser, Assistant Attorney General, for the State.

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

MEYER, Justice.

Defendant brings forward two assignments of error on appeal. The first involves the cross-examination of the defendant concerning his post-arrest silence. In addition, defendant argues that double jeopardy principles prohibit his conviction and sentencing for both breaking or entering and felony larceny pursuant to that breaking or entering. For the reasons set forth below, we find no error and, therefore, affirm the decision of the Court of Appeals.

Defendant was convicted of breaking or entering a home in Gastonia, North Carolina, while the occupants were on vacation, and of felony larceny pursuant to the breaking or entering. The value of the goods stolen was placed at approximately $4,000. Evidence against the defendant consisted of the testimony of Bobby Grigg, who lived with his parents in a house across the street from the victims' residence. Grigg saw the defendant at approximately 6:00 p.m. on the day of the break-in. Grigg, the defendant, and an unidentified man rode in defendant's car to visit one of Grigg's friends. After leaving Grigg at his house at 7:30 p.m., the defendant and the unidentified man drove off.

Later that night as Grigg was walking to a friend's house, the defendant and the unidentified man pulled up in defendant's car and asked Grigg to accompany them to Blacksburg, South Carolina. Grigg noticed some guns, a television, a stereo, and a

file cabinet in the trunk and back seat of defendant's car. Defendant told Grigg that he had broken into the Barrow residence.

At some point during the trip, the defendant stopped and removed the file cabinet from his car. Grigg's fingerprints were later found on the file cabinet.

In Blacksburg, defendant met with Bobby Cooper, to whom he eventually sold a rifle and a revolver. These items were later recovered and identified as items stolen from the victims' home.

Defendant presented two alibi witnesses—his girl friend and his father. Defendant testified on his own behalf and denied seeing Grigg at any time on the evening of the break-in.

I.

Defendant first argues that in cross-examining him concerning his post-arrest silence, the prosecutor committed "plain error of constitutional magnitude." Defendant's theory at trial was that Grigg's testimony "was a calculated attempt to 'frame' " him. On cross-examination, the following exchange took place:

Q. Are you saying he's [Grigg] concocted this entire story because you didn't loan him some money when you were playing pool?

A. To tell you the truth, I don't know why he's got me in on this.

Q. You don't have any idea, do you?

A. No, sir.

Q. Did you have an occasion to talk with Detective Duncan?

A. No, sir.

Q. You ever seen Detective Duncan?

A. You talking about that lady?

Q. Yes, sir.

A. No, sir.

Q. You ever talk to any detective about this?

A. I talked to one. When they looked me up, they come [sic] and got me off my job, and I went down there in Gaffney,

and they locked me up over there, and a detective and plain clothed officer in a uniform come [sic] down there and got me and brought me up here.

Q. What, if any, statement did you give that officer?

A. Any statement?

Q. Yes, sir.

A. I don't [sic] give him no [sic] statement.

Q. You didn't give him a statement did you?

A. No, sir. He was asking me questions about this break-in.

Q. And you didn't give a statement, did you?

A. No, sir. I didn't know what he was talking about.

There was no objection to the testimony. Nevertheless, defendant now complains that "by so attempting to impeach the defendant's exculpatory testimony on the basis of [his] post-arrest silence—i.e., the defendant's failure to relate either his alibi or Bobby Grigg's possible motive for implicating defendant in a crime—the prosecutor violated the defendant's constitutional right to remain silent and, thus, denied the defendant a fair trial." We do not agree.

[1] It is undisputed that defendant did not object to any of the cross-examination set out above. Failure to make timely objection or exception at trial waives the right to assert error on appeal, N.C. R. App. P. 10(b)(1); *State v. Murray*, 310 N.C. 541, 545, 313 S.E. 2d 523, 527 (1984); *State v. Oliver*, 309 N.C. 326, 334, 307 S.E. 2d 304, 311 (1983); and a party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of App. R. 10(b). *State v. Oliver*, 309 N.C. at 335, 307 S.E. 2d at 312. When a defendant contends that an exception, in the words of App. R. 10(b)(1), "by rule or law was deemed preserved or taken without" objection made at trial, he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error. In so doing, he must alert the appellate court that no action was taken by counsel at trial and then establish his right to review by asserting the manner in which the exception was

preserved or how the error may be noticed although not brought to the attention of the trial court. *State v. Oliver*, 309 N.C. at 335, 307 S.E. 2d at 312. As the majority decision in the Court of Appeals notes, defendant did not comply with these requirements and should be deemed to have waived his right to except on appeal to the cross-examination.

[2] Even had defendant properly preserved and brought forward his exceptions, however, the cross-examination complained of entitles defendant to no relief. When first asked by the prosecution, "You ever talk to any detective about this?" defendant responded, "I talked to one." Following the apparent admission by defendant that he had talked to a detective about at least some aspects of the crime and the accusations against him, the prosecutor sought to ascertain what had been said. At that time, defendant denied having made any statement regarding the crime, because the detective "was asking me questions about this break-in," and defendant "didn't know what he [the detective] was talking about." The prosecutor then shifted his cross-examination to other matters.

This cross-examination did not violate defendant's constitutional right to remain silent. Defendant clearly indicated that he had not, in fact, remained silent but had talked with a detective about the matter. He further indicated that his conversation with the detective was not an inculpatory or exculpatory statement but rather a disavowal of any knowledge whatsoever of the crime. Under such circumstances, the cross-examination cannot be construed as an unconstitutional attempt by the State to use defendant's post-arrest silence to impeach his testimony at trial. The cross-examination did not involve an attempt to impeach defendant's credibility by reason of post-arrest silence, but was an inquiry into an admitted conversation between defendant and a police officer. Defendant's response to the cross-examination was that he was unable to make any statement to the officer because he had no knowledge of the crime. This was totally consistent with defendant's position at trial and had no impeaching effect.

Stripped of excess verbiage, the cross-examination testimony consisted of a question by the prosecutor as to whether defendant had talked to any detective "about this"; defendant's response that he had talked to one detective; the prosecutor's question of what defendant had said to the detective; and defendant's re-

sponse that he didn't know anything about the break-in that was the subject of the detective's inquiry. The clear implication of defendant's response is that he stated to the detective that he knew nothing of the break-in under investigation.

Whatever motives prompted the cross-examination questions, neither they nor defendant's responses constituted an impermissible comment upon the defendant's invocation of his constitutional right to remain silent.

However, even assuming, *arguendo*, the violation of a constitutional right, admission of the evidence complained of was harmless beyond a reasonable doubt. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972); N.C.G.S. § 15A-1443(b) (1983). This is so because the evidence presented by the State was very convincing. *State v. Black*, 308 N.C. 736, 741, 303 S.E. 2d 804, 807 (1983); *State v. Brown*, 306 N.C. 151, 164, 293 S.E. 2d 569, 578, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982). As was said in *State v. Williams*, 288 N.C. 680, 693, 220 S.E. 2d 558, 568 (1975), "[T]his evidence was of such insignificant probative value when compared with the overwhelming competent evidence of guilt that its admission did not contribute to defendant's conviction and therefore admission of the evidence was harmless error beyond a reasonable doubt." *See also State v. Castor*, 285 N.C. 286, 293, 204 S.E. 2d 848, 853 (1974) (Huskins, J., dissenting).

Nor does this cross-examination without objection by defendant constitute "plain error" which would entitle defendant to relief upon our review of his subsequently asserted exceptions. In *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983), this Court adopted the plain error rule with regard to App. R. 10(b)(1) when no objection or exception to evidence presented and admitted was made at trial. In so doing, this Court quoted with approval from *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L.Ed. 2d 513 (1982), as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in

a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

In *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986), we said this:

> The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. *State v. Odom*, 307 N.C. at 661, 300 S.E. 2d at 378-79. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. *State v. Black*, 308 N.C. at 741, 303 S.E. 2d at 806-07. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection. *Cf.* N.C.G.S. § 15A-1443(c) (defendant not prejudiced by error resulting from his own conduct).

Id. at 39, 340 S.E. 2d at 83-84.

Even had the exchange on cross-examination constituted error, we conclude that, absent such error, the jury probably would have reached the same result.

II.

[3] Defendant next argues that his conviction and sentencing in the same trial for both felony breaking or entering and felony larceny violates the prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution and in N.C. Const. art. I, § 19. On the felony larceny charge, two felony theories were presented to the jury in the alternative—N.C.G.S. § 14-72(b)(2), breaking or entering, and N.C.G.S. § 14-72(a), property worth more than $400.00. The jury did not specify the theory it relied upon, and it would be pure speculation to suggest which

theory it relied upon. We, therefore, for the purposes of deciding this case, construe this ambiguous verdict in favor of the defendant, *State v. Williams,* 235 N.C. 429, 70 S.E. 2d 1 (1952), and assume that the felony larceny verdict was predicated upon a finding that defendant committed the larceny pursuant to the breaking or entering. Thus, we assume that the predicate crime of breaking or entering was used to raise the larceny charge to the compound crime of felony larceny.

We are thus required to decide whether the prohibition in either the United States or North Carolina Constitution against placing a person twice in jeopardy prohibits, in a single trial, convictions and punishment for both breaking or entering and felony larceny based upon that breaking or entering. We hold that conviction and punishment for both in a single trial is not prohibited by the provisions of either Constitution.

The argument advanced by defendant has been presented under various titles: double jeopardy, lesser-included offense, an element of the offense, multiple punishment for the same offense, merged offenses, etc. The defendant and the State have briefed and argued the issue as one of "double jeopardy." We choose to avoid any lengthy discussion of the appropriate title, as it is the principle of law rather than the characterization of the issue that is important. The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 23 L.Ed. 2d 656 (1969); *see also State v. Murray,* 310 N.C. 541, 547, 313 S.E. 2d 523, 528 (1984).

We are not here concerned with category (1) because there has been no prior acquittal, nor with category (2) because there was only one prosecution, i.e., both charges were tried contemporaneously in the same trial.

When analyzing the precise issue now before us as one of double jeopardy, courts across the nation have often tended to confuse rather than clarify the legal principles involved because of the failure to recognize and differentiate between single-prosecution and successive-prosecution situations. In *People v. Robideau,* 419 Mich. 458, 355 N.W. 2d 592, *reh'g denied,* 420 Mich. 1201, 362 N.W. 2d 219 (1984), the Michigan Supreme Court recent-

ly spoke to a possible reason for the obvious confusion among various court decisions which address the double jeopardy issue:

> We . . . come to the conclusion that much of the inconsistency in double jeopardy analysis results from the failure to clearly distinguish between single-prosecution and successive-prosecution cases. . . .
>
> Successive-prosecution cases involve the core values of the Double Jeopardy Clause, the common-law concepts of *autrefois acquit* and *convict.* (Citation omitted.) Where successive prosecutions are involved, the Double Jeopardy Clause protects the individual's interest in not having to twice "run the gauntlet", in not being subjected to "embarrassment, expense and ordeal", and in not being compelled "to live in a continuing state of anxiety and insecurity", with enhancement of the "possibility that even though innocent he may be found guilty". (Citation omitted.)
>
> . . . .
>
> Different interests are involved when the issue is purely one of multiple punishments, without the complications of a successive prosecution. The right to be free from vexatious proceedings simply is not present. The only interest of the defendant is in not having more punishment imposed than that intended by the Legislature. The intent of the Legislature, therefore, is determinative.

Robideau, 419 Mich. at 484-85, 355 N.W. 2d at 602-03.

Since defendant was tried for both offenses at a single trial, we will interpret his contention to be that he has been subjected to multiple punishments for the same offense.

Where multiple punishment is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the legislature. *Brown v. Ohio,* 432 U.S. 161, 53 L.Ed. 2d 187 (1977). The Double Jeopardy Clauses of both the United States and North Carolina Constitutions prohibit a court from imposing more punishment than that intended by the legislature. "[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punish-

ments the Legislative Branch has authorized." *Whalen v. United States*, 445 U.S. 684, 688, 63 L.Ed. 2d 715, 721 (1980). Recent expression of this principle is found in *Ohio v. Johnson*, 467 U.S. 493, 499, 81 L.Ed. 2d 425, 433, *reh'g denied*, --- U.S. ---, 82 L.Ed. 2d 915 (1984):

> In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 93, 5 L.Ed. 37 (1820), the question under the Double Jeopardy Clause [of] whether punishments are "multiple" is essentially one of legislative intent, see *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535, 103 S.Ct. 673 (1983).

In *State v. Murray*, 310 N.C. 541, 547, 313 S.E. 2d 523, 528 (1984), this Court said:

> [T]he Supreme Court of the United States has held that, where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court *in a single trial* may impose cumulative punishments under the statutes. *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed. 2d 535 (1983).

Missouri v. Hunter, 459 U.S. 359, 74 L.Ed. 2d 535 (1983), which is controlling here, was decided as a result of the Missouri Supreme Court's misperceptions of the nature of the Double Jeopardy Clause's protection against multiple punishments.

"With respect to cumulative sentences imposed in a single trial, the Double Jeopardy clause does no more than prevent the sentencing court from prescribing greater punishments than the legislature intended." *Id.* at 366, 74 L.Ed. 2d at 542. "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed." *Albernaz v. United States*, 450 U.S. 333, 344, 67 L.Ed. 2d 275, 285 (1981). Thus, the issue is whether the legislature intended the offenses of breaking or entering and felony larceny pursuant to the breaking or entering

to be separate and distinct offenses. *See State v. Perry,* 305 N.C. 225, 287 S.E. 2d 810 (1982).

In *State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66 (1967), we recognized that when a person is acquitted of or convicted and sentenced for an offense, the prosecution is prohibited from *subsequently* (i.e., in a subsequent, separately tried case) indicting, convicting, or sentencing him a second time for that offense, or for any other offense of which it, in its entirety, is an essential element. However, the Court went on to hold, "What the state cannot do by separate indictments returned successively and tried successively, it cannot do by separate indictments returned simultaneously and consolidated for simultaneous trial." *Id.* at 234, 154 S.E. 2d at 70. This latter language in *State v. Midyette* and the holding in that case has been rendered no longer authoritative by recent U.S. Supreme Court decisions such as *Missouri v. Hunter* and *Ohio v. Johnson* and the language in our recent case of *State v. Murray. State v. Midyette* is hereby overruled.

Traditionally, the United States Supreme Court has applied what has been referred to as the *Blockburger* test in analyzing multiple offenses for double jeopardy purposes. The opinion in *Blockburger v. United States,* 284 U.S. 299, 304, 76 L.Ed. 306, 309 (1932), stated:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

If what purports to be two offenses actually is one under the *Blockburger* test, double jeopardy prohibits successive prosecutions, *Brown v. Ohio,* 432 U.S. 161, 53 L.Ed. 2d 187 (1977); *Harris v. Oklahoma,* 433 U.S. 682, 53 L.Ed. 2d 1054 (1977); *Illinois v. Vitale,* 447 U.S. 410, 65 L.Ed. 2d 228 (1980), but, as was made clear in *Missouri v. Hunter,* 459 U.S. 359, 74 L.Ed. 2d 535 (1983), double jeopardy does not prohibit multiple punishment for offenses when one is included within the other under the *Blockburger* test if both are tried at the same time and if the legislature intended for both offenses to be separately punished. The *Blockburger* test is used by the federal courts in cases in-

volving violations of federal law in single prosecution situations as an aid to determining legislative intent. When each statutory offense has an element different from the other, the *Blockburger* test raises no presumption that the two statutes involve the same offense.

In single prosecution situations, the presumption raised by the *Blockburger* test is only a federal rule for determining legislative intent as to violations of federal criminal laws and is neither binding on state courts nor conclusive. When utilized, it may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test. That is, even if the elements of the two statutory crimes are identical and neither requires proof of a fact that the other does not, the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended. *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535 (1983); *Albernaz v. United States*, 450 U.S. 333, 67 L.Ed. 2d 275 (1981); *People v. Robideau*, 419 Mich. 458, 355 N.W. 2d 592, *reh'g denied*, 420 Mich. 1201, 362 N.W. 2d 219 (1984).

Though breaking or entering is not inevitably an element of felony larceny, if, as defendant points out, one looks beyond the *elements* of the two crimes (breaking or entering and felony larceny, in the abstract) and considers the *facts*, i.e., evidence used to prove the crimes, evidence of the crime of breaking or entering was, in fact, used to prove defendant guilty of "felonious" larceny. This is so because the legal theory upon which the State relied to convict defendant of the compound crime of felony larceny was that the larceny was committed pursuant to the breaking or entering.

In *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed. 2d 187 (1977), and *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed. 2d 228 (1980), the United States Supreme Court made it clear that a factual analysis rather than a definitional analysis must be undertaken by the courts in determining whether *successive prosecutions* are barred by the double jeopardy clause of the United States Constitution. Those cases do not apply, however, when a defendant is simultaneously tried for two offenses having overlapping facts and the question is whether the legislature intended for each offense to be separately punished.

In *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984), the defendant was tried in the same trial on charges of armed robbery and larceny. Defendant argued that his protections against double jeopardy had been violated in that he had been subjected to multiple punishments for the same offense. This Court rejected defendant's argument and stated:

> [E]ven where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982).

State v. Murray, 310 N.C. at 548, 313 S.E. 2d at 529. *See also State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983); *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980).

In *Whalen v. United States*, 445 U.S. 684, 63 L.Ed. 2d 715 (1980), the United States Supreme Court concluded that Congress did not intend multiple punishment when the defendant was convicted in a single trial of rape and of felony murder with rape as the felony, even though felony murder did not in all cases require proof of rape. There, the Court said: "There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance . . . ." *Id.* at ---, 63 L.Ed. 2d at 725.

The "factual" approach, rather than the "definitional" approach, is applied by this Court to prohibit multiple punishment in a single prosecution in the circumstance of the felony-murder rule. The felony-murder rule is a rule of ancient application under which there is a fictional transfer of the malice which plays a part in the underlying felony to the unintended homicide so that the homicide is deemed committed with malice.

> At common law, the author of an unintended homicide is guilty of murder if the killing takes place in the perpetration of a felony. This in essence constitutes the doctrine of felony-murder (also known as the doctrine of constructive malice).

> Coke is probably responsible for the birth of the doctrine when, in 1644 [sic], he said "that a death caused by any unlawful act is murder." He illustrated thus: If a man shoots at a wild fowl and accidentally kills a man, that is an excusable homicide because the act of shooting is not unlawful; but if a man shoots at a cock or hen belonging to another man and accidentally kills a man, that is murder because the act is unlawful. The doctrine was later limited to cases where the unlawful act amounted to a felony. It was in this posture basically that the doctrine found its way eventually into American law. Although the doctrine of felony-murder has long since been abrogated in England, the doctrine has flourished in the United States, albeit over the years limitations have been imposed upon its operation.
>
> In the typical case of felony-murder, there is no malice in "fact", express or implied; the malice is implied by the "law". What is involved is an intended felony and an unintended homicide. The malice which plays a part in the commission of the felony is transferred by the law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice; and a homicide with malice is common law murder.

2 Wharton's Criminal Law § 145 (1979).

In *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972), *superseded on other grounds by statute*, we held that the crimes of felony breaking and entering and felony larceny merged with the crime of murder committed in the perpetration of those felonies. We reasoned that "[t]echnically, feloniously breaking and entering a dwelling [and, by extension, any underlying felony] is never a lesser included offense of the crime of murder." *Id.* at 215, 185 S.E. 2d at 675. However, proof of the breaking or entering was an "indispensable element" in the State's proof of the murder, and hence "the separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment." *Id.* at 215-16, 185 S.E. 2d at 675. Unfortunately, the Court used this terminology: "In this sense, the felonious breaking and entering *was a lesser-included offense* of the felony murder." *Id.* at 216, 185 S.E. 2d at 675. (Emphasis added.) The confusion resulting from the failure to recognize and differentiate between

successive-prosecution and single-prosecution situations previously addressed herein appears to have been the basis for this statement.

> [T]he separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. If defendant had been acquitted in a prior trial of the separate charge of felonious breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution on the theory of felony-murder. (Citation omitted.)
>
> . . . .
>
> . . . For the reasons stated above, with reference to the felonious breaking and entering count in the separate bill of indictment, the felonious larceny was, under the circumstances of this case, a lesser included offense of the felony-murder, in the special sense above mentioned. The jury's verdict in the murder case established that defendant killed Ernest Mackey while engaged in the perpetration of the interrelated crimes of felonious breaking and entering and of felonious larceny.

State v. Thompson, 280 N.C. at 216, 185 S.E. 2d at 675.

However well entrenched the felony-murder merger rule may be in this State, the reasoning expressed in *Thompson* for its being, i.e., that the breaking and entering and the felony larceny were "lesser included offense(s) of the felony murder" and that the fact that Thompson could not be tried on the murder charge if he had been acquitted "in a prior trial" of the felony of breaking and entering or felony larceny, was erroneous. Clearly, what we refer to as the felony-murder rule is not founded upon the concept of "lesser-included offense" or upon the concept of "indispensable element of the offense" but upon the need to supply the element of malice where, in the strict sense, none existed. Other cases in which this Court has arrested judgment on the underlying felony under the felony-murder rule include: *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208 (1976) (kidnap and rape); *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208 (1976) (arson); *State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974) (armed robbery); *State v. Carroll*, 282

N.C. 326, 193 S.E. 2d 85 (1972) (armed robbery); and *State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972) (armed robbery).

The United States Supreme Court reached a similar result eight years after *Thompson* in *Whalen v. United States*, 445 U.S. 684, 63 L.Ed. 2d 715 (1980). *Whalen* was decided not on the basis of double jeopardy, but on the basis of legislative intent—the Court holding that, though it could have done so, Congress had not authorized multiple punishments for rape and first-degree felony murder committed during the course of the rape.

In *State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1209 (1976), this Court attempted to clarify the application of our felony-murder rule as follows:

> It seems to us that the better practice where the State prosecutes a defendant for first-degree murder on the theory that the homicide was committed in the perpetration or attempt to perpetrate a felony under the provisions of G.S. 14-17, would be that the solicitor should not secure a separate indictment for the felony. If he does, and there is a conviction of both, the defendant will be sentenced for the murder and the judgment will be arrested for the felony under the merger rule. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1973). If the separate felony indictment is treated as surplusage, and only the murder charge submitted to the jury under the felony-murder rule, then obviously the defendant cannot thereafter be tried for the felony. *State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972).

State v. Carey, 288 N.C. at 274-75, 218 S.E. 2d at 400.

It is not error, however, to deny a motion to dismiss the underlying felony charge. As this Court said in *Thompson*, wherein the defendant was charged with felony breaking and entering and felony murder:

> The motion for judgment as in case of nonsuit with reference to the felonious breaking and entering count in the separate indictment was properly overruled. Although a remote possibility, conceivably the jury could have found beyond a reasonable doubt that defendant feloniously broke

> into and entered the Mackey apartment but not that defendant shot and killed Ernest Mackey. Under appropriate instructions as to this contingency, it was proper to submit the felonious breaking and entering count in the separate indictment.

State v. Thompson, 280 N.C. at 215, 185 S.E. 2d at 675.

These and other cases have firmly established that in this State a defendant may not be punished both for felony murder and for the underlying, "predicate" felony, even in a single prosecution. Whether in other situations multiple punishments may be imposed when a defendant, in a single trial, is convicted of multiple offenses when some are fully, factually embraced within others is to be determined on the basis of legislative intent.

As the United States Supreme Court stated in *Missouri v. Hunter*, 459 U.S. at 368-69, 74 L.Ed. 2d at 543-44:

> [S]imply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, *in a single trial*, of cumulative punishments pursuant to those statutes. . . . Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. (Emphasis added.)

See also Ohio v. Johnson, 467 U.S. 493, 81 L.Ed. 2d 425 (1984).

In reaching our decision in the present case, we first reiterate that the intent of the legislature is determinative. The Double Jeopardy Clause plays only a limited role in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding—that role being only to prevent the sentencing court from prescribing greater punishments than the legislature intended. We further reiterate that where our legislature "specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory

construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Missouri v. Hunter*, 459 U.S. at 368-69, 74 L.Ed. 2d at 544. *See State v. Price*, 313 N.C. 297, 327 S.E. 2d 863 (1985).

The traditional means of determining the intent of the legislature where the concern is only one of multiple punishments for two convictions in the same trial include the examination of the subject, language, and history of the statutes.

With regard to the subject of the two crimes of breaking or entering and larceny, it is clear that the conduct of the defendant is violative of two separate and distinct social norms, the breaking into or entering the property of another and the stealing and carrying away of another's property.

The statutory history of the two crimes predates the turn of the twentieth century. At common law, larceny was a felony regardless of the value of the property stolen. *State v. Cooper*, 256 N.C. 372, 124 S.E. 2d 91 (1962). In 1895, the legislature changed the common law, making larceny of property valued under $20.00 a misdemeanor. However, there was a proviso added which stated that if the larceny was from the person *or pursuant to a breaking and entering,* the section would not apply. 1895 Pub. Laws ch. 285. Thus, the common law rule making larceny a felony regardless of value was left intact by the legislature when the larceny was committed pursuant to a breaking and entering. *State v. Cooper*, 256 N.C. 372, 124 S.E. 2d 91 (1962), determined that a thief who stole property in a breaking or entering should not get the benefit of the new misdemeanor provision, but should continue to face the harsher penalties of the common law. Over the years, the legislature amended the statute several times, raising the monetary level under which larceny would be treated as a misdemeanor in derogation of the common law. At the same time, it increased the number of exceptions to the statute. *See, e.g.*, 1913 Pub. Laws ch. 118; 1949 N.C. Sess. Laws ch. 145; 1959 N.C. Sess. Laws ch. 1285.

The statute remained in this form until 1969. In that year, the General Assembly rewrote N.C.G.S. §§ 14-51, 14-53, 14-54, 14-55, 14-56, 14-57, and 14-72 in acts which were titled as "clarifications" of the laws. 1969 N.C. Sess. Laws ch. 522, ch. 543.

The 1969 amendments to N.C.G.S. § 14-72 provided, *inter alia*, that larceny committed pursuant to a burglary (N.C.G.S. § 14-51), breaking out of a dwelling house burglary (N.C.G.S. § 14-53), breaking or entering (N.C.G.S. § 14-54), or burglary involving the use of explosives (N.C.G.S. § 14-57) would be a felony regardless of the value of the property stolen. Rather than continuing to leave the common law rule in effect *by implication* as to those specified circumstances of larceny, the legislature codified that rule, specifically stating that larceny is a felony regardless of value in those situations. Thus, the statute as presently constituted was intended to clarify, not change, the previous enactments.

Even the placement of these two crimes in the General Statutes may be some indication that the legislature intended that they be separate and distinct. Chapter 14 of the General Statutes, entitled "Criminal Law," is divided into eleven subchapters composed of seventy-four different articles. Breaking or entering (N.C.G.S. § 14-54) is found under Article 14 of Subchapter IV, entitled "Offenses Against the Habitation and Other Buildings," while larceny is found under Article 16 of Subchapter V, entitled "Offenses Against Property."

With regard to the judicial history of the treatment of the two crimes, this Court has uniformly and frequently held, from as early as the turn of the century, that breaking and/or entering and larceny are separate and distinct crimes. *E.g.*, *State v. Hooker*, 145 N.C. 581, 59 S.E. 866 (1907); *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983). Our appellate courts have also sustained convictions for both breaking or entering and felony larceny pursuant to breaking or entering in a single trial. *See State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971); *State v. Greer*, 270 N.C. 143, 153 S.E. 2d 849 (1967); *State v. Aaron*, 29 N.C. App. 582, 225 S.E. 2d 117, *cert. denied*, 290 N.C. 663, 228 S.E. 2d 455 (1976), *cert. denied*, 430 U.S. 908, 51 L.Ed. 2d 585 (1977). It would appear that we have also approved multiple punishments for both offenses. *See State v. Morgan*, 265 N.C. 597, 144 S.E. 2d 633 (1965), *overruled on other grounds*, 275 N.C. 439, 168 S.E. 2d 401 (1969). These many years of uniform construction have been acquiesced in by our legislature. Had conviction and punishment of both crimes in a single trial not been intended by our legisla-

ture, it could have addressed the matter during the course of these many years.

The two crimes of breaking or entering and felony larceny carry the same penalties—both are Class H felonies, punishable by a maximum of ten years imprisonment. N.C.G.S. § 14-1.1. It is noteworthy that under defendant's analysis here—that the crime of breaking or entering is a lesser-included offense of felony larceny pursuant to a breaking or entering—first- and second-degree burglary and burglary with explosives (Class C, D, and E felonies, respectively, carrying maximum sentences of 50, 40, and 30 years, respectively) would be lesser-included offenses of the Class H felony of larceny. Our legislature could not have intended such an absurd result.

We do not believe that our legislature intended that the crime of breaking or entering should subsume the co-equal crime of felony larceny committed pursuant to the breaking or entering. We conclude that the legislature intended that the crime of breaking or entering and the crime of felony larceny pursuant to that breaking or entering be separately punished.

We hold that a defendant may be tried for, convicted of, and punished separately for the crime of breaking or entering and the crime of felony larceny following that breaking or entering when the cases are jointly tried. Finally, we note that this question might have been avoided altogether by the presentation of the felony larceny to the jury upon specific verdict issues.

Affirmed.

Justice EXUM dissenting as to Part II.

I concede that under *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535 (1983), the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not preclude punishing this defendant for both felonious breaking or entering and felonious larceny, of which, we must assume, the breaking or entering is an essential element, so long as our legislature so intended.

I think *Hunter* was incorrectly decided. It is based, in my view, on a misapplication of principles formulated by the United

States Supreme Court in earlier cases and designed to resolve double jeopardy questions other than the one presented here and in *Hunter.* The misapplication is understandable because as the Supreme Court itself acknowledged in *Albernaz v. United States,* 450 U.S. 333, 343, 67 L.Ed. 2d 275, 284 (1981), its "decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Now a majority of our Court has, by slavishly following *Hunter* and misapplying some of the same precedents there relied on, determined to entangle itself in this Sargasso Sea even after being forewarned by the Court which created it and decided *Hunter* based upon it. Forewarned, for the majority, is not, alas, to be forearmed.

I concede, of course, that we are bound by *Hunter* insofar as we must decide this case under the Double Jeopardy Clause of the Fifth Amendment. We are not bound to follow *Hunter* and are free to follow our own precedents on the subject insofar as we base decision on the double jeopardy prohibition contained in the Law of the Land Clause in Article I, section 19 of the North Carolina Constitution. *See State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243 (1954) (Law of Land Clause includes prohibition against double jeopardy).

Unlike those of the United States Supreme Court, our precedents speak with one clear, unambiguous voice on the subject. The majority recognizes as much in that it finds it necessary to overrule *State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66 (1976), and to find "erroneous" the stated rationale for the Court's decision in *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972), in order to sustain its position.

We should in this case follow our precedents, avoid the United States Supreme Court's Sargasso Sea, and hold that to punish both for the breaking or entering and for the larceny in this case violates the double jeopardy prohibition of Article I, section 19 of the North Carolina Constitution.

The essential fallacy in the majority opinion and the United States Supreme Court's *Hunter* opinion is the failure to distinguish between two different situations which call for different applications of double jeopardy principles. The first situation is that in which a single criminal transaction amounts to the violation of

two or more criminal statutes, neither of which violation forms an essential element of the other. The question is: Can the state convict and punish for each criminal offense committed? In this context the United States Supreme Court has concluded that it can so long as the legislature so intended. *Albernaz v. United States*, 450 U.S. 333, 67 L.Ed. 2d 275 (1981); *Blockburger v. United States*, 284 U.S. 199, 76 L.Ed. 306 (1932). This Court, without discussing the question of legislative intent, has concluded that it can. *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Davis*, 223 N.C. 54, 25 S.E. 2d 164 (1943). This was the context addressed by the language in *State v. Murray*, 310 N.C. 541, 547, 313 S.E. 2d 523, 528 (1984), here relied on by the majority. These cases note that determination of whether the single transaction really constitutes more than one offense or only one offense may require an examination of the various elements involved in the offenses and may ultimately rest on whether each offense has an element the other does not. But once it is established through this test that two or more different criminal offenses have been committed, albeit by only one factual transaction, the double jeopardy prohibition does not preclude punishing each different offense committed if the legislature intended that each be separately punished.

This is not the question presented in this appeal, although the majority sometimes treats the appeal as if it were. The question presented in this appeal may be put as follows: When a defendant is simultaneously convicted of two or more crimes and one of those crimes constitutes an essential element of the other so that without this elemental crime there could be no conviction of the other compound crime, does the double jeopardy prohibition preclude punishing defendant both for the compound crime and the elemental crime. Until *Hunter*, the United States Supreme Court cases relied on by the majority do not answer this question. Except for *Hunter*, these cases do not hold that this question resolves itself to one of legislative intent.

The closest case factually to the one before us is *Whalen v. United States*, 445 U.S. 684, 63 L.Ed. 2d 715 (1980). In *Whalen* defendant was convicted of first degree "felony murder" on the theory that he murdered his victim during the perpetration of a rape. He was also convicted of the rape. He was given consecutive sentences for both the first degree murder and the rape. The

United States Supreme Court held that consecutive sentences could not be imposed for both crimes on the ground "that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape . . . ." *Id.* at 693, 63 L.Ed. 2d at 725, and "[t]he Double Jeopardy Clause *at the very least* precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." *Id.* at 689, 63 L.Ed. 2d at 722 (emphasis supplied). *Whalen* does not hold, indeed it could not have held given its view of congressional intent, that had Congress intended consecutive punishments for both the rape and the murder it would have been constitutionally permissible.

As I have previously noted, *Albernaz* and *Blockburger*, and our own *Murray*, involved situations where one transaction resulted in defendants' convictions of one or more crimes. In none of the cases was one of the crimes an essential element of another. The cases address the question of whether in law one or more crimes were committed and if so whether each crime could be punished separately and cumulatively. The Court looked to see whether each crime had elements not present in the others to answer the first question and to legislative intent to answer the second.

Our felony murder cases provide a perfect analogy for resolving this case and should be considered as controlling it. It has, as the majority concedes, long been the law in this jurisdiction that the state may not punish both for the felony murder and the underlying felony which constitutes an essential element of the felony murder. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983); *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). This result has sometimes been referred to as the "merger rule," or "merger doctrine." *State v. Silhan*, 302 N.C. 223, 262-63, 275 S.E. 2d 450, 478 (1981); *State v. Jeffries*, 55 N.C. App. 269, 290, 285 S.E. 2d 307, 320 (1982). The true basis for the rule, however, lies in the double jeopardy prohibition.

In considering whether to permit the underlying felony of armed robbery in a capital, felony murder prosecution to be considered as an aggravating circumstance, this Court had reason to consider the application of the merger rule in concluding that the

underlying felony, if used to convict defendant of first degree felony murder, could not also be considered as an aggravating circumstance at the sentencing phase. *State v. Cherry,* 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied,* 446 U.S. 941 (1980). For a unanimous Court, Justice, now Chief Justice Branch wrote:

> *Although designed to prevent double jeopardy, a problem with which we are not here confronted, we think the merger rule sheds light on the question before us.* Once the underlying felony has been used to obtain a conviction of first degree murder, *it has become an element of that crime and may not thereafter be the basis for additional prosecution or sentence.* Neither do we think the underlying felony should be submitted to the jury as an aggravating circumstance in the sentencing phase when it was the basis for, and an element of, a capital felony conviction.

Id. at 113, 251 S.E. 2d at 567-68 (emphasis supplied).

Neither do I think, as does the majority, that this Court erred in *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972), when it said, in a felony murder case, that the underlying felony of felonious breaking or entering was a lesser included offense of the felony murder in the sense that it was "an essential and indispensable element in the state's proof of murder committed in the perpetration of the felony of feloniously breaking into and entering that particular dwelling." 280 N.C. at 215, 185 S.E. 2d at 675. This language was quoted with approval and emphasized in *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975).

The reason, of course, that the underlying felony in a felony murder prosecution is a lesser included offense of the felony murder is because once the state has proved the felony murder it has proved all of the elements of the underlying offense and in addition the other elements necessary to prove the felony murder. The underlying felony is a lesser included offense in a felony murder prosecution in the same sense as the joyriding offense was held to be a lesser included offense of auto theft for double jeopardy purposes in *Brown v. Ohio,* 432 U.S. 161, 53 L.Ed. 2d 187 (1977). The Court there said:

> Here the Ohio Court of Appeals has authoritatively defined the elements of the two Ohio crimes: joyriding consists of

> taking or operating a vehicle without the owner's consent, and auto theft consists of joyriding with the intent permanently to deprive the owner of possession. App. 22. Joyriding is the lesser included offense. The prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft; the prosecutor who has established auto theft necessarily has established joyriding as well.

Id. at 167, 53 L.Ed. 2d at 195. The Court in *Brown* held that a defendant who had pled guilty to joyriding could not later be prosecuted for auto theft, saying:

> If two offenses are the same . . . for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings. Unless 'each statute requires proof of an additional fact which the other does not' the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment.

Id. at 166, 53 L.Ed. 2d at 194-95 (citations in original deleted). The Supreme Court then concluded that proof of auto theft necessarily proved joyriding. There were no additional elements of joyriding which were not included in the crime of auto theft. Therefore both offenses were the same, and both successive prosecutions and double punishment were prohibited by the Double Jeopardy Clause.

In *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978), defendant kidnapped two women, forced them at gunpoint to a deserted place where he then robbed both, shot one—causing serious injury but not death—and raped the other. He was convicted at one trial of kidnapping, rape, armed robbery, and felonious assault. One of the questions in the case was whether he could be sentenced for all crimes, the sentences to be served consecutively. The argument was made that the robbery, the rape and the assault were essential elements required to prove "aggravated" kidnapping under the kidnapping statute as it was then written. We concluded that these felonies were not elements of

kidnapping nor were they sentence-enhancing factors. Defendant, we concluded under the statute as it was then written, could have been given the same punishment for kidnapping whether or not these other offenses had occurred, unless defendant could have proved certain mitigating factors then provided for in the statute.

Importantly in *Williams* this Court acknowledged as valid the principle relied on by defendant "that when a criminal offense in its entirety is an essential element of another offense a defendant may not be punished for both offenses. . . ." *Id.* at 659, 249 S.E. 2d at 713. The Court went on to say:

> This principle is frequently applied in felony-murder cases when the underlying felony is used as an essential element of first degree murder. In such cases punishment for the murder precludes punishment also for the underlying felony. (Citations omitted.) The principle, however, is not limited to felony murder, but applies in any situation in which one criminal offense is in its entirety an essential element of another offense. *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66 (1967). The basis for each application is the constitutional prohibition against double jeopardy. Amends. V and XIV, U.S. Const.; Art. I, § 19, N.C. Const. *See* cases cited in 4 N.C. Index 3d, Criminal Law, §§ 26-26.9.

Id., n. 3.

In *Midyette* two indictments were consolidated for trial. In one, No. 483, defendant was charged with the felonious assault of one W. I. Robertson by shooting him with a .22 caliber pistol. In the second case, No. 484, defendant was charged with resisting a public officer, to wit, W. I. Robertson, while in the discharge of his duty "by firing at and hitting the said officer with bullets from a .22 caliber pistol." Defendant was convicted and sentenced on both offenses. On appeal, this Court arrested judgment in the resisting arrest case. The Court said that having been convicted of the felonious assault against Robertson, defendant "could not thereafter be lawfully indicted, convicted and sentenced a second time for that offense, or for any other offense of which it, in its entirety, is an essential element." 270 N.C. at 233, 154 S.E. 2d at 70. The Court went on to say that the state by its allegations in the indictments had made the assault case an essential element of the resisting arrest case, saying:

> By the allegations it elects to make in an indictment, the state may make one offense an essential element of another, though it is not inherently so, as where an indictment for murder charges that the murder was committed in the perpetration of a robbery. In such a case, a showing that the defendant has been previously convicted, or acquitted, of the robbery so charged will bar his prosecution under the murder indictment. *State v. Bell*, 205 N.C. 225, 170 S.E. 2d 50.

Id. Finally, the Court noted that under the indictments by which defendant was tried

> the State could not convict the defendant of resistance of a public officer in the performance of his duty without proving the defendant guilty of the exact offense [the felonious assault] for which he has been convicted and sentenced [in the assault case].

Id. at 234, 154 S.E. 2d at 70.

The above authorities of this Court should control this case. Here, the breaking or entering was an essential element of the felonious larceny. Without it, defendant could not have been convicted of felonious larceny, assuming, as we must, that this was the theory of felonious larceny upon which the jury relied. Consequently, the state may not punish defendant for both the felonious larceny and the felonious breaking or entering.

To me, it simply makes no sense to say that the constitutional double jeopardy prohibition provides no check on legislative but only on judicial power. If, as the United States Supreme Court has said many times, and as the majority here acknowledges, the double jeopardy prohibition means that the state cannot punish more than once for a single offense, this must mean that the legislature cannot authorize courts to punish more than once for a single offense. I would so interpret this state's constitution, notwithstanding what the United States Supreme Court has held with regard to the federal constitution.

The expression that the double jeopardy prohibition applies more to the courts than it does to the legislature arises from the fact that only courts punish for crime. The legislature defines crimes and sets punishments, but it does not punish. Since only

courts punish, the prohibition against double punishment must of necessity be directed more to courts than to the legislature. The expression means that courts must not apply legislatively prescribed punishments so as, in effect, to punish more than once for a single offense. It does not mean that the legislature is free to authorize the courts to punish more than once for a single offense.

Under our precedents when one crime, the elemental crime, is used as an essential element to prove another compound crime, which could not be proved without this element, and defendant is convicted simultaneously of both the compound crime and the elemental crime, both convictions cannot stand and be separately punished. To do so, this Court has consistently held, is to convict and punish for the elemental crime twice—a violation of the double jeopardy prohibition. These holdings seem eminently sound to me.

Even if the majority's position that the double jeopardy question resolves itself into one of legislative intent is adopted, I find no evidence in the statutes of any legislative intent to authorize punishment for both felonious larceny and felonious breaking when the latter constitutes an essential element of the former. In *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535 (1983), upon which the majority primarily relies, the Missouri legislature had expressly authorized punishment for the primary felony ["armed criminal action"] and additional punishment for the elemental felony ["first degree robbery"]. I do not think we should, as the majority does, imply from the statutory history of the larceny and breaking statues a legislative intent to authorize punishment for the felonious larceny and in addition punishment for the felonious breaking which forms an essential element of the larceny. The breaking and larceny statutes were passed, or amended, before *Missouri v. Hunter* was decided when decisions of both this Court and the United States Supreme Court provided no support for the notion that the legislature could authorize punishment for a primary offense and additional punishment for an offense forming an essential element thereof. It seems clear to me that when the larceny and breaking statutes were passed and amended, our legislature would not have thought it had the power to authorize punishment for both felonious larceny and felonious breaking when the latter was an essential element of the former. Not

thinking it had the power, it would not have intended to exercise it.

The majority argues that this Court has "approved multiple punishments" for breaking or entering when this crime is an essential element of felonious larceny, *i.e.*, that punishment may be imposed both for the breaking offense and the larceny offense when defendant is tried and convicted of both at the same trial and the former is an essential element of the latter. It then argues that since the legislature has acquiesced in this Court's "approval," it must intend the result we approved.

The majority relies solely on *State v. Morgan*, 265 N.C. 597, 144 S.E. 2d 633 (1965), for the proposition that our Court has heretofore approved the result it reaches today. In *Morgan* defendant was indicted in one count of the bill for felonious breaking or entering a certain storehouse and in another count with the larceny of goods of less than $200 in value. He entered pleas of guilty to both counts. He was sentenced in the breaking case to not less than two nor more than four years and received a similar sentence in the larceny case, the latter to begin at the expiration of the former. Defendant's sole contention on appeal was that the sentences imposed were excessive and harsh and "unwarranted by the true spirit of the statute." This Court, in a *per curiam* opinion, affirmed the judgments, saying simply:

> Under the provisions of G.S. 14-54, the crime charged in the first count, to which defendant pleaded guilty, is punishable by a sentence in prison of four months to ten years.
>
> The crime charged in the second count in the bill of indictment, to wit, larceny of property from a storehouse, with felonious intent, *et cetera*, is a felony as at common law, without regard to the value of the property stolen. *S. v. Cooper*, 256 N.C. 372, 124 S.E. 2d 91.
>
> The court below could have imposed a maximum sentence of ten years on each count.
>
> There is no merit in defendant's contention, and the sentences imposed by the court below will be upheld.

Id. at 598, 144 S.E. 2d at 633.

Morgan is too slender a reed to support the majority's legislative-acquiescence-in-judicial-approval theory. First, there was no contention in *Morgan* that the sentences imposed violated the double jeopardy prohibition. Second, defendant entered pleas of guilty to the crimes charged. It was not, therefore, incumbent upon the Court to determine upon which theory defendant might have been convicted of felonious larceny had he not pled guilty.

> A defendant, nothing else appearing, pleads guilty to a charge contained in a bill of indictment not to a particular legal theory by which that charge may be proved. His plea waives his right to put the state to its proof. It obviates the necessity for the state's invocation of some particular legal theory upon which to convict defendant. The question of which theory, if there is more than one available, upon which defendant might be guilty does not arise. His plea of guilty means, nothing else appearing, that he is guilty upon any and all theories available to the state.

State v. Silhan, 302 N.C. 223, 263, 275 S.E. 2d 450, 478 (1981). Finally, the result in *Morgan,* insofar as it stood for the proposition that the larceny count in the bill of indictment was sufficient to charge a felony, was overruled in *State v. Jones,* 275 N.C. 432, 168 S.E. 2d 380 (1969).

Justices MARTIN and FRYE join in this dissenting opinion.

GARY RAYMOND HENRY v. RUFUS L. EDMISTEN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NORTH CAROLINA; J. RUSSELL NIPPER, IN HIS OFFICIAL CAPACITY AS CLERK OF SUPERIOR COURT OF WAKE COUNTY; MAUDE P. HOCUTT, IN HER OFFICIAL CAPACITY AS A MAGISTRATE IN WAKE COUNTY; AND R. W. WILKINS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES

STEVE HERROD BARBEE v. RUFUS L. EDMISTEN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NORTH CAROLINA; J. RUSSELL NIPPER, IN HIS OFFICIAL CAPACITY AS CLERK OF SUPERIOR COURT OF WAKE COUNTY; AND R. W. WILKINS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES

No. 550PA84

(Filed 18 February 1986)

1. **Automobiles and Other Vehicles § 2.4— driving while impaired—failure of breath analysis test—ten-day license revocation—due process**

The statute providing for a mandatory, prehearing ten-day license revocation for drivers charged with an impaired driving offense who *fail* a breath analysis test, N.C.G.S. § 20-16.5, does not violate the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution because the state's compelling interest in highway safety outweighs the private interests involved and any risk of erroneously depriving those interests and justifies the state's immediate suspension of a person's driver's license pending the outcome of prompt postsuspension review.

2. **Constitutional Law § 23— prompt remedial action by state—law of the land**

When the furtherance of a legitimate state interest requires the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state's interest, the law of the land ordinarily requires no more than that before such action is undertaken, a judicial officer determine there is probable cause to believe that the conditions which would justify the action exist.

3. **Automobiles and Other Vehicles § 2.4; Constitutional Law § 23— driving while impaired—failure of breath analysis test—ten-day license revocation—Law of the Land Clause**

The statute providing for a mandatory, ten-day license revocation for drivers charged with an impaired driving offense who fail a breath analysis test does not violate the Law of the Land Clause of Art. I, § 19 of the N. C. Constitution since the summary ten-day license revocation is a remedial measure reasonably related to the state's interest in highway safety and a detached and impartial judicial officer must scrutinize every condition of revocation to determine if there is probable cause to believe each condition has been met before revocation can occur.

4. **Automobiles and Other Vehicles § 2.4; Constitutional Law § 20— driving while impaired—failure of breath analysis test—ten-day license revocation—equal protection**

The statute providing for a mandatory, ten-day license revocation for drivers charged with an impaired driving offense who fail a breath analysis test does not violate equal protection rights guaranteed by the state and federal constitutions because the legislature's decision to revoke at the time of arrest the licenses of probably impaired drivers but not other traffic offenders bears a rational relationship to the state's legitimate interest in highway safety.

5. **Automobiles and Other Vehicles § 2.4— driving while impaired—unlicensed driver—ten-day revocation—inapplicability to new license**

The portion of N.C.G.S. § 20-16.5 providing that if the person is not currently licensed "the revocation continues until 10 days from the date the revocation order is issued and the person has paid the applicable costs" means that the revocation continues until the person has paid the applicable costs and at least ten days have elapsed from the date the revocation order is issued. The statute did not authorize the clerk of court to extend the revocation period to plaintiff's new license when he appeared to pay the restoration fee well after ten days from the date revocation of his license was ordered.

6. **Automobiles and Other Vehicles § 2.4; Criminal Law § 138.1— driving while impaired—summary revocation proceeding not punishment**

The statute providing for a mandatory, ten-day license revocation for drivers charged with an impaired driving offense who fail a breath analysis test does not violate Art. XI, § 1, of the N. C. Constitution, which sets forth permissible punishments, since the summary revocation procedure of the statute is not a punishment but a highway safety measure.

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

ON discretionary review of a judgment entered by *Barnette, J.*, at the 4 October 1984 Civil Session of WAKE County Superior Court. We certified this cause for review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31 and N.C. R. App. P. 15(e)(1).

Van Camp, Gill and Crumpler, P.A., by William B. Crumpler and Sally H. Scherer for plaintiff appellees.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for defendant appellants.

EXUM, Justice.

The Safe Roads Act of 1983, 1983 N.C. Sess. Laws ch. 435, provides for a mandatory, prehearing ten-day license revocation

for drivers charged with an impaired driving offense who fail a breath analysis test. *Id.* at § 14 (codified at N.C.G.S. § 20-16.5 (1983)). The questions presented by this appeal are whether this statute violates (1) the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and (2) the corresponding Law of the Land and Equal Protection Clauses of Article I, section 19 of the North Carolina Constitution. Because we conclude that the state's compelling interest in public safety justifies the state's immediate suspension of a person's driver's license pending the outcome of prompt postsuspension review, we hold the statute does not violate the Due Process Clause. The statute also does not violate the Law of the Land Clause because a detached and impartial judicial officer must scrutinize every condition of revocation to determine if there is probable cause to believe each condition has been met before revocation can occur. Concluding that the revocation statute does not unreasonably single out for different treatment drivers who are charged with impaired driving offenses from drivers who are charged with other traffic offenses, we also hold the statute does not infringe equal protection rights.

I.

The Safe Roads Act (the "Act") provides:

> A person's driver's license is subject to revocation under this section if:
>
> (1) A law-enforcement officer has reasonable grounds to believe that the person has committed an offense subject to the implied-consent provisions of G.S. 20-16.2;
>
> (2) The person is charged with that offense as provided in G.S. 20-16.2(a);
>
> (3) The charging officer and the chemical analyst comply with the procedures of G.S. 20-16.2 and G.S. 20-139.1 in requiring the person's submission to or procuring a chemical analysis; and
>
> (4) The person:
>
> . . .
>
> b. Has an alcohol concentration of 0.10 or more within a relevant time after the driving.

N.C.G.S. § 20-16.5(b) (1983).[1]

Other provisions of the Act provide as follows: If a person has an alcohol concentration of 0.10 or more within a relevant time after driving, the charging officer and a chemical analyst must execute a revocation report. § 16.5(c). The revocation report must contain a written statement of facts indicating each condition of revocation stated above has been met. § 16.5(a)(4). This revocation report must be filed with a judicial officer. § 16.5(d)(1).

After the revocation report is filed, the judicial officer upon the licensee's request must hold a hearing to determine if there is probable cause to believe that the conditions for revocation have been met. If the judicial officer determines that such probable cause exists, the judicial officer must enter an order revoking the person's driver's license. § 16.5(e). The revocation period begins at the time the revocation order is issued and continues until the person's license has been surrendered for ten days and the person has paid a $25 restoration fee unless the person is not currently licensed. In that case the revocation continues until ten days from the date the revocation order is issued and the person has paid the $25 fee. *Id.*

A person whose license has been revoked may request in writing a hearing to contest the validity of the revocation. The request for the hearing must specify the grounds upon which the validity of the revocation is challenged. A person specifically may request that the hearing be conducted by a district court judge. If the person does not request that the hearing be conducted by a district court judge, a magistrate conducts the hearing. The revocation remains in effect pending the hearing but the hearing must be held and completed within three working days following the request if the hearing is before a magistrate, or within five working days if the hearing is before a district court judge. § 16.5(g).

At the conclusion of the hearing, the presiding judicial officer must enter an order sustaining or rescinding the revocation. The decision of the judicial officer is final and may not be appealed in

1. All other statutes referred to in this opinion are in Chapter 20 of the General Statutes of North Carolina. Further statutory references will be to section numbers within Chapter 20.

the General Court of Justice. *Id.* Although appeal is prohibited, the presiding judicial officer may issue a modified order if he determines that an order has been issued improvidently. § 16.5(n).

License revocation proceedings are civil actions and must be identified by the caption "In the Matter of ____________." § 16.5(o).

II.

On 23 December 1983 plaintiff Gary Raymond Henry was arrested in Wake County and charged with impaired driving. On 25 January 1984 plaintiff Steven Herrod Barbee was likewise arrested and charged. Plaintiffs Henry and Barbee submitted to having their breath analyzed by a breath-testing machine known as the Intoxilyzer. Breath analysis showed that both men had an alcohol concentration of 0.10. Pursuant to the Act a revocation report on each man was properly filed and an order revoking each man's license was entered. Plaintiff Henry surrendered his license on 23 December 1983. Because plaintiff Barbee's license was expired at the time he was arrested, the arresting officer seized his license as evidence. Neither plaintiff requested a hearing to contest the validity of revocation.

On 30 December 1983 plaintiff Henry obtained a temporary restraining order requiring the clerk of superior court to return his license to him. At the hearing on the issuance of the restraining order it was stipulated that if Henry were present he would testify he was a traveling salesman who depended upon his driving privileges to maintain his livelihood. He would have testified further he had already suffered inconvenience and expense because of the revocation and would continue to suffer harm if the revocation was not suspended. On 9 April 1984 Henry filed a complaint seeking a declaratory judgment that the order revoking his license was unconstitutional.

Although Barbee never paid the $25 restoration cost, in March 1984 he applied for and, due apparently to clerical error, received a new driver's license. After learning he was required to pay a restoration fee in order to have his driving privileges reinstated, Barbee appeared before the clerk on 25 May 1984 to pay the $25 fee. The clerk seized Barbee's newly acquired license and informed him the new license would remain revoked for ten days.

Barbee obtained a temporary restraining order staying revocation. At the hearing on the issuance of the restraining order, it was stipulated that if Barbee were present, he would testify he needed his license to get to and from work and to accomplish matters essential to his health and welfare. On 25 May 1984 Barbee also filed a declaratory judgment action contesting the constitutionality of the order revoking his license.

The two actions were consolidated for hearing before Superior Court Judge Henry V. Barnette, Jr. The superior court concluded that the ten-day pretrial revocation provision of § 16.5 deprived plaintiffs of an interest in property in contravention of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Law of the Land Clause of Article I, section 19 of the North Carolina Constitution. The superior court entered an order enjoining the state from revoking the plaintiffs' drivers' licenses.

The superior court employed a three-factor balancing test used in *Matthews v. Eldridge*, 424 U.S. 319, 47 L.Ed. 2d 18 (1976), to resolve the due process issue. These factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 47 L.Ed. 2d at 53. The superior court concluded that plaintiffs had a substantial interest in continued possession of their driving privileges pending the outcome of the hearing due them. It also determined there was a substantial risk of error under the challenged procedures. It found that breath-testing machines have a margin of error of 10 percent and "there are means by which a defendant can challenge the validity" of test results. The superior court concluded as to the third factor that the fiscal and administrative burdens that additional or substitute procedures would entail were minimal. And although the state has a substantial interest in highway safety, this interest could be served by less drastic means than revoking a person's driver's

license for ten days. For example, a 24-hour revocation would be sufficient to insure highway safety.

Because the superior court struck down the revocation provision of § 16.5 on constitutional grounds, the court did not reach the merits of plaintiffs' argument that the statute was an unconstitutional punishment under the North Carolina Constitution. It did note, however, this argument "has merit."

We granted discretionary review on 12 December 1984 and now reverse.

III.

[1] The Law of the Land Clause is the parallel provision in the state constitution to the Due Process Clause of the Fourteenth Amendment of the federal constitution. A decision by the United States Supreme Court interpreting the Due Process Clause is not binding on this Court when interpreting the law of the land. *Watch Co. v. Brand Distributors*, 285 N.C. 467, 206 S.E. 2d 141 (1974); *Horton v. Gulledge*, 277 N.C. 353, 177 S.E. 2d 885 (1970), *overruled on other grounds, State v. Jones*, 305 N.C. 520, 290 S.E. 2d 675 (1982). We would employ a different method for deciding what procedural safeguards are due under the Law of the Land Clause to a person deprived of a protected interest than the United States Supreme Court has proposed for deciding similar questions under the Due Process Clause. Accordingly, we will first decide whether the license revocation procedure of the Safe Roads Act comports with federal due process. Next we will measure that procedure against the requirements of our state's Law of the Land Clause.

A.

No process is due a person who is deprived of an interest by official action unless that interest is protected by law, *i.e.*, unless it is an interest in life, liberty or property. The state concedes, as it must, that plaintiffs possess a protected property interest in their licenses. *See Bell v. Burson*, 402 U.S. 535, 29 L.Ed. 2d 90 (1971). One issue for us to decide, then, is whether the process provided by the ten-day revocation statute comports with the minimum standard of federal constitutional due process. In order to decide this issue we must employ the same three-factor balancing test relied upon by the superior court.

The United States Supreme Court relied upon this balancing test in *Mackey v. Montrym*, 443 U.S. 1, 61 L.Ed. 2d 321 (1979), to determine the validity of a Massachusetts statute which authorized prehearing revocation of licenses of persons who refused to submit to a breath analysis test. Although North Carolina's revocation procedure differs from Massachusetts' procedure in some ways, the two schemes are similar in many important respects.

Massachusetts revokes licenses only for test refusals. North Carolina revokes licenses if test results satisfy a judicial officer there is probable cause to believe, among other things, the person had a blood alcohol concentration of 0.10 or more. Furthermore, multiple postrevocation review is available in Massachusetts. A person whose license is revoked there has the right to a hearing before the revoking body, the registrar. Mass. Gen. Laws Ann. ch. 90, § 22(a) (West Supp. 1985). Unfavorable decisions in that body can be appealed to another administrative body, the board of appeal, *id.*, ch. 90 § 28, and ultimately to the courts. *Id.*, ch. 30A § 14. Although a person whose license is revoked in North Carolina has the right to a postsuspension hearing before a judicial officer, the decision of that judicial officer is final. A practical reason exists for the absence in North Carolina of the right of appeal from the decision of the hearing officer. The revocation period in Massachusetts is ninety days, *Mackey v. Montrym*, 443 U.S. at 12, 61 L.Ed. 2d at 330. The revocation period in North Carolina is only ten days. § 16.5(e). Assuming no extraordinary relief staying the revocation is obtained, the revocation period in North Carolina would be over before any meaningful appeal could be prosecuted.

Prompt postsuspension review is available both in Massachusetts and in North Carolina. In Massachusetts a postsuspension hearing is available immediately following revocation and a decision can be obtained, taking into account the possibility of weekends, within seven to ten days. *Mackey v. Montrym*, 443 U.S. at 7-8, n. 5, 61 L.Ed. 2d at 328. In North Carolina a decision can be obtained, taking into account the possibility of weekends, in less than a week. A hearing must be held and completed within five working days (three if the hearing is conducted by a magistrate rather than a district court judge) following revocation. § 16.5(g).

The United States Supreme Court upheld Massachusetts' revocation procedure using the balancing test mentioned above.

The Court held, "We conclude, as we did in *Love*, that the compelling interest in highway safety justifies the Commonwealth in making a summary suspension effective pending the outcome of the prompt postsuspension hearing available." *Mackey v. Montrym*, 443 U.S. at 19, 61 L.Ed. 2d at 335. We are satisfied that North Carolina's revocation procedure is not so dissimilar from that employed by Massachusetts and upheld in *Mackey* that it would alter the balance struck in that case in favor of constitutionality.

1.

The first factor that must be weighed is the private interest affected by the challenged official action. Here, as in *Mackey*, the private interest affected is a driver's privilege to operate a motor vehicle. More particularly, it is the driver's interest in continued possession and use of his driver's license pending the outcome of the hearing the driver is due. *Id.* at 11, 61 L.Ed. 2d at 330. This interest is not insubstantial because a license suspension can be shortened but cannot be undone. The state does not make a driver whole for any personal inconvenience and economic hardship suffered during a delay between erroneous deprivation and postsuspension restoration of driving privileges.[2]

Several factors affect the weight of the driver's interest in continuous use of driving privileges. One is the maximum revocation period. *Id.* at 12, 61 L.Ed. 2d at 331. The longer the suspension period the greater the private interest in being licensed. North Carolina provides for an abbreviated revocation period of only 10 days. A person could obtain alternate transportation, take vacation from work and reschedule appointments to make up for the loss of the person's driving privileges during that short period.

In *Mackey* the United States Supreme Court held that the private interest involved in that case was less substantial than the private interest involved in *Dixon v. Love*, 431 U.S. 105, 52 L.Ed. 2d 172 (1977). In *Love* the Court upheld the constitutionality of a statute authorizing the state to suspend summarily for up to

2. The superior court found here, for example, that plaintiffs Henry and Barbee had suffered damages to their businesses, inconvenience and expense and would continue to do so until their licenses were reinstated.

twelve months repeat traffic offenders' licenses without a preliminary hearing. The Court in *Mackey* reasoned that Massachusetts' procedure authorized suspension for only ninety days while the Illinois procedure involved in *Love* permitted suspension for as long as one year. The private interest involved in the case before us is even less substantial than that involved in *Mackey* as the maximum length of revocation here is ten days. And while the maximum revocation period is ten days, the maximum period of actual, wrongful deprivation is even shorter because of the availability of prompt postsuspension review.

The timeliness of postsuspension review is another factor bearing on the weight of the private interest in being licensed. *Mackey v. Montrym*, 443 U.S. at 12, 61 L.Ed. 2d at 330-31. Prompt postsuspension review is available in North Carolina. Section 16.5(e) requires that a judicial officer must at the time the judicial officer orders a person's license revoked personally inform the person of the person's right to a hearing at which the person may contest the validity of the revocation. The hearing must be completed within three working days following a request for such hearing (or within five working days following a request for a hearing before a district court judge). If a requested hearing is not held and completed within the prescribed time, the judicial officer who ordered revocation must enter another order revoking it. § 16.5(g).

Plaintiffs observe that no limited driving privilege for driving to work, alcohol rehabilitation or elsewhere is available under North Carolina procedure. The existence or absence of hardship relief is one factor affecting the weight of the private interest in licensing. *See Dixon v. Love*, 431 U.S. 105, 52 L.Ed. 2d 172. The United States Supreme Court indicated in *Mackey*, however, the existence of such relief is not the "controlling" factor in deciding a statute's constitutionality. *Mackey*, 443 U.S. at 12, 61 L.Ed. 2d at 330. The Court distinguished the procedure involved in *Love*, which made a limited driving privilege available, from the one at issue in *Mackey*, which provided no hardship relief.

> The bearing such provisions [for hardship relief] had in *Love* stemmed from the delay involved in providing a postsuspension hearing. Here, unlike the situation in *Love*, a postsuspension hearing is available *immediately* upon a driver's

> suspension and may be initiated by him simply by walking into one of the Registrar's local offices and requesting a hearing. The *Love* statute, in contrast, did not mandate that a date be set for a postsuspension hearing until 20 days after a written request for such a hearing was received from the affected driver.

Mackey v. Montrym, 443 U.S. at 12, 61 L.Ed. 2d at 330-31. In this case as in *Mackey* prompt postsuspension review is available. The presence of such review reduces the need for hardship relief and together with the brevity of the suspension period reduces the actual weight of the private interest in continuous use and possession of one's driver's license pending the outcome of the hearing.

2.

The second step in the balancing test requires us to weigh the risk of erroneous deprivation of the private interest as a result of the procedures used and the probable value of additional procedural safeguards. Due process does not mean, however, that governmental decision making must comply with standards that assure error-free determinations. *Mackey v. Montrym*, 443 U.S. at 13, 61 L.Ed. 2d at 331. Some process short of an evidentiary hearing sometimes will be sufficient to permit the state to take adverse administrative action. When, as in this case, prompt post-deprivation review is available, what is generally required is no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for determining that the facts justifying the official action are as a responsible government official warrants them to be. *Id.*

We believe North Carolina's predeprivation procedure provides a reasonably reliable basis for determining that the facts justifying revocation are as alleged by the revoking authority. Cause exists for license revocation in North Carolina if: (1) A person is arrested and charged with an impaired driving offense; (2) the charging officer and the chemical analyst who administers the breath test to the person charged comply with statutorily prescribed procedures for breath testing; and (3) the person has an alcohol concentration of 0.10 or more or refuses to submit to breath testing. § 16.5(b). If cause for revocation exists, the charging officer and chemical analyst must expeditiously execute and file a revocation report with a judicial officer. § 16.5(c). The

report must contain a sworn statement of facts indicating the conditions of revocation have been met. § 16.5(a)(4). The judicial officer must determine if there is probable cause to believe that each condition of revocation has been met. If the judicial officer finds such probable cause, he must enter an order revoking the person's driver's license.

The facts of arrest surrounding the impaired driving charge as well as compliance with chemical analysis procedures, the first two conditions of revocation, are both matters within the personal knowledge of the reporting officer. That officer must swear to the truthfulness of the matters in the revocation report. Although, as the dissenters in *Mackey* pointed out, the police version of a disputed encounter between the police and a private citizen may not be inherently reliable, 443 U.S. at 24, 61 L.Ed. 2d at 338, North Carolina's procedure provides an additional check on police excess not found in *Mackey*. Before revocation can take place in North Carolina, a detached and impartial judicial officer must scrutinize every condition of revocation to determine if there is probable cause to believe each condition has been met, including the required blood alcohol content. This probable cause hearing provides a more meaningful process to a driver than the "informal opportunity" granted in *Mackey* for a driver to tell his or her side of the story to the police. *Mackey*, 443 U.S. at 14, 61 L.Ed. 2d at 332.

The superior court apparently found no inherent risk of error in North Carolina's presuspension procedure insofar as that procedure is used to determine whether the first two conditions of revocation are present. The superior court ruled, however, that "there is an appreciable risk, if not a substantial risk, of an erroneous deprivation" of plaintiffs' interests, insofar as that procedure is used to determine whether a person has an alcohol concentration of 0.10. The superior court found as fact that breath-testing machines have a margin of error of approximately 10 percent. There are means, the superior court further found, of challenging the validity of a breath test. Plaintiffs point out in this connection that a person's attorney could examine the preventive maintenance logs kept on the breath machines used to test a person. Witnesses present when the person was drinking also could be consulted to determine if the test results were consistent with the amount of alcohol the person claims to have drunk.

Although such means to challenge the validity of a breath test exist, the superior court found the Safe Roads Act provides no presuspension opportunity to challenge these results. The superior court concluded that given time to accumulate evidence and a meaningful hearing, a person who registers a 0.10 alcohol concentration during breath testing could demonstrate his actual alcohol concentration was lower.

We think the district court overstated the risk of error inherent in the revoking authority's initial reliance on unchallenged breath-test results. In *State v. Shuping*, 312 N.C. 421, 323 S.E. 2d 350 (1984), this Court addressed a concern similar to that expressed by the superior court in this case. In *Shuping* the defendant argued that because breath-test results may deviate by as much as 10 percent when the machine is operating properly, her alcohol concentration could have been 0.09 rather than 0.10 as reported. We observed that before a person's breath is analyzed, a procedure "in the nature of a control test" is employed. *Id.* at 427, 323 S.E. 2d at 354. The breath-testing machine operator introduced into the machine a sample of air from a jar containing a known solution of 0.10 alcohol. If the machine yields the expected reading or deviates by 10 percent *below* the expected reading, the machine may be used to take defendant's actual breath sample. The machine may not be used if it deviates by more than 10 percent under the expected reading. *No* deviation *above* the expected reading is permitted. *Id.* at 427-28, 323 S.E. 2d at 354. "Consequently, any 'error,' if error there be, [is] fully in favor of defendant." *Id.* at 430, 323 S.E. 2d at 355. We also observed in *Shuping*:

> Courts in several states have reviewed the accuracy and reliability of breath-testing devices . . . 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).

Shuping, 312 N.C. at 431, 323 S.E. 2d at 355-56.

In *Heddan v. Dirkswager*, 336 N.W. 2d 54 (Minn. 1983), the Minnesota Supreme Court considered a challenge to Minnesota's

prehearing license revocation statute. Minnesota, like North Carolina, revokes licenses of drivers who fail a breath test. *Id.* at 61. The Minnesota Supreme Court used the three-factor balancing test to determine the constitutionality of Minnesota's revocation procedure. The appellants in *Heddan* attempted to distinguish Minnesota's revocation statute from the Massachusetts statute upheld in *Mackey.* They argued the risk of erroneous deprivation of a license due to the "infinite possibilities of error" inherent in breath testing was a significant difference in the two state's statutes. *Id.* The court rejected this contention. It observed:

> This court has previously considered the reliability of Breathalyzer testing. In *State v. Quinn,* 289 Minn. 184, 186, 182 N.W. 2d 843, 845 (1971), we stated:
>
> > It is generally held that the alcoholic content of the blood may be reliably determined by such a test, and testimony of the reading obtained upon a properly conducted test may be admitted without antecedent expert testimony that the reading is a trustworthy index of alcohol in the blood.
>
> (Citations omitted.)
>
> Three experts testified for the state as to the accuracy and reliability of the Breathalyzer test. Mr. Richard Prouty, Chief Forensic Toxicologist, Office of Medical Examiner, State of Oklahoma, noted that:
>
> > [T]he Breathalyzer and its various models are and have been internationally accepted and recognized as a reliable evidentiary device for determining blood alcohol content.
>
> Mr. Lowell Van Berkom, BCA Laboratory Director, stated:
>
> > [T]he use of the Breathalyzer Model 900 and 900A in accordance with this Breathalyzer operational checklist 21-step procedure provide a highly accurate and scientifically acceptable result of breath analysis for alcohol.
>
> Mr. Phillip L. Neese, supervisor of the chemical testing unit for the Minneapolis Police Department, noted that 'the Breathalyzer was an accurate instrument, but that the readings were slightly *lower* than blood tests.' (Emphasis added.)

Heddan v. Dirkswager, 336 N.W. 2d at 61-62.

No machine, of course, in infallible. A presuspension hearing in which a person is permitted to offer evidence challenging breath-test results may reduce even further the already insubstantial risk that a person's alcohol concentration was not at least 0.10 as reported. We believe, nevertheless, that breath-test results are not so inherently erroneous that additional procedural safeguards, such as a predeprivation evidentiary hearing, would contribute appreciably to the truth finding process. The prerevocation procedure of the Safe Roads Act, including its initial reliance on the results of breath testing, provides at least a reasonably reliable basis for determining that the conditions required for revocation are met.

3.

The third and final factor that must be weighed is the state's interest served by the summary procedure used, including the state function involved and the fiscal and administrative burdens that would result from additional procedures argued to be necessary.

The ten-day revocation prescribed by § 16.5 promotes the state's important police function of protecting the safety of its people. States have broad authority to adopt summary procedures to protect public health and safety. *Mackey v. Montrym*, 443 U.S. at 17, 61 L.Ed. 2d at 334. If as in *Mackey* the state's interest in public protection was served by summary suspension of drivers' licenses of persons who refused to take a breath test, public protection should be furthered even more by suspending the licenses of persons whose test results show them to have a prohibited blood alcohol concentration.

The state's interest in public protection is primarily served by the summary procedure's removing a person from the streets and highways when there is probable cause to believe the person presents a hazard to the safety of himself and other wayfarers. *Id.* at 18, 61 L.Ed. 2d at 334. The summary and automatic character of revocation is reasonably related to the statute's purpose. If no such prehearing suspension were available, the driver would continue as a threat to lives and property during the time after the driver's arrest for impaired driving and before the driver was afforded a revocation hearing.

Plaintiffs contend, however, that a ten-day suspension is not reasonably related to the state's interest in shielding the public from the danger posed by a driver who fails a breath test. They argue the revocation period is both too long and too short. They say a ten-day revocation is unnecessarily long if the purpose is to protect the public from the hazards of an impaired driver on the particular occasion for which he is arrested. Plaintiffs suggest a twenty-four hour revocation would be sufficient to achieve this purpose. On the other hand, they argue a ten-day revocation is too short to protect the public from future incidents of impaired driving by the same driver. A longer suspension would be necessary for this purpose.

Although one purpose of summary license revocation is to safeguard the public from an impaired driver on the particular occasion on which the driver is arrested, the revocation has a broader purpose. The statute authorizing revocation assumes implicitly that drivers who have driven impaired on one occasion pose an appreciable risk of repeating their conduct. We cannot say this assumption is so unreasonable as to prevent the state from summarily suspending a person's driving privileges.[3] Because one purpose of revocation is to protect the public from potential future incidents of impaired driving, the revocation period is not excessive.

Plaintiffs, however, have no cause to complain the suspension period is not long enough. The ten-day revocation period protects against future incidents of impaired driving in the period immediately following arrest. This short revocation serves as an in-

3. The National Transportation Safety Board reports that 30 percent of the 773,000 drunk driving convictions each year are repeat offenders. National Transportation Safety Board, *Deficiencies in Enforcement, Judicial, and Treatment Programs Related to Repeat Offender Drunk Drivers,* Report No. NTSB/33-84104 (1984).

A study prepared for the National Highway Traffic Safety Administration using North Carolina data through 1974 predicted that almost 8 percent of persons with a previous conviction for impaired driving would be involved in an alcohol related *crash* in the following year. These persons presented a risk twenty-one times greater than that of the general population as a whole of being involved in such a crash. These predictions proved to be substantially valid. *See* J. Lacey, J. Stewart, F. Council, 1 Techniques for Predicting High-Risk Drivers For Alcohol Countermeasures (1979) (available at University of North Carolina Highway Safety Research Center).

terim highway safety measure until after a person is afforded a trial. At that time further protection of the public is available. Section 17 provides for a one-year license suspension following an impaired driving conviction. The duration of this stop-gap protection is especially appropriate in light of the summary procedure through which it is imposed. We believe the ten-day revocation is well tailored to the state's interest in the summary procedure employed.

Finally, in connection with the state's interest in the summary revocation procedure, the United States Supreme Court has observed that a presuspension hearing would also impose a substantial fiscal and administrative burden on the state. The availability of such a hearing would encourage frivolous requests for hearings. Drivers would have a significant incentive to demand such a hearing as a dilatory tactic to maintain possession of their driving privileges. *Mackey v. Montrym*, 443 U.S. at 18, 61 L.Ed. 2d at 334-35.

After balancing the Act's procedures for revoking a person's driver's license, we conclude the state's compelling interest in highway safety outweighs the private interests involved and any risk of erroneously depriving those interests. We hold the Act's prehearing suspension provisions do not deprive plaintiffs of property without due process of the law.

B.

We are not satisfied with using a balancing test as a gauge to determine what procedural steps our state's Law of the Land Clause requires before the state may deprive a person of a protected interest. The balancing test is open to several objections. First, it makes the decision making process unduly responsive to the subjective notions of the decision makers. Each court must make its own assessment of the weight to be afforded the private interest, the state's interest and the value of additional procedures. Second, infusion of this subjectivity into the decision making process necessarily leads to unpredictable and sometimes inconsistent results. In this case, for example, the superior court judge reached a different conclusion about the constitutionality of the revocation statute than did we using the same balancing test.

The root of the problem with using the balancing test to determine whether the process provided by a statute is that

which is constitutionally due is that the test confuses the judicial and legislative functions. The role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials. Rather than rebalancing, the Court's role is only to measure the balance struck by the legislature against the required minimum standards of the constitution. The best way for the Court to discharge this function is for it to enunciate a workable principle as to what process the law of the land minimally requires.

We glean such a principle from certain federal cases decided under the Fourth Amendment and Due Process Clauses.[4] In *Gerstein v. Pugh,* 420 U.S. 103, 43 L.Ed. 2d 54 (1975), the United States Supreme Court considered a Fourth Amendment challenge to a Florida procedure for detaining persons arrested without a warrant who were unable to post bail. Florida permitted such persons to be detained for a substantial period of time solely on the basis of a prosecutor's determination of probable cause. *Id.* at 106, 43 L.Ed. 2d at 60-61. The Court observed that a person could not be deprived of liberty under the procedure prescribed by the Fourth Amendment unless there exists probable cause to believe the suspect had committed an offense. Furthermore, to implement the Fourth Amendment's protection against unfounded invasions of liberty, the existence of probable cause must be decided by a neutral and detached judicial officer whenever possible. *Id.* at 112, 43 L.Ed. 2d 64. "Accordingly," the Court held, "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114, 43 L.Ed. 2d at 65.

The Court went on to discuss the processes which must attend the judicial determination of probable cause after a person is arrested without a warrant. The courts below had held "the determination of probable cause must be accompanied by the full

4. Although a separate constitutional provision, the Fourth Amendment affords procedural protection related to that given by the Due Process and Law of the Land Clauses. The Fourth Amendment protects individuals from specific intrusions into liberty occasioned by prohibiting unreasonable searches and seizures and by requiring in part that "no warrants shall issue but upon probable cause . . . ."

panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses." *Id.* at 119, 43 L.Ed. 2d at 68. The Court overruled these holdings:

> These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

Id. at 120, 43 L.Ed. 2d at 69 (footnote omitted).

In a related case the court upheld a New York statute which authorized pretrial detention of accused juvenile delinquents. Detention was based on a judicial officer's finding of a " 'serious risk' " that the child " 'may before the return date commit an act which if committed by an adult would constitute a crime.' " *Schall v. Martin*, 467 U.S. 253, 255, 81 L.Ed. 2d 207, 211 (1984). This finding was made at the juvenile's initial appearance. Within three days following the juvenile's initial appearance, the detained juvenile was entitled to a formal, adversarial probable cause hearing. The Court observed: "There is no doubt that the Due Process Clause is applicable in juvenile proceedings. 'The problem,' we have stressed, 'is to ascertain the precise impact of the due process requirement upon such proceedings.' " *Id.* at 263, 81 L.Ed. 2d at 216. In order to answer this question the Court made two further inquiries: First, whether preventive detention in New York serves a legitimate state objective; second, whether the procedural safeguards employed by the statute were adequate. *Id.* at 263-64, 81 L.Ed. 2d at 216-217. In response to the first inquiry, the Court stated:

> We find no justification for the conclusion that, contrary to the express language of the statute and the judgment of the highest state court, § 320.5(3)(b) is a punitive rather than a regulatory measure. Preventive detention under the Family Court Act serves the legitimate state objective, held in com-

> mon with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime.

Id. at 274, 81 L.Ed. 2d at 223. The Court also held the procedural safeguards employed by the pretrial detention statute were adequate. Although the statute provided a formal adversarial probable cause hearing before a juvenile could be finally detained, we believe the essential saving feature of the statute was that a detached judicial officer decided both initially whether detention was necessary in the interests of society and subsequently whether there existed probable cause justifying further detention.

Finally, in *Johnson v. United States*, 333 U.S. 10, 92 L.Ed. 436 (1947), we observe a similar concern for judicial intervention in the probable cause determination. In that case the police received information that persons were smoking opium in a hotel. The police went to the hotel, traced the odor of burning opium to a certain room, and without a search warrant knocked on the door. When the petitioner answered, the police placed her under arrest, searched the room and found incriminating evidence. In what is now the classic statement of the rule, the Court held:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

Id. at 13-14, 92 L.Ed. at 440 (footnotes omitted).

[2] Implicit in the foregoing cases is the following principle: When the furtherance of a legitimate state interest requires the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state interest, the law of the land ordinarily requires no more than that before such action is undertaken, a judicial officer determine there is probable cause to believe that the conditions which would justify the action exist.

After a person charged with impaired driving fails a breath test, prompt remedial action by the state is needed. Such a person, as noted above, represents a demonstrated present as well as appreciable future hazard to highway safety. The safety of the impaired driver and other people using the state's highways depends upon immediately denying the impaired driver access to the public roads. Action is required before the person charged can receive a full evidentiary hearing. Substantial preparation is required before such a hearing can take place, but the impaired driver continues to pose a safety hazard while the hearing is pending.

[3] The ten-day revocation is also reasonably related to furthering of the state's interest in highway safety. A suspension of ten days, as noted above, provides immediate protection against the probably impaired driver and serves as an interim highway safety measure until after a person is afforded a trial. Because the summary ten-day license revocation is a remedial measure reasonably related to the state's interest in highway safety, the law of the land is satisfied by judicial review of the state's action to determine if there is probable cause to believe the conditions justifying revocation exist. The Act provides for such review. Before revocation can take place, a detached and impartial judicial officer must scrutinize every condition of revocation to determine if each condition probably has been met. § 16.5(e). This constitutes all the process plaintiffs are due under the law of the land before their licenses were revoked for the ten-day period.

Plaintiffs contend, however, the revocation statute is not a remedial measure but punishment. Although the law of the land would not permit the state to punish a person except after a trial,

Bell v. Wolfish, 441 U.S. 520, 60 L.Ed. 2d 447 (1979)[5] we find no merit in plaintiffs' contention that the summary ten-day revocation is punishment. We have already answered many arguments plaintiffs advance in support of this contention at other places in this opinion.[6] Plaintiffs' principal argument which we have not yet answered relates to legislative intent. Plaintiffs cite these observations of one commentator:

> This [revocation] provision serves a couple of functions important to the Governor and the proponents of the bill. First, it provides an immediate 'slap in the face' to virtually all drivers charged with DWI. Second, the fact that it is imposed independent of the trial on the criminal charge makes it more certain that a sanction will be imposed, regardless of the defendant's status or his lawyer's expertise.

"Impaired Driving; The Safe Roads Act," *A Summary of Legislation in the 1983 General Assembly of Interest to North Carolina Public Officials* 117 (1983).

We conclude, nevertheless, that the summary revocation procedure of § 16.5 is not a punishment but a highway safety measure. Whatever the intent of individual proponents of the bill, the bill as finally enacted reflects an intent by the legislature for the revocation provision to be a remedial measure. The revocation statute provides, "Proceedings under this section are civil actions, and must be identified by the caption 'In the Matter of ___________.' " While we are reminded that the substance of a law and not just the label given to it by the legislature is determinative as to its validity, *see Shore v. Edmisten, Atty. Gen.*, 290 N.C. 628, 227 S.E. 2d 553 (1976), our cases hold that revocation proceedings are civil rather than criminal in nature. *State v. Carlisle*, 285 N.C. 229, 204 S.E. 2d 15 (1974); *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 182 S.E. 2d 553 (1971). "The purpose of a revocation proceeding is not to punish the offender, but to remove from the highway one who is a potential

5. Although *Bell* was decided under federal due process principles, the law of the land cannot constitutionally afford less procedural protection than that afforded by due process.

6. Plaintiffs argue, for example, a revocation period of ten days is not reasonably related to the state's interest in promoting highway safety.

hazard to himself and others." *State v. Carlisle*, 285 N.C. at 232, 204 S.E. 2d at 16. Revocation is not added punishment for a criminal act but a finding that a driver is no longer fit to hold and enjoy the driving privilege which the state has granted under its police power. *Harrell v. Scheidt, Comr. of Motor Vehicles*, 243 N.C. 735, 92 S.E. 2d 182 (1956).

IV.

[4] Plaintiffs contend by cross-assignment of error that the license suspension provisions of the Safe Roads Act denies them equal protection of the laws under the state and federal constitutions. They contend the revocation scheme differentiates without rational basis between persons arrested for impaired driving offenses and other traffic offenders. Persons arrested for impaired driving offenses have their licenses revoked once in a civil proceeding and again later if convicted of a crime. *See* § 17. While there are other serious traffic offenses besides impaired driving, the legislature has provided double revocation only for impaired driving offenses.

Plaintiff Barbee further contends the revocation provision of § 16.5 unfairly discriminates against persons whose drivers' licenses have expired at the time they are arrested. Because his license was expired and seized as evidence by the officer who arrested him for impaired driving, Barbee could not surrender his expired license. His driving privileges were not reinstated until he obtained a new license and surrendered it for ten days. Barbee contends the state has no rational basis for extending the revocation period until ten days after a person obtains and surrenders a new license.

There is no doubt the police power of the state is subordinate to the equal protection guarantees of the federal and state constitutions. *Town of Atlantic Beach v. Young*, 307 N.C. 422, 298 S.E. 2d 686, *appeal dismissed*, 462 U.S. 1101, 77 L.Ed. 2d 1328 (1983). Because plaintiffs do not contend, and we do not find, persons arrested for impaired driving offenses are a suspect class or that the right to drive is a fundamental right, we employ the following analysis to this case.

> When an equal protection claim does not involve a 'suspect class' or a fundamental right, the lower tier of equal

> protection analysis is employed. *E.g., Vance v. Bradley*, 440 U.S. 93, 59 L.Ed. 2d 171, 99 S.Ct. 939 (1979). This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest. *E.g., New Orleans v. Dukes*, 427 U.S. 297, 49 L.Ed. 2d 511, 96 S.Ct. 2513 (1976); *Hagans v. Lavine*, 415 U.S. 528, 39 L.Ed. 2d 577, 94 S.Ct. 1372 (1974).

Texfi Industries v. City of Fayetteville, 301 N.C. 1, 11, 269 S.E. 2d 142, 149 (1980).

The state has a reasonable basis for drawing a distinction between impaired drivers and other traffic offenders for purposes of license revocation. The state has a legitimate interest in protecting the motoring public. A person for whom there is probable cause to believe has a blood alcohol concentration of 0.10 poses a demonstrated present and potential future threat to the safety of himself and other highway travelers. The legislature reasonably could have believed traffic offenders who are not so impaired do not present such an impending threat. The legislature's decision to revoke at the time of arrest the licenses of probably impaired drivers but not other traffic offenders bears a rational relationship to the state's legitimate interest in highway safety. Accordingly, we hold that the revocation required by § 16.5 does not violate the equal protection rights guaranteed by the state and federal constitutions.

[5] We need not address the issue of whether § 16.5 as applied to plaintiff Barbee infringes his equal protection rights. The revocation statute did not authorize the revoking authorities to seize Barbee's newly obtained license. The statute authorizing revocation provides that if a judicial officer finds probable cause to revoke a person's driver's license,

> the judicial officer must order the person to surrender his license and if necessary may order a law-enforcement officer to seize the license. . . . Unless the person is not currently licensed, the revocation under this subsection begins at the time the revocation order is issued and continues until the person's license has been surrendered for 10 days and the person has paid the applicable costs. *If the person is not currently licensed, the revocation continues until 10 days from*

the date the revocation order is issued and the person has paid the applicable costs.

§ 16.5(e) (emphasis added).

The revocation statute is ambiguous with respect to the duration of the suspension period. The statute can be read to mean either that revocation continues: (1) until the person has paid the applicable costs and at least ten days have elapsed from the date the revocation order is issued or (2) until ten days from the date the revocation order is issued and the date the person has paid the applicable costs, whichever occurs last.

When a statute is ambiguous the Court must resort to construction to ascertain legislative intent. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948). A maxim of statutory construction is that where a statute is susceptible of two reasonable interpretations, one of which will raise a serious constitutional question, the interpretation which avoids this question should be adopted. *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977).

The interpretation of the revocation statute which extends revocation for ten days after revocation costs are paid raises a serious question as to the statute's constitutionality. Continuing revocation for ten days after a person pays the revocation fee seems unrelated to any legitimate state interest. The date when a person pays the fee is not reasonably related to the state's legitimate goal of highway safety. Although the state does have a legitimate interest in recouping the costs of administering the revocation scheme, this interest would be fully served by extending the revocation period until the date a person pays the costs. It would not be served by continuing revocation beyond that time. The first construction of the statute, which extends revocation only until applicable revocation costs are paid, avoids the constitutional problems associated with the second interpretation. We hold, therefore, the first interpretation of the statute is the correct one.

Well after ten days from the date revocation of his license was ordered, plaintiff Barbee appeared on 25 May 1984 before the Wake County Clerk of Court to pay the $25 restoration fee. The clerk's office seized Barbee's new license and informed him his license would continue in a state of revocation for ten days. In ex-

tending the revocation period to Barbee's new license after he tendered the restoration fee, the clerk's office exceeded its statutory authority.

V.

[6] Plaintiffs contend by cross-assignment of error that the ten-day suspension provision of the Safe Roads Act is a punishment not authorized by Article XI, section 1 of the North Carolina Constitution. That provision provides: "The following punishments only shall be known to the laws of this state: death, imprisonment, fines, removal from office, and disqualification to hold and enjoy office of honor, trust, or profit under this state." N.C. Const. Art. XI, § 1. We find no merit in this contention. The license revocation procedure of § 16.5, as noted above in Part III, is not a punishment but a highway safety measure.

To summarize our holdings, the revocation provisions of § 16.5 do not infringe the due process, law of the land or equal protection rights guaranteed plaintiffs under the state and federal constitutions. Revocation, also, is not a punishment unauthorized by the state constitution.

For all the reasons set forth above the decision of the superior court is reversed as to plaintiff Henry in No. 84CVS2347. As to plaintiff Barbee in No. 84CVS3414 the decision of the superior court is modified and affirmed.

In Case No. 84CVS2347, reversed.

In Case No. 84CVS3414, modified and affirmed.

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

EARL J. BARRINO, ADMINISTRATOR OF THE ESTATE OF LORA ANN BARRINO v. RADIATOR SPECIALTY COMPANY

No. 439A84

(Filed 18 February 1986)

Master and Servant § 87— workers' compensation—alleged intentional acts by employer—common law action precluded

In a negligence action against an employer by the administrator of the estate of an employee who allegedly died as a result of defendant's willful and wanton negligence, summary judgment was properly entered for defendant because the Workers' Compensation Act is the exclusive remedy and an employee may not bring a civil action against an employer for injuries received as a result of such negligence. It was not necessary to decide whether the allegations of the complaint were adequate to allege conduct that would remove the employer from the exclusivity provisions of the Workers' Compensation Act because those allegations would only have provided a choice of remedies and plaintiff had already made a binding election to recover under the Workers' Compensation Act. Moreover, the exclusiveness of the Act cannot be avoided merely because the conduct complained of is alleged to violate the National Electric Code and OSHANC safety regulations. N.C.G.S. 97-10.2, N.C.G.S. 97-10.1, N.C.G.S. 97-12.

Justice BILLINGS concurring.

Justice MITCHELL joins in the concurring opinion.

Justice MARTIN dissenting.

Justices EXUM and FRYE join in the dissenting opinion.

APPEAL as of right pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 69 N.C. App. 501, 317 S.E. 2d 51 (1984) which affirmed the judgment of *Griffin, J.*, entered at the 21 March 1982 Schedule "C" Session of Superior Court, MECKLENBURG County, allowing defendant's motion for summary judgment.

Plaintiff's intestate, Lora Ann Barrino, an employee of the defendant, was severely burned and otherwise injured in an explosion and fire in defendant's plant on 26 November 1980. Following the explosion, Miss Barrino received benefits under the Workers' Compensation Act (hereinafter the "Act") for the period that she was totally disabled prior to her death on 10 December 1980. Payments were also made under the Act for medical and funeral expenses and, as Miss Barrino was unmarried and had no

children, the workers' compensation death benefits were paid to the plaintiff (in his individual capacity as father) and his wife, Christine Barrino, as parents of the intestate. Total benefits paid by the workers' compensation carrier totaled approximately $69,000.

Plaintiff, the father of Lora Ann Barrino and administrator of her estate, subsequent to his intestate's death, filed this civil action against the defendant employer in Superior Court, Mecklenburg County on 24 November 1982, seeking compensatory and punitive damages and recovery for the wrongful death of plaintiff's intestate.

The defendant filed an answer containing general denials of the material allegations of plaintiff's complaint and asserting *inter alia* various defenses based upon the exclusivity of plaintiff's remedy under the Workers' Compensation Act.

After the exchange of certain requests for admissions and interrogatories and answers thereto, defendant moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The defendant's motion was heard by Judge Kenneth Griffin and summary judgment was entered for defendant and plaintiff's motion was dismissed with prejudice on 23 March 1983. Plaintiff appealed and the majority of the panel of the Court of Appeals affirmed the judgment of the trial court. The case is before us by virtue of a dissent in the Court of Appeals filed by Judge Phillips.

Chambers, Ferguson, Watt, Wallas & Adkins, P.A., by Melvin L. Watt, for plaintiff-appellant.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, and Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, P.A., by John J. Doyle, Jr., for defendant-appellee.

MEYER, Justice.

The primary issue before this Court is whether the North Carolina Workers' Compensation Act provides the exclusive remedy when an employee is injured in the course of his or her employment by the willful, wanton and reckless negligence of the employer. We hold that the Act is the exclusive remedy and that

the employee may not bring a civil action against the employer for injuries received as a result of such negligence. Accordingly, we affirm the decision of the Court of Appeals which affirmed the trial court's entry of summary judgment in favor of the defendant-employer.

The defendant, Radiator Specialty Company, is the owner and operator of a manufacturing plant located at Indian Trail, North Carolina. On 26 November 1980 Lora Ann Barrino was working at the plant as an employee of defendant. At approximately 9:05 a.m. an explosion and fire occurred at the plant which resulted in severe second and third degree burns over seventy per cent of Miss Barrino's body. She lived for approximately fourteen days thereafter but died on 10 December 1980 as a result of injuries sustained in the explosion and fire. At the time of her death, Miss Barrino was unmarried and had no children. She was survived by her parents, Earl J. and Christine Barrino, who were the only persons entitled to receive workers' compensation death benefits and were also the sole heirs and distributees of Miss Barrino under the North Carolina law of intestate succession. The parents applied for and received the death benefits of $29,028.30, which were paid to them by defendant's workers' compensation insurance carrier. The carrier also paid $170.68 in lost wages, $35,542.50 for medical expenses, $1,000.00 for burial expenses and $3,300.00 for attorneys fees, for a total of $69,041.48.

Miss Barrino's father, Earl J. Barrino, was appointed administrator of her estate. After the workers' compensation benefits were paid, and within two years of his intestate's death, the plaintiff-administrator filed this civil action against the defendant-employer seeking compensatory damages for injuries, pain and suffering, lost wages, medical expenses, and other losses incurred by the intestate, recovery for wrongful death and punitive damages.

The allegations concerning the specific acts of the defendant-employer complained of and of proximate cause are found in paragraphs 6, 7 and 8 of the complaint and are as follows:

> 6. At the time and place set out above, the defendant recklessly, wantonly, willfully, intentionally and with reckless disregard of the rights and safety of plaintiff's intestate or with full knowledge and actual intent that defendant's willful

misconduct would expose plaintiff's intestate to serious injury, harm or death:

a) designed, constructed, located, installed and operated equipment used in handling, storing and utilizing liquefied petroleum gases at its Indian Trail plant and facilities without inspections and approvals required by law and in a wantonly and willfully dangerous manner in violation of Section 119-48 *et seq.* of the North Carolina General Statutes and rules and regulations promulgated pursuant thereto;

b) at its plant and facilities at Indian Trail, North Carolina at which ignitable concentrations of flammable gases or vapors existed and at which volatile flammable liquids and flammable gases were handled, processed and used, defendant:

(1-6) [Here there appear in the complaint, in six separately numbered sub-paragraphs, allegations of acts of the defendant-employer said to violate the National Electrical Code and the Occupational Safety and Health Act of North Carolina (OSHANC).]

c) covered meters designed to detect and warn of dangerous and explosive gas and vapor levels in the Indian Trail plant and facility with plastic bags to assure that said meters would not warn plaintiff's intestate and other employees of the dangers then and there existing;

d) turned off alarms which sounded to warn of dangerous and explosive gas and vapor levels in the Indian Trail plant and facility and instructed plaintiff's intestate and other employees to resume work despite the sounding of the alarms and after the alarms had been disengaged; and

e) failed to provide a safe work place in which plaintiff's intestate and other employees could work without fear of harm and injury and took affirmative, wanton, reckless and intentional steps as heretofore set forth to create dangerous working conditions for plaintiff's intestate and other employees.

7. As the sole, direct and proximate consequence of the reckless, wanton, willful and intentional acts of defendant as

heretofore set forth, defendant's plant exploded and burned on November 26, 1980 and the plaintiff's intestate received serious, painful and disfiguring bodily injuries causing medical expenses in excess of $35,000.00, lost income and other expenses.

8. As the sole, direct and proximate consequence of the reckless, wanton, willful and intentional acts of defendant as heretofore set forth the plaintiff's intestate died on December 10, 1980.

The defendant filed an answer alleging five defenses: (1) the complaint fails to state a claim against the defendant upon which relief could be granted; (2) a general denial of any negligent or intentional act and that any such act proximately caused the deceased's injuries; (3) that the plaintiff's intestate and the defendant-employer were at all times subject to and complied with the provisions of the North Carolina Workers' Compensation Act and that the rights and benefits provided to plaintiff's intestate under the Act are exclusive and plaintiff is not entitled to pursue, and is barred absolutely from pursuing, a civil action against defendant pursuant to N.C.G.S. § 97-10.1; (4) the plaintiff, as personal representative, has applied for and received all medical and burial benefits due under the Act and has thus made a binding election of remedies which precludes him as a matter of law from pursuing the civil action; and (5) the plaintiff and his wife, as parents of the deceased, are the only persons entitled to receive the compensation for death benefits pursuant to the Act and are also the sole heirs and distributees of the deceased under the law of intestate succession and having applied for and received the death benefits, paid by defendant's workers' compensation carrier, plaintiff is precluded and estopped from pursuing the civil action.

In response to the defendant-employer's Request for Admissions, the plaintiff-administrator admitted *inter alia* existence of the employee-employer relationship; compliance with and coverage under the Act; payment of all the amounts alleged in defendant's answer by defendant's carrier in satisfaction of the workers' compensation claims of Lora Ann Barrino, her next of kin, heirs, personal representative and estate; that plaintiff and his wife

were the only parties entitled to receive the death benefits under the Act and that they had applied for and received those benefits.

Thereafter, defendant filed a Motion For Summary Judgment alleging that there was no genuine issue as to any material fact on the following grounds: (1) in light of the parties' compliance with and coverage under the Act at the time the fatal injuries were incurred, the action is barred absolutely by the exclusivity provisions of the Act; (2) even if the complaint was construed to allege an intentional assault on plaintiff's intestate, those entitled to recovery had applied for and received full benefits under the Act and thus a binding election of remedies had been made and the receipt of benefits by the plaintiff and all others entitled to proceeds of any judgment in the civil action constitutes a bar to the action. The motion was specifically based on the pleadings and responses of the plaintiff to defendant's request for admissions.

The summary judgment motion came on for hearing before Judge Griffin and he granted summary judgment in favor of the defendant-employer and dismissed the action with prejudice on 23 March 1983. The plaintiff-administrator appealed to the Court of Appeals which affirmed the summary judgment. *Barrino v. Radiator Specialty Co.*, 69 N.C. App. 501, 317 S.E. 2d 51 (1984).

We first examine the question of whether, when compliance with and coverage under our Workers' Compensation Act exist, an injured employee may bring a civil action against the employer to recover damages for his injuries caused by the willful and wanton negligence of the employer.

The provisions of the North Carolina Workers' Compensation Act pertinent to this question 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.

N.C.G.S. § 97-10.1 provides:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then *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. (Emphasis added.)

This latter provision of our Act, N.C.G.S. § 97-10.1 is commonly referred to as an "exclusivity provision." We have held that this provision bars a worker from maintaining a common law negligence action against his employer. *Hicks v. Guilford County,* 267 N.C. 364, 148 S.E. 2d 240 (1966). Such exclusivity clauses have consistently been held to be constitutional under the equal protection and due process clauses of both federal and state constitutions. *See* 2A Larson, The Law of Workmen's Compensation § 65.20 (1984) (hereinafter cited as *Larson*).

For a very brief explanation of the exclusivity provision we turn to §§ 65.11 and 65.14 of Professor Larson's treatise.

> Once a workmen's compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for injury by the employee or his dependents against the employer and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.

Larson, § 65.11.

> The operative fact in establishing exclusiveness is that of actual coverage, not of election to claim compensation in a particular case.
>
> Even if the employee himself has never made application for compensation, his right to sue his employer at common law is barred by the existence of the compensation remedy.

Larson, § 65.14.

A recognized exception to the Act's exclusivity provision is the injured employee's ability to bring a civil action against his employer when his injuries result from a deliberate assault by the employer with intent to actually injure him. *See, e.g., 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). For an explanation of the legal theory upon which this exception rests we turn again to Professor Larson's treatise:

> An intentional assault by the employer upon the employee . . . will ground a common-law action for damages. Several legal theories have been advanced to support this result. The best is that the employer will not be heard to allege that the injury was "accidental" and therefore was under the exclusive provisions of the Workmen's Compensation Act, when he himself intentionally committed the act.

Larson, § 68.11.

The plaintiff forcefully argues that the right of the injured employee to sue his employer should be further extended to include the situation where the employee is injured by the negligence of the employer when that negligence is willful, wanton and reckless and is the result of intentional acts of the employer. Any such extension would be contrary to the virtually unanimous rule throughout the country.

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, *the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury.*
>
> . . . .
>
> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of

> the kind of actual intention to injure that robs the injury of accidental character. (Emphasis added.)

Larson, § 68.13.

Professor Larson alludes to two New York cases which dramatically illustrate precisely how exacting is the burden of proving real intent on the part of the employer to harm the employee in order to justify a common-law action. In *Artonio v. Hirsch*, 3 A.D. 2d 939, 163 N.Y.S. 2d 489 (1957), the employee brought a civil action against the employer, alleging that the employer had deliberately sealed and intentionally made inoperative certain safety locks on steel presses necessary for the protection of the employee who operated them. The New York Supreme Court held these allegations insufficient to overcome the exclusiveness of the Workers' Compensation Act remedy. In *Santiago v. Brill Monfort Company*, 11 A.D. 2d 1041, 205 N.Y.S. 2d 919 (1960), the employer appealed the lower court's denial of its motion to dismiss suits brought by employees wherein the complaints alleged that the employer had unlawfully and intentionally removed safety guards from machines merely to increase production and profits and had thereby "committed an assault" on the employees. The New York Supreme Court dismissed the tort actions against the employer on the basis that deliberate removal of safety guards was not equivalent to deliberate intent to injure, and nothing less than a deliberate intent to injure would suffice to break the exclusiveness barrier. *Santiago*, 11 A.D. 2d 1041, 205 N.Y.S. 2d 919; Larson, § 68.13.

As to the seeming harshness of this rule, Professor Larson notes:

> If these decisions seem rather strict, one must remind oneself that what is being tested here is not the degree of gravity or depravity of the employer's conduct, but rather the narrow issue of intentional versus accidental quality of the precise event producing injury. The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.

Larson, § 68.13. *See also Southern Wire & Iron, Inc. v. Fowler,* 217 Ga. 727, 124 S.E. 2d 738 (1962), wherein it was held that a common-law action against the employer corporation would not lie on allegations that the president of the corporation had willfully and intentionally ordered the employee to work with his bare hands in an acid vat of whose dangerous propensities the employee was unaware, for the alleged purpose of punishing the employee for his refusal to divulge the names of fellow employees who attended a union organization meeting.

In our recent case of *Freeman v. SCM Corporation,* 311 N.C. 294, 316 S.E. 2d 81 (1984), the plaintiff, an employee of defendant SCM Corporation, was working on a molding machine when she noticed that the machine was malfunctioning. She reported the problem to her supervisor and requested permission to turn off the machine. The supervisor ordered plaintiff to continue operating the machine. On subsequent occasions, plaintiff repeated her fears that the machine was not functioning properly but was consistently told to continue her work. Plaintiff was later struck in the face by a pressure bolt which blew out of the machine.

Plaintiff sought and recovered workers' compensation benefits for injury to her nose, back, neck and shoulder. Subsequently, plaintiff filed a civil action against the employer alleging that her injuries were caused by the *gross, willful and wanton negligence and by the intentional acts of the defendant-employer.* Plaintiff further alleged that her injuries did not result from an "accident" within the meaning of the Workers' Compensation Act and therefore her claim was not barred by the exclusivity provision of N.C.G.S. § 97-10.1. Defendant alleged lack of subject matter jurisdiction and moved to dismiss pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The trial court granted defendant's motion and the plaintiff appealed to the Court of Appeals.

The Court of Appeals held that since plaintiff had been compensated through payment of workers' compensation benefits, she was precluded from maintaining a separate action against her employer. On appeal to this Court, we concluded that the result reached by the Court of Appeals was correct and held that plaintiff's remedies under the Workers' Compensation Act were exclusive and that she was therefore precluded from recovering against her employer in an independent negligence action. In

response to a comment in the Court of Appeals' opinion that the plaintiff had "selected" a particular avenue of recovery, this Court stated:

> We wish to make it abundantly clear that in fact plaintiff had no "selection" as to the appropriate avenue of recovery for her injuries.
>
> General Statute 97-10.1 provides that:
>
>> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.
>
> Since plaintiff was here covered by and subject to the provisions of the Workers' Compensation Act, her rights and remedies against defendant employer were determined by the Act and she was required to pursue them in the North Carolina Industrial Commission. *See, e.g., Bryant v. Dougherty*, 267 N.C. 545, 148 S.E. 2d 548 (1966); *McCune v. Rhodes-Rhyne Mfg. Co.*, 217 N.C. 351, 8 S.E. 2d 219 (1940). She could not, in lieu of this avenue of recovery, institute a common law action against her employer in the civil courts of this State.

Freeman, 311 N.C. at 296, 316 S.E. 2d at 82.

In order for plaintiff to prevail in the case now before us we would have to overrule *Freeman* and numerous other decisions to the same effect. Indeed, plaintiff concedes in his brief before this Court that "It is quite apparent that, if the Court's conclusion as expressed in *Freeman v. SCM Corporation* is the current law in North Carolina, plaintiff's appeal cannot be sustained." Having now revisited *Freeman*, we conclude that its holding is sound and we therefore decline plaintiff's entreaty to overrule that decision.

We note that in certain instances not related to the liability of the *employer*, an employee injured during the course of his employment does have the option of proceeding in a civil action

for damages against the party who injured him. He may sue third parties who are strangers to the employment. N.C.G.S. § 97-10.2. He may sue a co-employee where there was actual intent to injure him, *see, e.g., Wesley v. Lea,* 252 N.C. 540, 114 S.E. 2d 350 (1960), and in our recent case of *Pleasant v. Johnson,* 312 N.C. 710, 325 S.E. 2d 244 (1985) (Meyer, J., dissenting), this option was extended to claims against co-employees when an employee is injured by the co-employee's willful, wanton and reckless negligence.

In *Pleasant,* the plaintiff and the defendant were co-employees. As plaintiff returned from lunch to the construction site where he and defendant were working, the plaintiff walked across the parking lot and a truck driven by the defendant struck him seriously injuring his right knee. The plaintiff received disability benefits under the Act and then commenced a civil action against the defendant co-employee alleging that defendant was willfully, recklessly and wantonly negligent in operating the motor vehicle in such a fashion as to see how close he could operate the vehicle to the plaintiff without actually striking him but, misjudging his ability to accomplish such a prank, actually struck the plaintiff.

The majority in *Pleasant* concluded that, at least as to co-employees, "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." After citing authority to the contrary from this and other jurisdictions, the majority stated: "*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." (Emphasis added.) 312 N.C. at 716, 325 S.E. 2d at 249.

However, in *Pleasant* we specifically noted that we did not decide, nor even consider, whether an *employer* may be sued in a civil action for the employer's willful, wanton and reckless negligence. The plaintiff in effect argues that the holding of *Pleasant* should be extended to the employer. We do not agree.

As a part of the rationale for allowing a civil suit against the co-employee for his willful, wanton and reckless negligence, the *Pleasant* majority cited three factors: (1) "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"; (2) "[W]hen 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"; and (3) "[T]he fact that plaintiff has received benefits under the . . . Act does not foreclose him from bringing an action for the . . . [co-employee's] willful and wanton negligence." 312 N.C. at 717, 325 S.E. 2d at 249-50.

None of the foregoing factors obtain when the civil suit is against the employer as opposed to being against a co-employee. When the suit is against the employer and benefits have already been paid under the Act, (1) obviously, the employer has had to participate in the defense of the compensation claim *and* has had to pay the award (even if the employer is covered by insurance, premiums for coverage are based on experience factors); (2) since recovery in the civil action is also from the employer it can only result in greater liability even if credit is given for the benefits paid under the Act; and (3) as to the employer, even if the Act were not the exclusive remedy, the plaintiff would be deemed to have made an election of remedies when he sought and obtained benefits under the Act.

Plaintiff also contends that here, as in the case of suits against third parties who are strangers to the employment and in suits against fellow employees, a prior application for and receipt of workers' compensation benefits from the *employer* should not constitute a binding election of remedies. N.C.G.S. § 97-10.2; *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6; *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E. 2d 244. We do not agree.

In suits against third parties who are strangers to the employment and in suits against co-employees, the recovery from the tort-feasor is distributed pursuant to N.C.G.S. § 97-10.2(f)(1), (a) first to the payment of actual court costs, (b) second to the payment of attorney's fees, (c) third to reimburse the employer for the benefits paid by way of compensation, and (d) fourth all remaining proceeds to the employee or his personal representative. In the case of claims against the employer for intentional assaults

with intent to actually injure, however, the injured employee is put to an election of remedies between workers' compensation benefits and a civil action; the pursuit of either bars the right to pursue the other.

In his discussion of the rule permitting an employee to sue his employer for injuries intentionally inflicted, Professor Larson noted "It is interesting to observe that this holding has the rather remarkable effect of giving the employee in these circumstances an option to claim compensation or sue his employer at common law, although such options are usually not supposed to exist." Larson, § 68.12.

Despite the fact that in *Pleasant* this Court overruled our prior holdings in *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 and in *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 as to suits against *co-employees* for willful and wanton negligence, the holding of those cases as to *employers* still obtains: "The acceptance of benefits under the Act forecloses the right of the employee to maintain a common law action . . . against the employer. . . ." *Warner*, 234 N.C. at 733, 69 S.E. 2d at 10.

We find it unnecessary to decide whether the allegations of the complaint are adequate to allege such conduct on the part of defendant-employer so as to remove the employer from the exclusivity provisions of the Workers' Compensation Act under the theory of an intentional assault with intent to actually injure. Assuming, *arguendo*, that the allegations adequately allege an intent to actually injure the employee, the result reached in this case would not differ. Such allegations would have done nothing more than have provided a choice of remedies and it is clear that even if such a choice of remedies existed, plaintiff had already made a binding election to recover under the Workers' Compensation Act. Having done so, he may not also pursue the civil action.

The plaintiff further contends that the exclusiveness of the Act is avoided because the allegations of the complaint charge violations of safety codes such as the National Electrical Code and the Occupational Safety and Health Act of North Carolina (OSHANC).

The federal Occupational Safety and Health Act contains a specific provision explicitly stating that it does not in any way af-

fect rights and liabilities of employees and employers under the workers' compensation laws:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4). We find this principle equally applicable to the case under discussion. The exclusiveness of the Act cannot be avoided by bringing a civil action against the employer merely because the conduct complained of is alleged to violate the National Electric Code and OSHANC safety regulations.

In *Byrd v. Fieldcrest Mills, Inc.*, 496 F. 2d 1323 (4th Cir. 1974), an employee was killed in an accident concededly arising out of the course of his employment. It was also conceded that the injury was covered by the North Carolina Workers' Compensation Act. The decedent's wife brought a civil action against the employer seeking damages on an independent federal cause of action for the employer's violation of certain provisions of the federal Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq*. The Fourth Circuit Court of Appeals held that 29 U.S.C. § 653(b)(4), quoted above, precludes any private remedy based on OSHA if the private remedy would in any manner affect the rights of parties under the Workers' Compensation Act. *See also Mauch v. Stanley Structures, Inc.*, 641 P. 2d 1247 (Wyo. 1982). Neither can an injured employee escape the exclusivity of the Act by bringing a civil action against the employer based on state occupational safety and health acts. *See, e.g., Frith v. Harrah South Shore Corp.*, 92 Nev. 447, 552 P. 2d 337 (1976). *See also North v. United States Steel Corp.*, 495 F. 2d 810 (7th Cir. 1974); Larson, § 65.34.

It is also clear from the Act itself that such allegations of safety code violations do not remove the claim from the exclusivity of the Act. N.C.G.S. § 97-12 provides *inter alia* a penalty to the employer of a 10% increase in benefits "when the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission.

. . ."[1] Accordingly, it is apparent that the legislature has specifically addressed this subject in the Act itself and has chosen to provide additional compensation when allegations such as the plaintiff has made in this case are proved in a claim made under the Act. Any change in the treatment to be accorded conduct alleged to violate safety codes is properly addressed by the legislature, rather than the courts.

In addition to compensatory damages, plaintiff has prayed for punitive damages. A claim for punitive damages is also subject to the bar of the exclusivity provision of the Act. At any point where compensatory damages are barred, punitive damages are also barred. *North v. United States Steel Corp.*, 495 F. 2d 810; *Stricklen v. Pearson Constr. Co.*, 185 Iowa 95, 169 N.W. 628 (1918); *Roof v. Velsicol Chem. Corp.*, 380 F. Supp. 1373 (N.D. Ohio 1974); *Liberty Mut. Ins. Co. v. Stevenson*, 212 Tenn. 178, 368 S.W. 2d 760 (1963); Larson, § 65.37.

The opinion of the Court of Appeals affirming the trial court's entry of summary judgment in favor of the defendant-employer is

Affirmed.

Justice BILLINGS concurring.

As Justice Meyer states in his opinion for the Court, it is unnecessary to decide whether the allegations of the complaint are adequate to allege an intentional assault with intent to actually injure, removing the employer from the exclusivity provisions of the Workers' Compensation Act, for the plaintiff has made a binding election.

In *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1951) this Court rejected the plaintiff-employee's tort action against the president of his employer on two bases:

1. N.C.G.S. § 97-12 also provides a comparable penalty to the employee if the injury or death is caused by the employee's willful failure to use a safety appliance or perform a statutory duty or by his willful breach of a rule or regulation adopted by the employer, approved by the Commission, and brought to the knowledge of the employee prior to the injury.

First, it was admitted in the trial below that the defendant did not intentionally injure the plaintiff. And, in the second place, it is admitted that the plaintiff has applied for and received medical expenses and compensation for temporary total disability, and for permanent partial disability, in accordance with the provisions of the North Carolina Workmen's Compensation Act. *The acceptance of benefits under the act forecloses the right of the employee to maintain a common law action, under the exception pointed out, against the employer* "or those conducting his business."

The general rule in this respect is given by Horowitz, "Injury and Death Under Workmen's Compensation Laws," page 336, as follows: "Where an 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.*" *Essick v. Lexington, et als.*, [232 N.C. 200, 60 S.E. 2d 106 (1950)]. [Emphasis added.]

Id. at 733, 34, 69 S.E. 2d at 10.

Thus, at least since 1951, this Court has been aligned with the majority of American jurisdictions in holding that a successful compensation claim bars a subsequent damage suit against the employer in the situation where the Workers' Compensation Act is not the employee's exclusive remedy. 2A Larson, Workmen's Compensation Law §§ 67.31, 67.32 (1983 and 1985 supplement). This Court's recent decision in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E. 2d 244 (1985) does not change the long-standing law on this point.

Because the fact that the plaintiff has recovered all benefits provided for under the Act is affirmatively established and not contested, there is no genuine issue of material fact relating to the question of whether the plaintiff has made an election. Therefore, summary judgment was appropriately entered.

Justice MITCHELL joins in this concurring opinion.

Justice MARTIN dissenting.

I respectfully dissent. The primary issue before this Court is not, as the majority contends, whether the North Carolina Workers' Compensation Act provides the exclusive remedy for an employee injured by the willful, wanton, and reckless negligence of his employer. The question we must decide is whether the trial court erred in granting summary judgment for the defendant-employer in view of evidence put forth by the plaintiff which creates a genuine issue of material fact concerning defendant's subjective intent.

Summary judgment is properly granted when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). In the present case the trial court found defendant's defense based on the exclusivity provision of the Workers' Compensation Act, N.C.G.S. 97-10.1, adequate to sustain its motion for summary judgment. However, as the majority recognizes, the exclusivity provision is not absolute. An employee is not barred from bringing a civil suit against his employer when the injuries complained of are a result of the intentional actions of the employer. *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).

Because the issue of the intentional nature of defendant-employer's misconduct is determinative of plaintiff's right to maintain the present action, it clearly constitutes a material fact under Rule 56 of the North Carolina Rules of Civil Procedure. As such, summary judgment is proper only if the issue is not in controversy. Rule 56 does not authorize the court to decide a disputed issue of fact. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975).

Whether Lora Ann Barrino was killed as the result of intentional actions on the part of the defendant is a disputed issue of fact. Plaintiff sets forth numerous specific and illegal actions of the defendant. These include the covering of meters designed to warn of explosive gas and vapor levels and the turning off of alarms which would have sounded to warn of dangerous gas

levels. The only reasonable explanation for the corporation's actions in concealing and dismantling the warning devices is that it intended for its employees to be subjected to extremely hazardous working conditions and to the probable consequences of working in such conditions, including serious injury or death. As Prosser states: "Intent is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does." W. Prosser, *Handbook of the Law of Torts* § 8 (4th ed. 1971). *Accord* Restatement (Second) of Torts § 8A and comment b (1965). The death of Lora Ann Barrino or one of her co-workers was, at the very least, "substantially certain" to occur given defendant's deliberate failure to observe even basic safety laws.

For plaintiff to prove that defendant's conduct was intentionally tortious does not require a showing that the defendant corporation intended that plaintiff's daughter would be the particular victim or that death, as opposed to some lesser harm, would be the result. *Fallins v. Insurance Co.*, 247 N.C. 72, 100 S.E. 2d 214 (1957).

The above analysis of N.C.R. Civ. P. 56 and relevant case law thus indicates that plaintiff has in fact shown the question of defendant-employer's intent constitutes a genuine issue of material fact. Therefore, summary judgment was improper. It was especially inappropriate given that the case involves the defendant's subjective intent and issues of intent should usually be determined on the basis of circumstantial evidence and only rarely by summary judgment. *Girard Trust Bank v. Belk*, 41 N.C. App. 328, 255 S.E. 2d 430, *cert. denied*, 298 N.C. 293 (1979).

Finally, summary judgment is a drastic remedy and must be approached with caution so that no party is deprived of trial on a genuinely disputed factual issue. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Summary judgment in the present case fails to serve its purpose in eliminating unnecessary trials, rather it serves to deprive the plaintiff of trial on a genuinely disputed issue.

In *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E. 2d 244 (1985), we held that the North Carolina Workers' Compensation Act does not insulate a co-employee from the effects of his negligence. We

stated our belief that such a result would "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." *Id.* at 718, 325 S.E. 2d at 250 (citing S. Horowitz, *Injury and Death Under Workmen's Compensation Laws* 336 (1944)).

While this Court should be concerned with deterring negligent and injurious horseplay on the part of a co-employee, we should be more concerned with deterring intentional employer conduct which is likely to endanger the lives and safety of thousands of workers. Therefore, when an employee injured or killed on the job sets forth in his complaint circumstances which raise disputed questions of fact as to intentional employer misconduct, summary judgment should be denied.

We should not permit an employer to assume that no matter how egregious and deliberate his misconduct, the Workers' Compensation Act will allow him statutory immunity. To do so would contravene the legislative goal of promoting workplace safety. N.C. Gen. Stat. § 95-126(b)(2) (1981). In addition, it is a basic proposition of public policy that an insured is not allowed to protect himself by insurance from the consequences of his intentional or criminal wrongs. *Blackwell v. Insurance Co.*, 234 N.C. 559, 67 S.E. 2d 750 (1951). If we were to permit an employer to insure himself against liability for the consequences of his intentional acts, we would encourage the employer to weigh the economic costs of compliance with safety regulations against the costs of workers' compensation and to choose the most cost-effective course of conduct. If the possibility of a common law tort suit is to have any significant effect in deterring intentional employer misconduct at the workplace, the courts must be extremely cautious in using summary judgment to dismiss an employee's action.

In order to justify its holding that the Workers' Compensation Act is plaintiff's exclusive remedy, the majority relies primarily on two recent decisions of this Court: *Pleasant v. Johnson,* 312 N.C. 710, 325 S.E. 2d 244, and *Freeman v. SCM Corp.*, 311 N.C. 294, 316 S.E. 2d 81 (1984). However, both cases deal solely with *negligent* misconduct on the part of an employer or co-employee. It is patently misleading to attempt an analysis of

the present case, which deals with *intentional* employer misconduct, on the basis of our holdings in *Pleasant* and *Freeman.*

In *Freeman* we found that the Workers' Compensation Act provided the sole remedy for the plaintiff injured as a result of negligent conduct on the part of her employer. As the majority notes, we specifically stated: "We wish to make it abundantly clear that in fact plaintiff had no 'selection' as to the appropriate avenue of recovery for her injuries." 311 N.C. at 296, 316 S.E. 2d at 82. *Freeman* provides a clear statement of the law in North Carolina concerning suits by an employee which demonstrate negligent employer conduct. However, we need not, as the majority contends we must, overrule *Freeman* in order to find that the plaintiff in the instant case has a valid cause of action. In *Freeman* a single supervisory employee of the defendant corporation negligently permitted the plaintiff to continue working at a machine which the employee had reported as malfunctioning. In the present case the actions of the defendant-employer present a pattern of intentional and criminal[1] misconduct which endangered the lives of every person employed at defendant's plant. In contrast to *Freeman,* such actions are not likely to be attributable to a single employee but, instead, indicate a deliberate disregard of basic safety regulations on the part of the corporation as a whole. Widespread, deliberate, and criminal misconduct which is likely to result in the death of one or more persons is not properly deemed "negligent."

In *Pleasant* we concluded that the "Workers' Compensation Act does not shield a co-employee from common law liability for willful and reckless negligence." 312 N.C. at 716, 325 S.E. 2d at 249. As the majority notes, the plaintiff in *Pleasant* was injured as a result of a "prank." One afternoon after lunch the defendant co-employee attempted to see how close he could operate a truck

1. Willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor when said violation causes the death of an employee. N.C. Gen. Stat. § 95-139 (1981).

More enlightened jurisdictions have found somewhat harsher penalties appropriate. On 14 June 1985, in an Illinois case, three corporate officials were found guilty of murder in the death of an employee exposed to cyanide gas under totally unsafe working conditions. Subsequently, each of the three defendants was sentenced to twenty-five years in prison and fined $10,000. *People v. Film Recovery Systems,* The Raleigh News & Observer, July 2, 1985, at 4A, col. 4 (Ill. Cir. Ct., 4th Dist.).

to the plaintiff without actually hitting him. The defendant, however, misjudging his ability, struck the plaintiff. We characterized the defendant's conduct as willful, wanton, and reckless negligence and allowed the plaintiff to maintain a common law tort action against the co-employee.

In the present case, company officials systematically flaunted basic safety regulations and knowingly subjected every employee at the Indian Trail plant to death or serious injury. In *Pleasant* the defendant co-employee injured the plaintiff while engaged in horseplay. If the defendant's conduct in *Pleasant* constitutes willful, wanton, and reckless negligence, then clearly the conduct of the defendant-employer in this case embodies a degree of culpability beyond negligence and as such the exclusivity provision of the Workers' Compensation Act should not serve to shield the employer from liability for his tortious conduct.

In *Pleasant* we specifically did not decide the question of whether an *employer* may be sued in a civil action for his willful, wanton, and reckless negligence. It is a question we should still decline to decide as it is not determinative of the case at bar.

The majority cites *Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974), as authority for its holding that plaintiff has made a binding election to recover under the Workers' Compensation Act and is thereby precluded from pursuing a civil action. However, *Byrd* involved an employee killed as a result of negligent conduct on the part of the employer. This Court has never held that an employee injured by the intentional conduct of his employer makes a binding election of remedies by his acceptance of workers' compensation benefits. As the Court concluded in *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6, the acceptance of benefits under the Act forecloses the right of the employee to maintain a common law *negligence* action against his employer.

The law in general disfavors the defense of election of remedies and it is to be narrowly applied. *Friederichsen v. Renard*, 247 U.S. 207, 62 L.Ed. 1075 (1918). As Larson states, "The least the courts can do is to insist upon a scrupulous respect for the requirements of a binding election." 2A A. Larson, *The Law of Workmen's Compensation* § 67.35 (1982).

One of the essential elements of an election of remedies defense, according to Larson, is that there must be an inherent

contradiction between the position taken by the plaintiff in the workers' compensation forum and the position he asserts in the common law action. *Id.* The term "accident" as used in the Workers' Compensation Act has been defined by this Court as "an unlooked for and untoward event which is not expected or designed by the injured employee." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962). Therefore, it is not contradictory in North Carolina to assert that an act was at once an accident and an intentional tort. "An unexpected assault may be considered an accident despite its characterization as an intentional tort." *Daniels v. Swofford*, 55 N.C. App. 555, 558, 286 S.E. 2d 582, 584 (1982). There is no inherent inconsistency in plaintiff's effort to recover for the intentional misconduct of the defendant. The laws of North Carolina have provided the plaintiff with both a statutory and a common law remedy and the doctrine of election of remedies does not function to require a choice between the two. A crucial element of the election of remedies defense, "inherent inconsistency," is lacking and the defense must fail.

The purpose of the doctrine of election of remedies is to prevent double redress of a single wrong. *Smith v. Oil Corp.*, 239 N.C. 360, 79 S.E. 2d 880 (1954). This can be achieved either by reducing plaintiff's award in tort by the amount of benefits already received or by granting subrogation to the employer's compensation insurance carrier. *Cf.* N.C. Gen. Stat. § 97-10.2 (1979 & Cum. Supp. 1983). The result thus obtained would be a more equitable one than forcing an employee who believes in good faith that he was injured by the intentional misconduct of his employer to forego his compensation claim in order to maintain his common law claim. An injured employee having financial difficulties would be likely to accept workers' compensation benefits and forego a valid tort claim because he would have no real alternative. Such a policy would not serve to discourage intentional employer misconduct. Finally, the doctrine of election of remedies presupposes a "choice" between one or more inconsistent remedies. *NASCAR, Inc. v. Midkiff*, 246 N.C. 409, 98 S.E. 2d 468 (1957). An employee in severe economic straits who makes a decision based solely on the exigencies of his immediate situation cannot be considered as having freely "chosen" one remedy over another.

In summary, because the instant case involves a genuine issue of material fact as to defendant's intent, I find summary judgment to have been inappropriate.

Justices EXUM and FRYE join in this dissenting opinion.

GEORGANNE SMITH v. WILLIAM GEORGE PRICE

No. 332PA85

(Filed 18 February 1986)

1. **Bastards § 10— paternity action—JNOV for mother—error**

The trial court erred in a paternity action by granting plaintiff's motion for a judgment n.o.v. where the defendant admitted his own sexual relationship with plaintiff and the possibility of his paternity, but did not admit that he was the only male who could have fathered the child; the controlling evidence in the case was not documentary; plaintiff's case was dependent upon the credibility of her testimony and there were contradictions and uncertainties in her deposition and trial testimony concerning the date of her last menstrual period, her first meeting with defendant, and the date of her sexual relations with another man; and, although plaintiff offered the results of blood-grouping tests giving the statistical probability that defendant was the father, blood tests are primarily reliable for excluding rather than proving paternity. N.C.G.S. 1A-1, Rule 50(a), N.C.G.S. 8-50.1(b)(1).

2. **Rules of Civil Procedure § 59; Trial § 48— paternity action—juror misconduct —conditional new trial—error**

The trial court erred in a paternity action tried before 1 July 1984 by granting a conditional new trial on the basis of juror misconduct where the trial judge stated that the determination to grant a new trial was in his discretion, but the misconduct was improperly proved solely by the juror's affidavit and testimony. N.C.G.S. 1A-1, Rule 59(a)(2), N.C.G.S. 8C-1, Rule 606(b), N.C.G.S. 15A-1240.

3. **Bastards § 10— paternity action—dismissal of counterclaim based on fraud— moot**

The issue of whether the trial court erred by granting a directed verdict against defendant on his counterclaim for fraud in a paternity action was rendered moot by the reversal of the trial court's judgment n.o.v. and conditional new trial in favor of plaintiff.

4. **Bastards § 10; Attorneys at Law § 7.5— paternity action—award of attorney fees—error**

The trial court erred by awarding plaintiff attorney fees in a paternity action where the trial court did not include the attorney fees as part of the costs,

did not make a finding of good faith by the plaintiff, and gave no indication of what portion of the fees were attributable to the custody and support aspects of the case. N.C.G.S. 50-13.6, N.C.G.S. 6-4, N.C.G.S. 6-21(10).

ON discretionary review of the decision of the Court of Appeals, 74 N.C. App. 413, 328 S.E. 2d 811 (1985), affirming in part judgments entered 27 and 29 February 1984 in District Court, FORSYTH County. Heard in the Supreme Court 16 December 1985.

The plaintiff sued the defendant to have him declared the father of the son born to her 9 November 1981 and for custody and support determinations. The defendant denied paternity and in the alternative counterclaimed for damages, alleging that the plaintiff had defrauded him for the purpose of procreation.

The evidence at the jury trial showed, and the defendant admitted, that the plaintiff and the defendant engaged in sexual intercourse a total of four times between 20 February and 1 March 1981. Prior to that time the couple had been only casual acquaintances. The plaintiff telephoned the defendant on 20 February and they agreed to go to dinner. Afterwards they went to the defendant's apartment where they engaged in sexual relations.

The plaintiff had stated in deposition that she thought sexual intercourse was "the logical conclusion of an enjoyable evening."

Following the first act of intercourse the defendant asked about contraception methods and the plaintiff assured him that she was taking care of that. The following afternoon as the defendant was taking the plaintiff home from the defendant's apartment, he remarked that he had not seen her take her pill. She responded that she used the rhythm method of birth control.

The plaintiff admitted that in March of 1981 she had sexual intercourse with another man, but she contended that that encounter was after 19 March 1981 and that she was already pregnant at the time. Although she stated that she had had pregnancy tests at Lyndhurst Gynecological Associates in Winston-Salem on 19 March 1981 (just under four weeks after first having sexual relations with the defendant), she did not introduce the results of the tests.

Dr. Mary Ruth McMahan, Director of the Paternity Testing Laboratory at Bowman Gray School of Medicine in Winston-Sa-

lem, performed blood grouping tests upon blood samples taken from the plaintiff, the defendant and the child. She testified that the statistical probability that the defendant was the father of the child ranged from 96.42% to 99.95%. According to Dr. McMahan, she reports a range of probability, rather than a pure mathematical probability, based upon the strength or weakness of non-scientific evidence, such as the strength of evidence that only the putative father had access to the mother during the period of possible conception.

The plaintiff admitted that she did not use temperature charts and cervical mucus checks in practicing the rhythm method of birth control. She stated that she just checked the calendar and determined when her "safe" period was based upon the regularity of her menstrual cycle. She testified that she had become pregnant twice previously while utilizing the rhythm method. Her last period before conception of the child whose paternity is in issue occurred at the end of January 1981, beginning on 27 or 29 January.

Defendant's medical expert, Dr. Paul J. Meis, testified that the method of birth control as practiced by the plaintiff was unreliable. He also testified that a full-term baby conceived the 20th or 21st of February to a woman whose last menstrual period began on 29 January would likely be born on 11 November, but that that date could vary in either direction by two weeks. The plaintiff's child weighed over nine pounds when he was born on 9 November 1981.

At the close of all the evidence, the trial judge directed a verdict against the defendant on his counterclaim and denied both parties' motions for directed verdict on the issue of paternity. The jury returned a verdict that the defendant was not the father of the plaintiff's child, and the trial judge granted the plaintiff's motion for judgment notwithstanding the verdict (JNOV) on the issue of paternity. The plaintiff also made a motion for a conditional new trial, which was denied. However, plaintiff's "amended new trial motion" was later granted by the trial judge. After a hearing, the judge awarded custody, child support and attorney fees to the plaintiff. The defendant appealed.

The Court of Appeals affirmed the trial court's entry of a directed verdict against the defendant on the fraud counterclaim

and of the JNOV on the issue of paternity, but it vacated and remanded for further proceedings the trial court's order with respect to attorney fees. The Court of Appeals held that although attorney fees may be awarded for custody and support actions, there is no statutory basis for attorney fees in a paternity action. Having upheld the JNOV, the Court of Appeals did not discuss the judge's conditional order for a new trial.

This Court granted the defendant's petition for discretionary review. We reverse the Court of Appeals' ruling on the JNOV and the trial court's order granting the plaintiff's motion for a new trial. We affirm the ruling of the Court of Appeals remanding the case for further proceedings on the issue of attorney fees. The issue of the directed verdict on the defendant's counterclaim has been rendered moot.

Pettyjohn, Molitoris & Connolly, by Anne Connolly, for plaintiff-appellee.

David B. Hough for defendant-appellant.

BILLINGS, Justice.

I. Judgment Notwithstanding the Verdict

[1] According to the defendant, the plaintiff's motion for JNOV was not properly before the trial judge because when the plaintiff made a motion for a directed verdict at the close of all of the evidence (a prerequisite for JNOV), the plaintiff did not state the specific grounds therefore, as required by N.C.G.S. § 1A-1, Rule 50(a). When making the motion, the plaintiff's attorney said, "Your Honor, for the record purposes only, we'd also make a motion for a directed verdict with respect to the paternity issue but do not feel we need to argue that." The judge replied, "Okay, well, with respect to the issue of paternity, I'm going to deny the motions for directed verdict." The judge referred to motions in the plural because the defendant's counsel had just argued his own motion for directed verdict on the paternity issue, after plaintiff's counsel had argued his motion for directed verdict on the fraud issue. The plaintiff claims here that the judge and the parties knew the grounds for the plaintiff's motion. The defendant claims that, although an order entered by the trial judge states that the judge was aware of the grounds for the plaintiff's motion,

there is nothing in the record to show that the defendant knew the grounds. This Court held in *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974) that, although stating the grounds for a directed verdict is mandatory, N.C.G.S. § 1A-1, Rule 50(a) should not be inflexibly enforced in situations where the grounds are apparent to the court and to the parties. We do not decide whether *Anderson* applies in this case because, assuming *arguendo* that the motion for JNOV was properly before the trial court, the judge erred in granting it.

In a paternity action under N.C.G.S. § 49-14, the plaintiff must prove beyond a reasonable doubt that the defendant is the father of the child whose paternity is in issue. In this case, in order to affirm the JNOV we must conclude as a matter of law that the jury could have had no reasonable doubt that the defendant was the biological father of the plaintiff's son. The evidence in this case is not so overwhelming, however, that the doubt expressed by the verdict of a unanimous jury can be said to be without reason.

In considering a motion for JNOV, the trial court is to consider all evidence in the light most favorable to the party opposing the motion; the nonmovant is to be given the benefit of every reasonable inference that legitimately may be drawn from the evidence; and contradictions must be resolved in the nonmovant's favor. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981). The same standard is to be applied by the courts in ruling on a motion for JNOV as is applied in ruling on a motion for a directed verdict. *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972), *vacated on other grounds on rehearing*, 283 N.C. 277, 196 S.E. 2d 262 (1973); *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). In *Cutts v. Casey*, 278 N.C. 390, 417, 180 S.E. 2d 297, 311 (1971), an action in trespass to try title, this Court said that the trial court cannot "direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses." Subsequent cases have explained the statement in *Cutts*, and it is now clear that a directed verdict or a judgment notwithstanding the verdict may be entered in favor of the party with the burden of proof "where credibility is manifest as a matter of law." *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E. 2d 388, 395 (1979). "In such situations it is proper to direct verdict for the party with the burden of proof if the evi-

dence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be shown." *Id.* In *Burnette,* this Court identified three situations where credibility is manifest as a matter of law:

> (1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests. [Citations omitted.]
>
> (2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents. [Citations omitted.]
>
> (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradictions." [Citations omitted.]

Id. at 537-38, 256 S.E. 2d at 396.

In this case, although the defendant, the nonmovant, admitted the truth of his own sexual relationship with the plaintiff and therefore the *possibility* of his paternity, he did not admit that he was the only male who could have fathered the plaintiff's son. Therefore, situation number one above does not apply in this case.

Neither is the controlling evidence in this case documentary; therefore, situation number two does not apply.

The plaintiff argues that although the plaintiff's case is dependent upon the credibility of her testimony, there are only latent doubts as to her credibility and the defendant has "failed to point to specific areas of impeachment and contradiction."

As this Court pointed out in *Burnette,* "the instances where credibility is manifest will be rare, and courts should exercise restraint in removing the issue of credibility from the jury." *Id.* at 538, 256 S.E. 2d at 396. "[E]ven though proponent succeeds in the difficult task of establishing a clear and uncontradicted prima facie case, there will ordinarily remain in issue the credibility of the evidence adduced by proponent." *Id.* at 536, 256 S.E. 2d at 395.

Although the plaintiff's evidence made out a strong prima facie case, we cannot say that all question of credibility was

removed, especially since the quantum of proof required is beyond a reasonable doubt and is thus higher than in the usual civil case. Considering the evidence in the light most favorable to the defendant, several points emerge that make the plaintiff's case subject to some reasonable doubt.

Although the plaintiff stated that she thought her menstrual period began on 29 January 1981, she was not sure of the exact date. She stated that she kept a record of her periods on a pocket calendar but did not have the calendar with her at the trial. She had testified in a pre-trial deposition that her period in January had begun on the 27th. Further, although at trial she testified that she first met the defendant in December of 1980 and went out with him to the Royal Pub in January, in her deposition she had said that the first meeting occurred in November and they went out to the Royal Pub in December. Her explanation was that "the deposition was a month off altogether; if you'll just move a— everything a month late, I think everything will fall into place." Both parties stated that they engaged in sexual intercourse during the period between 20 February and 1 March 1981 and thereafter they had no further personal contact. Very shortly thereafter the plaintiff engaged in sexual relations with another man but asked the jury to discount the possibility that he was the father because she found out on 19 March 1981 that she was pregnant, and she did not have sexual relations with the other man until after that date. She was unsure of the exact date when she had sexual intercourse with him but was sure it was in late March. No results of the pregnancy test which the plaintiff said she had performed were introduced into evidence. This is not proof from which the courts can say that the evidence establishes as a matter of law that the jury could not entertain a reasonable doubt as to the defendant's being the father of the plaintiff's child.

The credibility of the plaintiff herself is at the heart of this case. She is an interested witness testifying about information within her knowledge but not available to the defendant as it relates to her menstrual cycle and her contact with other men. The jury certainly had the right to weigh her testimony and decide whether a reasonable doubt existed about her statements that the defendant was the only person with whom she had engaged in sexual relations between 29 January 1981 (the stated date of her last period) and 19 March 1981 (the date when she

said she knew she was pregnant) and about whether she in fact became pregnant during that period of time.

The plaintiff also offered the results of blood grouping tests. Although the blood grouping tests gave a statistical probability ranging from 96.42% to 99.95% that defendant was the father of the plaintiff's son, blood tests are primarily reliable for excluding the possibility of paternity, not proving paternity. *Cole v. Cole*, 74 N.C. App. 247, 252, 328 S.E. 2d 446, 449, *affirmed per curiam*, 314 N.C. 660, 335 S.E. 2d 897 (1985). The General Assembly has determined that if blood tests definitely *exclude* the putative father as a possible biological father,

> the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results, and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged-parent defendant is not the natural parent.

N.C.G.S. § 8-50.1(b)(1). The legislature has not mandated any weight to blood tests which do not exclude the putative father. The jury is entitled to consider this evidence and accord it the weight deemed appropriate. The danger of relying too heavily on tests is illustrated rather dramatically in *Cole*, where the trial judge found paternity in part based on a 95.98% probability in the blood grouping tests, in spite of overwhelming evidence that the defendant was sterile at the time the baby was conceived. The Court of Appeals reversed the trial court after a discussion about the statistical formula generally used to calculate the probability of paternity being dependent upon something called "prior probability of paternity," which is based on factors other than the blood test. In *Cole*, the prior probability factor that defendant was sterile meant that the impressively specific and scientific sounding 95.98% probability had to be reduced to 0%. In the present case the equally impressive sounding numbers are entitled to no definitive life of their own; it is not out of the question that tests of blood samples from the other male with whom the plaintiff admittedly had sexual intercourse would show a similar statistical probability were he to undergo such tests. No tests were introduced which would exclude him as the father of the plaintiff's child.

The jury was entitled to draw its own conclusions about the credibility of the witnesses and the weight to accord the evi-

dence. Consequently, we reverse the Court of Appeals, which affirmed the JNOV.

II. Order For New Trial

[2] Next the defendant requests us to examine the trial court's order granting the plaintiff a conditional new trial.

The trial judge granted the plaintiff's motion for a new trial, to become effective only if the appellate court reversed or vacated the JNOV. The defendant contends that at the time the trial judge ruled on the new trial motion he no longer had jurisdiction over the case because the defendant had given notice of appeal to the Court of Appeals.

The chronology of events surrounding the new trial motion is as follows: The trial commenced on 6 December 1983 during the 5 December 1983 civil session of Forsyth County District Court. The jury returned its verdict on 9 December 1983, and the plaintiff on 12 December filed written motions for JNOV and for a new trial. The grounds stated in the new trial motion were:

a. The verdict is not supported by the evidence.

b. Equity and justice require that said verdict be set aside.

The plaintiff's motions were heard on 13 December 1983 at which time the trial judge granted JNOV, but in response to the plaintiff's query about the new trial motion, he just shook his head indicating "no." No entry reflecting these rulings was made in the minutes. The defendant gave notice of appeal in open court on 13 December at the conclusion of the hearing. On 19 December 1983 the plaintiff filed a document entitled "Amended Motion for a New Trial" requesting a new trial on the ground of prejudicial juror misconduct. *See* N.C.G.S. § 1A-1, Rule 59(a)(2). The trial judge conducted a hearing on the "amended" motion on 9 January 1984. On 27 February 1984, the trial judge entered four written orders. The first order set aside the verdict of the jury and entered judgment for the plaintiff. The second order contained, *inter alia*, the following:

> 1. Plaintiff made an oral motion for a new trial in conjunction with a motion for judgment notwithstanding the verdict on December 9, 1983, in open court immediately after a

verdict in favor of the defendant had been rendered, and defendant opposed the oral motion; and

. . .

3. The plaintiff's oral motion was reduced to writing, filed and served on the defendant on December 12, 1983; and

. . .

5. Plaintiff did not establish sufficient grounds for a new trial and the motion should be denied; and

6. At the hearing on December 13, 1983, the Court made a non-verbal response to plaintiff's motion for a new trial; and

7. The Court's non-verbal response was not recorded in the minutes of the December 13, 1983 hearing; and

8. The non-verbal response of the Court was misinterpreted by plaintiff, as evidenced by plaintiff's amended motion for new trial filed on December 17 [sic], 1983.

THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Plaintiff's oral motion for new trial which was reduced to writing and filed on December 12, 1983, is hereby denied;

2. The date of the actual signing of this Order shall be the effective date of this Order for all purposes.

The third order determined the matters of custody and child support for the minor child. The fourth order was the ruling granting the amended new trial motion and contains, *inter alia*, the following:

2. That on December 13, 1983, the Honorable David R. Tanis granted plaintiff's motion for judgment notwithstanding the verdict and ordered that the verdict previously entered be set aside and judgment be entered for the plaintiff. Defendant, in open court, gave notice of appeal.

. . .

7. That the Court has jurisdiction to rule on plaintiff's amended motion for new trial in that the parties were ob-

> viously confused on December 13, 1983 as to the meaning of Judge Tanis' non-verbal response to plaintiff's initial motion for new trial filed on December 12, 1983. Further, while it was the intention of Judge Tanis to deny plaintiff's motion for new trial on December 13, 1983, the non-verbal response was not entered in the minutes nor was an order denying said motion signed and entered prior to the amended motion being filed or brought on for hearing.

The trial court then found facts regarding the conduct of one juror as evidenced by that juror's affidavit and testimony and ordered:

> that if the judgment notwithstanding the verdict granted herein is vacated or reversed on appeal, the Court hereby determines in its discretion that the misconduct of the juror . . . was prejudicial and a new trial shall be granted.

Appeal entries were signed by the trial judge on 27 February 1984.

The defendant contends that the trial judge erred in his conclusion that that court had jurisdiction to rule on the plaintiff's "amended" motion for new trial.

Since we conclude that, regardless of the question of jurisdiction, the trial judge erred in granting the amended new trial motion, we find it unnecessary to discuss the question of jurisdiction.

Ordinarily, a motion for a new trial is addressed to the sound judicial discretion of the trial judge and is not reviewable in the absence of an abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). However, in this case, the defendant contends that the trial judge based his decision to grant a new trial solely upon evidence which, under decisions of this Court, is incompetent, and that review is requested upon a question of law rather than upon the exercise of the trial judge's discretion. *See Selph v. Selph*, 267 N.C. 635, 148 S.E. 2d 574 (1966) and *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363 (1962).

The 19 December 1983 amended new trial motion alleged juror misconduct in that one juror had "made an independent investigation of matters involved in the trial," and the juror's affidavit was attached to the motion. Over the defendant's objection

that a juror is not allowed by testimony or affidavit to impeach, attack or overthrow the jury's verdict, the trial judge conducted a hearing and on 27 February 1984 entered an order allowing the motion for a conditional new trial, finding, *inter alia*:

> 8. That based on the affidavit and live testimony of [the juror involved], . . . the Court finds that:
>
> a. During the course of jury deliberations, [the juror] telephoned Lyndhurst Gynecological Associates and in answer to questions posed was informed that an internal exam of a pregnant patient could be used to show whether a woman was six or eight weeks into her pregnancy. She was also informed that sonic scans could be used to pinpoint the date of conception. While the juror did not question the nurse concerning the plaintiff in this action, Lyndhurst Gynecological Associates served as plaintiff's obstetricians during the pregnancy involved in this case and [the juror] knew so at the time she called Lyndhurst.
>
> b. That [the juror] did not inform the other jurors of her investigation.
>
> c. That prior to receiving the information from Lyndhurst, [the juror] voted that the defendant was the father of the child born to the plaintiff on November 9, 1981. That subsequent to receiving the information, [the juror] changed her vote to state that defendant was not the father. That while deliberations continued after [the juror] received the information and she had the benefit of those deliberations prior to her final vote, [the juror] stated that her final vote of no on the issue of paternity was based on the reasonable doubt which was raised in her mind as a result of the information she received from Lyndhurst.

Effective 1 July 1984, N.C.G.S. § 8C-1, Rule 606(b) controls the question of competency of jurors as witnesses upon an inquiry into the validity of a verdict. Because this case was tried prior to that date, Rule 606(b) does not apply, and we must look to prior law to determine whether the trial judge properly received the juror's affidavit and testimony. Also, we note that N.C.G.S. § 15A-1240 applies only to criminal cases and has no applicability to this civil proceeding.

The case of *Selph v. Selph*, 267 N.C. 635, 148 S.E. 2d 574 (1966) is in some respects strikingly similar to the one before us. Rather than impeaching his verdict on the basis of an independent investigation, the juror in *Selph* was allowed to state to the trial judge, after the verdict had been received and the jury dismissed, that he and at least two others were mistaken as to the legal effect of their answer to an issue. The judge ordered " 'that the verdict rendered by the jury be, and the same is hereby set aside in the discretion of the court, and a new trial is ordered.' " *Id.* at 637, 148 S.E. 2d at 575. Justice (later Chief Justice) Sharp, in the Court's opinion reversing the trial court, stated:

> In this case no abuse of discretion appears, nor is any abuse suggested. However, error in law does appear, for the motion upon which Judge Carr acted was based on grounds which the law does not recognize or sanction. To permit his order to stand would permit a juror to impeach the verdict and thus violate a public policy which had "been long settled" when the case of *State v. M'Leod*, 8 N.C. 344, was reported in 1821. If Judge Carr, without finding any facts except that the ends of justice required the action, had set aside the verdict in the exercise of his discretion, his order would have been unassailable on appeal.

Id. at 638, 148 S.E. 2d at 577.

In the instant case Judge Tanis had denied the plaintiff's motion which was based upon grounds that the verdict was not supported by the evidence and that equity and justice required that it be set aside. If that motion had been granted within the exercise of the trial judge's discretion, it "would have been unassailable on appeal." *Id.* However, Judge Tanis granted the amended motion specifically on the basis that "the misconduct of the juror . . . was prejudicial and a new trial shall be granted." The fact that Judge Tanis stated that the determination to grant a new trial was "in its [the court's] discretion" does not alter the fact that it was based solely upon the affidavit and testimony of the juror. Therefore, if that evidence was improperly received, the order granting the motion for a new trial must be reversed.

The evidence offered by the plaintiff through the juror touched upon two areas: (1) the fact that extraneous prejudicial in-

formation was acquired by the juror, and (2) the effect that this information had upon her vote. Even if N.C.G.S. § 8C-1, Rule 606 (b) were applicable to this case and allowed a juror's testimony as to area (1), apparently it prohibits testimony as to area (2). Under the law applicable to civil trials prior to July 1, 1984, juror evidence as to area (1) also was prohibited.

In *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363 (1962) the trial judge refused to allow examination of a juror in conjunction with a new trial motion on the ground of juror misconduct made after the verdict was received. The misconduct related to an alleged conversation between the juror and an unidentified man during a lunch recess. In ruling that the trial judge properly refused to hear the juror, this Court said:

> "It is firmly established in this State that jurors will not be allowed to attack or to overthrow their verdicts, nor will evidence from them be received for such purpose." *Lumber Co. v. Lumber Co.*, 187 N.C. 417, 121 S.E. 2d 755. "The rule is a salutary one. If it were otherwise, every verdict would be subject to impeachment." *In re Will of Hall, supra,* N.C. Reports page 88, S.E. 2d page 13.
>
> Judge Hall was correct in denying plaintiff's motion at the September 1961 term to examine the juror Davis.

Id. at 106, 125 S.E. 2d at 365.

These cases clearly establish that prior to 1 July 1984, a juror's testimony could not be received even to show that extraneous prejudicial information was improperly brought to the jury's attention. While such evidence could be received in a criminal case because of the constitutional right of confrontation [*See Parker v. Gladden,* 385 U.S. 363, 17 L.Ed. 2d 420 (1966); *State v. Johnson,* 295 N.C. 227, 244 S.E. 2d 391 (1978); N.C.G.S. § 15A-1240; 1 Brandis on North Carolina Evidence § 65 (1982)] no such exception to the general anti-impeachment rule applied in civil cases. Therefore, it was error for the trial judge to grant the conditional new trial on the basis of juror misconduct proved solely by the juror's affidavit and testimony.

III. Directed Verdict on Counterclaim

[3] The defendant asks us to determine whether the trial court properly granted a directed verdict against him on his coun-

terclaim for fraud, which alleged that the plaintiff made false representations in order to deceive the defendant into letting her use him for the purpose of procreation. The defendant asked for $85,000 in compensatory damages and $85,000 in punitive damages, $85,000 being a figure approximating what the defendant would have to pay for support if his paternity were established. The Court of Appeals affirmed the directed verdict against the defendant, saying that the defendant could not assert such a counterclaim because he was in effect trying to avoid his legal obligation to provide support for the child in the event that he was found to be the father. "The fact that he seeks damages from plaintiff rather than avoidance of the obligation altogether does not disguise his underlying intention to evade his responsibility to his child and to impede our enforcing of the child's legal and constitutional rights to support . . . . [T]he argument is simply not appropriate in a civil action to establish paternity, either as a defense or a counterclaim." 74 N.C. App. at 422, 328 S.E. 2d at 817. We do not decide here whether there can ever be a proper situation for allowing a fraud claim in a paternity suit, however, for by reversing JNOV in favor of the plaintiff and the order for a new trial on the issue of paternity, we have rendered the fraud issue moot.

IV. Attorney Fees

[4] Finally, the plaintiff asks us to reverse the Court of Appeals' remand of the trial judge's award of attorney fees.

The Court of Appeals vacated the award of attorney fees to the plaintiff because N.C.G.S. § 50-13.6, which provides for an award of attorney fees in proceedings for custody or support of a minor child, does not apply to civil actions to establish paternity. We note that N.C.G.S. § 6-21 provides, *inter alia*, as follows:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . .
>
> (10) In proceedings regarding illegitimate children under Article 3, Chapter 49 of the General Statutes.

. . .

> The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow: . . . .

There is a clear difference between including attorney fees in the costs taxed against a party to a lawsuit and in ordering the payment of attorney fees. When costs are taxed, they establish a liability for payment thereof, and if a fund exists which is the subject matter of the litigation, costs may be ordered paid out of the fund prior to distribution of the balance thereof to the persons entitled. *Rider v. Lenoir County*, 238 N.C. 632, 78 S.E. 2d 745 (1953). If no such fund exists, the satisfaction of the judgment for costs may be obtained by methods as for the enforcement of any other civil judgment. N.C.G.S. § 6-4.

In the case of attorney fees authorized by N.C.G.S. § 50-13.6, the court is given power to "order payment of reasonable attorney's fees to an interested party," which makes the award of attorney's fees an order of the court, enforceable by contempt for disobedience, rather than a civil judgment.

We note that the trial judge did not include the attorney fees as part of the costs but *ordered* that the defendant pay attorney fees in the amount of $2,250.00. The judgment states that the plaintiff's attorneys spent 45 hours in court "on this case." It therefore appears that the defendant has been ordered to pay attorney fees which were based in large part upon hours spent in prosecuting the paternity action. An award of attorney fees in this manner is not authorized by the law of this state.

The Court of Appeals correctly held that although attorney fees may be awarded pursuant to N.C.G.S. § 50-13.6 in an action for custody or support of a minor child, before awarding attorney fees the judge must find that the party to whom the fees are awarded was acting in good faith. Although a portion of the attorney fees in this case was awarded for the custody and support portion of the action, the trial judge made no finding of good faith by the plaintiff and no indication of what portion of the fees was attributable to the custody and support aspects of the case.

Because of error in the award of attorney fees and our reversal of the trial judge's entry of JNOV, we affirm that part of the

opinion of the Court of Appeals vacating the award of attorney fees and remanding for further proceedings on that issue.

Affirmed in part, reversed in part and remanded.

STATE OF NORTH CAROLINA v. TONY MITCHELL SIDDEN AND ANTHONY RAY BLANKENSHIP

No. 487A84

(Filed 18 February 1986)

1. Criminal Law § 89.1— character witness—knowledge or reputation

The trial court in a first degree murder case did not err in permitting a witness to testify concerning an eyewitness's reputation, since the witness was familiar with the eyewitness's reputation in the community, and his testimony as to the eyewitness's character was based upon this reputation rather than upon the witness's opinion.

2. Criminal Law § 89.1— character witness—statement of general reputation required first

Though a witness in a first degree murder case should have been required to state that an eyewitness's reputation was "good" before proceeding to enumerate the character traits which accounted for the eyewitness's good reputation, no reversible error was committed by failure to follow this procedure.

3. Criminal Law § 89.1— character witness—sufficiency of knowledge of present reputation

There was no merit to defendants' contention that the trial court erred in denying motions to strike testimony of two witnesses concerning an eyewitness's good character because neither witness had sufficient knowledge of the eyewitness's present reputation upon which to rest an opinion, since testimony revealed that one witness did have sufficient contact with the community to afford her an adequate basis upon which to form an opinion, and defendants waived any error in the admission of the second witness's testimony by their failure to object on direct examination when it became clear that his testimony was not based on an assessment of the eyewitness's present reputation.

4. Criminal Law § 89.1— character witness—statement about general reputation—testimony as to specific incidents of misconduct volunteered

The trial court did not err in allowing an SBI agent to testify that one of the defense witnesses was known as "a large dealer in controlled substances, including marijuana and cocaine," since the agent was assigned to the county where the defense witness lived; the agent testified that he had known the defense witness for 17 or 18 years and that he was familiar with the general

character and reputation of the defense witness in the community in which he lived; and the agent could, after giving a categorical answer regarding reputation, of his own volition and without prompting from the prosecutor describe in what respect the defense witness's reputation was bad.

5. Criminal Law § 79.1— statement of codefendant—admissibility as part of res gestae

There was no merit to one defendant's argument that he was denied a fair trial by the State's failure during pretrial discovery to attribute to the other defendant a statement made at the crime scene because, had the statement been attributed to the other defendant, the first defendant would have been entitled to severance, since the statement in question would be admissible in the trial of either defendant as part of the *res gestae*. N.C.G.S. § 15A-927(c)(1).

6. Criminal Law § 89.1— testimony about witness's reputation

Testimony by a witness in a position to have heard discussions of a person's reputation that he has never heard anything bad about the person is testimony of good reputation and is admissible.

7. Criminal Law § 89.1— character witness—failure to state general reputation first—no prejudice

Though it was error to allow a character witness to testify that another witness had "drinking problems" and was "not real truthful" without requiring him first to state categorically that the witness's reputation was "bad," such error was not reversible where it was clear that the character witness was familiar with the witness's reputation and his description of it leads to no conclusion but that he thought it was "bad"; furthermore, evidence of the witness's drinking habits came in through testimony of another witness.

THE defendants were indicted on 15 November 1982 by the WILKES County Grand Jury for first degree murder. Venue for the trial was changed to YADKIN County and the defendants were tried jointly before *Judge James M. Long* and a jury at the 2 April 1984 Criminal Session of YADKIN County Superior Court. Each defendant was convicted of first degree murder. Following a sentencing hearing pursuant to N.C.G.S. § 15A-2000(b), the trial judge, upon the jury's recommendation, sentenced the defendants to life imprisonment. The defendants appealed to this Court as a matter of right pursuant to N.C.G.S. § 7A-27(a).

The State's evidence tended to show that the deceased, Gary Sidden, was murdered a few yards from his mobile home in the community of Hays, Wilkes County, North Carolina sometime between 10:00 p.m. and midnight on the evening of 21 July 1982. Dr. Modesto Scharyj, the pathologist who performed an autopsy upon Sidden's body on 22 July, stated that his examination revealed that the deceased had received two shotgun wounds, a contact

wound to the neck and pellet wounds to the back from a distant shot. Dr. Scharyj further stated that either wound would have caused death within one minute.

The State's principal witness was Claude Junior Johnson. Johnson lived in a tool shed on Gary Sidden's property about fifty feet from Sidden's mobile home. Johnson had been working at Sidden's produce stand for four months prior to Sidden's death. Johnson received no pay; in exchange for his work he was given free room and board, cigarettes and an occasional beer.

Johnson testified that on 21 July 1982 he retired for the evening at approximately 10:00 p.m. He stated that shortly after he went to bed in the tool shed he was awakened by what sounded like a shotgun blast. The area around the tool shed was well illuminated by several outdoor lights, but when Johnson first looked out the window he could not see anyone. About three or four minutes later, however, he saw defendant Blankenship run out of Gary Sidden's trailer holding what appeared to be a shotgun. A moment later Gary Sidden and defendant Tony Sidden ran out of the trailer. Johnson testified that he heard Gary Sidden begging for his life. Defendant Tony Sidden and Gary Sidden then wrestled on the ground next to the trailer for a few minutes. Gary eventually broke free and began to run toward the shed. Johnson said that defendant Blankenship then jerked up his gun and shot at Gary Sidden. For the next three to five minutes, the three men were out of Johnson's view. Johnson soon heard a third gunshot, and then he heard a voice say, "Let's go, Blondie. I think we've got him now." Johnson testified that Tony Sidden used to be called "Blondie."

The next morning Johnson reported to Ricky Sidden and Phil Allen, who were selling produce at Gary Sidden's stand, that Gary had been murdered the night before. Johnson testified that he waited until morning to tell anyone about the shooting because he was so frightened by what he had seen and heard that he hid under a rocker in the tool shed throughout the night.

The defendants introduced alibi evidence tending to show that they were not in Wilkes County on the night of 21 July 1982. Norma Jean Alexander, George Torrealba, Renee Torrealba, Charles Smith, Jean Ockert and Regina Hudson testified that the defendants were with them at a party in Wagram, North Carolina

on the evening of 21 July 1982 through the early morning hours of the next day. Defense witnesses estimated that it is approximately 200 miles from the Hays Community in Wilkes County to Wagram in Scotland County.

The defendant Blankenship testified in his own behalf. Blankenship stated that he and the defendant Tony Sidden, who was married to Blankenship's mother, left Wilkes County at about 7:00 p.m. on 20 July to go on vacation. They traveled to Wagram to meet Blankenship's mother and arrived at about 11:00 p.m. Blankenship testified that he and his family stayed with friends in Wagram for several days. Blankenship recalled seeing a news story while watching television there, during which Wilkes County Sheriff Kyle Gentry announced that murder warrants had been issued for Blankenship and Sidden. Blankenship, who was fourteen years old at the time of the murder, testified that he was frightened and that he convinced Tony Sidden not to return to Wilkes County. Thereafter, the defendants traveled to several states and finally settled in Kansas under assumed names. Blankenship and Sidden voluntarily returned to Wilkes County and surrendered to authorities on 11 September 1983.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

William C. Gray, Jr., for defendant Sidden.

Adam Stein, Appellate Defender, by Malcolm Ray Hunter, Jr., First Assistant Appellate Defender, for defendant Blankenship.

BILLINGS, Justice.

Defendants Blankenship and Sidden

The defendants jointly argue three assignments of error. Two of these assignments concern testimony by prosecution witnesses regarding Claude Johnson's reputation in the community, and the third assignment relates to testimony offered by SBI Agent Kenneth Sneed as to the reputation of George Torrealba, one of the defendants' alibi witnesses.

[1] The defendants first argue that the trial court erred by permitting Earl Gambill to testify concerning Claude Johnson's repu-

tation. The defendants object to Gambill's testimony on the ground that it was based upon *personal opinion* rather than a knowledge of Johnson's *reputation.*

The defendants correctly state the rule of law applicable to this issue. As this Court's recent decision in *Holiday v. Cutchin,* 311 N.C. 277, 280-81, 316 S.E. 2d 55, 58 (1984) makes clear:

> [W]hen character is only collaterally in issue, as it is when offered either to impeach or rehabilitate a witness, proof by witnesses other than the person whose character is in question may only be by evidence of reputation. *State v. Taylor,* 309 N.C. 570, 308 S.E. 2d 302 (1983); *State v. Cox,* 303 N.C. 75, 277 S.E. 2d 376 (1981); *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1 (1959), *cert. denied,* 362 U.S. 917 (1960). Unlike proof of character when character is directly in issue, proof of character to impeach or rehabilitate may not be by opinion evidence or evidence of specific acts of the person whose character is in question. *See* 1 Brandis on North Carolina Evidence, § 113 at 419.20 (2d ed. 1982). Where character testimony is offered to prove another person's credibility as a witness, the testimony must be limited to that person's reputation.

See also State v. Peek, 313 N.C. 266, 328 S.E. 2d 249 (1985); *State v. McEachern,* 283 N.C. 57, 194 S.E. 2d 787 (1973); *State v. Hicks,* 200 N.C. 539, 157 S.E. 851 (1931).

With respect to the defendants' objections to Earl Gambill's testimony, we find that the record does not support their argument that Gambill was expressing a *personal opinion* about Claude Johnson's character. Gambill testified on direct examination that "if anybody knows [Claude Johnson's reputation in the community], I should know it." He further testified that Johnson's general character and reputation in Hays was "good." It is true that during cross-examination by defendant Blankenship's attorney Gambill made statements to the effect that it was "immaterial" to him what others said about Claude Johnson and that he didn't "have to have nobody to give his character." When questioned by the trial judge about the basis for his testimony regarding Johnson's character, Gambill responded that it was based upon his "opinion." While taken in isolation this comment might seem to require the exclusion of Gambill's testimony as violative

of the North Carolina rule prohibiting proof of character based upon personal opinion rather than reputation,[1] we note the following testimony which the defendants did *not* quote in their briefs. The trial court also asked Gambill whether his testimony was "based in any way upon what you say you may have heard other people say?" Gambill responded: "I have never heard nobody say anything about him having a bad reputation. The only thing I have ever heard of Sebon Johnson doing in my life is taking a little drink of beer or something, and just about anybody has done that. I ain't never known him to do anything out of the way to nobody." Furthermore, Gambill testified as follows during cross-examination by defendant Sidden's counsel:

> Q: You say you have never heard anybody discuss his general character and reputation at all?
>
> A: I've heard people talking about him up there, but not— I've never heard nobody give him no bad character.
>
> Q: Have you ever heard anybody give any good character either, have you?
>
> A: Oh, yes, quite a few.
>
> . . . .
>
> Q: Where did you hear them give good character references?
>
> A: I've heard it up around there at my brother's store—in the community up there.

We think that considering Gambill's testimony in its entirety, it is plain that Gambill was familiar with Claude Johnson's reputation in the community and that his testimony as to Johnson's character was based upon this reputation. We therefore hold that the trial judge correctly overruled defendants' objection to Gambill's testimony.

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1. The new North Carolina Rules of Evidence, which apply to actions and proceedings commenced after 1 July 1984, did not govern the trial of these defendants which began on 2 April 1984. 1983 N.C. Sess. Laws Ch. 701, § 3. We note, however, that Rule 405 effects a change in the permissible methods of proving character. Rule 405(a) provides that proof of character "may be made by testimony as to reputation or by testimony in the form of an opinion." N.C. R. Evid. 405(a). *See also* N.C. R. Evid. 608(a).

[2] By this same assignment of error, the defendants attack the reputation testimony offered by prosecution witness Thurman Holloway. Mr. Holloway testified, in pertinent part, as follows:

Q: Mr. Holloway, do you know Claude Junior Johnson, or Sebon Johnson?

A: Yes, I do.

Q: How long have you known him?

A: Well, I've known him all of his life.

Q: And do you know his general character and reputation in the community in which he's lived or worked?

A: Yes.

Q: What is it?

A: Well, he worked for me quite a bit . . .

MR. GRAY: Move to strike.

COURT: Overruled.

Q: Go ahead.

A: And I found him dependable.

MR. GRAY: Move to strike.

COURT: Motion denied.

Q: Go ahead, sir.

A: And he's truthful.

MR. GRAY: Move to strike.

COURT: Motion denied.

Q: Go ahead, sir.

A: And that's the better part of it.

MR. GRAY: Object. Move to strike.

MR. WHITLEY: Objection. Move to strike.

COURT: I didn't understand the last statement.

WITNESS: I said that was the better part of it. He's truthful and honest.

COURT: Motion denied.

MR. ASHBURN: No further questions.

The defendants here argue that the trial judge erred in overruling their objections to this testimony because the proper method of qualifying character witnesses proffered to give reputation evidence was not followed. They argue that Holloway should not have been permitted to specifically describe Johnson's character traits without first stating categorically what Johnson's reputation was.

We acknowledge that the defendants' argument is technically correct. Established case law[2] provides that

> when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify. This is a preliminary qualifying question which should be answered yes or no. If the witness answer it in the negative, he should be stood aside without further examination. If he reply in the affirmative, thus qualifying himself to speak on the subject of *general* reputation and character, counsel may then ask him to state what it is. This he may do categorically, i.e., simply saying that it is good or bad, without more, or he may, of his own volition, but without suggestion from counsel offering the witness, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices.

State v. Hicks, 200 N.C. 539, 540-41, 157 S.E. 851, 852 (1931). *See also State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973); *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978).

While we agree with defendants that Holloway should have been required to state that Johnson's reputation was "good" before proceeding to enumerate the character traits which accounted for Johnson's good reputation, we are convinced that no reversible error was here committed by the failure to follow this procedure. It is clear from Holloway's assessment of Johnson's character that he thought Johnson's reputation in the community was "good." Furthermore, we note that no less than 13 witnesses

2. *But see* N.C. R. Evid. 404, 405 and 608 (effective 1 July 1984).

testified as to Johnson's "good" reputation in the Hays Community. The jury therefore heard time and again testimony of the same import as that offered by Thurman Holloway from witnesses who were, in fact, properly examined in accordance with the *Hicks* rule. We therefore hold that despite technical merit in defendants' contention, this assignment of error is overruled.

[3] The defendants' next argument concerns the testimony offered by Thelma Garwood and Herbert Gambill as to Claude Johnson's good character. The basis of this assignment of error is that the trial judge erred in denying motions to strike their testimony because "neither had sufficient knowledge of Johnson's present reputation upon which to rest an opinion."

In *State v. McEachern*, 283 N.C. 57, 67, 194 S.E. 2d 787, 794 (1973), this Court held that before a witness may testify as to another person's reputation, it must be demonstrated that "the testifying witness [has] sufficient contact with that community or society to qualify him as knowing the general reputation of the person sought to be attacked or supported."

Thelma Garwood's testimony on direct examination reveals that she was born and raised in Wilkes County and that she has known Claude Johnson "almost all of [her] life." She further stated that she knew "the general character and reputation of Claude Junior Johnson" in the Hays Community and that it was "very good." On cross-examination, defense counsel elicited from Mrs. Garwood that she had lived in Winston-Salem since 1934. She testified, however, that she "still [owns] property up there" and that she "[goes] back there quite often." Significantly, she also stated that on her frequent visits to Wilkes County she always asks about Johnson. In our estimation, this testimony established that Mrs. Garwood had "sufficient contact" with the Hays Community to afford her "an adequate basis upon which to form [an] opinion" concerning Johnson's general reputation. *McEachern*, 283 N.C. at 67, 194 S.E. 2d at 794.

The defendants also object to the testimony of Herbert Gambill on the basis that Gambill's contacts with Wilkes County were too remote in time to permit his testimony regarding Claude Johnson's present reputation in that area. Mr. Gambill was asked:

Q: Do you know the general character and reputation of Claude Junior Johnson, or Sebon, in the community where he has either lived or worked?

A: Well, I do for the times that I have lived there. I've been away quite a while.

Q: And, what *was* it?

A: It *was* good.

(Emphasis added.)

No objection was made, and the witness was cross-examined.

When on cross-examination Herbert Gambill indicated he had not lived in the Hays Community since 1961, the defendants moved to strike the character evidence given on direct. However, we rule that defendants waived any error in the admission of Gambill's reputation testimony by their failure to object on direct examination when it became clear that Gambill's testimony was not based on an assessment of Johnson's present reputation.

Before stating any opinion regarding Johnson's reputation, Gambill said that it had been quite a while since he had lived in the community. The defendants were required to object as soon as the witness's inability to testify as to Johnson's *present* reputation became known. *See* 1 Brandis on North Carolina Evidence § 27 (1982) and cases cited therein. By failing to do so, defendants waived appellate review of the admissibility of this evidence.

[4] The defendants' third assignment of error is that the trial judge erred by allowing SBI Agent Kenneth Sneed, on rebuttal, to testify that defense witness George Torrealba was known as "a large dealer in controlled substances, including marijuana and cocaine." The defendants object to this testimony on two grounds: (1) that the State failed to present evidence that Sneed had sufficient contacts with Wagram, North Carolina, the community in which Torrealba lived, to qualify him as knowing the general reputation of Torrealba in that community; and (2) that through the admission of this testimony, the State was allowed to introduce extrinsic evidence of specific bad acts, i.e., drug dealing, by "dressing it up as reputation evidence."

As to the defendants' first objection to Sneed's testimony, our review of the transcript convinces us that the witness was qualified under the *McEachern* standard to offer testimony regarding Torrealba's reputation in Wagram. Sneed explained on direct examination that he was a Special Agent with the North Carolina State Bureau of Investigation. He stated that he was assigned to Richmond and Scotland Counties. Wagram is located in Scotland County. Sneed further testified that he has known George Torrealba for "approximately seventeen or eighteen years" and that he was familiar with "the general character and reputation of George Torrealba in the community in which he lives." While the record is silent as to whether Sneed himself lived in Wagram, it is not essential that the witness have acquired knowledge of a person's reputation in the course of his own residence in the community. We have held that a stranger who has investigated a person's reputation in a recognized community or group may testify to the result of the investigation. *State v. Steen*, 185 N.C. 768, 117 S.E. 793 (1923). *See also State v. Cole*, 20 N.C. App. 137, 201 S.E. 2d 100 (1973); *State v. Moles*, 17 N.C. App. 664, 195 S.E. 2d 352 (1973).

We likewise find no merit in the defendants' argument that the trial court erred in allowing Agent Sneed spontaneously to explain his conclusion that Torrealba had a bad reputation because "he is known as a large [drug] dealer." The *Hicks* rule, which was discussed previously in this opinion, permits the impeaching witness, after he has given a categorical answer regarding reputation, *of his own volition* to describe in what respect a person's reputation is good or bad.[3] *Hicks*, 200 N.C. at 541, 157

3. Again, we refer the reader to the North Carolina Rules of Evidence which were inapplicable to the trial of this action. Rule 608 provides, in part, that:

> (a) *Opinion and reputation evidence of character.*—The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of

S.E. at 852. This is precisely what happened in the instant case; Sneed stated that Torrealba had a bad reputation and then, without prompting by the prosecutor, offered testimony of his reputation for dealing in controlled substances. Sneed's testimony describing Torrealba's bad reputation is similar to reputation evidence approved by this Court in *State v. Mills*, 235 N.C. 226, 69 S.E. 2d 313 (1952) and *State v. McLawhorn*, 195 N.C. 327, 141 S.E. 883 (1928). In those cases, no error was found in the admission of volunteered testimony by character witnesses that another person's reputation was bad for making and selling whiskey.

We hold that the trial judge correctly permitted Agent Sneed to testify that George Torrealba had a bad reputation in Wagram and that he was known as "a large dealer in controlled substances."

Defendant Sidden

[5] We next consider the defendant Sidden's argument that he was denied a fair trial by the State's failure during pretrial discovery to attribute the statement "Let's go Blondie, I think we've got him now" to the defendant Blankenship rather than to the defendant Sidden.

It is difficult to determine from the defendant Sidden's brief the precise basis of his argument on this point. It appears, however, that defendant Sidden filed a post-verdict motion for appropriate relief in which he argued that if in its compliance with the discovery order the State had attributed the statement to the defendant Blankenship, the defendant Sidden would have been entitled to severance under N.C.G.S. § 15A-927(c)(1). That statute requires the prosecutor to select one of three courses of action (one of which is to try the defendants separately) "[w]hen a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him *but is not admissible against him*." (Emphasis added.) Judge Long denied the defendant Sidden's motion for ap-

truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. R. Evid. 608.

propriate relief, ruling that "even if the State had been able to identify who may have made the statement, and if it had been identified as a statement of the defendant Blankenship, that the defense of either defendant would not have been entitled to sanitize that statement, it being a part of the *res gestae* and not a part of any out of court confession or declaration against interest which tends to implicate a co-defendant."

We note initially that in his pretrial statement Claude Johnson did not specifically attribute the statement to either defendant. Johnson simply stated that during the scuffle which took place outside the tool shed on the evening of 21 July 1982, he heard someone say, "Let's go Blondie, I think we've got him now." In that same statement, however, Johnson referred to the defendant Blankenship as "Blondie." It was therefore reasonable for both defense counsel and the State to assume at that point that defendant Sidden was the individual who made the statement. At trial, however, Johnson testified that defendant *Sidden* was known by those in the Hays Community as "Blondie." Although Johnson still did not specifically attribute the statement to either defendant, it then appeared, at least inferentially, that defendant Blankenship had been the one who shouted this statement outside Johnson's window on the evening of 21 July.

Be that as it may, we agree with Judge Long that defendant's argument is without merit because the statement would have been admissible against the defendant Sidden even had he been tried separately from defendant Blankenship. The provisions of N.C.G.S. § 15A-927 are intended to protect a defendant's sixth amendment right of confrontation and cross-examination which, because of the privilege against self-incrimination, may be lost when a co-defendant's statement, inadmissible against but implicating the defendant, is admitted into evidence against the co-defendant at a joint trial. *See Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968). These considerations do not apply to the instant case, however, as the statement would have been admissible at the defendant Sidden's trial if he had been tried separately. Johnson's statement that he heard one of the perpetrators of the crime say "Let's go Blondie, I think we've got him now" is not hearsay because it does not contain an assertion by a person other than the testifying witness, Johnson, which was offered to prove the truth of the matter asserted. *See* 1 Brandis on

North Carolina Evidence § 138 (1982) and cases cited therein. Rather, Johnson's statement is his description of the "oral statements attending and connected with the transaction in question," *id.* at § 158, and thus is a part of the *res gestae.*

Even if we construed the statement to be hearsay because it was an assertion that the name of the person accompanying the declarant was Blondie, this Court has held that a hearsay statement which is part of the *res gestae* is admissible as an exception to the hearsay rule. In *State v. Connley*, 295 N.C. 327, 245 S.E. 2d 663 (1978), *judgment vacated on other grounds*, 441 U.S. 929, 60 L.Ed. 2d 657 (1979) we quoted with approval the following statement of the concept of *res gestae* from Underhill's Criminal Evidence § 266, p. 664 (5th ed. 1956):

> Circumstances constituting a criminal transaction which is being investigated by the jury, and which are so interwoven with other circumstances and with the principal facts which are at issue that they cannot be very well separated from the principal facts without depriving the jury of proof which is necessary for it to have in order to reach a direct conclusion on the evidence, may be regarded as res gestae.
>
> These facts include declarations which grow out of the main fact, shed light upon it, and which are unpremeditated, spontaneous, and made at a time so near, either prior or subsequent to the main act, as to exclude the idea of deliberation or fabrication. A statement made as part of res gestae does not narrate a past event, but it is the event speaking through the person and therefore is not excluded as hearsay, and precludes the idea of design.

Connley, 295 N.C. at 342, 245 S.E. 2d at 672.

The statement therefore would have been admissible against both defendant Sidden and defendant Blankenship had they been tried separately, and the trial judge correctly denied defendant's motion for appropriate relief on the stated basis.

Defendant Sidden raises several additional issues in which he alleges error in various evidentiary rulings and instructions given by the trial judge. He argues that the testimony offered by pros-

ecution witnesses Doreatha Walker and Johnny Wiles regarding Claude Johnson's reputation was improperly received. The basis of the defendant's objection to Doreatha Walker's testimony is that the prosecutor improperly *invited* her to amplify her statement that Johnson's reputation in the Hays Community was "good." We have reviewed the prosecutor's direct examination of Mrs. Walker and we find no support in the transcript for the defendant's argument.

Defendant Sidden's objection to Johnny Wiles' testimony regarding Claude Johnson's good reputation on the ground that it was based upon personal opinion rather than reputation is also without merit. The defendant's challenge is directed to the following portion of Wiles' testimony on direct examination:

Q: How long have you known Claude Junior Johnson?

A: I've known him, I guess, for 25 years.

Q: Do you know his general character and reputation in the community, or in the community where he's worked?

A: I knew him myself, and I never heard anything bad about Sebon.

MR. GRAY: Move to strike.

COURT: On what grounds?

MR. GRAY: It's not responsive, and it calls for a conclusion.

COURT: Overruled. It appears to be relevant.

Q: The question, and listen to my question, do you know the general character and reputation of Claude Junior Johnson in the community there where he lived?

A: Yeah, it was good.

[6] The district attorney was careful to elicit from the witness the categorical conclusion as to Johnson's reputation required by *Hicks*, 200 N.C. 539, 157 S.E. 851. Wiles' testimony respecting Johnson's reputation was therefore unobjectionable. Furthermore, testimony by a witness in a position to have heard discussions of a person's reputation that he has never heard anything bad about the person is testimony of good reputation and is admissible. *See*

1 Brandis on North Carolina Evidence § 110 (1982). This assignment is dismissed.

Defendant Sidden next argues that the trial court erred in permitting the State to offer rebuttal evidence relating to Johnson's good reputation in the community. Again, we find no error. The defense attacked Claude Johnson's character by introducing evidence which tended to show that Johnson had a reputation in Hays for being a drunkard. Russell Walker testified that he had seen Johnson drunk on several occasions and that he appeared drunk on 21 July 1982. The State is always entitled to offer rebuttal evidence to impeach defendant's witnesses or to explain, modify, or contradict defendant's evidence. *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977). *See also* N.C.G.S. § 15A-1226 (1983) ("Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party."). The trial judge therefore did not err in allowing the State to present, during rebuttal, additional evidence of Johnson's good character.

[7] The defendant Sidden's next assignment of error is directed to the testimony of Vernon Holloway. Holloway was called by the State during rebuttal to offer impeaching testimony as to the reputation of Russell Walker, the defense witness who testified that Claude Johnson was often drunk and appeared inebriated on the day of the murder. The defendant's objection seems to be that Holloway was allowed to testify that Walker "has quite a bit of drinking problems and he is not real truthful" without being required to state categorically that Walker's reputation was "bad."

We have earlier engaged in a lengthy discussion of the *Hicks* rule which requires that a character witness first proffer a categorical answer regarding an individual's reputation before the witness may proceed to volunteer the specifics of that individual's "good" or "bad" reputation. Admittedly, the district attorney did not follow this rule when he questioned Vernon Holloway regarding Russell Walker's reputation. We find, however, that no reversible error was committed by his failure to do so. While it is true that Holloway did not proffer the magical language that Walker's reputation was "bad," he was clearly *familiar* with Walker's reputation, and his *description* of it leads to no conclusion but that he thought it was "bad." Furthermore, evidence of

Russell Walker's drinking habits also came in through the testimony of another witness. Arlena Sidden testified without objection that Walker was drunk on the day of the murder. Under these circumstances, we hold that the failure of the district attorney to question Holloway in strict conformity with the *Hicks* rule does not constitute prejudicial error.

Defendant Sidden's next assignment of error requires little discussion. Sidden contends that the evidence adduced at trial was insufficient to support a theory that he acted in concert with defendant Blankenship in committing the crime charged, and therefore the trial judge erred in instructing the jury that they could convict Sidden of first degree murder on that theory. We have held that

> [i]t is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979). Suffice it to say that Claude Johnson's testimony placed defendant Sidden at the scene of the crime on the night of 21 July 1982, and his testimony further established that Sidden was "acting together" with Blankenship "pursuant to a common plan" to murder Gary Sidden.

Finally, we address defendant's contention that the trial court erred in failing to instruct the jury that not guilty was a possible verdict when he responded to the jury's request "to hear about first and second degree [murder] again." This argument is totally unsupported by the record. Before proceeding to define again the elements of first and second degree murder, the judge explained as follows:

> Members of the jury, the Defendants have each been accused of First Degree Murder. Under the law, and the evidence in this case, it is your duty to return one of the following verdicts as to each Defendant: either guilty of First Degree Murder, or guilty of Second Degree Murder, *or not guilty.*

(Emphasis added.)

We have examined carefully defendant Sidden's remaining assignments of error. We have not undertaken a written evaluation of each of them because they either lack a factual basis of support in the record or are utterly without merit in law.

We therefore hold that defendants Sidden and Blankenship each received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JIMMY EARL HARRIS

No. 176A85

(Filed 18 February 1986)

1. **Criminal Law § 99.3— confession photocopied—copies given to jurors—no expression of opinion by court**

The trial court did not err in allowing copies of an accomplice's statement implicating defendant to be photocopied and distributed to each juror since the trial judge did not thereby express an opinion on the credibility of the witness; defendant did not object to the procedure at trial and did not request any instruction on the matter; and the manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge.

2. **Homicide § 25.1— erroneous instruction—subsequent instruction on acting in concert proper—no prejudice**

Defendant in a first degree murder case was not prejudiced by the trial court's erroneous instructions with respect to the role played by defendant in the crime since the court subsequently correctly instructed on acting in concert; the earlier erroneous instruction was in fact favorable to defendant; and defendant did not object to the challenged instructions.

3. **Criminal Law § 101.2— jurors reading of newspaper article—duty of court to admonish jurors—curative instruction**

Though the trial court erred in failing to admonish jurors to avoid contact with any accounts of the trial outside the courtroom pursuant to N.C.G.S. 15A-1236(a)(4), and several jurors did read a newspaper article covering the *voir dire* hearing on the admissibility of defendant's confession, defendant was not prejudiced since he did not object to the court's failure properly to instruct the jury and did not ask for complete instructions; the contents of the article were not injurious to defendant's case, as most of the matters discussed in the article were presented to the jury during the trial and the statements the article attributed to defendant were the same contentions his attorney made at trial; and the district attorney's reported comment about the case potentially being dropped in the event defendant's statement was suppressed in no way

conveyed an opinion as to defendant's guilt or innocence. Furthermore, even if the article was prejudicial to defendant, the trial judge's instructions to the jury cured any possible prejudice, and the jurors indicated that they could put the article out of their minds and that they could remain impartial and limit their deliberations to matters adduced at trial.

4. **Criminal Law §§ 62, 76.4— polygraph test—admissibility at confession—voir dire hearing**

Evidence concerning the administration of a polygraph test may be admissible in the absence of the jury on a *voir dire* hearing to determine the admissibility of a confession.

5. **Criminal Law § 75.3— voluntariness of confession after polygraph test**

The trial judge properly found that defendant's confession was made freely, voluntarily and understandingly where defendant confessed after a polygraph operator told defendant he did not believe defendant was telling the truth on the test; defendant was fully advised of his constitutional rights each time officers spoke with him; on each occasion defendant waived his rights and agreed to talk with the officers; no threats, promises, inducements, or offers of reward were made to defendant; there was no show of violence or threats of violence to induce defendant to talk with officers; there was nothing coercive in transporting defendant from one jail to another in order to prevent his coming into contact with his codefendant; and while in custody defendant placed a call to his aunt in a nearby town in order to verify his alibi, and there was no evidence that he was not free to make other calls if he so desired.

APPEAL by defendant from judgment entered by *Brown, J.*, at the 12 November 1984 session of Superior Court, NASH County. Heard in the Supreme Court 16 December 1985.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the state.

Thomas W. King, for defendant.

MARTIN, Justice.

The evidence tended to show that Rodney Moore and Jimmy Harris, the defendant, broke into a house on Western Avenue in Rocky Mount in June 1984 and stole a .45-caliber automatic handgun. Between midnight and 1:00 a.m. on 8 July 1984, while Moore and Harris were out riding around together in defendant's father's car, they passed by Rocky Mount Motor Court. Seeing the door open to the end room, the two men planned to rob the people inside, thinking the open door would make the robbery easy. They parked in a nearby trailer park and walked to the motel.

The occupants of room 40, Jackie McCluster and Katherine Harrell, were preparing to move into another room at the motel because the air conditioning in room 40 was not working. Mr. McCluster was packing his belongings and Ms. Harrell was sitting on the bed talking to him. Suddenly, Moore, with the gun in his hand, entered the room and closed the door behind him. He told the room's occupants to hold it and to be quiet. When McCluster began to ask Moore what he wanted and moved towards him, Moore pulled the trigger and shot McCluster in the chest. Ms. Harrell began screaming and picked up the telephone receiver. Moore told her to put it down, which she did, and when the telephone rang back and she picked it up, he walked out of the room, pointing the gun at her.

A police officer arrived, went into the motel room, and came back out, saying that McCluster was dead. Ms. Harrell identified Moore as the man who shot McCluster. She did not ever see or hear anyone else with him. Autopsy revealed that McCluster died as a result of a gunshot wound to the chest.

Rodney Moore was arrested on 2 August 1984 and on 3 August gave police written confessions to both the June breaking and entering and larceny on Western Avenue and to the murder and attempted robbery of McCluster. He implicated defendant in both incidents. Specifically, he said that defendant waited at the corner of the Rocky Mount Motor Court, outside room 40, while Moore went inside; that defendant had heard the shot; and that defendant "got sort of mad" when he found out Moore had not gotten anything from the victims.

On 3 August 1984, Rocky Mount police officers Thompson and Howard arrested Harris. Defendant denied any involvement in the crimes.

Evidence at the suppression hearing showed that Rocky Mount Police Lieutenant Johnny Edwards interviewed defendant on 5 August as a suspect in the shooting death of McCluster. Defendant waived his Miranda rights, signed a polygraph release form, and agreed to take a polygraph test. During the pretest interview, defendant consistently denied any participation in the 8 July incident. After defendant had taken the polygraph examination and Lt. Edwards had reviewed the results, the police officer told defendant that he didn't think defendant was telling the

truth. At that point, defendant admitted that he had been with Moore at the motel on 8 July, that the two men planned to rob the people in the room with the open door, that Moore went into the room while he waited outside, and that he did not know that Moore was going to shoot the man. Lt. Edwards then asked defendant if he would give him a written statement, and defendant said he'd prefer for the lieutenant to ask the questions and he would answer and sign them. Lt. Edwards asked defendant questions about the incident and wrote down the questions and defendant's answers to them, and then defendant initialed each question and signed the statement at the bottom. Again, defendant admitted being with Moore at the motel on the night of the killing but denied breaking into the house on Western Avenue and helping to steal the .45 pistol. Harris then agreed to go with Edwards and other detectives to the motel the next morning to show them where he stood and what Moore did.

Further, at around 8:45 a.m. the next morning, defendant was brought into Edwards' office. SBI Agent Terry Newell and Captain Horace Winstead and Detective Wayne Sears of the Rocky Mount Police Department were also present. Detective Sears read defendant's statement indicating defendant's involvement in the murder, and Harris confirmed his answers from the previous day one by one and admitted signing the confession. Agent Newell also glanced at the statement and observed defendant's signature at the bottom. The confession was put back on Lt. Edwards' desk. Defendant was then left alone in Lt. Edwards' office for approximately ten minutes. When the officers returned to the room, they asked defendant if he was ready to go with them to the motel. When they arrived at the motel, defendant became uncooperative and denied ever having gone to that motel, saying that the motel he went to with Moore was somewhere else. The officers took defendant back to the police station. After Detective Sears and Lt. Edwards realized that defendant's confession was missing from the lieutenant's desk, defendant began disrobing, saying "You think I got it? Check me." Defendant was returned to his cell, and the two officers "took [the] office apart" looking for the statement, but it was never found.

Defendant testified at the suppression hearing and denied answering "yes" to Edwards' questions concerning defendant's participation in the murder and also denied initialing or signing a

confession. He did, however, admit picking up the statement from Lt. Edwards' desk while he was left alone in the room and putting it in his shirt pocket and throwing it out of the car window on the way back to the police station from the scene of the burglary of the gun. Defendant testified that he had visited his father in Spring Hope, North Carolina, from the 7th to the 8th of July and that he knew nothing about the murder.

The trial judge overruled defendant's motion to suppress, finding that none of defendant's constitutional rights had been violated; that his statements were made freely, voluntarily, and understandingly; that defendant was given no promises or inducements; that there were no threats of violence; that defendant had fully understood his constitutional rights to silence and counsel and other rights; and that defendant freely, knowingly, voluntarily, and intelligently waived each right.

Defendant did not take the stand but presented alibi evidence from his father, Forest Harris, which was corroborated by Beulah Mitchell, defendant's paternal grandmother who resides with her son. Rodney Moore also testified for the defense. He admitted to having agreed with the state that he would enter a guilty plea in these cases. Moore testified that he went alone to the Rocky Mount Motor Court and that only he was present with Mr. McCluster and Ms. Harrell when the shooting, which he said was accidental, occurred. He said that the police had promised to help him if he implicated defendant in the killing, so he told them "a bunch of stuff." He further admitted that when he was first arrested, he gave a written confession to police which he assured them was the truth and that in it he confessed that both he and Harris had stolen the gun used to kill McCluster; that Harris was with him when he shot the victim and that Harris had heard the shot. On the stand, he confirmed he had told officers:

> Me and Jimmy Harris was going north on Church Street in his father's car. We were going to the Squirrel's Nest Club in Goldrock and I had an automatic gun with me I had stole from Western Avenue and we went to the Motor Court. The end room door was opened and we saw it. Jimmy said that it might be some money in there, so we said let's go check it out. We turned around at the bowling alley and parked. Then we went back in the room and he stood at the ed—edge of the room and I went in. That's what happened.

However, at defendant's trial, Moore also denied that he had initially told officers the truth.

The jury returned verdicts of guilty of murder in the first degree and guilty of attempted robbery with a firearm. Apparently applying the doctrine of *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed. 2d 1140 (1982), the trial judge sentenced defendant to life imprisonment for the crime of murder in the first degree, and ruled that the attempted armed robbery conviction merged with the murder conviction. From this judgment, defendant entered notice of appeal.

I.

[1] Defendant first argues that the trial court erred in allowing copies of Rodney Moore's statement to be photocopied and distributed to each juror. He contends that this "gave improper weight to said statements and thus was an improper commentary on the evidence" on the part of the trial judge.

During cross-examination, the district attorney sought to impeach the allegation made by Moore on direct examination that he acted alone in the commission of the crimes by introducing into evidence several statements initially made by Moore to police to the effect that defendant had been with him at the time of the perpetration of the crimes. State's exhibits 8 and 12 were rights forms and waivers executed by Moore, and state's exhibits 9, 10, and 11 were handwritten confessions of Moore. After the prosecutor moved that these five exhibits be received into evidence, the trial judge said, "All right, I will let you make copies during the lunch recess, I would like to give each member of the jury a copy." After the lunch recess, the exhibits were distributed to the individual jurors. Defendant asserts that this action by the trial judge violated N.C.G.S. § 15A-1222, which states that "[t]he judge may not express during any stage of the trial any opinion in the presence of the jury on any question of fact to be decided by the jury," and the rule set out in *State v. Simpson*, 233 N.C. 438, 64 S.E. 2d 568 (1951), in which it was held that N.C.G.S. § 1-180 (the predecessor to 15A-1222) "forbids any intimation of [the trial judge's] opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury." 233 N.C. at 442, 64 S.E. 2d at 571. Defendant asserts that the judge's statement and ac-

tion clearly indicated his opinion "as to the lack of credibility of the witness, Rodney Moore, given the prior inconsistent statements made by him as to the role of the Defendant-Appellant," and that defendant was thereby prejudiced.

The transcript reveals that defendant did not object at trial either to the judge's remark or to the procedure and did not request any instruction on the matter. Because the manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, his control of the case will not be disturbed absent a manifest abuse of discretion. *State v. McCray,* 312 N.C. 519, 324 S.E. 2d 606 (1985); *State v. Goldman,* 311 N.C. 338, 317 S.E. 2d 361 (1984); *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 (1983). The fact that the trial judge chose to have copies of these handwritten statements made for distribution to individual jurors instead of providing one copy to the twelve jurors and waiting for each one to read the statements and pass them along was well within his discretion, and the record does not support a finding that defendant was prejudiced by the manner in which the judge chose to publish these exhibits to the jury. Accordingly, this assignment of error is overruled.

II.

[2] Defendant secondly contends that the trial court committed prejudicial error in its charge to the jury on the elements of the offenses. Specifically, defendant claims that the trial judge failed to make proper reference to the role played by the defendant as indicated by the evidence and that the trial judge later issued further confusing instructions with respect to the role of the defendant.

Defendant contends that the trial judge erred when he instructed the jury initially that in order to find defendant guilty of murder in the first degree, the jury must find that defendant had a firearm in his possession which he used to threaten or endanger the life of McCluster or Harrell pursuant to his design to bring about the robbery, that defendant shot McCluster, and that the shooting was the proximate cause of McCluster's death. Similarly, the trial judge instructed that to find defendant guilty of attempted armed robbery, the jury must find that defendant possessed a firearm, that he threatened to use the firearm to en-

danger or threaten the life of the victims, and that defendant's use of the firearm was designed and calculated to bring about the robbery. In so charging, the judge created the mistaken impression that to convict defendant of murder, defendant himself must have actually done the shooting, and to convict defendant of attempted armed robbery, defendant had to have been holding the gun. Neither counsel for defendant nor for the state objected to these erroneous instructions. Following these instructions, the jury retired and deliberated from 3:00 to 4:58 p.m.

The next morning, Judge Brown expressed to the jurors some concern about the clarity of his previous instructions and told them that he was going to give them "some further instructions." He then correctly instructed them as to the elements of the crimes under a theory of acting in concert, saying that in order to convict a defendant of a crime it is not necessary that he personally commit all the acts required to constitute that crime and that when "two or more persons act together with the common purpose to commit robbery and while attempting to commit the robbery a murder occurs, each is held responsible for the acts of the other done in the commission of the attempted robbery or the murder." The trial judge then proceeded to summarize the evidence and instruct according to the evidence adduced at trial, namely that Rodney Moore possessed the gun and was the actual perpetrator of the killing and that to convict defendant, the state must prove that defendant acted with Moore with the intent to rob McCluster or Harrell.

Defendant did not object to the challenged instructions as required under Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and now contends that the charge constituted "plain error" under *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

Defendant cites *State v. Harris*, 289 N.C. 275, 280, 221 S.E. 2d 343, 347 (1976), to support his claim that "where the Court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. . . . It must be assumed on appeal that the jury was influenced by that portion of the charge which is incorrect," and thus defendant is entitled to a new trial.

We find the facts of *Harris* to be distinguishable. In that case, the judge's instruction placing the burden on the defendant of satisfying the jury that the victim's death was an accident was held to have been error because accident is not an affirmative defense. The Court in that case found that "an erroneous instruction *on the burden of proof* is not ordinarily corrected by subsequent correct instructions upon the point." 289 N.C. at 280, 221 S.E. 2d at 347 (emphasis added). Such is not the situation here.

As we pointed out in *Odom*, the plain error rule will be applied only in exceptional circumstances where the error was sufficiently fundamental and prejudicial as to amount to a miscarriage of justice or the denial of a fair trial, "or where it can fairly be said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'" 307 N.C. at 660, 300 S.E. 2d at 378 (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)). In the case sub judice, it cannot be said that the trial judge's initial mistaken instruction was prejudicial to defendant. As the state correctly points out in its brief, the instruction was in fact favorable to defendant. We therefore decline to apply the plain error rule and we overrule this assignment of error.

III.

[3] In his third and fifth assignments of error, defendant alleges prejudicial error in the trial court's failure to instruct jurors to avoid listening to or reading media coverage of the trial and contends the trial court erroneously denied defendant's motion for mistrial when it was discovered that several jurors had read a newspaper article on the trial.

N.C.G.S. § 15A-1236 provides, in pertinent part:

> (a) The judge at appropriate times must admonish the jurors that it is their duty:
>
> . . . .
>
> (4) To avoid reading, watching, or listening to accounts of the trial;

Our review of the transcript confirms defendant's allegation that at no time during the trial did Judge Brown instruct the jury in accordance with 15A-1236(a)(4). Defendant argues that the trial

judge's omission in this regard constituted prejudicial error because several jurors read a newspaper article covering the voir dire hearing the previous day on the admissibility of defendant's confession. Prejudice resulted, he alleges, because testimony of the defendant appeared in the article although defendant never took the stand during trial in the presence of the jury. Furthermore, the article reported that "[i]f Judge Brown rules that the evidence be suppressed, [the assistant district attorney] said, the case may be dropped." Defendant was thereby prejudiced, he contends, in that the jurors who read the article certainly must have thought the trial judge considered defendant's confession significant and that there was "something to the statement" when he declined to suppress it.

Defendant also claims the trial court abused its discretion in the denial of his motion for mistrial when the several jurors admitted they had read the newspaper article. Defendant alleges prejudice in this matter since the trial judge had not adequately warned the jury to avoid such media coverage and he thereby "enhanced the statements"; the article indicated the case might be dismissed if defendant's statements were suppressed; matters not in evidence before the jury appeared in the article; and the voir dire testimony of defendant, who didn't testify at trial, was reported in the article, violating defendant's fifth amendment right against self-incrimination. He says that in *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967), involving an article similar to that sub judice, defendant's motion for a mistrial was held properly denied because the trial judge there had admonished the jury about avoiding trial publicity and the jury was also sequestered, but neither of those conditions was met in the case before us. Defendant also cites *State v. Reid*, 53 N.C. App. 130, 280 S.E. 2d 46 (1981), as analogous to this case. In *Reid*, the trial judge was quoted in the newspaper as having said there were "too many shots" and that thus the defendant's motion to dismiss for insufficiency of evidence would be denied; this was found to have been prejudicial error. Here, defendant says, a critical issue was whether defendant Harris's statement would be suppressed, and he maintains that the state's evidence was enhanced by the district attorney's out-of-court statement. As jurors were not free from outside influences, defendant's right to a fair trial was threatened in violation of *Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed. 2d 600 (1966).

We agree with defendant that N.C.G.S. § 15A-1236(a)(4) requires the trial judge to admonish jurors to avoid contact with any accounts of the trial outside the courtroom and that the trial judge's failure to do so in this case was error. However, defendant must show prejudice, *State v. Williams*, 296 N.C. 693, 696, 252 S.E. 2d 739, 742 (1979), and furthermore, he must object to any failure to properly instruct the jury. *State v. Richardson*, 59 N.C. App. 558, 297 S.E. 2d 921 (1982); *State v. Daniels*, 59 N.C. App. 442, 297 S.E. 2d 150 (1982). Not only did defendant's counsel fail to object and to ask for complete instructions, but also for the reasons stated below, we fail to find either that this error was prejudicial or that the trial judge abused his discretion in denying defendant's motion for a mistrial on account of the newspaper article in question.

The article complained of by defendant merely stated that defendant had pled innocent to the charges against him; listed the offenses charged; reported that defendant was being tried on an "acting in concert" theory; reported that defendant had confessed to driving the car to the motor court; told that defendant had admitted taking the confession from Edwards' desk and throwing it away; said that Harrell had testified; and reported that to which defendant objects, namely that the prosecutor commented that "the case may be dropped" if Judge Brown ruled the confession inadmissible. We agree with the state that the contents of the article were not injurious to defendant's case, as most of the matters discussed in the article were presented to the jury during the trial and the statements the article attributed to defendant were the same contentions his attorney made at trial. We also agree with the state that the district attorney's comment about the case potentially being dropped in the event defendant's statement was suppressed in no way conveyed an opinion as to the defendant's guilt or innocence. The district attorney's comment at most could be construed to be a commentary on the insufficiency of the evidence against defendant without the statement.

Not only do we find the contents of the article not to have been prejudicial, but our review of the record reveals the following transpired before the judge gave his corrected instructions:

> COURT: Ladies and gentlemen, I have been handed a copy of the Evening Telegram which has a report of this case

> in Wednesday's addition [sic] and I ask if any of you have read that article?[1] Now there were matters reported in that article that might not have been in evidence at this trial. I will ask those of you who have read the article if you feel that you will be able to disregard what was reported in that article and not consider it in your deliberations and make up your verdict solely on the evidence that was presented and that you heard in the courtroom. If any of you feel that you could not do that, then you need to let me know. I take it then that all of you feel that that would not in any way have any bearing on your verdict in the case, is that correct? If that is your feeling, please raise your hand and let me know.
>
> (All jurors raised hands.)

Although we do not find the article in question to have damaged defendant's case in any way, even assuming arguendo that the remarks in question were prejudicial, the trial judge's instructions cured any possible prejudice. The jurors affirmatively indicated that they could put the article out of their minds and that they could remain impartial and limit their deliberations to matters adduced at trial. As the Supreme Court of the United States stated in *Irvin v. Dowd*, 366 U.S. 717, 723, 6 L.Ed. 2d 751, 756 (1961), on the subject of pretrial publicity:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Along these lines, as (then) Judge Mitchell wrote in *State v. McDougald*, 38 N.C. App. 244, 251, 248 S.E. 2d 72, 79 (1978):

> A defendant has not borne his burden of showing that he will be denied an impartial jury solely by introducing evidence that his case has received widespread news coverage or that some prospective jurors have been exposed to such coverage

1. According to defendant in his brief, at this point at least three and possibly four jurors raised their hands in response to the court's inquiry.

> and formed or expressed opinions based upon their exposure. The defendant must additionally show that it is reasonably likely that prospective jurors would base their conclusions in his case upon pretrial information rather than evidence introduced at trial and would be unable to put from their minds any previous impressions they may have formed.

The same principles espoused in *Irvin* and *McDougald* apply no less to cases where the jurors were exposed to the offending publicity during the course of the trial. As defendant has failed to make any persuasive showing of prejudice in the trial judge's failure to properly admonish the jury according to N.C.G.S. § 15A-1236(a)(4) and has failed to show any abuse of discretion in the trial judge's denial of his motion for mistrial, and as we do not perceive that either the failure to so admonish or the jurors' having read the article affected the jury's finding of guilt, we overrule this assignment of error.

IV.

[4] Defendant claims that the trial court committed error in allowing into evidence at the voir dire hearing on defendant's motion to suppress his statement evidence associated with a polygraph examination of defendant and evidence obtained after use of the polygraph test. He asserts that the mention of the polygraph test at trial was admitted in violation of *State v. Grier,* 307 N.C. 628, 300 S.E. 2d 351 (1983), in which we imposed a ban on polygraph evidence at trial,[2] and *State v. Craig and State v. Anthony,* 308 N.C. 446, 302 S.E. 2d 740 (1983), in which we reiterated our holding in *Grier* that polygraph results are incompetent for all purposes at trial. It was clearly improper, defendant alleges, for a police officer to testify on voir dire that he gave defendant a polygraph test and that after the test he concluded that defendant was not telling the truth.

The test for determining the voluntariness of a confession is whether the confession is voluntary under the totality of the circumstances of the case. *State v. Jackson,* 308 N.C. 549, 304 S.E. 2d 134 (1983). In the case presently before us, the trial court con-

2. In its opinion, the Court made clear that its ban on the use of polygraph evidence at trial in no way served to prohibit the use of polygraph examinations for investigative purposes. 307 N.C. at 645, 300 S.E. 2d at 361.

ducted a voir dire hearing on defendant's motion to suppress the statement made by defendant. During this hearing, the state presented evidence showing that defendant volunteered to take a polygraph test during the police investigation into the murder, that he took the test, that the examiner told defendant he did not think that defendant was telling the truth, and that defendant thereupon confessed. The administration of the polygraph test was merely an event bearing on the total circumstances surrounding defendant's inculpatory statement. At no time during the suppression hearing were the substantive questions and answers of the polygraph test discussed, nor were the results of the test ever admitted as substantive evidence to show whether the defendant's statements were true, and it was made clear in *Grier* and *Craig and Anthony* that the *results* of the polygraph examination are the evil to be avoided. *See generally* Annot. "Property and Prejudicial Effect of Informing Jury that Accused Has Taken Polygraph Test Where Results Would Be Inadmissible in Evidence," 88 A.L.R. 3d 227 (1978 & Supp. 1985). We hold that evidence concerning the administration of a polygraph test may be admissible in the absence of the jury on a voir dire hearing to determine the admissibility of a confession. We find this assignment of error to be without merit.

V.

[5] Finally, defendant contends that the trial court abused its discretion in denying defendant's motion to suppress his statement to police officers. He asserts that his confession was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966). In arguing that his statement was inadmissible and involuntary, he asserts first that the trial judge's reliance on and acceptance of testimony concerning the polygraph examination in deciding the motion to suppress defendant's statement was error under *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351; second, he alleges that his confession was induced by improper and coercive law enforcement tactics and procedures such as repeated questioning during a three-day period and his being transported between the Rocky Mount Police Department and the Edgecombe County Jail; and third, that interrogating officers did not permit defendant to contact family, friends, or an attorney during the forty-eight hours prior to the confession.

As we said in the previous discussion, it was not error for the trial judge to admit testimony on voir dire that defendant confessed after the polygraph operator told him he did not believe defendant was telling the truth on the test, as this related to the totality of the circumstances surrounding defendant's confession. The fact that a polygraph test was administered is a question which bears on the admissibility of the confession, and the admission of testimony concerning the polygraph test is not in itself an adequate basis for ruling a confession involuntary. *See generally* Annot. "Admissibility in Evidence of Confession Made by Accused in Anticipation of, During, or Following Polygraph Examination," 89 A.L.R. 3d 230 (1979 & Supp. 1985); Annot. "Admissibility of Polygraph Evidence at Trial on Issue of Voluntariness of Confession Made by Accused." 92 A.L.R. 3d 1317 (1979 & Supp. 1985).

Regarding defendant's second argument, we do not find that any of the actions of the police were improper. Defendant was advised of his rights and was questioned only briefly on the Friday he was arrested because he smelled of alcohol and was believed by police to be intoxicated. On Saturday afternoon, at about 2:00 p.m., defendant was again given his Miranda rights, signed a rights waiver form, and was interviewed for less than an hour. He was then taken to the magistrate's office and charged with murder in the first degree. Defendant agreed to take the polygraph test on Sunday night and signed a Miranda waiver form and a polygraph release form. The entire procedure, including the examination itself, the post-test interview, and the interview during which he made his incriminating statement took a total of about two hours, from about 7:30 p.m. to 9:30 p.m. On Monday morning at approximately 8:45 a.m., defendant was brought into Lt. Edwards' office where he was again given the Miranda warnings, and he confirmed the truth of the confession he had made to Lt. Edwards the night before. Defendant then accompanied officers to the Rocky Mount Motor Court, where he declined to cooperate. On the basis of our review of the record and transcript in this case, we agree with the trial judge that defendant was fully advised of his constitutional rights each time officers spoke with him; on each occasion defendant waived his rights and agreed to talk with the officers; no threats, promises,

inducements, or offers of reward were made to defendant; there was no show of violence or threats of violence to induce defendant to talk with officers. Further, we find nothing unreasonable or coercive in transporting defendant from Rocky Mount to the jail in Tarboro in order to prevent him from coming into contact with his codefendant, Rodney Moore, who was incarcerated in the jail at Rocky Mount. Finally, the record reveals that while in custody, defendant placed a telephone call to his aunt in Spring Hope in order to verify his alibi, and there is no evidence that defendant was not free to make other calls if he so desired. We hold that the trial judge properly found that defendant's confession was made freely, voluntarily, and understandingly.

We find that defendant received a fair trial free of prejudicial error.

No error.

HERMAN BLUMENTHAL, EXECUTOR OF THE ESTATE OF I. D. BLUMENTHAL, DECEASED v. MARK G. LYNCH, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 20A85

(Filed 18 February 1986)

1. Appeal and Error § 2— appeal based on dissent in Court of Appeals—only issues addressed by dissent reviewable

In an appeal of right to the Supreme Court under N.C.G.S. § 7A-30(2) because of a dissent in the Court of Appeals, only the issue addressed by the dissenting opinion is properly before the Supreme Court for review. App. Rule 16(b).

2. Appeal and Error § 5— authority of Supreme Court to suspend rules

When issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest, the Supreme Court will exercise its inherent residual power to suspend or vary operation of its published rules or its authority under Rule 2 of the North Carolina Rules of Appellate Procedure and address those issues though they are not properly raised on appeal.

3. **Taxation §§ 22, 32— intangibles tax—exemption for charitable organization—inapplicability to executor individually or to estate**

Plaintiff executor is not eligible for an exemption from the intangibles tax with respect to the property he holds as executor on the ground that he himself, as executor, is a charitable organization as described in the first paragraph of N.C.G.S. § 105-212. Nor is the estate itself a charitable organization entitled to an exemption from the intangibles tax.

4. **Taxation § 32— intangibles tax—fiduciary exemption inapplicable to assets held by executor**

The fiduciary exemption of N.C.G.S. § 105-212(3) is unavailable with respect to intangibles held and controlled by any personal representative of a resident decedent at any time during administration of the estate.

5. **Taxation § 32— intangibles tax—stock subject to buy-back agreement—not taxable as accounts receivable**

Corporate stock held by an executor was not taxable for intangibles tax purposes as accounts receivable because it was subject to a buy-back agreement between decedent and the issuing company.

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

ON appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals reported at 72 N.C. App. 55, 323 S.E. 2d 423 (1984), affirming the judgment of *Snepp, J.*, entered at the 12 December 1983 Administrative Session of Superior Court, MECKLENBURG County, denying plaintiff-executor's claim for refund of intangibles tax and entering judgment for the defendant Secretary of Revenue.

Parker, Poe, Thompson, Bernstein, Gage and Preston, by H. Bryan Ives, III, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by Marilyn R. Rich, Assistant Attorney General, for defendant-appellee.

MEYER, Justice.

Plaintiff is the executor of the estate of I. D. Blumenthal who died testate, a resident of North Carolina, on 6 December 1978. On 4 April 1981, plaintiff filed with the Secretary of Revenue intangibles personal property tax returns for the years 1978, 1979, and 1980. Said returns were filed under protest and without remittance of the tax. On 7 May 1981, the Secretary of Revenue issued notices of tax assessment for unpaid intangibles tax, in-

terest, and penalties. Plaintiff-executor timely protested the assessment, and a hearing was held on 9 September 1981 before the Secretary, who thereafter on 16 October 1981 issued his "Final Decision" waiving the penalty but sustaining the balance of the assessment as follows:

For the year	– 1978	$14,314.25
	– 1979	14,606.06
	– 1980	22,710.75
Total		$51,631.06

Plaintiff-executor paid the foregoing amount and filed his complaint in the present civil action pursuant to N.C.G.S. § 105-267 for a refund under N.C.G.S. §§ 105-241.4 and 105-267. The case came on for trial before Snepp, J., who found the facts to be as stipulated by the parties and concluded as a matter of law that plaintiff-executor was not entitled to a refund of the intangibles tax or the interest thereon and entered judgment in favor of the Secretary of Revenue on 27 December 1983. Plaintiff-executor gave notice of appeal, and on 18 December 1984, the Court of Appeals filed its decision, one judge dissenting, affirming Judge Snepp's judgment in favor of the Secretary of Revenue. For the reasons set forth herein, we affirm the decision of the Court of Appeals.

I. D. Blumenthal (the "decedent") was the founder and principal shareholder of Radiator Specialty Company. Earlier in his lifetime, decedent had established the Blumenthal Foundation for Charity, Religion, Education and Better Interfaith Relations (hereinafter the "Foundation"), a private, charitable foundation under federal tax law and exempt from North Carolina intangibles tax. At his death, his estate was valued at approximately $8.6 million, $6.8 million of which represented the value of decedent's stock in Radiator Specialty Company (hereinafter "Radiator") and its Canadian subsidiary (hereinafter "Canada Radiator").

In his will, decedent bequeathed to his three sisters $100,000 each in cash and the remainder of his estate to the Foundation. Plaintiff, who is a brother of the decedent and who is a trustee of the Foundation and an officer of both Radiator and Canada Radiator, qualified as executor of the estate on 20 December 1978. The executor paid the cash bequests to the sisters on 11 January

1979, and after that date all distributions from the estate have been to the Foundation.

Keeping in mind that the plaintiff qualified as executor on 20 December 1978 and that the estate remains open to the present time, it is important to note that the major portion of the tax and interest assessed by the Secretary of Revenue (hereinafter "Secretary") was a result of the executor's holding the stock of Radiator and Canada Radiator on December 31 of 1978, 1979, and 1980.

Plaintiff found it advantageous for tax reasons to delay distribution to the Foundation until 1981 as he explains in his brief before this Court as follows:

> In addition to the typical duties of an executor, the plaintiff had to deal with stock in the two closely-held corporations. The problem was compounded because the Foundation was the major beneficiary under the decedent's will and codicil.
>
> The Foundation is a private charitable foundation under federal tax law. As such it would have incurred federal excise tax from holding the stock of Radiator or the stock of Canada [Radiator] bequeathed to it by reason of the "excess business holdings" provision of IRC § 4943. Therefore, either the Foundation had to dispose of the stock or the Estate had to dispose of the stock before it got to the Foundation. As is usual with closely-held securities, each company itself was the best market for the stock. Indeed, the Decedent had anticipated this as to Radiator and had provided by contract for a sale of the Radiator stock, following receipt of a favorable private letter ruling from the IRS. In addition, absent a favorable ruling, such sales to the companies could themselves trigger federal excise tax to the Foundation under IRC § 4941 as prohibited acts of self-dealing. Moreover, only by effecting the sales by the Estate could they be structured as installment sales under applicable Internal Revenue regulations. . . .
>
> As a result of the tax issues encountered, plaintiff acting on advice from the attorneys for the Estate, Foundation and the two companies, decided to hold the stock as executor, re-

quest private letter rulings from the IRS on the tax issues, sell the stock to the companies after receipt of the rulings, and distribute the proceeds of sale to the Foundation. Although the plaintiff received federal estate tax and North Carolina inheritance tax clearances in June and July, 1980 and although estates are typically closed after receipt of such clearances, the ruling and sales process described above was not completed until August 17, 1981. By that time, however, the Secretary of Revenue had raised his claim that the plaintiff, as Executor of the Estate, was liable for North Carolina intangibles tax for 1978, 1979 and 1980. The bulk of the tax and interest (approximately 85%) was assessed by the Secretary as a result of the plaintiff's holding, as executor, the stock of the two companies on December 31, 1978, December 31, 1979, and December 31, 1980. . . . The plaintiff, as executor, paid the $51,631.06 intangibles tax and interest on November 13, 1981, as required by law, G.S. 105-267, in order to pursue in court his contention that he was not liable for the tax. Plaintiff, as Executor, distributed prior to November 30, 1981, all the remaining Estate assets, less cash of $37,768.78, the claim against the Secretary of Revenue and certain other nominal assets, to the Foundation as the sole remaining beneficiary of the Estate. As of the date of trial, the Executor had not filed his final account with Clerk of Superior Court.

(Record page citations omitted; footnote omitted.)

Plaintiff has steadfastly contended that, as executor of the estate, he is exempt from the intangibles tax (after payment of the three $100,000 bequests) under each of the following paragraphs of N.C.G.S. § 105-212 as they appear in the current version of the statute:[1]

[(1)] None of the taxes levied in this Article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit . . . .

. . . .

1. N.C.G.S. § 105-212 has been amended several times since the tax years in question, but the revisions do not affect the parts of the statute pertinent to the case at bar except for the fact that the paragraphing is changed and the pertinent provisions of the paragraph referred to herein as the third paragraph (in the current version) formerly appeared in the fourth paragraph of the statute.

> [(3)] If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section for the tax imposed by this Article, such intangible personal property shall be partially or wholly exempt from taxation and under the provisions of this Article in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this Article are imposed, bears to the entire net income derived from such intangible personal property during such calendar year.

The parties stipulated to the findings of fact which the trial court adopted as its own. Based on the findings of fact, the trial court made the following conclusions of law:

> 1. That the intangible personal property held or controlled by plaintiff, Herman Blumenthal, Executor of the Estate of I. D. Blementhal [sic], Deceased, is not "intangible personal property held or controlled . . . for the benefit of any organization exempt under this section from the tax imposed by this Article" within the meaning of GS 105-212.
>
> 2. That the said property does not qualify for the exemption from intangibles tax provided for in GS 105-212.
>
> 3. That plaintiff is not entitled to a refund of intangibles tax paid with respect to said property; [sic]

The trial judge's conclusions of law raised the following questions for consideration on appeal: (1) Is the "charitable exemption" contained in the first paragraph of N.C.G.S. § 105-212 applicable to exempt plaintiff from the intangibles tax? (2) Is the "fiduciary exemption" contained in the third paragraph of N.C.G.S. § 105-212 applicable to exempt plaintiff from the intangibles tax?

The Court of Appeals treated both questions simultaneously and held that the trial court properly concluded as a matter of law that the executor of an estate is ineligible for the intangibles tax exemption with respect to "property held or controlled by a fiduciary . . . for the benefit of any organization exempt under

this section," when the exempt organization is a beneficiary under decedent's will.

The dissenting opinion filed in the Court of Appeals is confined to the single issue of whether the assets held by the plaintiff-executor were held or controlled for the benefit of the exempt charitable foundation and were thus not subject to intangibles tax. In addition to this issue, plaintiff's brief discusses several issues not addressed in the dissent. Plaintiff argues first that he is eligible for an exemption from intangibles tax with respect to the property he held as executor on grounds that he himself, as executor, is a charitable organization as described in the first paragraph of N.C.G.S. § 105-212. Plaintiff also asserts that corporate stock which he held as executor was not corporate stock at all, but rather an account receivable because it was subject to a buy-back agreement between the decedent and the issuing company.

Plaintiff seeks review of these issues under N.C.G.S. § 7A-30 (2), which provides that "an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent."

[1, 2] Although plaintiff is clearly entitled to bring an appeal by the terms of N.C.G.S. § 7A-30(2), only the issue raised in the dissent is properly before this Court for review. Rule 16 of the North Carolina Rules of Appellate Procedure defines the permissible scope of review in cases such as this:

> (a) *How Determined.* Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. . . .
>
> (b) *Scope of Review in Appeal Based Solely Upon Dissent.* Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues which are specifically set out in the dissenting opinion as the basis for that dissent . . . .

This Court's appellate review is properly limited to the single issue addressed in the dissent, and we strongly disapprove of and

discourage attempts by appellate counsel to bring additional issues before this Court without its appropriate order allowing counsel's motion to allow review of additional issues. Nevertheless, on rare occasions, when, as here, issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest, this Court will exercise its inherent residual power or its authority under Rule 2 of the North Carolina Rules of Appellate Procedure and address those issues though they are not properly raised on appeal. As noted in the commentary to Rule 2, this residual power to suspend or vary operation of our published rules does not depend on express reservation by this Court in its body of rules but is included in the rules as a reminder to counsel that the power does exist and may be drawn upon where the justice of doing so or the injustice of failing to do so appears manifest to the Court. Commentary to Rule 2, N.C.R. App. P. Because these additional issues arise frequently in the administration of estates and must often be determined by the Department of Revenue and because they have been fully briefed by the parties to this action, we elect to address them at this time.

[3] We first address plaintiff-executor's contention that he, as executor, is exempt from intangibles tax under the charitable exemption, the fiduciary exemption, or both. Plaintiff argues alternatively (1) that he, individually, in his capacity as executor, is a charitable organization; (2) that the estate as an entity is a charitable organization; and (3) that the estate as an entity is a religious, educational, charitable, or benevolent organization. We speak to each argument seriatum.

The plaintiff is an individual, albeit an individual acting in the fiduciary capacity of an executor. It is the individual as executor, not the estate, who controls and indeed holds title to the tangible personal property. Though it is the estate's assets and not the personal assets of the executor himself that are subject to tax, it is the executor who is charged with the duty and responsibility of paying the intangibles tax. N.C.G.S. § 105-207 provides as follows:

§ 105-207. *Fiduciaries to pay taxes.*

It shall be the duty of every guardian, executor, administrator with the will annexed, agent, trustee, receiver, or oth-

> er fiduciary in whose care or control any property or estate, real or personal, may be, to pay the taxes thereon out of the trust funds in his hands, if any there be; and if he fails so to do he shall become personally liable for such taxes, and such liability may be enforced by an action against him in the name of the sheriff. If he permit such property to be sold by reason of his negligence to pay the taxes when he has funds in hand, he shall be liable to his ward, principal, or cestui que trust for all actual damages incident to such neglect. This section shall not have the effect of relieving the estates held in trust or under the control of fiduciaries from the lien of such taxes.

To be covered by the charitable exemption, the party must be an "organization." An executor is not an "organization," much less a "charitable organization" entitled to exemption under the first paragraph of N.C.G.S. § 105-212.

Plaintiff argues that our analysis should focus on the estate as an entity and not on him as fiduciary as being a "charitable organization" entitled to exemption. He cites us to I.R.C. § 482 (1984), and Treas. Reg. § 1.482-1(a) (1985) for the proposition that the term "organization" includes an estate. These regulations construe federal income tax law and are irrelevant to our inquiry here. For the proposition at hand, an estate is not an entity in and of itself.

> The estate of a deceased person is not an entity known to the law, and is not a natural or an artificial person, but is merely a name to indicate the sum total of assets and liabilities of a decedent.

33 C.J.S. Executors and Administrators § 3(e) (1942).

Plaintiff argues that the estate is a charitable organization for state intangibles tax purposes because it meets the requirements for exemption from federal income tax under I.R.C. § 501(c)(3) (1984), which provision, according to plaintiff, is the source of the language found in the first paragraph of N.C.G.S. § 105-212. Here again, the federal statute has no bearing whatever upon liability for the tax which is the subject of this lawsuit. Just as plaintiff-executor is not himself a charitable organization, his undertaking, i.e., winding up the affairs of his

decedent and effecting transfer of assets to those entitled to receive them, is not a charitable undertaking.

For the same reasons that the estate itself is not a charitable organization, it is not itself a religious, educational, or benevolent organization.

Plaintiff-executor is entitled to no relief under either provision of N.C.G.S. § 105-212.

[4] We next address the only issue which was discussed in the dissenting opinion in the Court of Appeals: whether the Court of Appeals erred in affirming the trial judge's conclusion that, as a matter of law, the assets held by the executor were not held or controlled for the benefit of any organization exempt from intangibles tax within the meaning of the N.C.G.S. § 105-212 "fiduciary exemption." The dissent below distinguished the present case from the cases relied on by the majority and subsequently discussed herein on the basis that those cases involved estates which had not been administered to the extent that all the remaining "assets were being held for an exempt organization"— the obvious rationale of the dissent being that there comes a point in time when administration of the estate is sufficiently completed that all remaining assets may be said to be held for the benefit of beneficiaries and that where those beneficiaries are nonresidents or, as here, charitable organizations, the remaining intangible property will be exempt from taxation under the "fiduciary exemption" of the third paragraph of N.C.G.S. § 105-212.

The Secretary of Revenue contends, and properly so, that the period of administration of an estate is indivisible for intangibles tax purposes and that the fiduciary exemption is unavailable to the personal representative of a decedent's estate at any time. In adopting this interpretation of the statute, the trial court and the Court of Appeals followed the precedents of two previous decisions of this Court. Though these two cases involved nonresident beneficiaries, the principle is the same whether the property is held or controlled "for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section for the tax imposed by this Article." N.C.G.S. § 105-212 (1985).

In *Allen v. Currie, Commissioner of Revenue*, 254 N.C. 636, 119 S.E. 2d 917 (1961), a resident decedent left his realty and one-

fourth of his adjusted gross estate to his wife and left the residue, after payment of taxes and certain specific pecuniary bequests, to six nonresident beneficiaries. The executor paid the tax but demanded a refund of three-fourths of the amount paid on the theory that three-fourths of the gross estate was distributable to nonresidents and that the income had been distributed in accordance with that formula, thereby exempting three-fourths of the estate assets under the statutory exclusion provision. The underlying question, of course, is whether the executor held assets for the benefit of those nonresident beneficiaries. This Court was required to analyze the role of the executor of a decedent's estate:

> The status of an executor is well stated in 21 Am. Jur., Executors and Administrators § 8, as follows: "While a personal representative of a decedent stands in the place of, and is regarded as, the representative of the deceased person for the purpose of settling his business affairs and distributing his estate, in reality he serves in a dual capacity, occupying also the position of trustee for the persons beneficially interested in the estate. Such persons are generally the creditors and the heirs of the decedent, those designated in the will as legatees or devisees, and, in the default of beneficiaries taking under the will, those entitled to the estate under the statute of distributions. After all claims have been paid, the representative remains as a trustee for the beneficiaries of the estate."

Id. at 640, 119 S.E. 2d at 920-21.

The holding of the case, however, makes it clear that it is only the executor's role as the decedent's personal representative which is significant:

> While the estate was in process of administration, the executors held and controlled all assets of the estate for disbursement and distribution according to law and the provisions of the will without distinction as to the kind and character of the assets to be distributed to the widow or to the nonresident residuary beneficiaries upon final settlement. In short, the assets were in the hands of the executors in their capacity as the testator's personal representatives. . . .
>
> . . . .

> The ultimate question is whether the exemption provided in the quoted portion of G.S. 105-212 is available to plaintiff. This provision was incorporated in G.S. 105-212 in 1947. . . .
>
> . . . [W]e think the 1947 amendment was intended to apply to an established or continuing trust . . . .
>
> . . . [T]he exemption was not intended to apply, and does not apply, to intangibles constituting general assets held and controlled by an executor of an estate during the process of administration.

Id. at 642-43, 119 S.E. 2d at 922-23.

In *Ervin v. Clayton, Comr. of Revenue*, 278 N.C. 219, 179 S.E. 2d 353 (1971), a resident decedent bequeathed to her nonresident daughter half her stocks and bonds and all of her bank deposits not consumed in the administration of the estate, plus an interest in a residuary trust, the provisions of which were not detailed in the opinion. The executor paid intangibles tax for the years 1964 and 1965 but later filed for a refund, "asserting that 'the Estate of Cleora C. Doane was exempt from intangibles taxes in that the Executor held the assets of the Estate as a fiduciary domiciled in this State for the benefit of a nonresident beneficiary.'" *Id.* at 222, 179 S.E. 2d at 355. This Court was again asked to speak to this issue. The holding in *Ervin* is in accord with *Allen*:

> The fiduciary obligation of the personal representative of a decedent is distinguishable from that of the trustee (by whatever named called) of an established or continuing trust. An executor, as the resident decedent's personal representative, is obligated to administer the estate in accordance with law and the provisions of the will. As such personal representative, he must ascertain and pay the funeral expenses and debts, including inheritance and estate taxes as well as taxes on income received by the decedent prior to death and on income received by him as personal representative. Until this has been done, the status of intangibles constituting assets of the estate remains unsettled. What intangibles, if any, a particular beneficiary is entitled to receive cannot be determined with exactitude until the estate is ready for final settlement. As noted in *Allen*: "Ordinarily, distribution of

assets or of income prior to final settlement is made by an executor at his own risk. *Mallard v. Patterson,* 108 N.C. 255, 13 S.E. 93 [1891]."

> We are of opinion and now hold that the exemption from intangibles tax provided in the quoted portion of G.S. 105-212 does not apply to intangibles held and controlled by the personal representative of a resident decedent during the period such personal representative is engaged in the active administration of the estate in accordance with law.

Id. at 226, 179 S.E. 2d at 357.

The opinion of this Court in *Ervin* was obviously intended to decide the principle and was not intended to be restricted to the particular facts presented:

> Our decision on this appeal is not based on factual similarities or differences in *Allen* and in the present case. We deem it appropriate to decide whether the exemption provided in the quoted portion of G.S. 105-212 is available to any personal representative of a resident decedent in respect of intangibles held and controlled by him as such personal representative during the period he is engaged in the active administration of the estate in accordance with law.

Id. at 225, 179 S.E. 2d at 357.

In 1976, the Secretary of Revenue adopted an equally unequivocal regulation:

> .1505 DOMESTIC TRUSTS FOR NONRESIDENTS OR EXEMPT ORGANIZATIONS
>
> If any intangible personal property is held or controlled by a resident fiduciary for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt from intangibles tax, such intangible personal property shall be partially or wholly exempt from taxation in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which intangibles taxes are imposed, bears to the entire net income derived from such intangible personal property dur-

ing such calendar year. This exemption does not apply to executors and administrators of estates.

17 NCAC 8 .1505 (1 February 1976) (later amended on 1 November 1984 to number the above paragraph as subsection (a) and to change "resident fiduciary" to "resident trustee").

We reject plaintiff's argument that if an executor is a fiduciary under N.C.G.S. §§ 105-206 and 105-207 relating to the filing of returns and the payment of tax, then every provision in the intangibles tax article which speaks of fiduciaries must be construed to apply to executors, no matter how tortured a construction would result.

Though, as the dissent below points out, in neither *Allen* nor *Ervin* had the estate been administered to the extent of the one here, we interpret the language of our opinions in those cases to mean that the fiduciary exemption of the third paragraph of N.C.G.S. § 105-212 is unavailable in respect of intangibles held and controlled by *any* personal representative of a resident decedent at *any* time during administration of the estate. The fiduciary exemption simply has no application to a decedent's estate in the process of administration.

We also reject plaintiff's argument that if the assets in the hands of the executor are not totally exempt from the time of the decedent's death, they became exempt either (1) when the Foundation became the only remaining beneficiary not to have received its distribution or (2) when the taxes and debts were paid. Plaintiff's theory is that at those points in time, the administration of the estate became "passive" as opposed to "active" and thus divisible into nonexempt and exempt periods. This is obviously based on the numerous references in *Ervin* to "active administration." *Ervin* does not hold, and there is no basis in fact or in law for severing the administration of estates into "active" and "passive" phases. As previously noted in this opinion, the period of administration is indivisible for intangibles tax purposes. Even if we accepted plaintiff's argument in this regard, as the majority below recognized, plaintiff-executor had not been discharged from his duties as of December 31 of the years in question. The Secretary's brief suggests that plaintiff-executor has not yet been discharged and continues even now to actively administer the remaining assets of the estate, file accounts, pay expenses, collect

income, and indeed prosecute this lawsuit, and thus is still engaged in active administration.

[5] Finally, plaintiff-executor argues that the shares of corporate stock of Radiator and Canada Radiator which comprised the bulk of his testator's estate and which were held by the estate on December 31 of each of the pertinent years were taxable not as shares of stock but as accounts receivable since they were subject to a buy-back agreement between the decedent and the issuing corporation. This contention was raised for the first time on the appeal to this Court and thus was not addressed in either the majority or dissenting opinions below. This argument lacks merit. Suffice it to say that at all times the plaintiff-executor held the shares of corporate stock, there had been no sale back to the corporations and, as executor, plaintiff was liable for intangibles tax on all stock held by him.

Plaintiff-executor argues that our "holdings" in *Allen* and *Ervin* "are clearly erroneous" and urges us to overrule those cases. We decline the opportunity to do so and by our decision in the case at bar reaffirm our holdings in those cases. The plaintiff suggests that our legislature, "[h]aving provided that executors of estates the assets of which are to be distributed to charity do not have to pay North Carolina income tax or North Carolina estate tax and that property held by those executors is not subject to North Carolina inheritance tax," could not have intended to exact an intangibles tax, particularly given the similarity of the "charitable language" in N.C.G.S. § 105-212 and the statutes governing these other taxes. If the decisions in *Allen*, *Ervin*, and the case at bar do not correctly interpret the intent of our legislature in enacting N.C.G.S. § 105-212, that body may address the question.

The decision of the Court of Appeals is

Affirmed.

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

ANDERSON v. JACKSON COUNTY BD. OF EDUCATION

No. 713P85.

Case below: 76 N.C. App. 440.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 February 1986.

BOGGS v. N.C. DEPT. OF TRANSPORTATION

No. 622P85.

Case below: 76 N.C. App. 679.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

BOLTON CORP. v. T. A. LOVING CO.

No. 715PA85.

Case below: 77 N.C. App. 90.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 18 February 1986.

CALHOUN v. CALHOUN

No. 559P85.

Case below: 76 N.C. App. 305.

Petition by defendants for discretionary review under G.S. 7A-31 denied 18 February 1986.

CLAYCOMB v. HCA-RALEIGH COMMUNITY HOSP.

No. 571P85.

Case below: 76 N.C. App. 382.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

FLOYD v. FLOYD

No. 724P85.

Case below: 77 N.C. App. 459.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

GRIER v. GRIER

No. 604P85.

Case below: 76 N.C. App. 679.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

HAMILTON v. TRAVELERS INDEMNITY CO.

No. 699P85.

Case below: 77 N.C. App. 318.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

HAYES v. BROWNE

No. 537P85.

Case below: 76 N.C. App. 98.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

IN RE DIGITAL DYNAMICS CORP. AND CARPHONICS, INC.

No. 102P86.

Case below: 78 N.C. App. 442.

Notice of appeal by Digital Dynamics and Carphonics under G.S. 7A-30 dismissed 18 February 1986. Petition by Digital Dynamics and Carphonics for discretionary review under G.S. 7A-31 allowed 18 February 1986 and the matter is remanded to the Court of Appeals for reconsideration in light of the opinion in *In re Superior Court Order*, 315 N.C. 378, 338 S.E. 2d 307 (1986). Petition by Digital Dynamics and Carphonics for writ of supersedeas and motion for temporary stay allowed 18 February 1986.

IN RE PROTEST OF MASON

No. 768P85.

Case below: 78 N.C. App. 16.

Petition by Clyde Mason, Jr. for discretionary review under G.S. 7A-31 denied 18 February 1986.

JOHNSON v. JOHNSON

No. 471PA85.

Case below: 75 N.C. App. 659.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 18 February 1986.

LANCASTER v. LUMBY CORP.

No. 753P85.

Case below: 77 N.C. App. 644.

Petition by defendants for discretionary review under G.S. 7A-31 denied 18 February 1986.

McCOMBS v. KIRKLAND

No. 568PA85.

Case below: 76 N.C. App. 336.

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals allowed 18 February 1986.

McCRARY STONE SERVICE v. LYALLS

No. 794P85.

Case below: 77 N.C. App. 796.

Petition by defendants for discretionary review under G.S. 7A-31 denied 18 February 1986.

McGEE v. EUBANKS

No. 690P85.

Case below: 77 N.C. App. 369.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

MOUNTAIN VIEW, INC. v. BRYSON

No. 791P85.

Case below: 77 N.C. App. 837.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

PASOUR v. PIERCE

No. 544P85.

Case below: 76 N.C. App. 364.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 18 February 1986.

PITTMAN v. INCO, INC.

No. 735P85.

Case below: 78 N.C. App. 134.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

PRESSMAN v. UNC-CHARLOTTE

No. 1PA86.

Case below: 78 N.C. App. 296.

Petition by plaintiff (Maurice Herman) for discretionary review under G.S. 7A-31 allowed 18 February 1986.

RODGERS BUILDERS v. McQUEEN

No. 495P85.

Case below: 76 N.C. App. 16.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

SAWYER v. FEREBEE & SON, INC.

No. 11P86.

Case below: 78 N.C. App. 212.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

SHARP v. WYSE

No. 802PA85.

Case below: 78 N.C. App. 171.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 18 February 1986.

SMITH v. MARINER

No. 717P85.

Case below: 77 N.C. App. 589.

Petition by defendant (Mary Anne B. Mariner) for discretionary review under G.S. 7A-31 denied 18 February 1986.

SMOCK v. BRANTLEY

No. 499P85.

Case below: 76 N.C. App. 73.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 18 February 1986.

SOUTH CAROLINA INS. CO. v.
SOUTHEASTERN PAINTING CO.

No. 729P85.

Case below: 77 N.C. App. 391.

Petition by defendant (H. Angelo & Company, Inc.) for writ of certiorari to the North Carolina Court of Appeals denied 18 February 1986.

STATE v. BOONE

No. 676P85.

Case below: 77 N.C. App. 238.

Motion by State to dismiss appeal for lack of substantial constitutional question allowed 7 January 1986. Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. BOWLING

No. 3P86.

Case below: 77 N.C. App. 845.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 February 1986.

STATE v. BRIGHT

No. 20P86.

Case below: 78 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. BROWN

No. 801P85.

Case below: 78 N.C. App. 442.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. BUTLER

No. 54P86.

Case below: 78 N.C. App. 442.

Petition by the State for discretionary review under G.S. 7A-31 allowed 18 February 1986 and the matter is remanded to the Court of Appeals for reconsideration in light of exhibits filed with the Court pursuant to the Attorney General's motion to be allowed to file addendum to the record, allowed by this Court on 18 February 1986.

STATE v. CAMERON

No. 179P85.

Case below: 73 N.C. App. 89.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. CLARK

No. 703P85.

Case below: 77 N.C. App. 459.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. EKLEBERRY

No. 480P85.

Case below: 75 N.C. App. 512.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. ELDER

No. 655P85.

Case below: 76 N.C. App. 681.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 February 1986.

STATE v. FIFIELD

No. 659A85.

Case below: 77 N.C. App. 460.

Notice of appeal by defendant under G.S. 7A-30. Motion by State to dismiss appeal for lack of substantial constitutional question allowed 10 December 1985.

STATE v. HAMILTON

No. 723P85.

Case below: 77 N.C. App. 506.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. HARVEY AND BROOKS

No. 17P86.

Case below: 78 N.C. App. 635.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. HOLDER

No. 727P85.

Case below: 77 N.C. App. 666.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. HOUSAND

No. 657P85.

Case below: 77 N.C. App. 460.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. JOHNSON

No. 78P86.

Case below: 78 N.C. App. 729.

Temporary stay pending receipt and consideration of the State's petition for discretionary review allowed 7 February 1986.

STATE v. LOCKLEAR

No. 707P85.

Case below: 77 N.C. App. 414.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. McDANIEL

No. 600P85.

Case below: 76 N.C. App. 543.

Motion by State to dismiss appeal for lack of substantial constitutional question allowed 7 January 1986. Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. MITCHELL

No. 597P85.

Case below: 76 N.C. App. 346.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 February 1986.

STATE v. MITCHELL

No. 718P85.

Case below: 77 N.C. App. 663.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. MOORE

No. 771PA85.

Case below: 77 N.C. App. 553.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 18 February 1986.

STATE v. PERKEROL

No. 705P85.

Case below: 77 N.C. App. 292.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. PHILLIPS

No. 797P85.

Case below: 77 N.C. App. 846.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. ROSENBAUM

No. 740P85.

Case below: 77 N.C. App. 846.

Motion by State to dismiss appeal for lack of substantial constitutional question allowed 7 January 1986. Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. SIMPSON

No. 728P85.

Case below: 77 N.C. App. 586.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. STALLINGS

No. 634P85.

Case below: 77 N.C. App. 189.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. WADE

No. 531P85.

Case below: 49 N.C. App. 257.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 February 1986.

STATE v. WATTS

No. 648P85.

Case below: 76 N.C. App. 656.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. WHITE

No. 612P85.

Case below: 76 N.C. App. 544.

Motion by State to dismiss appeal for lack of substantial constitutional question allowed 7 January 1986. Petition by defendant for discretionary review under G.S. 7A-31 denied 7 January 1986.

STATE v. WOODS

No. 751PA85.

Case below: 77 N.C. App. 622.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 18 February 1986.

TAYLOR v. BRITTAIN

No. 633PA85.

Case below: 76 N.C. App. 574.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 18 February 1986.

THOMAS M. McINNIS & ASSOC. v. HALL

No. 601A85.

Case below: 76 N.C. App. 486.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals allowed 28 January 1986.

U. S. HELICOPTERS, INC. v. BLACK

No. 796PA85.

Case below: 77 N.C. App. 827.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 18 February 1986.

WAITS v. JOHNSTON

No. 460P85.

Case below: 75 N.C. App. 512.

Petition by defendants for discretionary review under G.S. 7A-31 denied 18 February 1986.

WALKER v. WESTINGHOUSE ELECTRIC CORP.

No. 706P85.

Case below: 77 N.C. App. 253.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

WILKINSON v. WILKINSON

No. 800P85.

Case below: 77 N.C. App. 846.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE OF NORTH CAROLINA v. RICKY DALE LEDFORD

No. 452A84

(Filed 18 February 1986)

1. **Burglary and Unlawful Breakings § 5.2; Homicide § 21.6— first degree murder —felony murder—first degree burglary—time of offense—sufficiency of evidence**

There was no merit to defendant's contention that his conviction for first degree murder must be reversed because the State failed to prove beyond a reasonable doubt each and every element of the underlying felony, first degree burglary, particularly that the offense was committed during the nighttime, where the evidence tended to show that the last person to see the victim was her daughter; when the daughter left the victim's house at 3:00 p.m. on a Friday afternoon, the front window of the house was intact and the living room curtains were hanging straight; another of the victim's relatives saw the window on the following Saturday morning as she drove to work, and the window was broken; the curtain and broken glass were later found lying inside the room; a cab driver testified that, as he drove his taxi down the victim's street just before 2:00 a.m. on Saturday morning, he recognized defendant, whom he had known all of defendant's life, stepping onto the sidewalk in front of the victim's house; though it was dark, there were three streetlights in the vicinity; defendant did not acknowledge the cab driver's greeting but instead pushed something up under his shirt and kept walking; defendant's cousin testified that, while waiting for his paper route newspapers to be delivered around 2:00 a.m. on Saturday morning, he saw defendant walking toward a store from the direction of the victim's house; defendant displayed a roll of paper money, stating that he had been given the money in a gun deal; the victim's grandson found his grandmother bleeding and bruised in her bloodstained bed, wearing her pajamas, shortly after 9:00 a.m. on Saturday morning; and defendant offered several conflicting accounts as to his whereabouts on the night in question.

2. **Homicide § 21.4; Criminal Law § 61.2— first degree murder—identity of perpetrator—boot print—sufficiency of evidence**

The State's evidence with regard to defendant as the perpetrator of the crime was sufficient to be submitted to the jury where it tended to show that a boot print on the window side of a curtain in the victim's living room was made by the left boot which defendant was wearing on the night of the crime; cigarette butts taken from defendant's home and the cigarette butt taken from the nonsmoking victim's bedroom were the same brand; saliva on those cigarette butts was produced by a "type A secretor"; defendant was a type A secretor, as was 30% of the North Carolina population; a cab driver saw defendant step onto the sidewalk directly in front of the victim's home at 2:00 a.m. and stuff something into his shirt; the State introduced the checked flannel shirt which defendant admitted he was wearing on the night in question, and the cab driver stated that the shirt appeared to be the one defendant was wearing when the cab driver saw him; defendant's cousin testified that he saw

defendant at 2:00 a.m. on the day in question and defendant was displaying a roll of paper money at that time; the cousin saw defendant only minutes after the cab driver had seen him in front of the victim's house; and when defendant was arrested in the early hours two days later, he had in his possession over $400 consisting of bills similar in denomination to those which the victim had placed in a jar in her home two days before the assault.

3. Criminal Law § 61.2— boot print—admissibility of evidence

There was no merit to defendant's contention that shoe print evidence was inadmissible because it did not meet the three-part test for sufficiency of such circumstantial evidence set forth in *State v. Palmer,* 230 N.C. 205, since the boot print in question was discovered on the backside or window side of a curtain lying on the floor of the victim's living room "at or near the place of the crime"; the expert testified that the print could have been made only by defendant's left boot and by no other shoe; and there was evidence tending to connect defendant with the scene of the crime at or about the time the offenses were committed, including evidence that defendant was seen directly in front of the victim's home at 2:00 a.m. on the night in question and that defendant admitted he was wearing the boots corresponding to the print found on the curtain inside the victim's home.

4. Homicide § 15.5— expert opinion testimony—proximate cause of death—failure to use "could" or "might"

There was no merit to defendant's contention that, because a pathologist's testimony that injuries suffered by the victim on the date of the crime "were a proximate cause of her death" was not limited by the terms "could" or "might," it amounted to an expression of opinion as to an ultimate issue in the case and invaded the province of the jury, since the trial court accepted the witness as an expert in pathology; defendant did not object; the court properly concluded that the witness's testimony would assist the jury in understanding his testimony and in determining a fact in issue; defendant offered no evidence to the effect that the witness's expertise could not lead him to the conclusion he expressed or that his testimony was inherently incredible; and the witness did not offer an opinion as to defendant's guilt or innocence. N.C.G.S. 8-58.13.

5. Homicide § 15.5— expert opinion testimony—proximate cause of death—admission erroneous—no prejudice

Testimony by a pathologist in a murder prosecution that injuries sustained by the victim during the assault "were a proximate cause of her death" did not constitute a legal conclusion but did constitute testimony that a legal standard had been met, and its admission was therefore error; however, there was no reasonable possibility that, had the error not been committed, a different result would have been reached at trial.

6. Assault and Battery § 4— death resulting from assault—conviction for assault improper

If a victim dies as the result of an assault, a defendant cannot be convicted of assault with a deadly weapon inflicting serious injury for that particular assaultive conduct; therefore, defendant's conviction for assault with a

deadly weapon inflicting serious injury is vacated since the State failed to introduce evidence of an assault which did not result in the victim's death.

7. **Criminal Law § 138; Larceny § 10— sentence—clerical error—improper aggravating factors**

Defendant is entitled to a new sentencing hearing on his felonious larceny conviction where the State contended that a mere clerical error resulted in the file number of the first degree murder offense being placed on the Findings form and that the trial judge intended his findings to relate only to the felonious larceny conviction, thus properly escalating the punishment to the ten year maximum, but if there was a clerical error, the trial judge erred by finding two aggravating circumstances—that the victim was very old and that the offense was especially heinous, atrocious, and cruel—which were, under the facts of this case, totally unrelated to the crime of felonious larceny, and if there was no clerical error, the trial judge clearly erred by sentencing defendant to a term in excess of the presumptive sentence without making written findings in aggravation and mitigation.

BEFORE *Burroughs, J.*, at the 16 April 1984 Criminal Session of Superior Court, HAYWOOD County. Defendant was convicted of first-degree murder, first-degree burglary, felony larceny, and assault with a deadly weapon inflicting serious injury. The death-qualified jury recommended life imprisonment for the conviction of first-degree murder committed during the perpetration of first-degree burglary. On the Judgment and Commitment form, it appears that the assault conviction was consolidated for sentencing with the first-degree murder, and the judge sentenced defendant to life imprisonment upon the jury's recommendation. Defendant was separately sentenced to a consecutive term of ten years for the larceny conviction. Defendant appeals his life sentence as a matter of right pursuant to N.C.G.S. § 7A-27(a). His motion to bypass the Court of Appeals on his appeal of the ten-year sentence was allowed by this Court on 14 March 1985. Heard in the Supreme Court 17 October 1985.

Lacy H. Thornburg, Attorney General, by Tiare B. Smiley, Assistant Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

MEYER, Justice.

The State's evidence tended to show that on Saturday morning, 23 July 1983, Charlotte Henson drove down Pisgah Drive in Canton past the home of Nora Curtis, her husband's grandmother,

as she did every day on her way to work. On that morning, however, she noticed that the front window of Mrs. Curtis' home was broken. When she arrived at work, Mrs. Henson telephoned her brother-in-law, Stanley Henson, and asked him to check on his grandmother.

Stanley Henson drove to Mrs. Curtis' house, and when there was no response to his knock on the front door, he moved to the broken window and called out to his grandmother. He heard her moan and say that she was hurt. He then drove to the Canton Police Department and advised the dispatcher to send a patrol car to Mrs. Curtis' home immediately. He returned to his grandmother's home, arriving at the same time as Officer R. G. Stroup. Unable to gain entry through the locked front door, the men walked around to the side screen door which was secured by a hook and eye latch. Officer Stroup was able to force open the screen door, and the two men entered the house. A third door leading to the basement was locked from the inside.

The men found 87-year-old Nora Curtis in her nightgown, lying on her side on the bed which was partially broken down at the foot. On the bedroom floor, they found an old aluminum pot and a piece of curtain rod with a jagged end. Both items were stained with a reddish-brown material. There was blood on Mrs. Curtis' hands, arms, and face and on the pillow, bedcover, and mattress. Mrs. Curtis had bruises on her hands, arms, and face and a large knot on her left shoulder. The bedroom appeared to have been ransacked, and the doors of a wooden wardrobe were hanging open. Mrs. Curtis was taken to the Haywood County Hospital where she remained until her death on 3 August 1983.

An investigation of the Curtis home was conducted by the Canton Police Department and the SBI. A small, white cardboard box was found on top of the dresser in Mrs. Curtis' bedroom. It contained several items, including the butt of a Marlboro Light cigarette. Mrs. Curtis did not smoke. A piece of asphalt was found in the living room. Broken glass was found on the living room floor between the broken window and the couch. The curtain rod on the front window was broken down and one of the curtains was lying on the living room floor. When Sergeant Rhinehart picked up the curtain, he discovered a footprint on a portion of the backside or window side of the curtain that had been folded

under before he picked it up. SBI Agent Elliott was able to lift only two fingerprints from the scene, neither of which, when analyzed by the SBI latent print examiner, was found to be of suitable quality for identification purposes.

Mrs. Rochelle Robinson, a daughter of the victim, testified that on the Wednesday prior to the assault, she had driven her mother to the Clyde Savings and Loan to make a $1,500 deposit. Mrs. Robinson further stated that her mother had "at least five hundred dollars left," which she placed in a large plastic mayonnaise jar in the bedroom wardrobe "where she always kept it." Mrs. Robinson said her mother put "a couple of hundreds and some fifties and some twenties" in the mayonnaise jar. During the crime scene investigation, Officer Stroup found one twenty-dollar bill and some change in a jar inside the wardrobe; neither the plastic mayonnaise jar nor any other money was found in the house during the investigation.

The State also presented the testimony of Gene Ledford, the defendant's cousin. Ledford testified that at approximately 2:00 a.m. on 23 July, he and his stepfather were standing outside the Road Runner, a local store, when they saw the defendant. The defendant came over to them and displayed a roll of paper money. He said the money had been given to him by a man named Bryson so that they would not "rat" on him about the "gun deal." Shortly thereafter, the defendant walked away in the direction of his home.

Larry Kuykendall, a cab driver, testified that he was driving down Pisgah Drive just before 2:00 a.m. on 23 July. He stated that at that time, he saw the defendant, whom he knew well, stepping onto the sidewalk in front of Mrs. Curtis' house. Kuykendall stated that he waved at the defendant but that the defendant did not acknowledge him. He also testified that he saw the defendant push something up underneath the plaid flannel shirt he was wearing.

Sergeant Troy Rhinehart of the Canton Police Department testified that on the evening of 23 July 1983, the defendant accompanied him and Lieutenant Scott Ashe to police headquarters where defendant was advised of his constitutional rights and informed that the officers were investigating the break-in and assault at Mrs. Curtis' home. Defendant stated that he knew

nothing about the incident and that he had been at the Game Room that night and had returned to his home at approximately 11:00 p.m. While defendant was being questioned at the police station, the officers asked him to put his feet on the desk so that they could look at the soles of the boots he was wearing. The officers visually compared the tread on defendant's boots with the footprint on the curtain taken from Mrs. Curtis' house. Defendant agreed to give the officers his boots and the clothing he was wearing. The officers accompanied defendant back to the mobile home where he was living so that he could change clothes. In the bedroom of the mobile home, the officers noticed an ashtray containing cigarette butts. Defendant agreed to allow the officers to take the cigarette butts.

Rhinehart further testified that on 24 July, he spoke with Gene Ledford and Larry Kuykendall. The police then obtained warrants for defendant's arrest. They went to defendant's home very early on Monday morning, 25 July 1983; when two officers knocked on the front door, defendant ran out the back door where he was stopped by Sergeant Rhinehart. The officers searched the defendant and found $422.49 in his pockets. Defendant stated that he had earned the money mowing yards and doing other work.

Mrs. Curtis remained in the hospital following the assault. She had recovered sufficiently by 30 July 1983 that the attending physician, Dr. Bill Owen, left her in the care of Dr. Stuart Harley while Dr. Owen took his vacation. Mrs. Curtis began receiving physical therapy in the hospital, but her condition worsened and she died on 3 August 1983. Dr. Robert Boatright, a pathologist, performed an autopsy on Mrs. Curtis. He testified that Mrs. Curtis' death was caused by a blood clot that had formed in her leg and, in passing through her body, became lodged in the major artery from her heart to her lungs. In his opinion, the injuries Mrs. Curtis suffered in the assault caused her death because they resulted in a decrease in her usual activities, thereby restricting the movement of the muscles in her legs that would pump the blood out of the veins in her legs.

The defendant testified that he lived with his parents in Canton and had known the deceased, Mrs. Curtis, all his life, had been in Mrs. Curtis' home on a number of occasions, and had done odd jobs for her in the past. He last visited her home approx-

imately three to four weeks prior to the assault. Defendant further testified that he had gone to his girlfriend's house on the night of 23 July and stayed until 1:30 a.m., although police officer Grant Parrott testified in rebuttal that he had seen the defendant and three others drinking beer behind a feed store on Penland Street at approximately 10:45 p.m. Defendant testified that he went from his girlfriend's house to the Road Runner by walking down Academy Street and that he was not on Pisgah Drive that night.

On the Judgment and Commitment form, it appears that defendant was sentenced to life imprisonment on the consolidated charges of first-degree felony murder and assault with a deadly weapon inflicting serious injury. He was separately sentenced to a consecutive ten-year term on his conviction for felonious larceny.

Defendant has brought forward four issues for review by this Court. First, he argues that the evidence presented at trial was insufficient to support convictions for any of the offenses with which he was charged. Second, he contends that the trial court erroneously admitted testimony of the State's pathologist that the injuries inflicted on the decedent on 23 July 1983 were the proximate cause of her death because that testimony constituted an opinion as to a question of law and as to the ultimate issue in the case. Third, defendant argues that the trial court erred in sentencing him to a term of imprisonment in excess of the presumptive term for the felonious larceny by failing to make findings in aggravation or mitigation of punishment. Finally, defendant urges this Court to reconsider its ruling in several recent cases and find that the imposition of a sentence based upon a verdict of guilty returned by a jury drawn from a venire from which potential jurors were excluded because of their scruples against capital punishment deprives defendant of his right to due process of law and his right to trial by jury. We find no error in the guilt phase of defendant's trial, but remand the case to the trial court for a new sentencing hearing on defendant's conviction for felonious larceny. We also vacate the defendant's conviction for assault with a deadly weapon inflicting serious injury.

I.

Defendant was charged in an indictment, proper in form, with the first-degree murder of Mrs. Nora Curtis. The indictment alleges that a burglary and an assault occurred on 23 July 1983 resulting in the death of Mrs. Curtis on 3 August 1983. This indictment, drawn in accordance with N.C.G.S. § 15-144 (1983), is sufficient to sustain a conviction of first-degree murder committed in the perpetration of the felony of first-degree burglary. *See State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, 456 U.S. 932, 72 L.Ed. 2d 450 (1982); *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928, 54 L.Ed. 2d 288 (1977); *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970). The trial judge instructed the jury on a theory of felony murder, naming first-degree burglary as the underlying felony, and the jury returned a verdict of guilty on that theory. If the evidence presented at trial was insufficient to support a conviction of first-degree burglary, the judgment of conviction of first-degree felony murder based on that underlying felony cannot be sustained. *State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984). Defendant contends that his conviction for first-degree murder must be reversed because the State failed to prove beyond a reasonable doubt each and every element of the underlying felony, first-degree burglary. For the reasons set forth below, we hold that the State carried its burden of presenting substantial evidence of each essential element of the offense of first-degree burglary and of defendant's identity as the perpetrator so as to withstand defendant's motions to dismiss. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

The elements of the crime of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a 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. *State v. Harold*, 312 N.C. 787, 325 S.E. 2d 219 (1985). Defendant here contends that the State failed to prove that the offense was committed in the nighttime and that, therefore, the offense did not constitute burglary and thus could not support a felony-murder conviction. When the State fails to produce substantial evidence that the offense occurred during the nighttime, a defendant is entitled to have charges of burglary against him dismissed. *State v. Forney*, 310

N.C. 126, 131, 310 S.E. 2d 20, 23 (1984); *State v. Smith*, 307 N.C. 516, 518, 299 S.E. 2d 431, 434 (1983). Defendant also argues that the State's failure to prove the commission of the offense in the nighttime precludes its proving the identity of the defendant as the perpetrator of any of the offenses for which he was convicted. We find no merit in these conditions.

A.

There is no statutory definition of "nighttime" for the offense of burglary in North Carolina. *State v. Frank*, 284 N.C. 137, 145, 200 S.E. 2d 169, 175 (1973). North Carolina courts adhere to the common law definition of "nighttime." One of our early considerations of this term is found in *State v. McKnight*, 111 N.C. 690, 16 S.E. 319 (1892). In *McKnight*, Chief Justice Shepherd wrote:

> Sir William Blackston (4 Com., 224) says that "anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be that if there be daylight or *crepusculum* enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moonlight, for then many midnight burglars would go unpunished."

Id. at 691, 16 S.E. at 320. More recently, this Court has described "nighttime" as that period of time after sunset and before sunrise "when it is so dark that a man's face cannot be identified except by artificial light or moonlight." *State v. Lyszaj*, 314 N.C. 256, 266, 333 S.E. 2d 288, 295 (1985); *State v. Frank*, 284 N.C. 137, 145, 200 S.E. 2d 169, 175 (1973).

Defendant contends that the State's evidence permitted only conjecture and speculation as to whether any breaking or entry was committed in the nighttime. A review of the State's evidence convinces us that it was sufficiently "substantial" to withstand defendant's motions to dismiss and to allow this question of fact to be resolved by the jury. Substantial evidence is the amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982).

We note, first, that the State is not limited to proving solely by direct evidence that the breaking and entering was accomplished in the nighttime; this essential element may be shown

by proof of circumstances which convince a reasonable mind of the fact.

> If this were otherwise, many midnight burglaries would go unpunished, for such offenses are always secretly committed, when no one is, or is supposed to be, present to mark the time, and generally when nothing but circumstances can reveal it . . . .
>
> . . . .
>
> . . . Such crimes under such conditions are not committed in broad daylight, but under the security from detection and apprehension which the night affords, when sleep has disarmed the owner and rendered his premises defenseless.

State v. Richards, 29 Utah 310, 312, 314, 81 P. 142, 142, 143 (1905).

[1] In the instant case, the State presented sufficient circumstantial evidence that the offense was committed in the "nighttime." First, the record reveals that the last person to see the victim before the assault was her daughter, Edna Henson. Mrs. Henson testified that when she left her mother's house at approximately 3:00 p.m. on Friday afternoon, 22 July 1983, the front window of the house was intact and the living room curtains were hanging straight. When Charlotte Henson saw the window the next morning as she drove to work, the window was broken; the curtain and the broken glass were later found lying inside the room.

Second, Mr. Larry Kuykendall testified that as he drove his taxicab down Pisgah Drive just before 2:00 a.m. on Saturday morning, 23 July, he recognized defendant, whom he had known all of defendant's life, stepping onto the sidewalk in front of Mrs. Curtis' house. Mr. Kuykendall testified that he was driving only five to seven miles per hour and passed within five or six feet of the defendant. He stated that Mrs. Curtis' house is situated only "a couple of feet" from the sidewalk and "just a couple of yards" from the street. Mr. Kuykendall testified that, although he and defendant were well acquainted, defendant did not acknowledge him when he blew his horn and waved in greeting; he saw the defendant put "something up under his shirt" and keep walking. Mr. Kuykendall stated that he noticed that defendant "looked like he was wore out; like he was tired." Thus, the State presented

eyewitness testimony which placed defendant at the scene of the crime at just before 2:00 a.m. on the night in question; Mr. Kuykendall stated that "it was dark" but that there were three streetlights in the vicinity. The jury could reasonably have placed weight on the unrefuted testimony that the defendant refused to acknowledge the friendly greeting of a lifelong acquaintance and, instead, pushed something up under his shirt and kept walking toward town.

The third important link in the State's chain of circumstantial evidence tending to prove that the offense was committed in the nighttime was the testimony of defendant's cousin, Gene Ledford, who was waiting at the Road Runner for his paper route newspapers to be delivered in the early morning hours of Saturday, 23 July 1983. Ledford testified that at around 2:00 a.m., he saw the defendant walking toward the Road Runner from the direction of Pisgah Drive. Ledford and defendant's stepfather both testified that defendant came over to where they were standing with a group of friends and displayed a roll of paper money. Neither man knew how much money was in the roll, but they saw several twenty-dollar bills and some one-dollar bills. The defendant told these men that a man named Bryson gave him the money "in the gun deal" so that they would not "rat" on him. This evidence places the defendant on foot "a good mile" from Pisgah Drive sometime around 2:00 a.m. on 23 July 1983, and flashing a substantial sum of paper money.

The fourth relevant piece of evidence was the testimony of Stanley Henson, the victim's grandson who found his grandmother bleeding and bruised in her bloodstained bed shortly after 9:00 a.m. on 23 July. Mr. Henson testified that when he found Mrs. Curtis, she was wearing her pajamas and was lying on her side in her bed which had been broken down at the foot. While, in *State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984), we found evidence that the victim had been discovered barefoot and wearing her nightgown outside her home early in the morning was insufficient in and of itself to take the determination of the time of entry into the victim's home out of the realm of speculation and conjecture, such evidence is certainly probative, especially in light of the other evidence presented. Just as the evidence of the attire of the victim in *Forney* was not dispositive on these facts, it is not dispositive here, but it may appropriately be considered among

other circumstantial evidence on the question of whether the offense occurred during the nighttime.

Finally, we note that the defendant offered several conflicting accounts of his whereabouts on the night in question. He initially told law enforcement officers that he had gone to the Game Room, played a few games, drunk a few beers, then had gone home around 11:00 p.m. At trial, defendant testified that he had gone to his girlfriend's house that night at 9:00 and stayed until 1:30 a.m. when he went home. Defendant did not call his girlfriend to testify on his behalf at trial. In rebuttal, Officer Parrott testified that he had seen the defendant with three other men drinking beer behind a feed store at 10:45 p.m. and had spoken with the defendant at that time.

The State concedes that any individual link in the chain of its circumstantial evidence on the "nighttime" element, taken alone, is probably insufficient to establish that element. It contends, however, and we agree, that the cumulative effect of this evidence, taken as a whole, is sufficiently substantial to withstand defendant's motion to dismiss the burglary charge and to allow the issue to go to the jury for its determination of the question of fact beyond a reasonable doubt. *See generally* Annot., "Sufficiency of showing that burglary was committed at night," 82 A.L.R. 2d 643 (1962).

B.

[2] Defendant next contends that the State failed to present evidence at trial sufficient to withstand his motion to dismiss on the basis that the State had not proved defendant was the person who committed the offenses. Defendant claims that the State's evidence as to the identity of the defendant as the perpetrator was comprised of inference based on inference; such method of inferring a defendant's guilt is not permitted in this State. "A basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption." *State v. Byrd*, 309 N.C. 132, 139, 305 S.E. 2d 724, 729 (1983) (quoting *State v. Parker*, 268 N.C. 258, 262, 150 S.E. 2d 428, 431 (1966)).

The State presented no direct evidence which placed the defendant *inside* the victim's house during the nighttime hours of 23 July 1983. However, the State produced direct evidence that defendant had been inside the victim's house at some time and that defendant was seen stepping onto the sidewalk one or two feet from the house at 2:00 a.m. on 23 July 1983 and that defendant displayed a large sum of money very shortly thereafter.

The State presented four important "established facts" which, taken together, lead to the reasonable inference that the defendant committed the offenses for which he was convicted. First, the State tendered the expert testimony of SBI crime laboratory latent evidence expert, Ricky Navarro. Mr. Navarro compared the shoe print found on the window side of the curtain from the victim's living room with the sole of the left boot defendant admitted he was wearing on the night in question. His comparison of the unique characteristics of the print and the sole of the boot led him to the conclusion that the print was made by defendant's left boot and by no other shoe. Defendant attacks this evidence on grounds that it does not meet the three-part test for the sufficiency of such circumstantial evidence set forth in *State v. Palmer*, 230 N.C. 205, 213, 52 S.E. 2d 908, 913 (1949), and clarified in *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981).

[3] When the sufficiency of shoe print evidence is raised on appeal, the Court must determine whether the *Palmer* "triple inference" test has been met by the evidence presented at trial:

> In the nature of things, evidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) that the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime.

Palmer, 230 N.C. at 213, 52 S.E. 2d at 913. Although "it is not necessary that a witness be qualified as an expert to entitle him to testify as to the identity of shoe prints and their correspondence with the shoes worn by a defendant," *State v. Adkinson*, 298 N.C. 673, 680, 259 S.E. 2d 858, 863 (1979), Mr. Navarro was qualified as an expert in latent print identification. He

testified at great length and in great detail as to the basis of his conclusion that the boot print found on the curtain was made by defendant's left boot and by no other.

> "No doubt a witness to identity of footmarks should be required to specify the features on which he bases his judgment of identity; and then the strength of the inference should depend on the degree of accurate details to be ascribed to each feature and of the unique distinctiveness to be predicated of the total combination. . . ." Wigmore on Evidence (3rd Ed.), section 415.

Palmer, 230 N.C. at 214, 52 S.E. 2d at 914. There is no doubt that the first *Palmer* inference is sufficiently supported by the evidence at trial; the boot print was discovered on the backside or window side of a curtain lying on the floor of the victim's living room, "at or near the place of the crime." Likewise, there is no doubt that the third *Palmer* inference is supported by the evidence; the expert's testimony was that the imprint could have been made by no other shoe. Defendant seems to be arguing that, because he testified at trial that he had made the boot print weeks earlier during a visit in the victim's home, the State failed to provide a sufficient basis for the second *Palmer* inference, thus causing the State's identity evidence to fail under *Palmer*.

In *State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977), as here, investigators were unable to state that a shoe print was made at the time of the crime although they were able to positively state that the print was made by defendant's shoe. The rationale in *Long* for finding that the second *Palmer* inference had been met is applicable here:

> Although both Officers Van Isenhour and Mooney admitted on cross-examination that the shoe print could have been made a month prior to the crime, Officer Mooney's testimony on direct examination that the shoe print corresponded with shoes taken from defendant at the time of his arrest was clearly competent as tending to connect the accused with the crime. The question whether the shoe print could have been impressed only at the time the crime was committed is a question of fact for the jury, not a question of law to be determined by the court prior to the admission of the evidence. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977).

Long, 293 N.C. at 296, 237 S.E. 2d at 734. Therefore, because the State presented evidence tending to connect defendant with the scene of the crime at or about the time the offenses were committed, including evidence that defendant was seen directly in front of the victim's home at 2:00 a.m. on the night in question, and that defendant admitted he was wearing the boots corresponding to the print found on the curtain inside the victim's home, there is strong evidence that the footprint was made at the time of the burglary. The curtain on which the print was found had been pulled down from over the window which the intruder broke and through which he entered. According to the daughter's testimony, the curtain was hanging over the window the day before. The location of the print on the back (or window) side of the curtain was consistent with the intruder having stepped on the back of the curtain as he entered through the broken window. The question of whether the print was impressed at the time the crime was committed was a question of fact properly left to the jury. Assuming, *arguendo*, that the "triple inference" test of *Palmer* is required to be met when the shoe print evidence is proved by an expert, that test was met in this case, and defendant's contention that this evidence was insufficient as a matter of law has no merit.

The second important piece of circumstantial evidence connecting defendant with the crimes is the testimony of Mrs. Jona Medlin, SBI forensic serologist. Mrs. Medlin examined cigarette butts taken from defendant's home and the cigarette butt found in the victim's bedroom. She compared saliva from those cigarette butts and concluded that the saliva was produced by a person who is a "type A secretor." Mrs. Medlin's analysis of a sample of defendant's blood revealed that defendant is a type A secretor. She testified that thirty percent of the population of North Carolina falls into the type A secretor category. The State's evidence also indicated that the cigarettes were of the same brand.

The third evidentiary link is the testimony of Mr. Larry Kuykendall, the cab driver, who saw the defendant step onto the sidewalk directly in front of the victim's home at 2:00 a.m. and stuff something into his shirt. The State introduced into evidence the checked flannel shirt that the defendant admitted that he was wearing on the night in question. Mr. Kuykendall stated that the

shirt appeared to be the shirt defendant was wearing when Mr. Kuykendall saw him.

Finally, the State offered the testimony of defendant's cousin, Gene Ledford, who stated that he had seen the defendant around 2:00 a.m. on 23 July 1983 and that defendant was displaying a roll of paper money at that time. Ledford spoke with the defendant only minutes after Kuykendall had observed defendant step onto the sidewalk just in front of the victim's house. When defendant was arrested in the early hours of 25 July 1983, he had in his possession over $400.00, consisting of a one-hundred-dollar bill, four fifty-dollar bills, six twenty-dollar bills, and a one-dollar bill. The victim's daughter, Mrs. Rochelle Robinson, testified that she saw her mother leave $500.00, consisting of a couple of one-hundred-dollar bills, several fifty-dollar bills, and several twenty-dollar bills in a jar on the Wednesday prior to the assault. We find this evidence concerning defendant's possession of a large sum of money to be competent on the issue of whether defendant was the perpetrator of the offenses and that the weight and credibility of the evidence were properly before the jury. *See, e.g., State v. Puckett*, 211 N.C. 66, 74, 189 S.E. 183, 188 (1937); *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977). *See generally* Annot., "Evidence of acquisition or possession of money; source of which is not traced as admissible against defendant in criminal case," 91 A.L.R. 2d 1046 (1963).

In sum, therefore, we hold that from the four important "established facts" offered by the State (the boot print evidence, the blood type evidence, the cab driver's statements, and the testimony of defendant's cousin), reasonable inferences could be drawn that the defendant was present inside the victim's house on the night in question and that he was the perpetrator of the offenses for which he was convicted. The defendant's motion to dismiss the charges was correctly denied.

II.

Defendant's next contention is that the trial court erred in allowing the State's pathologist, Dr. Robert Boatright, to testify that, in his opinion, the injuries suffered by the victim on 23 July 1983 "were a proximate cause of her death." Defendant argues that it was error to admit this testimony for two reasons: the statement constituted (1) an opinion as to the ultimate issue for

the jury and (2) a legal conclusion. For the reasons stated below, we find no error in the admission of this testimony.

Dr. Boatright was tendered by the State and accepted without objection as an expert in the fields of pathology and medicine. He performed a post-mortem examination of the victim on 3 August 1983. During his direct examination at trial, the following exchange took place:

> Q. Dr. Boatright, do you have an *opinion* as a medical doctor, satisfactory to yourself, as to whether or not the trauma injuries that Nora Curtis had on the 23rd day of July, 1984 [sic], were a proximate cause of her death?
>
> MR. COWEN: Objection.
>
> THE COURT: Overruled.
>
> Q. And what is that opinion?
>
> A. My opinion is that they were a proximate cause of her death. May I explain the reasoning—

[4] Defendant argues, first, that it was error to admit this expert testimony unqualified by the terms "could" or "might." Defendant's contention is that, because the testimony was not limited by these terms, it amounted to an expression of opinion as to an ultimate issue in the case and invaded the province of the jury. Defendant relies on *State v. Keen*, 309 N.C. 158, 305 S.E. 2d 535 (1983), and *State v. Brown*, 300 N.C. 731, 268 S.E. 2d 201 (1980), for the proposition that expert medical testimony is properly admitted when "the witness testifies only that an event *could* or *might* have caused an injury but does not testify to the conclusion that the event did in fact cause the injury, unless his expertise leads him to the unmistakable conclusion . . . ." *Keen*, 309 N.C. at 163, 305 S.E. 2d at 538; *Brown*, 300 N.C. at 733, 268 S.E. 2d at 203 (emphasis in original).

Defendant did not object at trial to Dr. Boatright's qualification as an expert and does not now explain why Dr. Boatright's expertise limited him to forming an opinion only as to what could or might have caused the victim's death. Defendant's bare contention is that Dr. Boatright's expertise qualified him only to state what *could* or *might* have caused the victim's death, citing *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E. 2d 818 (1942). The rule

in *Patrick* has been clarified by modern case law and by statute. In *Patrick,* the medical expert testified that a second fracture of plaintiff's previously broken arm had, in fact, been caused by a car accident when there was no medical certainty that this was so. In *Mann v. Transportation Co. and Tillett v. Transportation Co.,* 283 N.C. 734, 198 S.E. 2d 558 (1973), this Court said:

> [A]n expert witness should be allowed "to make a positive assertion of causation when that conforms to his true opinion, reserving 'could' and 'might' for occasions when he feels less certainty"; . . . if the expert witness, "though holding a more positive opinion, is forced to adopt the 'could' or 'might' formula, then the result is patently unjust, unless the more positive opinion may be said to be inherently incredible."

Id. at 748, 198 S.E. 2d at 568 (citations omitted). The Court went on to explain that "[w]hen a jury's inquiry relates to cause and effect in a field where special knowledge is required to answer the question, the purpose of expert testimony is likely to be thwarted or perverted unless the expert witness is allowed to express a positive opinion (if he has one) on the subject." *Id. See also State v. Morgan,* 299 N.C. 191, 205, 261 S.E. 2d 827, 835 (1980); *State v. Wilkerson,* 295 N.C. 559, 571, 247 S.E. 2d 905, 912 (1978); *Taylor v. Boger,* 289 N.C. 560, 565, 223 S.E. 2d 350, 353 (1976); Comment, *Expert Medical Testimony: Differences Between the North Carolina Rules and Federal Rules of Evidence,* 12 Wake Forest L. Rev. 833, 847-49 (1976).

The shift in emphasis away from the question of whether expert testimony "invades the province of the jury" or expresses an opinion as to "an ultimate issue" is further evidenced by the General Assembly's enactment in 1981 of N.C.G.S. § 8-58.12 and N.C.G.S. § 8-58.13 (repealed by 1983 N.C. Sess. Laws ch. 1037, § 9). Those statutes discard the formerly required use of the hypothetical question and permit an expert witness to testify in the form of an opinion if his or her scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

Here, the trial court properly allowed Dr. Boatright to express his positive opinion as to the cause of the victim's death, unqualified by the terms "could" or "might." The trial judge, after accepting Dr. Boatright as an expert in pathology, properly con-

cluded, pursuant to N.C.G.S. § 8-58.13, then in effect, that Dr. Boatright's testimony would assist the jury in understanding his testimony and in determining a fact in issue. Defendant offered no evidence to the effect that Dr. Boatright's expertise could not lead him to the conclusion he expressed or that his testimony was "inherently incredible." The cases relied upon by defendant state that "could" or "might" must be used only when the witness' expertise cannot lead him to an "unmistakable conclusion." *Keen*, 309 N.C. at 163, 305 S.E. 2d at 538; *Brown*, 300 N.C. at 733, 268 S.E. 2d at 203. We also note that Dr. Boatright did not offer an opinion as to defendant's guilt or innocence. *Brown*, 300 N.C. at 735, 268 S.E. 2d at 204. Therefore, defendant's contention that Dr. Boatright's testimony as to the cause of Mrs. Curtis' death was improperly admitted as an expression of opinion as to an ultimate issue and thus invaded the province of the jury is without merit. *See also* N.C.G.S. § 8C-1, Rule 704 (effective 1 July 1984).

[5] Defendant's second basis for challenging admission of this testimony is that it *constituted a legal conclusion*. Defendant also seems to argue that Dr. Boatright's use of the term "proximate cause" in his answer to the prosecutor's question was improper because it *constituted testimony that a legal standard had been met*. Defendant seems to base this argument on a statement in 1 Brandis on North Carolina Evidence § 126, n.55 (2d rev. ed. 1982) to the effect that the principle excluding opinions on matters of law "clearly bars opinion that a criminal defendant is 'guilty' or that a civil defendant was 'negligent' or that *conduct was a 'proximate cause' of injury*." (Emphasis added.)

We have very recently stated that even under the new rules of evidence, an expert may not testify that a particular legal conclusion or standard has or has not been met, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985).

Dr. Boatright was the pathologist who examined the body of the deceased on autopsy. He testified that he found, *inter alia*, an embolus, or blood clot, blocking the major arteries from the heart to the lungs, resulting in her death. Then followed the portion of his testimony which is the subject of defendant's argument:

Q. Do you have an opinion, Dr. Boatright, satisfactory to yourself as to what caused the death of Mrs. Curtis?

A. Yes sir, a clot of blood moved from her vessels, the veins in her legs, through her heart and to the artery to the lungs and blocked it.

Q. What does that do, sir?

A. This dams up the flow of blood. And does not let the blood go around it. Almost as if you would drive a cork into the artery.

Q. Dr. Boatright, you heard the testimony here a few minutes ago of Dr. Bill Owen, is that correct?

A. Yes sir, I did.

Q. Did you hear his description of the trauma, the injury, that Mrs. Curtis—that he observed on Mrs. Curtis on July 23rd?

A. Yes sir, I did.

Q. Did you hear his testimony as to her condition in the hospital and the course of her stay in the hospital?

A. Yes sir, I did.

Q. Dr. Boatright, do you have an opinion as a medical doctor, satisfactory to yourself, as to whether or not the trauma injuries that Nora Curtis had on the 23rd day of July, 1984 [sic], were a proximate cause of her death?

MR. COWEN: Objection.

THE COURT: Overruled.

Q. And what is that opinion?

A. My opinion is that they were a proximate cause of her death. May I explain the reasoning—

Q. Yes sir, I would ask you the basis for that opinion?

A. The blood circulates in the body with no intrinsic pump or no pressure behind it, different from the arteries. The legs are the fartherest [sic] from the heart. The blood in

these vessels in the legs is lying there. And the movement of muscles surrounding these vessels propels this blood to the heart normally—comes under very low pressure, but the muscles and activity keep the blood flowing. When a person, particularly an old person, is put into bed this blood does not move because the muscles are not moving. It begins to stagnate, particularly in areas where the valves are partial—valves to aid in the flow of blood to permit it to go only one way towards the heart. Due to this settling of blood, a clot forms. This clot will set there in this vessel. It will grow because it has blocked the blood near the heart. The smaller veins distal to it become clogged up. In some instances, as it did in this case, the clot breaks loose. When it breaks loose, it flows through the body. The veins become larger as it goes from the legs to the heart; so there is no obstruction. However, once you go through the heart and back out to the lungs, the vessel is much smaller leaving the heart than the vessel entering the heart. Therefore, the—if we may say, it's like a cork or log in a river; when it gets to the narrow part, it plugs up the flow. This plugs up the flow and for all practical purposes stops the circulation of blood, resulting in death.

Q. How did the trauma injuries contribute to that?

A. They stopped her having her usual activity—being up and around. They put her in the hospital in pain, unable to move or painful for her to move; very much restricted the use of her legs; therefore the use of the muscle pumping the veins to get the blood out of her legs.

Q. Thank you, sir. That would be all.

In addition to his objection, the defendant moved to strike this testimony as "not being based on any opinion based on medical expertise." The trial judge denied the motion.

We first address defendant's argument that Dr. Boatright's testimony constituted a legal conclusion. The well-established rule is that opinion testimony to the effect that a defendant's *conduct* caused injury or death is clearly inadmissible as a legal conclusion. However, Dr. Boatright did not attempt to state an opinion as to any *conduct* which caused Mrs. Curtis' death; he merely

gave his expert medical opinion that the *injuries* he observed were the proximate cause of Mrs. Curtis' death. This testimony relates to a *medical* conclusion which Dr. Boatright was fully qualified to make. It clearly did not address a *legal* conclusion or standard. Dr. Boatright could not and did not testify that, in his opinion, defendant's alleged *conduct* on 23 July caused Mrs. Curtis' subsequent death on 3 August. That question was properly left to the jury.

Next, we address defendant's argument that Dr. Boatright's use of the term "proximate cause" constituted testimony that a legal standard had been met. We observe that the question related to whether the *trauma injuries* of 23 July were a "proximate cause" of death. In effect, the question asks, "Was the blood clot, which you conclude was the cause of death, caused by the trauma injuries, and therefore were the trauma injuries a proximate cause of death?" Dr. Boatright responded directly to the question in the affirmative and even employed the term "proximate cause." The prosecutor's question incorporated the term "proximate cause," a legal standard familiar to lawyers. In Black's Law Dictionary 1103 (5th ed. 1979), we find "proximate cause" defined as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." The "popular" meaning of the term "proximate cause" is approximately the same as the legal meaning. Webster's Third New International Dictionary 1828 (1966) defines "proximate cause" as "a cause which directly or with no mediate agency produces an effect; . . . ."

We conclude that this portion of Dr. Boatright's testimony did purport to state that a legal standard had been met and its admission was therefore error. We also conclude, however, that this error was not so prejudicial as to warrant a new trial. After answering the prosecutor's question in the affirmative, Dr. Boatright asked, and was permitted, to explain his reasoning. He explained, in considerable detail, that Mrs. Curtis' being bedridden caused a clot to form which traveled to the lung and lodged there, stopping the circulation of blood and resulting in death.

This explanation does not address the relationship between the conduct of the defendant and the death, but relates only to

the relationship among the deceased's bedridden condition, the blood clot, and her death. Dr. Boatright had previously been permitted to give testimony without objection, that the cause of death was the pulmonary embolus or blood clot. We conclude that though the admission of the prosecutor's question and Dr. Boatright's brief affirmative answer was error, there is no reasonable possibility that, had the error not been committed, a different result would have been reached at the trial. N.C.G.S. § 15A-1443 (1983).

III.

The defendant's next argument concerns the ten-year sentence he received on the felonious larceny conviction.

The defendant was convicted of first-degree murder under the felony-murder rule with the underlying felony being the first-degree burglary. He was also convicted of first-degree burglary, assault with a deadly weapon inflicting serious injury, and felonious larceny. After the jury recommended life imprisonment for the first-degree murder, the defendant was sentenced on the various charges.

The murder, burglary, and assault convictions were listed on one Judgment and Commitment form; the felonious larceny conviction was placed on another form. The trial judge went on to state that the burglary and assault convictions merged with the first-degree murder conviction as a matter of law. On a Findings form which listed the file number of the murder charge, 83CRS4979, the trial court found three aggravating circumstances: that the offense was especially heinous, atrocious, or cruel; that the victim was very old; and that the defendant has a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement. The trial court found no mitigating circumstances. The defendant was then sentenced to the mandatory term of life imprisonment for the first-degree murder conviction.

On the felonious larceny charge, the trial judge stated that he found the aggravating circumstances outweighed the mitigating circumstances, and he imposed the maximum ten-year sentence, which was ordered to run consecutive to the life sentence. However, the trial judge failed to list the findings in aggravation

and mitigation on the Judgment and Commitment form which contained the felonious larceny charge.

[6] Initially, we note that although the Judgment and Commitment form might tend to give the impression that the burglary conviction was consolidated for sentencing with the first-degree murder conviction, this is not what actually occurred. The sentencing hearing transcript reveals that the trial judge stated, "The first degree burglary and the assault, of course, by law merge into the murder charge." This statement clearly indicates that the trial judge recognized that the burglary, being the underlying felony, merged with the first-degree murder conviction. The trial judge, however, was incorrect in stating that the assault "merged" into the murder charge. We conclude that under the facts of this case, the defendant could not be convicted of assault with a deadly weapon inflicting serious injury.

Prior to 1969, N.C.G.S. § 14-32 (1953) provided:

> *Assault with deadly weapon with intent to kill resulting in injury.*—Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the State prison or be worked under the supervision of the State Highway and Public Works Commission for a period not less than four months nor more than ten years.

In order to obtain a conviction under this statute, the State was required to prove the following elements: (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) resulting in the infliction of serious injury, (5) *which falls short of causing death. State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638 (1968); *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962). It was therefore clear that if the assault resulted in the death of the victim, the defendant could not be convicted of this offense, as one of the essential elements of the crime would be lacking.

In 1969, the statute was amended to provide:

> *Assault with a firearm or other deadly weapon with intent to kill or inflicting serious injury; punishments.*—(a) Any person who assaults another person with a firearm or other

deadly weapon of any kind with intent to kill and inflict serious injury is guilty of a felony punishable under G.S. 14-2.

(b) Any person who assaults another person with a firearm or other deadly weapon per se and inflicts serious injury is guilty of a felony punishable by a fine or imprisonment for not more than five years, or both such fine and imprisonment.

(c) Any person who assaults another person with a firearm with intent to kill is guilty of a felony punishable by a fine or imprisonment for not more than five years, or both such fine and imprisonment.

Subsequent amendments deleted the word "firearm" and altered the degree of punishment which could be imposed. 1971 N.C. Sess. Laws ch. 765, § 1; 1973 N.C. Sess. Laws ch. 229, §§ 1-3; 1979 N.C. Sess. Laws ch. 760, § 5. Present N.C.G.S. § 14-32(b) (under which defendant was convicted) provides: "Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class H felon."

In a case arising after the 1969 amendment, we said that under N.C.G.S. § 14-32(b), the term "inflicts serious injury" means a physical or bodily injury resulting from an assault with a deadly weapon which, though serious, falls short of causing death. *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). Therefore, while the statute no longer expressly articulates the requirement that the assault not result in death, *Joyner* makes it clear that if the State proves to the satisfaction of the jury beyond a reasonable doubt that the assaultive conduct resulted in death, it has disproven the "serious injury" element because "serious injury" necessarily must be injury that falls short of death. If a victim dies as the result of an assault, a defendant cannot be convicted of assault with a deadly weapon inflicting serious injury *for that particular assaultive conduct.*

Here, the evidence clearly shows that the assaultive conduct which formed the basis of the assault charge resulted in the victim's death. No other assault independent of the one causing death took place. Since the State failed to introduce evidence of an assault which did not result in the victim's death, we vacate

the defendant's conviction for assault with a deadly weapon inflicting serious injury.

[7] The defendant also contends that an examination of the record clearly shows that the trial judge violated the Fair Sentencing Act, N.C.G.S. § 15A-1340.4 (1985), in sentencing him to a term in excess of the presumptive for the felonious larceny conviction. Defendant contends that there are two ways of reading this record. First, he suggests that the record could be interpreted as indicating that the trial judge made *no* findings in aggravation or mitigation as to the felonious larceny conviction, yet sentenced defendant to the maximum punishment provided by law for that offense. If that were the case, a failure to make these findings would require that the sentence for felonious larceny be vacated and the case remanded for resentencing. Defendant suggests that another interpretation of the record would infer that the trial judge made findings in aggravation and mitigation for all of the offenses together, without separating them as to each offense. If that were the case, the same result would be reached because this Court has held that separate findings must be made for each offense, even if the cases are consolidated for hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983):

> We therefore hold that in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.

Id. at 598, 300 S.E. 2d at 698.

Defendant notes that while some or all of the aggravating factors found by the trial judge could possibly be found to be proper in aggravation of the burglary charge, this charge merged by law with the first-degree murder charge. Defendant contends that only one of the aggravating factors—prior convictions punishable by more than sixty days imprisonment—could properly aggravate the felonious larceny conviction; and the other two aggravating factors—that the victim was very old and that the offense was especially heinous, atrocious, or cruel—are unrelated to the felonious larceny charge and are unsupported by the evi-

dence. For these reasons, defendant argues that these factors cannot properly be used to aggravate the offense of felonious larceny.

The State contends that a mere clerical error resulted in the file number of the first-degree murder offense being placed on the Findings form and that the trial judge intended his findings to relate only to the felonious larceny conviction, thus properly escalating the punishment to the ten-year maximum. The State notes that the Judgment and Commitment form for the first-degree murder is marked to indicate that no written findings were made because the prison term imposed is one required by law, i.e., life imprisonment, and that the Judgment and Commitment form for the felonious larceny is marked to indicate that written findings were, in fact, found though they appear on the other sheet. The State contends that those findings are contained in the Findings form which was erroneously marked with the first-degree murder file number. The State also argues that mere clerical error must be responsible for the confusion because the murder conviction is not subject to the Fair Sentencing Act or the presumptive terms set out in that act. N.C.G.S. § 15A-1340.1 (1983). The State suggests that there was no *Ahearn* violation and that this Court should remand the matter to the trial court for an order correcting the clerical error to show the felonious larceny file number on the Findings form.

After a careful examination of the record, we conclude that the defendant is entitled to a new sentencing hearing on the felonious larceny conviction. If there was no clerical error, the trial judge clearly erred by sentencing the defendant to a term in excess of the presumptive sentence without making written findings in aggravation and mitigation. If there was a clerical error, the trial judge still erred by finding two aggravating circumstances—that the victim was very old and that the offense was especially heinous, atrocious, and cruel—which are, under the facts of this case, totally unrelated to the crime of felonious larceny. We therefore vacate the ten-year sentence for the felonious larceny conviction and remand for a new sentencing hearing.

IV.

Finally, 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 issue of guilt and deprived him of a fair trial. We have consistently rejected such arguments. *E.g., State v. Noland,* 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied,* --- U.S. ---, 84 L.Ed. 2d 369, *reh'g denied,* --- U.S. ---, 85 L.Ed. 2d 342 (1985); *State v. Maynard,* 311 N.C. 1, 316 S.E. 2d 197, *cert. denied,* --- U.S. ---, 83 L.Ed. 2d 299 (1984). This assignment of error is without merit.

In summary, then, we hold that the trial court committed no error in the guilt-innocence phase of defendant's trial. We vacate the defendant's conviction for assault with a deadly weapon inflicting serious injury in file number 83CRS4981. We also vacate the ten-year sentence for felonious larceny in file number 83CRS4982 and remand the matter to the Superior Court, Haywood County, for a new sentencing hearing on the felonious larceny conviction.

No. 83CRS4979—First-degree murder—no error.

No. 83CRS4981—Assault with a deadly weapon inflicting serious injury—conviction vacated.

No. 83CRS4982—Felonious larceny—sentence vacated and remanded for resentencing.

STATE OF NORTH CAROLINA v. BRADLEY EUGENE MORGAN

No. 711A84

(Filed 18 February 1986)

1. **Criminal Law § 85.3— cross-examination of defendant—evidence of assaultive conduct to show character for truthfulness—impropriety**

The prosecutor's cross-examination of defendant concerning an alleged specific incident of misconduct, i.e., two assaults by pointing a gun at two people during the same incident, was improper under N.C.G.S. 8C-1, Rule 608(b) because extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness's character for truthfulness or untruthfulness.

2. **Criminal Law § 85.3— homicide—defendant as aggressor—evidence of misconduct to show character for violence—admission improper but not prejudicial**

The trial court in a first degree murder case erred in allowing the prosecutor to cross-examine defendant regarding extrinsic acts of misconduct in

order to circumstantially prove defendant's character for violence as the basis for an inference that defendant was the aggressor in the affray which resulted in the homicide in question and could not have acted in self-defense, since N.C.G.S. 8C-1, Rule 404(b) specifically provides that such evidence is not admissible to show that, because defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial; however, the error in admitting the evidence was not prejudicial where there was no reasonable possibility that a different result would have been reached at trial had the error in question not been committed.

3. Criminal Law § 85— extrinsic conduct evidence—procedure for introducing

Both N.C.G.S. 8C-1, Rule 404(b) and Rule 608(b) require the trial judge, prior to admitting extrinsic conduct evidence, to engage in a balancing, under Rule 403, of the probative value of the evidence against its prejudicial effect, and the better practice is for the proponent of the evidence, out of the presence of the jury, to inform the court of the rule under which he is proceeding and to obtain a ruling on its admissibility prior to offering it.

4. Criminal Law § 73— objection to evidence as hearsay—similar evidence admitted without objection

There was no merit to defendant's contention that testimony by a doctor concerning decedent's statement to the effect that he had removed money from his bank account in order to enter into a partnership amounted to inadmissible hearsay upon hearsay and was highly prejudicial to him as a link in the State's theory that defendant's motive for killing the victim was to remove him from the partnership and thereby to obtain financial gain, since there was other evidence, not objected to by defendant, as to the business relationship between defendant and deceased, and the testimony merely corroborated defendant's own testimony that he and deceased entered into a joint business venture.

5. Homicide § 28.3— self-defense—right of defendant to stand ground—failure to instruct error—no prejudice

Although it was error for the trial court not to instruct the jury as to defendant's right to stand his ground if it believed his testimony and found that he was not the aggressor, this error was not properly preserved for review where defendant failed to make timely objection at trial as required by Rule 10(b)(2), Rules of App. Procedure, and such error did not constitute "plain error" requiring reversal of defendant's conviction where it did not appear that, absent the error, the jury probably would have reached a different verdict.

Justice EXUM dissenting.

BEFORE *Owens, J.*, at the 15 October 1984 Criminal Session of Superior Court, RUTHERFORD County, defendant was convicted of first-degree murder. Defendant appeals his sentence of life imprisonment as a matter of right, pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 21 November 1985.

Lacy H. Thornburg, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Louis D. Bilionis, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

Defendant brings forth three assignments of error. First, defendant contends that the trial court committed reversible error in allowing the prosecutor, over objection, to cross-examine the defendant concerning a specific instance of prior assaultive conduct that was not probative of truthfulness or veracity. Second, defendant contends that it was reversible error for the trial court to admit testimony concerning a hearsay statement by the decedent recorded in his hospital file that was not itself admissible under any exception to the hearsay rule. Third, defendant contends that the trial court committed "plain error" by failing to instruct the jury that with regard to his theory of self-defense, the defendant had a right to stand his ground and had no duty to retreat. For the reasons stated below, we find no reversible error.

The State's evidence tended to show that in the fall of 1983, defendant and the deceased, Austin Yates Harrell, entered into a partnership agreement for the operation of a produce business and "flea market" in Alexander, North Carolina. The business became known as "Geno's" and was operated in a building fronting on Highway 221-A. Defendant also lived in the building.

During the early evening hours of 4 July 1984, Harrell went into the Amoco station across the intersection from Geno's and told Betty Jo Grayhouse that he was "going to close the place [Geno's] down." That same evening, defendant walked over to the Amoco station and told Ms. Grayhouse that Mr. Harrell was going to close him down and that she would see his (defendant's) name in the headlines before midnight. After defendant left the Amoco station, Ms. Grayhouse heard a "bang." A few minutes later, she saw the defendant come over to the Amoco station and go into a telephone booth.

Mrs. Debra Tate and her family were sitting on their front porch on the evening of 4 July 1984. The Tate residence is just across the road from Geno's. At about 7:45 p.m., Mrs. Tate no-

ticed Mr. Harrell out in front of Geno's fixing a bicycle. After he finished working on the bicycle, Mr. Harrell moved a metal table to a spot about four feet from the front door of Geno's and set up a folding metal chair near the table. As Mr. Harrell was bending down, about to sit down in the chair, defendant "threw open" the front door, aimed a shotgun at Mr. Harrell, and shot him. Mr. Harrell fell over backwards. Defendant reached back inside the door, put the shotgun away, and called across the street to Mr. Tate, saying, "Come here, you seen what I did." When Mr. Tate refused to go across the street, defendant walked over to the Amoco station. Law enforcement officers arrived shortly thereafter and arrested the defendant. Sonny Chapman of the Rutherford County Sheriff's Department saw Mr. Harrell's body on the ground outside Geno's with his feet some three to four feet from the front door.

An investigation of the scene produced a shotgun containing a spent cartridge leaning against a refrigerator inside the front door of the building. A hatchet was discovered underneath the sofa two to three feet from the wall, and a knife was found on a shelf next to the back door. What appeared to be bits of flesh were observed outside the building on a wooden brace nine feet from the edge of the front door, on the curb line, and on the center line of the highway in front of the building.

Dr. Michael Wheeler performed a post-mortem examination of decedent's body and testified at trial that the fatal wound was caused by a shotgun slug which entered the left side of Mr. Harrell's neck and exited the right side. The doctor estimated that the shot was fired from one and one-half to two and one-half feet away. Dr. Wheeler noted that the decedent was 6′-3″ tall and weighed approximately 280 pounds. In his opinion, a person of decedent's size, if shot in the manner in which the State contends decedent was shot, would fall backwards from where he was standing; the force of the shotgun blast would cause the victim's torso to be forced back somewhat, but his feet would probably not have moved. Dr. Wheeler also testified that his analysis of a sample of the decedent's blood indicated that he was intoxicated at the time of his death: "The blood ethynol level was 160 millimeters percent."

The defendant, who is 5′-7″ tall and weighs approximately 155 pounds, testified on his own behalf and offered a very different account of the events leading up to Mr. Harrell's death. He testified that he and Mr. Harrell dissolved their partnership on 2 February 1984, when he paid Harrell $1,000 in cash for Harrell's interest in the business. He did not see Mr. Harrell again until 29 June 1984 when Harrell came by Geno's looking for a place to stay. Others who knew Mr. Harrell testified that he had not been in the area for some time. Defendant also testified that he allowed Mr. Harrell to stay with him at Geno's on the condition that he remain sober. Mr. Harrell did not comply with that condition, however, and drank continuously from the time he arrived on Sunday, rarely sleeping and sometimes acting belligerently. Finally, defendant asked Mr. Harrell to leave, and defendant left for Chesnee, South Carolina, hoping that Mr. Harrell would be gone when he returned.

However, after arriving in Chesnee, defendant testified that he ran into Mr. Harrell who caught a ride back to Alexander with him. The two argued on the way back about whether Mr. Harrell would continue to stay with the defendant. The argument continued after they arrived at Geno's and, according to the defendant, Mr. Harrell went into a rage and threw a hatchet through the front door at him. The hatchet came to rest underneath the sofa. Harrell then pursued the defendant to the back of the building with a butcher knife and when he exited the back door, defendant tried to lock him out. However, Mr. Harrell came around to the front door again and threw a school desk/chair at the defendant, but it landed instead on the store's canopy. When Harrell came at the defendant through the front door, defendant reached for Harrell's shotgun and told him, "Yates, don't come in here no more; I can't take it anymore." According to defendant, Mr. Harrell responded, "This is it . . . I'm going to kill you." At that point, defendant fired the shotgun as Harrell came through the front door at him.

The defendant offered both lay and expert testimony to the effect that Mr. Harrell suffered from manic depressive psychiatric disorder and was taking prescription medications for treatment of that disorder. Defendant tendered the testimony of witnesses who had observed the decedent prior to the shooting behaving in odd and occasionally violent ways. Dr. William Westmoreland

testified that he had treated Harrell at the Spindale Mental Health Center during 1983 and 1984. He described Harrell's mood swings as characteristic of persons suffering from manic depressive psychiatric disorder and discussed the effect of alcohol consumption during the various stages of the disorder. During Dr. Westmoreland's last visit with Harrell on 28 June 1984, Harrell's condition was described as "stable . . . coming from a depressed state."

Defendant's theory of the case was that he had shot Harrell in self-defense, that he reasonably felt it necessary to shoot Harrell in order to protect himself from Mr. Harrell, a 6'-3", 280-pound manic depressive who was coming at him through the doorway of his home and business threatening to kill him. Defendant admitted on cross-examination, however, that at the time he shot Harrell, Harrell did not have a weapon in his hand.

I.

During recross-examination of the defendant at trial, the following exchange took place:

> Q. Mr. Morgan, do you recall that on April 26th, 1984, less than three months before this incident, that you assaulted Mike Hall with a deadly weapon, a shotgun, by pointing it at Mr. Hall and stating that you would cut him in two with the shotgun there at this same place of business, did you not do that did you not do that [sic] with Mike Hall?
>
> MR. MITCHELL: Objection.
>
> THE COURT: Objection Overruled.
>
> A. Mike Hall followed me from the station and come into my sotre [sic], yes sir, I remember that.
>
> Q. And then when Roger Poteat, the CHief [sic] of Police of Alexander Mills, came to serve the Warrant, did you not point the shotgun at Roger Poteat?
>
> A. No sir, I did not. I showed Roger the gun and it wouldn't [sic] even loaded.

The trial judge thus allowed the prosecutor to question defendant on cross-examination about a prior act of assaultive conduct not charged in the indictment upon which he was being

tried. Also referred to as "uncharged misconduct evidence," "prior bad acts," or "extrinsic conduct evidence," introduction of this type of evidence has the potential of raising problems under two sections of the Evidence Code, N.C.G.S. § 8C-1, Rules 404(b) and 608(b) (Cum. Supp. 1985). Before analyzing the propriety of the trial judge's ruling here, we must be clear about what the transcript reveals.

This colloquy took place on recross-examination of the defendant by the prosecutor. The defendant had just testified on his own behalf and had admitted shooting Mr. Harrell but claimed he had done so in self-defense. Defendant testified that he would not have shot Mr. Harrell if he had not been afraid of him. During direct and redirect examination, defendant had testified as to Mr. Harrell's often violent behavior and his drinking during the days preceding his death. Apparently without having requested a ruling on admissibility prior to trial, the prosecutor on recross-examination then inquired of defendant whether he had engaged in a specific act of misconduct, which involved the same type of conduct (use of a shotgun at defendant's place of business) as that resulting in the charges for which defendant was being tried, but directed toward unrelated third parties at a time three months prior to the Harrell incident. Defendant admitted pointing the shotgun at Mike Hall but denied pointing the shotgun at Police Chief Poteat. The prosecutor did not then seek to further prove this conduct by extrinsic evidence; thus the record does not reveal the specific circumstances surrounding the 26 April 1984 incident. In the record before us, there is no indication why defendant pointed a gun at Mr. Hall, whether Chief Poteat ever served the warrant or even what or for whom the warrant was issued, or whether defendant was ever charged and convicted of pointing a gun at either man. For purposes of this discussion, we shall assume that defendant was not convicted of either alleged previous assault. Thus, this exchange informed the jury that defendant, at his place of business, may have pointed a shotgun at two men other than Mr. Harrell within three months of the 4 July tragedy when similar conduct resulted in Mr. Harrell's death and defendant's arrest therefor.

The trial judge's ruling allowing this information to be heard by the jury raises important evidentiary questions to be answered in accordance with the North Carolina Evidence Code.

The briefs on appeal of this matter argue for and against admissibility of evidence of defendant's character traits through questions regarding his alleged prior act of misconduct pursuant to two sections of the Evidence Code. Defendant argues that the prosecutor's questions were improper under N.C.G.S. § 8C-1, Rule 608(b) (evidence of specific instances of conduct for the purpose of proving credibility of witness or lack thereof). The State contends that the evidence was properly admitted pursuant to Rule 404(b) (evidence of specific instances of a party's conduct for the purpose of proving motive, opportunity, etc.) as well as Rule 608(b).

Although both rules concern the use of specific instances of a person's conduct, the two rules have very different purposes and are intended to govern entirely different uses of extrinsic conduct evidence.[1] *See* Commentary, N.C.G.S. § 8C-1, Rule 608(b) ("Evidence of wrongful acts admissible under Rule 404(b) is not within this rule. . . ."). Our task on appellate review is complicated by the fact that there is nothing in the record indicating under which rule the prosecutor was proceeding or under which rule the trial judge overruled the objection. We must therefore consider the admissibility of the evidence under both Rule 404(b) and Rule 608(b).

A.

[1] Defendant correctly argues that the evidence of his alleged prior act of misconduct was inadmissible pursuant to Rule 608(b) (evidence of specific instances of conduct for the purpose of proving credibility of a witness or lack thereof). That rule provides:

> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the

1. "Extrinsic conduct evidence" refers to evidence of a specific prior or subsequent act, not charged in the indictment, which may be criminal but, as applied in Rule 608(b), does not result in a conviction. Criminal convictions are included in Rule 404(b).

> character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

N.C.G.S. § 8C-1, Rule 608(b) (Cum. Supp. 1985).

Rule 608(b) represents a drastic departure from the former traditional North Carolina practice which allowed a defendant to be cross-examined for impeachment purposes regarding *any* prior act of misconduct not resulting in conviction so long as the prosecutor had a good-faith basis for the questions. *E.g., State v. Dixon*, 77 N.C. App. 27, 334 S.E. 2d 433 (1985).

Rule 608(b) addresses the admissibility of specific instances of conduct (as opposed to opinion or reputation evidence) only in the very narrow instance where (1) the *purpose* of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; and (2) the conduct in question *is in fact probative* of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question did *not result in a conviction*; and (4) the inquiry into the conduct *takes place during cross-examination*. If the proffered evidence meets these four enumerated prerequisites, before admitting the evidence the trial judge must determine, in his discretion, pursuant to Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury, and that the questioning will not harass or unduly embarrass the witness. Even if the trial judge allows the inquiry on cross-examination, extrinsic evidence of the conduct is not admissible. N.C.G.S. § 8C-1, Rule 608(b) and Commentary.

Because the only purpose for which this evidence is sought to be admitted is to impeach or to bolster the credibility of a witness, the only character trait relevant to the issue of credibility is veracity or the lack of it. The focus, then, is upon whether the conduct sought to be inquired into is of the type which is indicative of the actor's character for truthfulness or un-

truthfulness. Among the types of conduct most widely accepted as falling into this category are "use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others." 3 D. Louisell & C. Mueller, Federal Evidence § 305 (1979) (footnotes omitted). On the other hand, evidence routinely disapproved as irrelevant to the question of a witness' general veracity (credibility) includes specific instances of conduct relating to "sexual relationships or proclivities, the bearing of illigitimate [sic] children, the use of drugs or alcohol, . . . *or violence against other persons*." *Id.* (footnotes omitted) (emphasis added). *See also* 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶608[05] (1985) ("crimes primarily of force or intimidation . . . or crimes based on malum prohibitum are not included"). For example, in *United States v. Alberti*, 470 F. 2d 878 (2d Cir. 1972), *cert. denied*, 411 U.S. 919, 36 L.Ed. 2d 311 (1973), cross-examination of a witness regarding a prior assault was properly disallowed because "the conduct involved does not relate to truthfulness or untruthfulness." *Id.* at 882. *See also United States v. Hill*, 550 F. Supp. 983 (E.D. Pa. 1982), *aff'd*, 716 F. 2d 893 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039, 79 L.Ed. 2d 165 (1984) ("acts of assault, force, or intimidation do not directly indicate an impairment of a witness' character for veracity." *Id.* at 990); *United States v. Kelley*, 545 F. 2d 619 (8th Cir. 1976), *cert. denied*, 430 U.S. 933, 51 L.Ed. 2d 777 (1977) (evidence tending to show defendant had directed threats and violence toward these victims in the past properly excluded under Rules 607, 608, 609; court intimates that had defendant asserted self-defense at trial, the evidence might have been admissible under Rule 404(b)).

We conclude that the prosecutor's cross-examination of defendant in this case concerning an alleged specific instance of misconduct, i.e., two assaults by pointing a gun at two people during the same incident, was improper under Rule 608(b) because extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness.

B.

[2] Our inquiry does not end here, however, because the State contends that the prosecutor's cross-examination was proper un-

der Rule 404(b) (evidence of specific instances of conduct for the purpose of proving character of accused to show motive, opportunity, etc.), which provides:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (Cum. Supp. 1985).

The question of admissibility of the "extrinsic conduct" of a criminal defendant pursuant to Rule 404(b) is the most litigated area of evidence. 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶404[08], at 404-47 (1985); Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 Pepperdine L. Rev. 297, 297 (1982). The heart of the long-established rule, codified in Rule 404(b), is restated by Professor McCormick as follows:

> [T]he prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is introduced for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that he committed the crime for which he is on trial.

McCormick on Evidence § 190, at 557-58 (3d ed. 1984) (footnotes omitted). *See also* E. J. Imwinkelried, Uncharged Misconduct Evidence § 1:03 (1984); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954) (traditional North Carolina rule).

In determining the admissibility of extrinsic conduct evidence pursuant to Rule 404(b), the trial judge must first determine the preliminary issue of whether the conduct is being offered pursuant to that rule. As the instant case illustrates, it is not always clear whether such evidence is being offered under 404(b) or under 608(b). Rule 404(b) has been interpreted as applicable only to parties and, in a criminal case, would usually be applicable only to a defendant. Rule 608(b) governs reference to specific instances of conduct only on cross-examination regarding the credibility of any witness and prohibits proof by extrinsic evi-

dence. Under Rule 404(b), however, evidence regarding extrinsic acts is not limited to cross-examination and *may* be proved by extrinsic evidence as well as through cross-examination. Commentary, N.C.G.S. § 8C-1, Rule 608. If the trial judge makes the initial determination that the evidence is of the *type* and offered for the proper *purpose* under Rule 404(b), the record should so reflect.

The next step in determining admissibility of the extrinsic conduct evidence under Rule 404(b) is a determination of its relevancy. As stated earlier, Rule 404(b) allows the use of extrinsic conduct evidence so long as the evidence is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.

Any evidence must be logically relevant in order to be admissible. N.C.G.S. § 8C-1, Rule 401 provides:

> Rule 401. *Definition of "relevant evidence."*
>
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The list in the second sentence of Rule 404(b) contains examples[2] of theories of relevancy under which extrinsic conduct evidence may properly be used as circumstantial proof of a controverted fact at trial (for instance, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, etc.).

The State here contends that the evidence brought out during defendant's cross-examination was admissible under Rule 404(b) because it was relevant to the issue of whether defendant was the aggressor in the altercation he described during direct examination. Since defendant claimed he shot Mr. Harrell in self-defense and since the aggressor in an affray cannot claim the benefit of self-defense unless he has abandoned the fight and has

2. The list is neither exclusive nor exhaustive. McCormick on Evidence § 190, at 558 (3d ed. 1984); 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶404[08], at 404-57 (1985). We note that, while Rule 608(b) is quite different from our former rule, Rule 404(b) is much the same as the traditional North Carolina rule and its "exceptions" as set out in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). *See also State v. Weldon*, 314 N.C. 401, 333 S.E. 2d 701 (1985); *State v. Dixon*, 77 N.C. App. 27, 334 S.E. 2d 433 (1985) (applying traditional, pre-Code law).

withdrawn by giving notice to his adversary, *State v. Johnson*, 278 N.C. 252, 258, 179 S.E. 2d 429, 433 (1971), whether the defendant was the aggressor was a contested element of defendant's self-defense claim. The State asserts that "[t]his evidence, therefore, was relevant to show that defendant's pointing of the shotgun at the decedent and shooting him was not in self-defense." The State's rationale here is precisely what is prohibited by Rule 404(b). In order to reach its conclusion, the State is arguing that, because defendant pointed a shotgun at Mr. Hill three months earlier, he has a propensity for violence and therefore he must have been the aggressor in the alleged altercation with Mr. Harrell and, thus, could not have been acting in self-defense. Indeed, the Commentary to N.C.G.S. § 8C-1, Rule 404(b) infers that "evidence of a violent disposition to prove that the person was the aggressor in an affray" is an impermissible use of "evidence of other crimes, wrongs, or acts." The theory of relevancy articulated by the State on this appeal is plainly prohibited by the express terms of Rule 404(b) disallowing "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith."

The cases relied upon by the State are inapposite. For example, in *United States v. Phillips*, 515 F. Supp. 758 (E.D. Ky. 1981), defendant was charged with shooting a federal marshal. Her defense was that her husband had hypnotized her and that she was legally insane, therefore unable to form the requisite criminal intent. The district court held that evidence that defendant had shot at another government official during an unrelated incident was admissible under Federal Rule of Evidence 404(b) to prove that defendant was able to form such a criminal intent without the direct influence of her husband. We note also that, in admitting the extrinsic conduct evidence, the trial court gave an appropriate instruction, limiting the jury's consideration of this evidence solely to the issue of defendant's state of mind or intent.

In *Atkinson v. State*, 611 P. 2d 528 (Alaska 1980), the court upheld the admission, pursuant to Rule 404(b), of evidence that defendant had previously pointed a gun at and threatened two other trespassers. At trial, defendant claimed that he would never point a gun and that the shooting for which he was on trial was accidental or inadvertent. The extrinsic conduct evidence was

admitted as tending to show that his pointing of the shotgun at the victim was neither inadvertent nor accidental.

In the instant case, defendant claimed neither that his shooting Mr. Harrell was accidental or inadvertent nor that he was unable to form the requisite criminal intent to shoot Mr. Harrell. He claimed that he shot Harrell in self-defense. The proper inquiry in a self-defense claim focuses on the reasonableness of defendant's belief as to the apparent necessity for, and reasonableness of, the force used to repel an attack upon his person. *See State v. Gladden*, 279 N.C. 566, 184 S.E. 2d 249 (1971). The fact that defendant may have pointed a gun at another person sometime in the past, without more, has no tendency to show that the defendant did not fear Mr. Harrell or to make the existence of his belief as to the apparent necessity to defend himself from an attack "more or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401. *Cf. Johns v. United States*, 434 A. 2d 463, 470 n.11 (D.C. App. 1981) ("It would be too attenuated an argument to say evidence of a defendant's reputation for violence indicates a tendency not to fear another person."); *People v. Zatzke*, 33 Cal. 2d 480, 492, 202 P. 2d 1009, 1016 (1949) (Carter, J., dissenting) ("to infer that because [defendant] had been guilty of different acts of sex perversion with others in the past, that he must not be adverse to all acts of sex perversion with anyone is not a logical deduction, a generality with no effect other than to prejudice the defendant in the eyes of the jury"). Had the State's evidence been to the effect that defendant had pointed a gun at or threatened *Mr. Harrell* three months earlier, such evidence would more likely be relevant as tending to show a plan or design, or as negating defendant's claim that Mr. Harrell's attack on him was unprovoked. *See United States v. Kelley*, 545 F. 2d 619 (8th Cir. 1976), *cert. denied*, 430 U.S. 933, 51 L.Ed. 2d 777 (1977).

[3] It was error for the trial court to allow, over defendant's objection, the prosecutor's cross-examination of defendant regarding alleged extrinsic acts of misconduct in order to circumstantially prove defendant's character for violence as the basis for an inference that defendant was the aggressor in the affray and could not have acted in self-defense. We note, in addition, that there is nothing in the record to indicate that the trial judge had an opportunity, out of the presence of the jury, to rule on the propriety

of the prosecutor's questions pursuant to either Rule 608(b) or Rule 404(b). Both rules require the trial judge, prior to admitting extrinsic conduct evidence, to engage in a balancing, under Rule 403, of the probative value of the evidence against its prejudicial effect. The better practice is for the proponent of the evidence, out of the presence of the jury, to inform the court of the rule under which he is proceeding and to obtain a ruling on its admissibility prior to offering it. We note, too, that no cautionary instruction was requested or given upon the trial judge's overruling defendant's objection to the admission of this evidence. *See, e.g., United States v. Teague,* 737 F. 2d 378, 381 (4th Cir. 1984), *cert. denied,* --- U.S. ---, 83 L.Ed. 2d 926 (1985); *State v. Robtoy,* 98 Wash. 2d 30, 653 P. 2d 284 (1982); 2 D. Louisell & C. Mueller, Federal Evidence § 140, at 193 (rev. ed. 1985). The jury, therefore, was permitted to consider this improperly admitted extrinsic conduct evidence for impermissible purposes.

Although we find that it was error to admit the extrinsic conduct evidence pursuant to Rule 404(b) *on the theory presented by the State on this appeal,* we hold that there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." N.C.G.S. § 15A-1443(a) (1983). *See also State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406 (1966). The error was, therefore, harmless in light of the other evidence properly admitted at trial. *See, e.g., United States v. Cauley,* 697 F. 2d 486 (2d Cir.), *cert. denied,* 459 U.S. 1222, 75 L.Ed. 2d 464 (1983).

The State presented eyewitness testimony tending to negate defendant's self-defense claim, as well as extensive physical evidence regarding the path of the fatal shotgun slug and the position of decedent's body. We also note that the objected-to exchange, although improper, was quite brief, and the prosecutor did not belabor his point.

II.

[4] In defendant's next assignment of error, he contends that the trial court erred in admitting the testimony of Dr. William Westmoreland concerning a statement made by the decedent, Mr. Harrell, and recorded in his hospital file. Dr. Westmoreland was permitted to read from a note prepared by another physician and contained in decedent's medical records to the effect that Mr.

Harrell had withdrawn a sum of money from his account at the end of August 1983 in order to enter into a partnership. Defendant in his brief argued that the testimony amounted to inadmissible hearsay upon hearsay and was highly prejudicial to him as a link in the State's theory that defendant's motive for killing Harrell was to remove him from the partnership and to thereby obtain financial gain. However, as the State correctly points out in its brief and as defendant conceded at the outset of his argument before this Court, admission of this testimony, even if error, is not prejudicial error.

First, deceased's brother, John Harrell, had testified as the State's first witness and had referred several times, without objection by defendant, to the business relationship that had existed between defendant and the deceased. When evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, as here, the benefit of the objection is lost. *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984); *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982). In addition, defendant himself had already testified at some length about the particulars of his partnership with Mr. Harrell. At most, the challenged testimony merely corroborated defendant's own testimony that he and decedent entered into a joint business venture. We find no error in the trial court's overruling defendant's objection to this testimony.

III.

[5] In defendant's final assignment of error, he contends that the trial court committed "plain error" by failing to instruct the jury as follows:

> If the defendant was on his own premises, in his home, or at his place of business, he could stand his ground and repel force regardless of the character of the assault being made upon him. However, the defendant would not be excused if he used excessive force.

The uncontroverted evidence at trial was to the effect that defendant resided in, and operated his business from, the building known as Geno's. According to his testimony at trial, defendant shot and killed Mr. Harrell in self-defense as Mr. Harrell came through the doorway of Geno's threatening to kill him.

> 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).

State v. McCray, 312 N.C. 519, 532, 324 S.E. 2d 606, 615 (1985). *See also State v. Grant*, 228 N.C. 522, 46 S.E. 2d 318 (1948) (defendant had no duty to retreat when assaulted by his brother-in-law, feloniously or nonfeloniously, in his own store); Annot., "Homicide: Duty to Retreat as Condition of Self-Defense When One is Attacked at His Office or Place of Business or Employment," 41 A.L.R. 3d 584 (1972).

Here, defendant submitted no request for special jury instructions to the effect that he had the right to stand his ground and repel force with force in his own home or place of business if he were found not to be the aggressor. Following the close of all the evidence, the trial judge asked, "Gentlemen, are there any written requests regarding the Court's Charge to the Jury?" Defense counsel responded, "I take it your Honor will also charge on self-defensive [sic], obviously." The trial judge noted for the record that there were no "special written requests regarding the Court's Charge to the Jury." Just prior to instructing the jury, the trial judge stated for the record:

> [T]he defendants [sic], at the close of all the evidence, had requested that the Court include in its principle [sic] charge an instruction on self-defense and that the Court advised the District Attorney and the Attorneys for the defendant that the Court would include in its charge the pattern jury instruction on self-defense contained in Criminal Pattern Jury Instruction 206.10 . . . .

Just before the jury began its deliberations and after having charged, *inter alia*, on self-defense as set out in N.C.P.I.—Crim. 206.10 (1983), the trial judge inquired of counsel, "All right gentlemen, are there any requests for any changes or modifications or additions to the Court's Charge to the Jury?" to which defense counsel responded, "Not for the defendant."

The paragraph of N.C.P.I.—Crim. 206.10 (1983) at p. 8 relating to the burden of proof of self-defense and the effect of an imperfect self-defense concludes with a footnote which states, "Where the evidence raises the issue of retreat, see alternative paragraph set forth in N.C.P.I.—Crim. 308.10." *Id.* at n. 7. N.C.P.I. —Crim. 308.10 (1983) reads as follows:

> SELF-DEFENSE, RETREAT—INCLUDING HOMICIDE (TO BE USED FOLLOWING THE SELF-DEFENSE INSTRUCTIONS WHERE RETREAT IS IN ISSUE.)
>
> > *Note Well: This instruction is to be used if the evidence shows that the defendant was at his home or on his premises or at his place of business when the assault on him occurred.*
>
> If the defendant was not the aggressor and he was [in his own home] [on his own premises] [at his place of business] he could stand his ground and repel force with force regardless of the character of the assault being made upon him. However, the defendant would not be excused if he used excessive force.

(Footnotes omitted.)

The trial court's instruction on self-defense did not include the N.C.P.I.—Crim. 308.10 "alternative paragraph" (the "no duty to retreat" instruction).

This Court has held in many cases that where competent evidence of *self-defense* is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case, and the trial judge must give the instruction even absent any specific request by the defendant. *See, e.g., State v. Todd*, 264 N.C. 524, 142 S.E. 2d 154 (1965). *See also State v. Anderson*, 40 N.C. App. 318, 253 S.E. 2d 48 (1979); *State v. Robinson*, 40 N.C. App. 514, 253 S.E. 2d 311 (1979). *Cf. State v. Jones*, 299 N.C. 103, 261 S.E. 2d 1 (1980) ("defense of home" instruction); *State v. Miller*, 267 N.C. 409, 148 S.E. 2d 279 (1966) (same); *State v. Spruill*, 225 N.C. 356, 34 S.E. 2d 142 (1945) (same). It has also been held that where supported by the evidence in a claim of self-defense, an instruction negating defendant's *duty to retreat* in his home or premises must be given even in the absence of a request by defendant. *E.g., State v. Poplin*, 238 N.C.

728, 78 S.E. 2d 777 (1953); *State v. Ward*, 26 N.C. App. 159, 215 S.E. 2d 394 (1975).

The State here contends that these rules have been altered by the recent amendment of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, which provides in pertinent part:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that the opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

The State finds support for its position in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), in which the defendant argued that the trial court erred in failing, *ex mero motu*, to instruct the jury on simple assault in his trial for attempted armed robbery. Case law existed which required a trial judge to instruct on a lesser-included offense supported by the evidence even absent a specific request for such an instruction. *State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980). Assuming, without deciding, that simple assault was a lesser-included offense of armed robbery, this Court in *Odom* stated that the *Brown* rule was "altered" by the amendment to Rule 10(b)(2). A closer analysis of the interrelationship of these rules convinces us that Rule 10(b)(2), as amended, does not, in fact, "alter" the rule of *Brown* or the analogous rule of *Todd, Spruill, Jones, Miller,* and *Poplin* (where competent evidence is presented, the trial judge must give self-defense and "no duty to retreat" instruction even absent specific request). These rules, placing upon a trial judge the duty to instruct, *ex mero motu*, on a substantial and essential feature of the case, are undisturbed by the Rule 10(b)(2) amendment. However, Rule 10(b)(2) operates to preclude a defendant from *assigning as error* on appeal a trial judge's failure to so instruct unless defendant preserves the error by making a timely objection at trial.

In *Odom*, where this Court held that Rule 10(b)(2) barred defendant from assigning error to an unobjected-to omitted jury instruction, we adopted the "plain error" rule to allow for review of some assignments of error normally barred by Rule 10(b)(2). As stated in *Odom*:

> [The "plain error" rule] is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

307 N.C. at 660, 300 S.E. 2d at 378 (emphasis in original) (*quoting United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L.Ed. 2d 513 (1982)). This Court has cautioned that "even when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed. 2d 203, 212, 97 S.Ct. 1730, 1736 (1977)." *State v. Odom*, 307 N.C. at 660-61, 300 S.E. 2d at 378.

> The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. *State v. Odom*, 307 N.C. at 661, 300 S.E. 2d at 378-79. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. *State v. Black*, 308 N.C. at 741, 303 S.E. 2d at 806-07. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection. *Cf.* N.C.G.S. § 15A-1443(c) (defendant not prejudiced by error resulting from his own conduct).

State v. Walker, 316 N.C. 33, 39, 340 S.E. 2d 80, 83-84 (1986).

Defendant here contends that application of the "plain error" rule is appropriate in light of *Odom* to reveal such a fundamental error as to entitle him to a new trial. We disagree. Although it was error for the trial court not to instruct the jury as to defendant's right to stand his ground if it believed his testimony and found that he was not the aggressor, *e.g., State v. Poplin,* 238 N.C. 728, 78 S.E. 2d 777 (1953), this error was not properly preserved for review by reason of defendant's failure to comply with Rule 10(b)(2), and we find upon review of the record as a whole, pursuant to *Odom* and *Walker,* that such error did not constitute "plain error."

The evidence for the defendant tended to show that he acted in self-defense in shooting Mr. Harrell only after Mr. Harrell, without provocation, burst into Geno's threatening to kill him. Defendant testified that prior to the shooting, Harrell went into a rage, picked up a hatchet, and threw it through the front door at him. Harrell then entered the building, pursued defendant with a knife, and ran out the back door. Defendant attempted to lock Harrell out of the building by securing the doors, but Harrell went around to the front of the building, threw a desk/chair toward the front door at defendant, then came into the building saying to defendant, "This is it . . . I'm going to kill you." The defendant testified that he was in fear for his life at the time and that he acted in self-defense when he shot Harrell coming at him through the doorway.

The State's case was based on the theory that defendant intentionally, unlawfully, with premeditation and deliberation, and without provocation fired a shotgun from inside Geno's at decedent who, being outside the store with his left side turned toward defendant, was preparing to sit down in a chair where he had set up a table. The State's theory was strongly supported by both the physical evidence and the testimony of witnesses, including disinterested eyewitnesses.

Thus, the evidence set out two very different theories of the events that led to the death of Yates Harrell on 4 July 1984—(1) a premeditated, deliberate murder, and (2) a killing in self-defense. The jury obviously believed the State's theory and disbelieved defendant's.

Our review of the whole record fails to convince us that absent the error, the jury probably would have reached a different verdict. Therefore, the defendant has not carried his burden of showing "plain error." *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986).

No error.

Justice EXUM dissenting.

I cannot subscribe to the majority's view that the cross-examination of defendant concerning his earlier assaults with a shotgun against Mike Hall and the chief of police, while error, was not reversible error.

That defendant shot Harrell to death is conceded; but the degree of his culpability in doing so, if any, is a close question. His defense was self-defense; and, on the face of it, his version of the incident seems as plausible as, if not more plausible than, the state's version. According to the state's witnesses defendant without provocation simply shot deceased to death at defendant's business establishment in the early evening of 4 July 1984, in the presence of witnesses to whom defendant immediately went and asked to come over and see what he had done. Defendant's evidence tended to show, in the words of the majority, "that he reasonably felt it necessary to shoot Harrell in order to protect himself from Mr. Harrell, a 6′-3″, 280-pound manic depressive who was coming at him through the doorway of his home and business threatening to kill him." That the deceased was suffering from a manic depressive psychiatric disorder exacerbated by alcohol consumption and that he had a substantial blood alcohol content on the occasion in question was established by disinterested witnesses. Further, the state's evidence also corroborated defendant's testimony that the deceased threw a hatchet at him which landed under a sofa in the business establishment. Investigators found the hatchet under the sofa.

Defendant's admission that Harrell had no weapon at precisely the time defendant fired his shotgun weakens defendant's case for perfect self-defense. Nevertheless, it would have been well within the realm of reason for the jury to have determined defendant to be guilty of manslaughter or second degree murder.

The jury might have convicted defendant of manslaughter on the theory that defendant shot in the heat of passion upon adequate provocation or used excessive force under the circumstances. *See State v. Wallace*, 309 N.C. 141, 305 S.E. 2d 548 (1983). The jury might have determined him guilty of second degree murder on the ground that he shot pursuant to a provocation insufficient to reduce the crime to manslaughter but sufficient to rob it of premeditation and deliberation and reduce it to second degree murder. *See State v. Thomas*, 118 N.C. 1113, 24 S.E. 431 (1896). I believe that without the challenged cross-examination the jury might well have opted, if not for acquittal, at least for a lesser degree of homicide than first degree murder; therefore, but for this cross-examination there is a "reasonable possibility that . . . a different result would have been reached at trial." N.C.G.S. § 15A-1443(a) (1983).

The principal reason Rule 608(b) prohibits cross-examination concerning specific acts of misconduct to impeach credibility (unless these acts bear on truthfulness) is the potential such cross-examination presents for undue prejudice, especially for a testifying criminal defendant. Evidence of a criminal defendant's former misconduct not bearing on truthfulness tends to draw a jury's attention from the real issues in the case, *United States v. Bledsoe*, 531 F. 2d 888, 891 (8th Cir. 1976), and may incline a jury to convict simply because defendant is "shown to be a bad man." *State v. Ervin*, 340 So. 2d 1379, 1381 (La. 1976). It is "[t]o minimize the possibility of such prejudice to defendant [that] statutes . . . exclude" such evidence. *Id.* "Restrictions on the use of character evidence . . . help prevent juries from convicting defendants for the wrong reasons." Note, 63 N.C. L. Rev. 535, 543 (1985). "In tacit recognition of the potential for unjustifiable prejudice . . ., [Rule 608(b)] limits" inquiry for impeachment of a witness, including a criminal defendant, to acts of misconduct "probative of truthfulness or untruthfulness." Crumpler and Widenhouse, "An Analysis of the New North Carolina Evidence Code: Opportunity for Reform," 20 Wake Forest L. Rev. 1, 44 (1984). I believe it reasonably possible that the cross-examination complained of here fulfilled its potential for prejudice to defendant.

Further, the state argues the evidence of defendant's past assaultive behavior with a shotgun is substantively admissible because it tends to prove defendant was the aggressor and thereby

to negate his claim of self-defense. Although the majority correctly rejects this theory of admissibility, it is at least reasonably possible that the jury improperly viewed this evidence as the state contends it should be viewed, and as a result improperly rejected defendant's claims of self-defense and reduced culpability.

I, therefore, would grant defendant a new trial because of the improper cross-examination.

STATE OF NORTH CAROLINA v. SHANNONE WAYNE McCLINTICK

No. 302A84

(Filed 18 February 1986)

1. **Criminal Law § 86.5— impeachment of defendant—specific acts of misconduct —pending charges—cross-examination proper**

In a prosecution for rape, burglary and robbery, the trial court did not err in allowing the State to cross-examine defendant for impeachment purposes about his alleged involvement in certain sex offenses and other crimes in California for which he had not been tried where the questions were asked in good faith based on a police report and charges pending in California, the district attorney identified each specific act with reference to the time, place and victim, and there was no reference in the questions to charges or indictments pending against defendant. The questions were not improperly framed so as to assert in advance the untruth of defendant's denials because the questions were prefaced or followed by such expressions as, "Isn't it a fact."

2. **Criminal Law § 86.4— cross-examination of defendant—question about being "wanted" in California—harmless error**

The trial court erred in permitting the prosecutor to ask defendant on cross-examination if he had used the name "Shannone Sherlin" because he knew he was "wanted" in California under the name of "Shannone McClintick" since the obvious inference to be gleaned by the jury from the use of the word "wanted" is that formal criminal charges against defendant were outstanding in California. However, such error was not sufficiently prejudicial so as to require a new trial where defendant had already rendered his explanation of his use of different names on direct examination, and where the evidence of defendant's guilt was so overwhelming that the jury would have convicted defendant of the offenses charged even without the error.

3. **Bills of Discovery § 6— failure to make discovery—sanctions not imposed—no abuse of discretion**

The trial court did not abuse its discretion in failing to impose any sanctions on the State, including the exclusion of evidence, for its failure to comply with discovery where the trial court expressed displeasure with the State's

tactics with respect to discovery and did employ several of the curative actions suggested by N.C.G.S. § 15A-910, and where the court at no time determined that defendant was not provided items to which he was entitled, that defendant was harmed by the delay in receiving them, that defendant was subjected to unfair surprise at trial, or that the State had failed to comply with the law.

4. **Indictment and Warrant § 13— motion for bill of particulars—sufficiency of State's responses**

The State's two responses to defendant's motion for a bill of particulars in a prosecution for rape, armed robbery and burglary, when considered with the indictments, sufficiently gave defendant notice of the nature of the State's allegations against him and of what role the State claimed he played in the offenses charged so as to allow him adequately to prepare his defense.

5. **Criminal Law § 89.3— corroboration of victim—statements that she had been raped**

Testimony by the victim's mother and an emergency room nurse that the victim had told them that she had been raped and a written statement of the victim were properly admitted to corroborate the victim's testimony. The number of witnesses who may testify to a particular fact is a matter within the sound discretion of the trial judge. N.C.G.S. § 6-60.

6. **Criminal Law § 169— *answers to questions not in record—failure to show prejudice***

The appellate court cannot determine whether defendant was prejudiced by the exclusion of testimony where defendant failed to put into the record what the witnesses would have testified if they had been permitted to do so.

7. **Constitutional Law § 80; Rape and Allied Offenses § 7— first degree rape—mandatory life sentence—not cruel and unusual punishment**

The mandatory life sentence for first degree rape provided by N.C.G.S. § 14-27.2 is not unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

8. **Burglary and Unlawful Breakings § 7; Rape and Allied Offenses § 6.1; Robbery § 5.4— instructions on lesser included offenses not required**

In this prosecution for first degree rape, armed robbery and first degree burglary, defendant's statement admitted into evidence in which he acknowledged that he entered the victim's trailer after a companion broke into it and that he assisted his companion in accomplishing rape did not establish a basis for an instruction on lesser included offenses.

9. **Criminal Law § 60.5— fingerprint evidence—time of impression—refusal to instruct**

The trial court did not err in refusing to instruct the jury that fingerprint evidence lacked probative force unless the evidence showed that the prints could have been made only at the time of the crime where there was no evidence that defendant had ever been in the victim's trailer at any time before the night of the crimes.

Justice EXUM dissenting.

APPEAL by defendant from judgments entered by *Sitton, J.*, at the 23 January 1984 session of Superior Court, BUNCOMBE County. Heard in the Supreme Court 21 November 1985.

Defendant was charged with rape in the first degree, robbery with a dangerous weapon, kidnapping in the first degree, and burglary in the first degree. Defendant entered a plea of not guilty to each offense.

At the close of all the evidence, the trial judge dismissed the charge of kidnapping in the first degree and denied defendant's other motions to dismiss. Following arguments of counsel to the jury and the judge's instructions, the jury returned verdicts of guilty of robbery with a dangerous weapon, rape in the first degree, and burglary in the first degree. Judgments were entered sentencing defendant to life imprisonment on the rape charge, fifteen years for burglary, and fourteen years for armed robbery, all sentences to run consecutively. Defendant appealed the life sentence directly to this Court pursuant to N.C.G.S. § 7A-27(a). We allowed his motion to bypass the Court of Appeals on the armed robbery and burglary convictions. For the reasons that follow, we find that defendant received a fair trial, free of prejudicial error.

Lacy H. Thornburg, Attorney General, by Alfred N. Salley, Assistant Attorney General, for the state.

Scott E. Jarvis for defendant.

MARTIN, Justice.

The state offered evidence tending to show that sometime after midnight on 5 August 1983, the seventeen-year-old defendant ran into his friend Billy Don Williams at a bar called Mack Kell's where defendant had been drinking. Williams asked defendant to go with him to pick up some money for his car payment, and Williams then drove defendant to a trailer park in Fairview. Williams parked, got out of the car, went into the trailer park, returned about five minutes later, and motioned to defendant to follow him. Williams went around the end of a trailer while defendant waited at the side. Williams entered the trailer through a window over a television set, breaking an oil lantern that was on top of the TV, and opened the door from the inside, letting defendant in. Then Williams opened a bedroom door and went in, closing the door behind him, leaving defendant in the hallway.

The victim, eighteen-year-old Mary Luanne Odom, who was awake and reading in bed, testified that she heard a crash but thought nothing of it, believing that her mother was awake and in the kitchen. She had resumed her reading when Williams came into her room with a knife in his hand and a nylon scarf over his face. After striking her in the face and knocking her over, the intruder told her not to look, that he was not going to hurt her, and that all he wanted was money. He put his hand over her mouth and asked her who else was at home and where money and valuables were. When she acknowledged that her mother was in the trailer and told him there were no valuables, he again knocked her over and put a pillow over her. He tied her hands behind her back with nylon stockings, jammed a dishcloth into her mouth, tied another dishcloth over her eyes, and tied her feet together. When she felt his hand on her leg, she broke her hands and feet loose and kicked him in the stomach, knocking his knife onto the floor. She got the pillow off her face and the blindfold off her eyes and was able to see that defendant was standing in the doorway. Defendant entered the room, closing the door behind him, and Williams said, "Get my knife. I've got to have my knife." After defendant handed Williams his knife, one with a three-inch blade, they tied Miss Odom's hands to the headboard and tied an electrical cord around her right leg. Defendant held the cord while Williams, who had threatened Miss Odom with his knife, fondled her, committed cunnilingus upon her, and had sexual intercourse with her. After Williams had completed the sex act, defendant had intercourse with her. Williams told her not to report the incident and threatened her life if she did so. The two men put a blanket and a pillow over her head and left the trailer. Miss Odom immediately woke up her mother, who had heard nothing, and they reported the incident to the police.

Later, Miss Odom discovered that her checkbook, her driver's license, her automatic teller card, a small silver cup, and a small amount of cash were missing. Miss Odom had previously written her personal code above the calendar in her checkbook, and beginning at 4:17 a.m. on 5 August 1983 and continuing through 12 August, twenty-three transactions (balance inquiries, checking and savings withdrawals, void attempts) were made on Luanne Odom's automatic teller card, resulting in total withdrawals of

$215 from Miss Odom's accounts. The card was finally captured by the machine, as its theft had been reported to bank security.

The victim sustained abrasion burns on her hands and wrists and bruises to her eye and lip. A medical examination indicated recent intercourse of a rough nature. Crime scene investigators discovered a bent window screen on the ground near the trailer, a raised window, footprints in the dirt below the window behind the TV set as well as outside Luanne's bedroom window, a footwear impression on top of the TV set, a broken oil lamp on the floor near the TV, stockings tied to the headboard and lying on the mattress, a broken electric blanket cord tied to the footpost of Luanne's bed, a pair of panties in the bed frame, fingerprints on top of the TV set, and a red bandanna on the bathroom floor. The SBI was unable to match the footwear impressions to those of any known suspects but identified a latent palm print and a right index fingerprint from the top of the TV as those of defendant. An SBI forensic serologist identified blood type of a B secretor from a vaginal swab obtained from the victim which was consistent with the blood type of defendant.

Defendant was picked up on a fugitive warrant from California on 8 September 1983 at about 1:45 a.m. Defendant and Williams were together at the time of arrest and identical sword-type knives were taken from each of them. Defendant was taken to the Buncombe County Courthouse where he was allowed to call his mother in California and was booked. At about 9:00 a.m. defendant was taken to an interview room, was served with the warrant in this case, and was read his juvenile rights. He signed a form advising him of his rights as a juvenile in the presence of two sheriff's department officers and one Asheville police officer. Defendant was read his rights one at a time, said he understood each right, and agreed to waive his right to counsel and talk to the officers as long as Asheville police officer Melvin Walsh, a friend of defendant's family, was present. At one point during the interview, defendant told "Uncle Mel" that he had not been telling the truth and that if the other two officers would leave the room, he would tell the truth. In a ten to fifteen minute private conversation between Officer Walsh and defendant, defendant told the policeman that Don Williams had let him into the trailer and that defendant did not have sex with Miss Odom but that he had held the electrical cord and watched while Williams had sex

with her. He denied any sexual contact with the victim. Defendant signed each page of a voluntary statement at 1:25 p.m.

Defendant testified at a suppression hearing regarding the admissibility of his statement, alleging that he was intoxicated on the night of his arrest. He also claimed that he had asked to see his grandparents, had requested a lawyer, and was never advised of his rights. He denied that the signature and initials on the juvenile rights form were his and that he had ever made a statement. In fact, he claimed the officers deceived him into signing the two documents by telling him they were release forms. After the voir dire hearing on the admissibility of his statement, the court found that the signatures in the name of "Shannone Sherlin" (a prior name of defendant by his natural father) and the initials "S.S." appeared to be those of defendant; that defendant was properly advised of his rights; that he was neither intoxicated nor coerced; that defendant voluntarily and understandingly waived his rights; and that defendant freely gave a statement to Officer Walsh and then to Officers Walsh, Ingle, and Mull. The court denied defendant's motion to suppress and overruled his objection to the evidence regarding the statement. Both the victim's and the defendant's statements were subsequently read into evidence.

Defendant testified in his own behalf at trial, claiming that he went to the Odoms' trailer thinking it was the home of Williams's girlfriend and that he did nothing other than stand in the living room for fifteen or twenty minutes while waiting for Williams to come from the back of the trailer. He denied having taken part in or witnessing any rape or robbery. He again claimed that he signed the juvenile rights and voluntary statement forms thinking they were release forms, and he denied having made a confession to the investigating officers or signing any documents with handwriting on them. He also testified that he was questioned after he had requested an attorney.

I.

[1] Defendant presents us with nine assignments of error. He first alleges the trial court erred in allowing the state to examine him about sex offenses and other crimes which he allegedly committed in California, contending that "these questions were so framed as to assert in advance the untruth of his denials." The

four questions objected to by defendant, which were the subject of defendant's motion in limine as well as his objections and motions to strike, were:

> Q: Mr. McClintick, on August 17, 1982, at approximately 12:15 a.m. in Anaheim, California, didn't you pry open the window in the home of a Mrs. Whitford and force her to a couch with a pair of scissors, isn't that the truth?
>
> Q: Mr. McClintick, on the date of August 20, 1982, at approximately 3:00 a.m. in Anaheim, California, didn't you enter the home of Mrs. Molly Moore, threaten her with a knife, tie her up with a pillowcase and attempt to pull her legs apart? Didn't you do that?
>
> Q: Isn't it a further fact that on that same date, August 20th, 1982, at approximately 1:45 in the morning in Anaheim, California, didn't you enter the home of Mrs. Pamela Taylor, and while you were armed with a three-foot club forced her out of her bed and onto the floor and your hand was injured in that incident, isn't that a fact, sir?
>
> Q: Mr. McClintick, isn't it a fact that when you came here to North Carolina you used the name Shannone Sherlin because you knew you were wanted in California under the name of Shannone McClintick? Isn't that a fact?

Noting that these questions were based on a police report and charges pending in California, defendant objects to both the form and the content of the questions and argues that they "were framed in such a fashion that regardless of how they were answered by Defendant-Appellant the jury had to be left with an impression that they constituted a statement of fact." Specifically, he takes umbrage at the district attorney's preceding and ending her questions with phrases such as "isn't it a fact . . .," and he asserts that the questions would have been more properly phrased in the form, "Did this event happen?"

Defendant cites *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954), to support his contention that argumentative and accusatory questions, framed as to assert in advance the untruth of his denials, deprived him "of the benefit of the evidential rule that the State is bound by the answers of the accused or any other witness for the defense when it cross-examines him as to col-

lateral matters for the purpose of impeachment," *id.* at 524, 82 S.E. 2d at 768, and caused such prejudice to defendant's credibility as to warrant a new trial. Further, defendant relies on *State v. Baker,* 312 N.C. 34, 320 S.E. 2d 670 (1984), to bolster his claim that a defendant may not be cross-examined on collateral crimes by the use of questions "which assume as facts unproved insinuations of the defendant's guilt of collateral offenses." *Id.* at 46, 320 S.E. 2d at 678 (citing *Phillips,* 240 N.C. at 524, 82 S.E. 2d at 767). As we perceive a distinction between the first three questions objected to and the fourth, we will first address the former as a whole.

Although this Court has forbidden cross-examination for impeachment purposes by referring to indictments, charges, arrests, or accusations on collateral criminal offenses, *State v. Shane,* 304 N.C. 643, 651, 285 S.E. 2d 813, 818 (1982), *cert. denied,* 104 S.Ct. 1604, 80 L.Ed. 2d 134 (1984); *State v. Williams,* 279 N.C. 663, 672, 185 S.E. 2d 174, 180 (1971); *see* 1 Brandis on North Carolina Evidence § 112, at 416 (1982 & Supp. 1983 at n. 57), it is equally well settled in this jurisdiction that as long as certain requirements are met, a criminal defendant may be cross-examined for impeachment purposes about specific *acts* of misconduct, *Shane,* 304 N.C. at 648, 285 S.E. 2d at 817; *State v. Lynch,* 300 N.C. 534, 268 S.E. 2d 161 (1980); N.C.R. Evid. 608(b) (1984); 1 Brandis on North Carolina Evidence § 112, at 416-17, and in rare instances he may even be asked whether he committed criminal acts. *State v. McCray,* 312 N.C. 519, 324 S.E. 2d 606 (1985); *State v. Beaty,* 306 N.C. 491, 293 S.E. 2d 760 (1982); *State v. Royal,* 300 N.C. 515, 268 S.E. 2d 517 (1980). The rationale for allowing such delving into the defendant's former transgressions was enunciated in *State v. Purcell,* 296 N.C. 728, 252 S.E. 2d 772 (1979), where the Court, via Justice Exum, explained:

> The purpose of permitting inquiry into specific acts of criminal or degrading conduct is to allow the jury to consider these acts in weighing the credibility of a witness who has committed them. For this purpose to be fulfilled, the questions put to the witness must enlighten the jury in some degree as to the nature of the witness' acts.

Id. at 733, 252 S.E. 2d at 775. For this reason questions similar to those sub judice were held proper in *State v. Ashley,* 54 N.C.

App. 386, 283 S.E. 2d 805 (1981), *disc. rev. denied*, 305 N.C. 153 (1982). In that case, the Court of Appeals' reasoning for allowing cross-examination of the defendant regarding his alleged involvement in crimes for which charges were pending against him in Florida was based on the fact that by taking the stand and testifying in his own behalf, the defendant forfeited his privilege against self-incrimination and was subject to impeachment by questions which related to specific acts of criminal conduct. *State v. Ross*, 295 N.C. 488, 246 S.E. 2d 780 (1978); *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973). As we observed in *Ross*, where we pointed out that such a wide scope of impeachment aids the jury in assessing a defendant's self-serving testimony, the "likelihood of undue prejudice accruing from the attempted impeachment . . . does not outweigh the court's substantial interest in arriving at the truth." 295 N.C. at 493, 246 S.E. 2d at 785.

The only limitations placed upon the prosecution in making inquiry into the defendant's previous iniquities are that there be factual bases for the questions and that they be asked in good faith, *State v. Shane*, 304 N.C. 643, 648, 285 S.E. 2d 813, 817; *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161; *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970); that the questions be content-neutral, *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973); and that the subject matter of the questions be within the knowledge of the witness, *State v. Purcell*, 296 N.C. 728, 732, 252 S.E. 2d 772, 775 (quoting *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181). The scope of the questions are subject to the discretion of the trial judge, *Purcell*, 296 N.C. at 732, 252 S.E. 2d at 775.

In the case before us, following defendant's objections the trial judge dismissed the jury after the district attorney's second question for the purpose of conducting a brief voir dire on the admissibility of the inquiries. During this hearing, defendant made motions to strike the first two questions. The trial judge informed defendant that the questions were proper under *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813, and other North Carolina Supreme Court cases permitting a criminal defendant to be cross-examined about prior acts of misconduct, even those for which the defendant had not been convicted, for impeachment purposes, as long as the questions were asked in good faith. He then inquired of the state as to the good faith basis of its questions. The state responded that it possessed the complete police file on defendant

(against whom extradition proceedings had been filed in California and were pending at the time of this trial and who was arrested on a fugitive warrant issued in that state) with the facts of the California police investigation into those incidents; that defendant's fingerprints were found in the victim's home after the 17 August incident; and that the victim identified defendant as the perpetrator of the incident asked about in the second question. The trial judge specifically found that the questions were asked by the state in good faith, and the jury was returned to the courtroom. The state then proceeded to ask the last two questions complained of here. Defendant answered "no" to all four questions.

We see no abuse of discretion in permitting these questions. Their good faith basis was demonstrated to the satisfaction of the trial judge. The district attorney asked the defendant about each incident, properly identifying each specific act with a reference to the time, place, and victim of defendant's alleged prior misconduct, *State v. Shane*, 304 N.C. 643, 652, 285 S.E. 2d 813, 819; *State v. Purcell*, 296 N.C. 728, 732-33, 252 S.E. 2d 772, 775, and did not allude to the fact that formal charges were pending against defendant in each of these incidents in violation of *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174. Further, we do not agree that the form of these questions was improper. They were not, as in *Shane* and *Purcell*, inadequate because they did not inquire about some "identifiable specific act on defendant's part," *Purcell*, 296 N.C. at 732, 252 S.E. 2d at 775; there was no reference to charges or indictments as in *Williams*; and we disagree with defendant that the questions were improperly framed "as to assert in advance the untruth of his denials," thereby depriving him "of the evidential rule that the State is bound by the answers of the accused . . . when it cross-examines him as to collateral matters for the purpose of impeachment," said to be impermissible in *State v. Phillips*, 240 N.C. 516, 524, 82 S.E. 2d 762, 768, and *State v. Baker*, 312 N.C. 34, 320 S.E. 2d 670. The form of the questions here, prefaced and followed by such expressions as, "Isn't it a fact," were merely leading and were no more accusatory than any other question customarily asked on cross-examination. We therefore do not find defendant's attempts to invoke the rulings in *Phillips* and *Baker* to be persuasive; whether the district attorney asked the questions in the form, "Did you . . .?" or "Didn't

you . . .?" is merely semantical. Moreover, the state's query into each matter ended upon the defendant's flat denial, so not only was the rule against offering extrinsic evidence to challenge defendant's denials not violated, *State v. Shane*, 304 N.C. 643, 653, 285 S.E. 2d 813, 819; 1 Brandis on North Carolina Evidence § 111, at 410; N.C.R. Evid. 608(b), but defendant's denials were conclusive and made the questions harmless. *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (where questions substantially similar to those presently before us were held proper). Nor was the probative value of the questions outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. *See* N.C.R. Evid. 403 (effective 1 July 1984). We find no error in the admission of the first three questions and answers.

[2] The prosecutor's fourth question, however, does give us pause for some concern. As discussed previously, evidence that a witness has been accused, arrested, indicted, or is under indictment for criminal offenses other than and unrelated to that for which he is then on trial is inadmissible. *State v. Williams*, 279 N.C. 663, 672, 185 S.E. 2d 174, 180. Here the prosecutor asked the defendant if he used the name "Shannone Sherlin" because he knew he was *wanted* in California under the name of "Shannone McClintick." The obvious inference to be gleaned by the jury from the use of the word "wanted" is that formal criminal charges against defendant were outstanding in California. This clearly was impermissible under *Williams*, and it was error to admit it. However, as noted in *Williams*, whether a violation of this rule amounts to a sufficient ground for a new trial depends on the circumstances of the individual case. 279 N.C. at 674, 185 S.E. 2d at 181. A review of the transcript shows us that on direct examination, the following exchange occurred between the defendant and his attorney:

Q. Mr. McClintick, have you also been known by the name Shannone Sherlin?

A. I was—that's my born name. I was born under that name.

Q. And did you have another name, last name, by the name of Brackett?

A. Yes, I was adopted.

Q. Would you explain that to the jury, please?

A. My mother had married a police officer of the name of Brackett, and he adopted me until I was 11 years old, and I left for California at that time.

. . . .

At that time, after I was born, my mother had married a police officer named Bud Brackett, and he adopted me at that time.

Q. Then your name became McClintick, is that correct?

A. After I moved to California my second stepdad adopted me then.

On oral argument, the state contended that it had a good faith belief that defendant had changed his surname from "McClintick" to "Sherlin" when he moved back to North Carolina in order to attempt to avoid apprehension for the California crimes and that it was a plausible explanation for defendant's change of name. Equally plausible is the theory that defendant preferred to use the name by which he was known in North Carolina when he lived in this state as a child. In any event, defendant had already rendered his explanation on direct examination; he did not further elucidate on cross-examination; the state did not attempt to press him on the issue but accepted his denial as final. As "[d]efendant's negative answers were conclusive and rendered the questions harmless," *State v. Black*, 283 N.C. 344, 350, 196 S.E. 2d 225, 229, we do not find that the error was sufficiently prejudicial so as to warrant a new trial. Moreover, considering the victim's certain identification of defendant, the defendant's inculpatory statement, and the other evidence tending to establish his guilt, we think the evidence is so overwhelming that the jury would have convicted defendant of the offenses charged even without the error. N.C.G.S. § 15A-1443(a) (1983). This assignment of error is overruled.

II.

Next, defendant alleges that the state in bad faith failed to comply with discovery requirements, and he asks that the trial court's discretionary rulings permitting admission of certain evidence be overturned on the grounds that the state's actions

hampered his defense and denied him a fair trial. However, defendant has failed to show how he was prejudiced. We do not perceive that the outcome would have differed or that defendant's defense would have been conducted differently had this information been provided or provided earlier, and because we believe that the trial judge "bent over backwards" to accommodate the defendant by granting recesses and continuances and holding hearings on these discovery matters, we find no abuse of discretion in the trial judge's failure to impose sanctions on the state or admitting the evidence complained of.

Defendant made timely requests for discovery and moved for a bill of particulars.

Specifically, because the state did not provide a copy of a fingerprint report and fingerprint cards until fifteen to twenty minutes prior to the commencement of the trial, defendant contends that all fingerprint evidence should have been excluded. He argues that the testimony of the victim should have been excluded because the state did not furnish him with a copy of her statement, to which defendant apparently believes he was entitled so that he could examine it for exculpatory material. Defendant also objects to the admission of the testimony of Pat Ward, the Buncombe County Jail nurse who drew a blood sample from defendant, because the state had not disclosed that she was a potential witness. He argues further that the state did not make sufficient discovery of the bank transactions record because the copy furnished him differed in several respects from the transaction record produced in court. Finally, defendant objects to the admission into evidence of a juvenile rights waiver form without discovery and the testimony of police officer Walsh as to statements defendant made after he signed the form, particularly in light of the fact defendant strenuously denied that any such form existed. In addition to these contentions, defendant also objects to the trial court's denial of his last motion to continue.

[3] Neither the North Carolina discovery statute, N.C.G.S. §§ 15A-902 to -910, nor the case of *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963), requires the trial court to impose any sanctions for failure to comply with discovery. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). The determination as to whether the state substantially failed to comply with discovery is

within the trial judge's discretion. *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984); *State v. Dukes*, 305 N.C. 387, 289 S.E. 2d 561 (1982). This Court has held that discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982); *State v. Lampkins*, 286 N.C. 497, 212 S.E. 2d 106 (1975), *cert. denied*, 428 U.S. 909 (1976); *State v. Carter*, 289 N.C. 35, 220 S.E. 2d 313 (1975). In the case before us, although the trial judge did not impose any sanctions for failure to comply with discovery and indeed expressed his displeasure with the state's tactics with respect to discovery, he did in fact employ several of the curative actions suggested by N.C.G.S. § 15A-910. Certain items of evidence were made available to defendant and he was given time to study them; in fact, some recesses were granted for this purpose. Some items, the existence of which were not disclosed to defendant, were excluded. It is obvious from the record that the trial judge disapproved of the state's delay in compliance and not providing defendant with certain items, the furnishing of which were not required but which could have been provided without burdening the state's case. However, at no time did he determine that defendant was not provided items to which he was entitled, that defendant was harmed by the delay in receiving them, that defendant was subjected to unfair surprise at trial, or that the state had failed to comply with the law. *See State v. Taylor*, 311 N.C. 266, 316 S.E. 2d 225 (1984) (no error to deny defendant's motion for sanctions where defense counsel was afforded opportunity to examine evidence before the opening of court the next day). We fail to find any abuse of discretion.

III.

[4] Turning now to defendant's next contention, he alleges that the trial court erroneously ruled that the state's "Further Answers" to his request for a bill of particulars were sufficient. In its first bill of particulars, the state had indicated that the two defendants had played substantially different roles, with one being a primary actor and the other being a secondary actor or accomplice. The amended bill indicated that the state would attempt to prove that defendant committed the crimes in question and also encouraged and aided Williams to commit the same

crimes, and the state actually proceeded on a theory that the two defendants were *acting in concert.* Defendant argues that the state's amended response was inadequate to apprise him of the nature of the state's allegations against him and of what role the state claimed he played in the offenses charged. This, combined with the state's delayed compliance with discovery procedures, left him subject to being surprised at trial, denying him a fair trial, he says, and he asserts that the trial judge abused his discretion by not requiring more from the state. *State v. Westry; State v. McCutcheon; State v. Miller; State v. Abbney,* 15 N.C. App. 1, 11-12, 189 S.E. 2d 618, 625, *cert. denied,* 281 N.C. 763 (1972).

The state's original answer to the request for a bill of particulars supplied defendant with the following information:

> (1) These offenses occurred between the hours of 3:00 a.m. and 4:00 a.m.
>
> (2) These offenses occurred at the residence of the victim.

The state's Further Answers provided:

> 1) That the defendant raped Luanne Odom.
>
> 2) That the defendant aided Billy Don Williams in the rape of the victim.
>
> 3) That the defendant conspired with Billy Don Williams for either one or both of said parties to rape Luanne Odum [sic].
>
> 4) That the defendant procured, counseled, commanded, and encouraged Billy Don Williams to rape Luanne Odum [sic].
>
> That the defendant did the same as alleged in one through four above in regards to First Degree Burglary Charge, Armed Robbery, and First Degree Kidnapping.

Combined with the information contained in the four indictments of defendant, which between them gave the date, time, and exact place of the offenses, the name of the victim, the type of weapon used, the occupants of the house at the time of the crimes, and the items taken from the premises, defendant certainly was

charged with notice of the nature of the state's allegations against him and of what role defendant played in the charged offenses. The trial court found as much and entered into the record its detailed findings to the effect that the state's responses to defendant's motion provided all the information necessary to allow defendant to adequately prepare his defense. We find no abuse of discretion.

IV.

[5] Next, defendant alleges that certain evidence corroborative of the victim's testimony should not have been admitted. Specifically, the trial judge allowed Nina Odom, the victim's mother, and an emergency room nurse, Cathy Buckner, to testify that the victim had told them that she had been raped, describing some of the surrounding circumstances. Additionally, a written statement of the victim was introduced into evidence and displayed to the jury. Defendant argues that this evidence was inadmissible and prejudicial because it merely repeated direct allegations that a crime had been committed rather than corroborating details of the victim's story and suggests that to allow such testimony would be to encourage situations where the more the victims complain to people around them, the more their accusations will be made and repeated in court. Defendant concedes there is no existing authority in support of his position but urges us to create a rule placing limits on corroborative evidence once it is shown that the present memory of the witness is in harmony with the witness's earlier statement.

Contrary to defendant's concession, there is ample authority enabling the trial judge to limit the number of witnesses a party may call to prove a fact in issue. The number of witnesses who may testify to a particular fact is a matter within the sound discretion of the trial judge. *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968). *See also* N.C.G.S. § 6-60 (1981). We find no abuse of discretion by the trial judge. The assignment of error is overruled.

V.

[6] Defendant next argues that the trial court erred in not receiving corroborating evidence of defendant's statement that he requested an attorney during his interrogation. There was con-

flicting evidence at trial as to whether defendant had requested the presence of an attorney during his initial police interview and the taking of his statement. Defendant testified that he had made such a request. However, the trial court refused to allow the defendant to ask two defense witnesses whether defendant had called them on the telephone and told them that he desired the presence of an attorney. Defendant says that these statements were important to his defense as corroboration of his prior statement and to enhance his credibility and, further, that the admissibility and validity of his confession hinges in part upon the resolution of this issue.

When the state's objection was sustained, defendant failed to put into the record what the witnesses would have testified if they had been permitted to do so. Therefore, we cannot determine whether defendant was prejudiced by the court's ruling. *See State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978).

VI.

[7] Defendant next contends that N.C.G.S. § 14-27.2, providing for a mandatory life sentence for a conviction of rape in the first degree, is unconstitutional under the eighth and fourteenth amendments to the United States Constitution. This question has already been answered by this Court contrary to the defendant's contention. *See State v. Peek*, 313 N.C. 266, 328 S.E. 2d 249 (1985).

VII.

[8] Defendant contends that the trial court erred in failing to instruct on lesser included offenses. He admits that his testimony does not establish a basis for an instruction on lesser included offenses but contends that his written statement which was admitted into evidence does. In this statement, he acknowledges entering the Odoms' trailer after Williams broke into it, and he confesses to assisting Williams in accomplishing rape. He denies entering the trailer with the intent to commit larceny or rape and further denies that he stole anything. We have carefully scrutinized defendant's statement as contained in the record and do not find any evidence of lesser crimes. As the state wryly noted in its brief, "[defendant's] testimony, if believed, contains no evidence of the intentional commission of any crime." Defendant's assignment of error is overruled.

VIII.

Defendant's eighth argument is that the trial court erred in denying his motion for appropriate relief. In this assignment, defendant argues that he was prejudiced by the failure of the state to provide him with discovery; that the court erroneously admitted into evidence his inculpatory statement; that the court permitted the state to cross-examine him on prejudicial matters concerning outstanding charges against him in California which he alleges were unsupported by the evidence; that the charge to the jury on various offenses was inadequate because of the "acting in concert" language used by the trial judge; that a number of evidentiary rulings were prejudicial; that the state argued improperly during closing argument by injecting personal belief and feeling into the argument; and that the evidence at the close of all the evidence was insufficient to justify submission of the case to the jury on charges or rape and burglary in the first degree and armed robbery.

[9] We have already discussed most of the grounds for defendant's motion. Of the remaining grounds, the only one which conceivably has merit relates to defendant's objection to the trial judge's refusal to instruct the jury that the fingerprint evidence lacked probative force unless the evidence showed that the prints could have been made only at the time of the crime, as required in *State v. Bradley*, 65 N.C. App. 359, 309 S.E. 2d 510 (1983). However, as there was no evidence in this case that defendant had ever been in the Odoms' trailer at any time before the night of the rape, we do not find it necessary to reach this issue. We find this assignment of error to be without merit.

IX.

Finally, defendant alleges he was denied a fair trial because the trial court indicated to the jury that it favored the prosecution. Defendant's only evidence of impropriety is the rulings the trial judge made which were unfavorable to defendant. This assignment of error is frivolous.

After scrupulous examination of the entire record before us, we find no prejudicial error.

No error.

Justice EXUM dissenting.

I disagree with the majority's conclusion that the state's cross-examination of defendant concerning the incidents allegedly occurring in California was not reversible error. The obvious effect of these four questions taken together and set out verbatim in the majority opinion was to convey to the jury that defendant had been charged in California with three assaults similar in nature to the assault for which he was being tried. The questions were thus improper under *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). Since the jury undoubtedly got this message, there is a reasonable possibility the result may have been different had the message not been conveyed. The result, in my view, is reversible error entitling defendant to a new trial.

Even if the first three questions, considered as the majority does apart from the fourth, are construed to be mere inquiries into acts of misconduct designed only to impeach defendant's credibility, the prejudicial impact of the questions far outweighs their probative value for this purpose. *See State v. Stone*, 240 N.C. 606, 83 S.E. 2d 543 (1954); *see also* N.C.G.S. § 8C-1, Rule 403. Under our new rules of evidence, effective 1 July 1984, such cross-examination will not be permitted even for impeachment purposes. N.C.G.S. § 8C-1, Rule 608(b). In my view it should not have been permitted in this case.

STATE OF NORTH CAROLINA v. JIMMY LEE MARTIN

No. 472A84

(Filed 18 February 1986)

1. Indictment and Warrant § 6.2— homicide—evidence sufficient for arrest warrant

The facts presented to a magistrate were sufficient to support a determination of probable cause to arrest where an officer told the magistrate about the physical details of the crime and the identification of defendant as the perpetrator by an eyewitness who knew defendant. The omission of a prior inconsistent statement by the witness and the fact that the detective interrogating the witness did not believe the rest of his account was not material because the witness had earlier said that he did not know the identity of the perpetrator rather than naming some identifiable person and then changing his story to name defendant, and the detective's suspicions about the witness's

involvement would not negate the witness's identification of defendant in light of the statement of one of the victims that the witness and another man had been present and that the other man had done the stabbing.

2. Criminal Law § 75.1— delay of two hours in taking defendant before a magistrate—no error

There was no unnecessary delay in taking defendant before a magistrate where defendant was arrested at about 3:15 a.m. and taken directly to the police station but was not taken before a magistrate until about 5:00 a.m. Defendant showed no prejudice in that there was no violation of a constitutional right in connection with the delay, the delay was less than two hours, and defendant failed to show that he would not otherwise have confessed. N.C.G.S. 15A-511(a), N.C.G.S. 15A-974.

3. Criminal Law § 75.3— defendant confronted by statement of accomplice—confession admissible

Defendant was not tricked into making a statement to officers in that he believed an accomplice had confessed even though the accomplice's testimony was exculpatory where the word confessed was suggested by defense counsel; the bulk of the testimony by police officers at the *voir dire* was that a detective had told defendant that an accomplice had made a statement that implicated defendant; and, considering the witness's differing accounts of what happened on the night in question, his admission to being present at the time his friend committed the offense, and the overall testimony of the witnesses at the *voir dire*, it cannot be said that defendant was tricked by the officers into making a statement.

4. Criminal Law § 75.14— admission of defendant's statement—mental capacity to waive rights—no error

The trial court did not err in a murder prosecution by refusing to suppress defendant's statement based on a lack of mental capacity to understand the statement and waiver of rights forms where the court found, based on competent evidence, that defendant verbally indicated that he understood his rights; that he was not intoxicated and was alert and responsive during questioning; that he responded rationally and understandingly to questions; and that he understood the statement and waiver of rights form.

5. Criminal Law § 102.3— prosecutor's closing argument—failure of court to correct ex mero motu or to give supplemental instruction—no error

The trial court did not err by failing to act *ex mero motu* in a murder prosecution to correct a prosecutor or to grant defendant's motion for a supplemental corrective instruction where, taken in context, the prosecutor in his closing argument was correctly telling the jurors the law on the use of character evidence and reminded them that their oath was to apply the law as it exists.

6. Criminal Law § 126.3— motion to re-poll jury denied—juror wishing to change vote—no error

The trial court did not err by denying defendant's motion to re-poll the jury where the clerk polled the jury at defendant's request and each juror

assented to the verdicts as read; the verdicts as read included a finding that defendant was guilty of murder on theories of premeditation and deliberation and also felony murder; the written verdict found defendant not guilty of felony murder; the clerk brought the discrepancy to the court's attention and the court inquired about which verdict was correct; the jury agreed that the written verdict was correct; defendant declined when the judge asked if he wanted the jury re-polled; the forelady of the jury approached the judge during the sentencing phase and said she wished to change her vote to guilty of second degree murder rather than first degree murder; and defendant moved to re-poll the jury. Defendant's request to re-poll the jury after the juror attempted to change her vote based on testimony presented during sentencing was an attempt to impeach the jury's verdict. N.C.G.S. 15A-1238 (1983).

7. **Criminal Law § 181.4— motion for appropriate relief—newly discovered evidence—dismissed**

Further proceedings in a murder prosecution were dismissed where defendant filed a motion for appropriate relief with the Supreme Court based on new evidence, the motion was remanded to the superior court for an evidentiary hearing, the superior court concluded that the new evidence was unbelievable and denied the motion, and no exceptions to those findings or to the judgment on the motion for appropriate relief were filed with the court.

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

APPEAL by defendant from judgments entered by *Freeman, J.*, at the 7 May 1984 Criminal Session of Superior Court, GUILFORD County, Greensboro Division. Defendant also filed with this Court a motion for appropriate relief seeking a new trial.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

A. Wayland Cooke and H. Davis North, III, for defendant-appellant.

FRYE, Justice.

Defendant was charged in separate bills of indictment, filed 20 February 1984, with first degree murder, armed robbery, conspiracy to commit armed robbery, assault with a deadly weapon with intent to kill inflicting serious injury, and conspiracy to commit first degree murder. A jury found defendant guilty of all charges except armed robbery and recommended a sentence of life imprisonment. The trial judge sentenced defendant to life imprisonment for the murder conviction followed by the presump-

tive sentences for the remaining convictions. Defendant appealed his conviction for first degree murder to this Court as a matter of right pursuant to N.C.G.S. § 7A-27(a). Defendant's motion to bypass the Court of Appeals on the lesser offenses was granted 14 August 1984.

Defendant presents four issues for this Court's consideration:

1) whether his confession should have been suppressed;

2) whether the weapons discovered as the result of the confession should have been suppressed;

3) whether the trial judge should have limited the prosecutor's argument *ex mero motu*, or, alternatively, should have allowed defendant's request for a curative instruction; and

4) whether defendant had a right to re-poll the jury during the sentencing phase of the trial as to its verdict in the guilt or innocence phase.

We answer all four questions in the negative and find no error in defendant's trial.

Betty Foley Peeler was killed on the evening of 10 November 1983. At the time of her death, she suffered from a heart condition, had undergone a colostomy, and had been hospitalized on various occasions for different ailments. She lived with her eighty-three-year-old father, Thomas T. Foley, in his home on Lee Street in Greensboro.

At defendant's trial, Tom Foley[1] said that he and his daughter were at home watching television on the evening she was killed. Sometime before eight o'clock, Ms. Peeler went to answer a knock on the door and returned with two young men. Foley and his daughter knew one of the men, one Willie Mastin, but not the other. Mastin said that the two had run out of gas and asked to use the telephone. When he finished his call, he said, "They are on their way with the gas." Foley asked Mastin where he was working and Mastin replied that he didn't know. Foley then asked who Mastin's friend was, and Mastin again replied that he did not

1. It should be noted that Foley appears to have been somewhat hard of hearing. He died in January of 1985.

know. Mastin eventually said that they also needed some oil and would go to a store up the street to get some.

When Mastin and the stranger returned, Mastin asked if his friend could use the bathroom. Betty Peeler offered to show him where it was. She and the stranger left the room. Foley then saw the stranger grab Ms. Peeler and pull her into the bathroom. She screamed, and Foley tried to go to her assistance. Mastin tried to dissuade him by saying that the noise was only Foley's dog. Foley got up nevertheless and met his daughter's assailant in the doorway. The young man was holding a knife. He stabbed Foley through the jawbone, cutting his tongue, and struck him between the eyes. Foley fell backwards over a wood stove in a corner of the room. He got up, grabbed a stick of wood, and struck his attacker. Mastin and the stranger both ran away.

Foley checked his daughter's pulse but found none. He went next door and asked the neighbors to call the police. By the time Foley returned to his house, police and ambulance were already there. Willie Mastin ran up, and Foley heard him tell the police some story about chasing the man who had stabbed Foley's daughter.

Foley had to be hospitalized for his injuries. He lost three teeth and a considerable amount of blood, needed stitches, and had a sore mouth for several days.

He was unable to identify defendant at trial as Mastin's friend. He explained his inability by saying that the stranger had kept his head down and not said anything the entire time he was in Foley's house.

When the police arrived at Foley's residence, they found Ms. Peeler already dead. The autopsy later disclosed that she had been stabbed eight times, twice in her neck, twice in her back, twice in her chest, and once in her left wrist and her right hand. The hand and wrist injuries were "defense-type" injuries that were probably the result of holding her hands in front of her to protect herself. One of the neck injuries pierced the carotid artery. Of the back injuries, one went through a rib and punctured a lung. One of the chest injuries penetrated her breastbone and punctured the aorta. These last two injuries, according to testimony at trial, required the use of considerable force.

The police officers on the scene at Foley's house interviewed Willie Mastin upon his return. After hearing his account of the killing, they requested him to accompany them to the police station to talk to a detective. Mastin agreed. Detective Scott interviewed him there at about 10:00 or 11:00 p.m. Scott had spoken briefly to Foley at the hospital earlier that night, and Foley had told him that he did not know the name of his daughter's killer but that Willie Mastin had been there. Foley thought Mastin was "involved." The account of the killing Mastin gave Scott was essentially the same as the one that he had earlier given the officers at Foley's house. Mastin said that he had been hitchhiking home from work when he was picked up by a white man, with black hair and a mustache, driving a blue 1970 or 1971 Fiat. The Fiat had a cut in the covering of the passenger's seat. Mastin did not know the man, who introduced himself only as "James." The Fiat ran out of gas near the intersection of Lee and Tate Streets. The two men went to Foley's house, which was nearby, to call for gas. There was no answer at the place Mastin called. "James" then remembered that he had a gas can in his car. The two returned to the car, got the can, bought some gas, and filled the car. "James" suggested returning to Foley's. When they got there, he asked if he could use the bathroom. From this point on, Mastin's account was similar to the story Foley told at trial, except that Mastin added that when he left, he chased "James" down the nearby railroad tracks. He saw "James" throw something into some bushes, but was unable to catch him, and so returned to Foley's to see whether Foley and his daughter were badly hurt.

Detective Scott did not believe this account and said so. He continued to question Mastin. Mastin stuck to his story until about 2:50 a.m. when he modified it. His new account was substantially the same as his previous one, except that he admitted that he knew the other man. Instead of an unknown "James" who picked him up in a blue Fiat, Ms. Peeler's killer was a friend of his named Jimmy Martin who lived in the trailer park where Mastin lived.

Detective Scott still did not believe that Mastin was an innocent bystander, but he did believe the identification. Accordingly, he sent Officer Brown to obtain a warrant for defendant's arrest. Brown told the magistrate that there had been a killing in which

the victim was stabbed to death, and that a witness had named defendant as the perpetrator. The magistrate issued the warrant.

The officers sent to arrest defendant found him in the trailer next door to his home. They found no indications that defendant had been taking drugs or alcohol. The officers verbally gave defendant his *Miranda* rights and took him back to Detective Scott at the police station.

Detective Scott in turn read defendant a Statement of Rights form and a Waiver of Rights form, pausing after each right to ask if defendant understood. Defendant indicated each time that he did, except for once asking about the meaning of the word "subsequent." He signed the waiver form.

Scott told defendant that Mastin had implicated him in the killing. Defendant then confessed to stabbing Ms. Peeler. Detective Scott took the following statement from him:

> On 11/10/83, Thursday afternoon, at about 4:30 P.M., I went over to Willie Mastin's trailer. We talked for a while and Willie said, "I know where we can get some money." He said, "It's worth going and getting." He then said, "you know Betty and Tom?" He said, "The plan is we go to the house," and he said, "we're going to stay for a few minutes, and this is what I want you to do. I want you to ask Betty to use the bathroom, and when she gets into the bathroom, hold her mouth and hit her in the back a couple of times with a knife." He said, "Then flush the toilet to let Tom know you used the bathroom. Shut the door behind, go to the living room and tell me (Willie) that Betty has something to show him." The plan was to leave the knife on the sink and Willie would get the knife and go back where Tom was and hit Tom with it, and he might need my help because he was big. After we stabbed Tom we were to cut out the porch light and living room light, leave the TV on, and get the money. We were to leave out the back door, and we were going to go down the tracks and use the phone to call a cab and then go home. The plan was to kill both Tom and Betty and not have any witnesses. At the trailer park, Willie showed me the knife. It belonged to him. It was a lock blade type and Willie carried it to the house where Betty and Tom lived. We left the trailer park sometime after 5 P.M., walking up to Patter-

son Avenue (Patton Avenue) to the railroad tracks and walked the tracks to Goodwill on Eugene Street and onto Lee Street. We got to the house, Tom and Betty's, and saw two girls walking. We crossed the street so no one would see us go in. We waited and as they passed Willie knocked on the door. Betty came to the door and she said, "Come on in," because she knew Willie. He introduced me to Tom and Betty and we talked and watched TV for about 30 minutes. Willie got up and said, "We're going to the store and we will be back in a few minutes." We went in and I got a pack of cigarettes, Winstons. We went around the store and talked for a few minutes about the plan, and I told him I did not want to do it, that I was afraid and I did not want to kill anyone; but he said, "Come on, man, it's easy and no one will know that we done it if we don't leave any witnesses." We went back, sat down for a few minutes, left again and told them we were going outside to the store and buy some oil for a car that needed some oil. We went back to the Ma-Jik market but did not buy anything.

Willie asked if I was ready, and I said, "No," and he said this was our only chance. We went back in, sat down and talked for a few minutes, and that's when I got up enough nerve to ask Betty to use the bathroom, and she said, "I'll show you where it's at." I followed Betty to the bathroom. She opened the door, reached for the light, that's when I grabbed her from behind, put my hand over her mouth, and stabbed her two times with a knife that I had in my right hand. She hollered, "Tom," two or three times, and Tom and Willie came in. I pushed Tom out of the way into the stove, and Willie and me ran out the front door, down Lee Street, to the railroad tracks. Willie said, "Throw the knife down." I threw it into some bushes. Willie said, "Let's go back," cause he wanted to see where Tom was because he could identify us, and he also said he thought Betty was dead. He told me to wait 30 or 45 minutes and if he didn't return, to go home. He didn't come back, and I ran home. I have not seen Willie since.

Detective Scott testified that he took this statement from defendant word for word, except for very minor points such as adding "p.m." to times and inserting "Patton Avenue" in parentheses.

As a result of defendant's statement, the police discovered two knives that defendant identified as the ones Willie Mastin gave him. One was the murder weapon.

Defendant moved to suppress both the statement and the knives. The trial judge held a *voir dire* on the motion to suppress the statement. The various police officers involved in the investigation of Ms. Peeler's killing testified to their activities as previously described. Defendant's evidence tended to show that he was mentally retarded, with an I.Q. of 66, was easily led, functioned on a twelve-year, eight-month-old level, comprehended oral statements on a second grade level, and read on a third grade level. He completed very little of the ninth grade. All three of defendant's expert witnesses stated in essence that in their opinions, defendant was not capable of making the statement attributed to him in the form in which was written. Nor did these experts believe that defendant understood the Statement and Waiver of Rights forms at an adult level or that he could understand the consequences of his waiver. The trial judge, after making findings of fact and conclusions of law, denied defendant's motions.

I.

Defendant primarily assigns as error the trial judge's denial of his motion to suppress the statement taken by Detective Scott. He advances four arguments to support this assignment.

[1] First, he contends that there was no probable cause to support issuance of a warrant.

Determinations of probable cause have often been the subject of comment by this Court. In *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972), Justice Branch, now Chief Justice, speaking for the Court, stated:

> The Fourth Amendment requirement that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized, applies to arrest warrants as well as to search warrants. The judicial officer issuing such warrant must be supplied with sufficient information to support an independent judgment that there is probable cause for issuing the arrest

> warrant. The same probable cause standards under the Fourth and Fourteenth Amendments apply to both federal and state warrants.

281 N.C. at 6, 187 S.E. 2d at 710 (citations omitted). The standard applied to determinations of probable cause is not a technical one. As the Court said recently in *State v. Zuniga*, 312 N.C. 251, 322 S.E. 2d 140 (1984), "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." 312 N.C. at 262, 322 S.E. 2d at 146. At minimum, a supporting affidavit for an arrest warrant must show enough for a reasonable person to conclude that an offense has been committed and that the person to be arrested was the perpetrator. *State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981). Moreover, as the United States Supreme Court reminded the legal community in *Massachusetts v. Upton*, 466 U.S. 727, 80 L.Ed. 2d 721 (1984), an appellate court reviewing the decision of a magistrate to issue a warrant does not decide the question of probable cause *de novo*; rather, the question for the appellate court's consideration is whether the evidence viewed as a whole provided a sufficient basis for the magistrate's finding.

In light of the considerations outlined above, a review of the evidence reveals that the facts presented to the magistrate were sufficient to support a determination of probable cause to arrest defendant. Officer Brown testified in essence that he told the magistrate about the physical details of the crime and the identification of defendant as the perpetrator by Willie Mastin, an eyewitness who knew defendant.

Defendant attacks only the sufficiency of Mastin's statement to support a finding that defendant was the perpetrator. He notes that no other evidence connected him with the crime; that Foley did not know him; and that he had no criminal record of any kind. Defendant argues that Mastin's credibility was therefore crucial and the magistrate had insufficient information to judge it, since the magistrate was not told that Mastin had made a prior inconsistent statement or that Detective Scott disbelieved the rest of his account. While these items might have been more properly mentioned than omitted, neither omission was material in this case. First, Mastin had earlier said that he did not know the iden-

tity of the perpetrator; he had not named some other identifiable person and then changed his story to name defendant. His earlier story is consistent with a normal desire not to squeal on a buddy. Second, Detective Scott's suspicions about Mastin's own involvement would not negate Mastin's identification of defendant in light of Tom Foley's statement that Mastin and another man had been present and that the other man had actually done the stabbing. Therefore, in this instance, Detective Scott's disbelief in the rest of Mastin's story is not material to a finding of probable cause to believe that defendant was the actual perpetrator.

Defendant urges, nevertheless, that the standards applicable to determining the reliability of paid police informers should apply to Mastin's statement. We reject this contention. Mastin was not a paid police informant. Had he been telling the whole truth, and Officer Scott incorrect in his beliefs, Mastin would have been an ordinary eyewitness. Several jurisdictions, acting on implied approval from the United States Supreme Court in *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419 (1970), *see* W. Lafave and J. Israel, *Criminal Procedure*, § 3.3(d) (1984), have declined to apply the same standards used for paid police informants to information obtained from witnesses and victims. *See, e.g., United States v. Rollins*, 522 F. 2d 160 (2nd Cir. 1975), *cert. denied*, 424 U.S. 918, 47 L.Ed. 2d 324 (1976); *United States v. Bell*, 457 F. 2d 1231 (5th Cir. 1972); *People v. Thompson*, 3 Ill. App. 3d 470, 278 N.E. 2d 462 (1972); *Saunders v. Commonwealth*, 218 Va. 294, 237 S.E. 2d 150 (1977). North Carolina has previously accepted a victim's description as sufficient identification to establish probable cause. *See State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719. In fact, Detective Scott's suspicions were valid. The result is the same; our Court of Appeals has held that identification by a codefendant is a sufficient identification to establish probable cause. *See State v. Freeman*, 31 N.C. App. 335, 229 S.E. 2d 238 (1976).

Defendant argues further that the arrest warrant was defective because it was not based upon a truthful showing under the rules of *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed. 2d 667 (1978). In *Franks*, the United States Supreme Court said:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the af-

> fiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56, 57 L.Ed. 2d at 672.

The misconduct relied upon by defendant is not that of Officer Brown who actually obtained the arrest warrant, but of Detective Scott. Defendant alleged that Detective Scott "knowingly and intentionally or with reckless disregard for the truth" presented the magistrate, through Officer Brown, false information in that he deliberately omitted material facts from the information he gave Officer Brown by not telling him he disbelieved Mastin's story.

Defendant had his hearing as mandated by *Franks*. The trial judge conducted a *voir dire* on defendant's motion to suppress, wherein defendant raised these issues, and after making findings of fact substantially similar to the facts described herein, concluded that probable cause had existed. The trial judge was correct in reaching this conclusion. Defendant completely failed to support his allegation of misconduct on the part of Detective Scott because, as discussed previously in this opinion, Scott's failure to tell Officer Brown about his disbelief in the remainder of Mastin's story was not material in this instance.

[2] Defendant's second argument for suppressing the statement taken by Detective Scott is that he was not taken before a magistrate without "unnecessary delay." N.C.G.S. § 15A-511(a) requires that a police officer take an arrested person to a magistrate without unnecessary delay. N.C.G.S. § 15A-511(a) (1984). Defendant was arrested at about 3:15 a.m. and taken directly to the police station. He was not taken before a magistrate until about 5:00 a.m. Defendant argues that this delay was unnecessary, due to the proximity of the magistrate's office to the police station. He

argues further that it was a substantial violation in that the delay was for the sole purpose of obtaining a confession. N.C.G.S. § 15A-974 provides that, upon a timely motion, evidence obtained as the result of a substantial violation of a provision of Chapter 15A must be suppressed. N.C.G.S. § 15A-974 (1984). Defendant contends that since his motion was timely, his confession therefore should have been suppressed.

We do not agree with defendant's contention. N.C.G.S. § 15A-511 does not prescribe mandatory procedures affecting the validity of a trial. *State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 795 (1980). For a violation to be substantial, defendant must show that the delay in some way prejudiced him, for example, by causing a violation of his constitutional rights, *id.*, or by resulting in a confession that would not have been obtained but for the delay, *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1981). Defendant here has shown no prejudice. He alleges no violation of a constitutional right in connection with the delay. The delay itself was less than two hours, and this Court has previously declined to find a four and one-half hour delay inherently unreasonable. *See State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978). More importantly, defendant has failed to show that he would not otherwise have confessed.

[3] Defendant's third argument for suppressing the statement taken by Detective Scott is that he was tricked into making it. Defendant's contention that he was tricked into confessing is based on the following exchange which occurred upon cross-examination by defense counsel of Officer Poole who was present when Detective Scott interrogated defendant:

> Q. And was he told that Mr. Mastin had implicated him?
>
> A. Yes, sir, he was.
>
> Q. All right. Was he told that Mr. Mastin had confessed and implicated him in the crime?
>
> A. Yes, sir.
>
> Q. Okay. And what did he say when—did you tell him or did Mr. Scott tell him Mr. Mastin confessed?
>
> A. Detective Scott.

Q. And when Detective Scott told him that Mr. Mastin had confessed, what did Mr. Martin say?

A. First he began to cry; and then he stated, "Yes, I will tell you all about it."

Based upon this exchange alone, defendant now argues that he was tricked into believing that Willie Mastin had confessed when in fact Mastin's second statement was largely exculpatory.

There is no merit in this argument. We first note that the bulk of the testimony given by police officers at the *voir dire* was basically that Detective Scott told defendant that Willie Mastin had made a statement that implicated defendant. Defendant then began to cry and confessed forthwith. The only evidence that Officer Scott told defendant that Mastin had "confessed" was the testimony of Officer Poole on cross-examination as indicated above. The word "confessed" was suggested by defense counsel rather than by either witness. Whether Officer Scott told defendant that Mastin had "implicated" defendant or had "confessed and implicated" defendant cannot be determined from the record. The trial judge simply found that defendant "was not threatened, intimidated or coerced . . . ." We are not convinced that Officer Poole meant to say that defendant was told Mastin had made a full confession; rather, he was responding to the sense of defense counsel's question and affirming that defendant was told Mastin had implicated him. Considering Mastin's differing accounts of what happened on the night in question, his admission to being present at the time his friend committed the offense, and the overall testimony of the witnesses at *voir dire*, we are unable to say that defendant was tricked by the officers into making a statement.

[4] Finally, defendant argues that the statement obtained by Detective Scott should have been suppressed because defendant had not voluntarily, knowingly, and intelligently waived his Fifth Amendment rights against self-incrimination. Defendant's argument here is essentially that his waiver was not knowing and intelligent due to his incapacity to understand the Statement and Waiver of Rights forms.

A subnormal mentality, standing alone, will not render a confession incompetent if it is in all other respects voluntarily and

understandingly made. If a person has the mental capacity to testify and to understand the meaning and effect of statements made by him, he possesses sufficient mentality to confess. Nevertheless, lack of mental capacity is a factor to consider in determining the involuntariness of a confession. *State v. Thompson,* 287 N.C. 303, 318-19, 214 S.E. 2d 742, 752 (1975), *death sentence vacated,* 428 U.S. 908, 49 L.Ed. 2d 1213 (1976); *cf. State v. Fincher,* 309 N.C. 1, 305 S.E. 2d 685 (1983) (capacity to consent to search).

While defendant's evidence tended to show that he was unlikely to have understood the *Miranda* warnings given him, the State presented evidence from which the trial judge could have concluded otherwise. "When the *voir dire* evidence is conflicting . . . the trial judge must weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact. When supported by competent evidence, his findings are conclusive on appeal." *State v. Jenkins,* 300 N.C. 578, 584, 268 S.E. 2d 458, 463 (1980). Here, the trial judge found that defendant verbally indicated that he understood his rights, that he was not intoxicated and was alert and responsive during questioning, that he responded rationally and understandingly to questions, and that he understood the Statement and Waiver of Rights forms. These findings were based upon competent evidence. The police officers testified that defendant appeared alert and that there were no signs that he was drunk or drugged. Detective Scott read the Statement and Waiver of Rights forms slowly, pausing after each right to ask whether defendant understood. Defendant repeatedly replied that he did. Finally, there was evidence that defendant had the capacity to ask for enlightenment when he did not understand: he asked the meaning of the word, "subsequent." The trial judge's findings will therefore not be disturbed.

Defendant also argues in this context that the State failed to show that the statement taken by Detective Scott was accurate. Defendant's experts testified that he could not have made the statement attributed to him in the form in which it was written. While defendant strongly argues that Detective Scott's repeated assertion that he had taken the statement from defendant word-for-word is not very credible, nevertheless, there was no showing that the facts as disclosed were inaccurate.

For all of the above reasons, we find that the trial judge did not err in denying defendant's motion to suppress.

II.

Defendant argues next that the knives discovered as a result of his confession should also have been suppressed. Since the trial judge did not err in denying the motion to suppress defendant's confession, there was no error in denying his motion to suppress the knives.

III.

[5] For his third assignment of error, defendant argues that the prosecutor in his closing argument "violated the rules of fair debate and propriety" to defendant's prejudice to such an extent that the trial judge should have either acted *ex mero motu* to correct the prosecutor or granted defendant's motion for a supplemental corrective instruction. Defendant excepts to two portions of the prosecutor's argument. Early in his argument the prosecutor said:

> I will get to the point real quickly, real quickly. Ladies and gentlemen, for you to come back in this courtroom and find the Defendant guilty of second degree murder is going to violate the oath that you took on this Bible . . . .

Somewhat later, he said the following:

> But that would not be right; it would not be following your oath as jurors in this case if you took—I will tell you ladies and gentlemen the oath that you took is as important to our system as the oath I take as a prosecutor, the oath that the Judge takes as the Judge, and the oath that Mr. Cooke and Mr. North must take as attorneys in this State—and they are both good attorneys. The only problem I have with anything that's occurred by any attorney is the fact that Mr. North has asked you, because the boy is not a bad boy, to find him guilty of second degree murder, to ignore your duties, to find the evidence, to find the facts and apply those facts to the law, because if you do that duty, I would argue to you there is no way that you could find the Defendant guilty of second degree murder. There is no way that you can find from the evidence if you believed the confession for—And if you don't believe the confession, then it should be a not guilty. But if you believe that confession, there is no way, I would argue to

> you, that you can find that they didn't plan, did not have premeditation, or that it was committed or was not committed during the course of a robbery. So, I would ask you to abide by your oath.

Defendant made no objections at the time but after the jury had retired to deliberate, he requested a supplemental curative instruction. The trial judge denied this request. Defendant contends that both of the passages recited above were improper and prejudicial.

Taken in context, the prosecutor's remarks in his closing argument do not reveal any impropriety. Following the first passage to which defendant excepts, the prosecutor continued:

> What Mr. North has asked you to do is to come in here and find somebody not guilty of first degree murder, because he has never done it before and because he runs errands for old people, which I commend him for.
>
> But, ladies and gentlemen, the evidence of character is admissible in a criminal court as to decide whether or not that man did the acts that the State of North Carolina has accused him of; but his character in no way, absolutely none, will excuse first degree murder to second degree murder. Not guilty by way of character, not guilty by way of cooperation, that has no place in the laws of the State of North Carolina.
>
> You took an oath; the judge will tell you the law, and all I'm asking is that you follow that law as you said you would.

Taken in context, then, the prosecutor was, correctly, telling the jurors the law on the use of character evidence and reminding them that their oaths were to apply the law as it exists. The prosecutor is entitled to argue relevant law. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

An examination of the second passage to which defendant excepts reveals the same situation as the first. There, the prosecutor argued to the jurors that defendant's confession revealed premeditation and deliberation. Counsel has a right to argue reasonable inferences from the evidence. *State v. Britt*, 291 N.C. 528,

231 S.E. 2d 644 (1976). The prosecutor also repeated to the jury part of the law on the use of character evidence, telling the jurors in essence that if they found premeditation and deliberation they could not use defendant's hitherto blameless character to reduce his conviction to second degree murder.

Since there was no impropriety in the prosecutor's remarks, the trial judge therefore had no duty to censor the argument on his own motion and no duty to grant defendant's motion for a curative instruction.

IV.

[6] Defendant argues lastly that the trial court erred in denying his request to repoll the jury.

After the jury returned its verdicts finding defendant guilty of first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, conspiracy to commit armed robbery and conspiracy to commit murder, defendant requested that the jury be polled. Accordingly, the clerk polled the jury. Each juror assented to the verdicts as read. As read, the verdicts included a finding that defendant was guilty of first degree murder on theories of premeditation and deliberation and also felony murder. During the next recess, however, the clerk noticed that the written verdicts found defendant not guilty of felony murder. The clerk brought this discrepancy to the judge's attention. The judge inquired of the jury when the recess was over which finding was correct, and the jury agreed that the written verdict was the correct one. The judge asked defendant if he wanted the jury repolled, and defendant declined. Later, during the penalty phase of the trial, the forelady of the jury approached the judge and told him that she wished to change her vote to find defendant guilty of second degree murder rather than first. Defendant moved to repoll the jury. The trial judge denied the motion.

Defendant argues that he was entitled to have the jury polled again under the provisions of N.C.G.S. § 15A-1238. This section provides as follows:

> § 15A-1238. Polling the jury.
>
> Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury

> must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

N.C.G.S. § 15A-1238 (1983). Defendant argues that the jury had not yet been "dispersed."

The statute on which defendant relies gives him a right to poll the jury. N.C.G.S. § 15A-1238 (1983). It does not give defendant a right to an unlimited number of polls. Defendant exercised his right once when the jury first returned its verdicts. The trial judge properly offered defendant a second opportunity to poll the jury after the discrepancy between the oral and written verdicts was discovered and clarified. Defendant declined and thereby waived any right to repoll the jury on account of the discrepancy. The event which occasioned defendant's request for a repolling was the attempt of the forelady to change her vote based on testimony presented at the sentencing phase of the trial. The trial judge correctly refused to allow her to do so; a juror may not impeach the verdict of the jury after it has been rendered and received in open court. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980). A juror's dissent is effectual at polling but not afterwards. *State v. Webb*, 265 N.C. 546, 144 S.E. 2d 619 (1965). Defendant's request to repoll the jury amounted to an attempt to impeach the jury's verdict, and the trial judge properly denied it.

V.

[7] On 4 April 1985, defendant filed with this Court a motion for appropriate relief seeking a new trial on the grounds that he had obtained additional evidence not previously obtainable which had a direct and material bearing upon his guilt or innocence. This new evidence was another statement by Mastin.

In a sworn affidavit, Mastin said that Tom Foley had tried to hire him to kill Betty Peeler for $3,000. Foley's reason was that he was tired of his daughter's ailments; he "wanted to put her out of misery [sic]." Mastin first tried to trick defendant into committing the murder. He said that he later changed his mind and de-

cided not to become involved. Nevertheless, he took defendant to Foley's house. When they left the first time, defendant told Mastin that he was not going to do it. Upon their return to Foley's, Mastin accordingly relayed their refusal. When defendant asked to use the bathroom, Foley himself stabbed his daughter. Defendant asked, "What's going on?" Foley told defendant that he, defendant, had stabbed Foley's daughter twice. Defendant ran out of the house. Mastin himself "cut" Foley when Foley came at him with a knife. Mastin then fled. When he caught up with defendant, defendant said that he did not remember anything and that he was scared. Mastin had gotten each of them some Quaaludes earlier that evening. Defendant said that he wished he had never taken the Quaaludes. He then ran off.

In his affidavit, Mastin said that he had told his sister this story while he was in jail and would take a lie detector test if asked.

This Court remanded defendant's motion for appropriate relief to the Superior Court, Guilford County, for an evidentiary hearing. The hearing was held 1 August 1985. After some preliminary findings, the presiding judge found as facts:

> [A]fter the trial of the defendant, Jimmy Lee Martin, the said Arthur William Mastin did enter pleas of guilty to second degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, and was sentenced to a substantial term of imprisonment; that upon being examined under oath and in open court, he stated orally and on his transcript of plea that he, the said Mastin, was guilty of those offenses and was satisfied with his attorneys and did freely, knowingly and voluntarily, of his own choice, enter the said pleas. That in the course of Mastin's trial preparation and trials, he at no time stated to his attorneys that Tom Foley had killed Betty Foley Peeler, nor that he had cut and stabbed Tom Foley in self defense; that the first time he made a statement to that effect was after he was confined to the Polk Youth Center with the defendant, Jimmy Lee Martin, when he first told a sister and later told the defendant Jimmy Lee Martin's attorneys; that in all pre-trial statements made by Arthur William Mastin, the defendant Jimmy Lee Martin was named as that person who stabbed Betty

> Foley Peeler to death and he did thus describe the killing in each of his statements made to the investigating officers; that at all times the said Arthur William Mastin stated to his trial attorneys that the killing was done by Jimmy Lee Martin at a time while the said Mastin was in the livingroom [sic] with Tom Foley; that Tom Foley was a very elderly, ill and frail person who has since the trial passed away and is thus unable to testify.

The trial judge found in addition:

> That the interview statement of Arthur William Mastin on November 12, 1983 and the interview statement of the said Mastin made on November 11, 1983 and the confession of the defendant, Jimmy Lee Martin, offered at trial are basically consistent with the testimony of Tom Foley offered at the trial and with each other, and fully support the conviction of the defendant Jimmy Lee Martin on each of the offenses and are totally inconsistent with the Affidavit and statement of Arthur William Mastin made on or about February 13, 1985 while incarcerated at the Polk Youth Center.

Based on these facts, the judge concluded that Mastin's most recent story was unbelievable and denied defendant's motion for a new trial. No exceptions to these findings or to the judgment on the motion for appropriate relief have been filed with this Court. Thus, further proceedings in this Court will be dismissed.

To summarize:

1) the trial judge did not err in denying defendant's motion to suppress the statement taken by Detective Scott;

2) consequently, there was no error in the denial of the motion to suppress the weapons recovered as a result of that statement;

3) the trial judge did not err in refusing to censor the prosecutor's closing argument because it was not improper; and

4) the trial judge properly denied defendant's request to repoll the jury.

For the reasons discussed herein, we find no error in defendant's trial. Defendant's motion for appropriate relief will be dismissed.

No error.

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

WASTE MANAGEMENT OF CAROLINAS, INC., T/D/B/A TRASH REMOVAL SERVICE, INC. v. PEERLESS INSURANCE COMPANY AND PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

No. 70PA85

(Filed 18 February 1986)

Insurance § 149— liability insurance—leaching of contaminants into groundwater as occurrence—coverage excluded by pollution exclusion clause

Where plaintiff trash collector intentionally dumped waste materials onto a landfill over a period of years, the unintended and unexpected leaching of contaminants from the waste materials into the groundwater beneath the landfill was accidental and thus an "occurrence" within the meaning of liability policies issued to plaintiff. However, the alleged occurrence was excluded from coverage by a pollution exclusion clause which excluded damage caused by the release, escape, discharge or dispersal of pollutants or contaminants that is not "sudden and accidental" where plaintiff alleged facts describing the contribution over a number of years of contaminating materials to the landfill which eventually rendered groundwater beneath it unfit for human consumption, and there was no express or implied allegation of a "sudden" release or escape of contaminants. Therefore, defendant insurers are under no obligation to defend plaintiff in federal actions concerning contamination of the aquifer by the leaching of waste materials from the landfill.

ON defendants' petition for discretionary review of the decision of the Court of Appeals, 72 N.C. App. 80, 323 S.E. 2d 726 (1984), reversing in part and affirming in part judgment entered by *Fountain, J.*, at the 12 September 1983 session of Superior Court, NEW HANOVER County. Heard in the Supreme Court 21 November 1985.

Burney, Burney, Barefoot, Bain & Crouch, by Auley M. Crouch III, and Hinshaw, Culbertson, Moelmann, Hoban & Fuller, by D. Kendall Griffith, William J. Holloway, and Joanna C. New, for plaintiff appellee.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr., for Pennsylvania National Mutual Casualty Insurance Com-

pany, and Prickett & Corpening, by Carlton S. Prickett, Jr., for Peerless Insurance Company, defendant appellants.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by J. Ruffin Bailey and Gary S. Parsons, for American Insurance Association and Alliance of American Insurers, amici curiae.

John C. Russell for Eugene R. Anderson, amicus curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, by John Sarratt, and Mendes & Mount, by John G. McAndrews and Henry Lee, for George Haycroft Milton and Underwriters at Lloyd's, London, amici curiae.

MARTIN, Justice.

On 11 January 1980, the United States of America filed an action against Waste Industries and others, including the owners, operators, and the franchisor of the Flemington landfill in New Hanover County, alleging that waste material disposed of on that landfill had leached into and contaminated groundwater beneath it, rendering the well water in several surrounding households hazardous for human consumption.[1] The suit, based upon section 7003 of the Resource Conservation and Recovery Act, sought injunctive and monetary relief.

The owners and operators of the landfill and the county, its franchisor, filed third-party complaints against Trash Removal Services, Inc. (TRS), among others, seeking indemnity for or contribution to whatever liability they incurred in the federal suit. The three third-party complaints alleged that, in delivering quantities of solid waste materials to the landfill, TRS had represented that the material was not hazardous or contaminated. The complaints also alleged that if the allegations in the federal suit proved to be true, TRS had been careless and negligent in its having transported and disposed of solid and hazardous wastes in the Flemington landfill and that TRS had not taken proper care to prevent the deposit of such waste materials there.

TRS, which hauls and disposes of local residential and industrial waste materials, had used the Flemington landfill from 1973

1. *See United States v. Waste Industries*, 556 F. Supp. 1301 (E.D.N.C. 1982), *rev'd*, 734 F. 2d 159 (4th Cir. 1984).

to 1979. During that period TRS was covered by two successive liability insurance policies, one with Peerless Insurance Company (Peerless), from 12 August 1974 to 12 August 1979, the other with Pennsylvania National Mutual Casualty Insurance Company (Penn), from 17 June 1979 through 17 June 1980. Both policies provided that under certain circumstances the insurers had a duty to defend suits against the insured. TRS therefore requested defense of the suit for contribution or indemnity from Peerless and Penn. Both insurers denied that either a duty to defend or an obligation to indemnify the owners and operators of the landfill arose under the allegations and facts of the underlying action. TRS then filed this declaratory judgment action seeking a determination of the parties' rights and obligations under the policies. The parties filed cross-motions for summary judgment focused upon the scope of the coverage language in the policies.

The trial court granted summary judgment to Peerless and Penn and denied the same to TRS. The latter appealed. The Court of Appeals reversed, finding that the facts as alleged in the third-party complaints did not foreclose the possibility that TRS's potential liability came within the policies' coverage and that this possibility obligated the insurers to defend TRS in suits initiated by the third-party complaints. For the reasons set out below, the decision of the Court of Appeals is reversed.

This case is here on appeal from the Court of Appeals' reversal of summary judgment for appellant insurance companies. In reviewing the propriety of summary judgment, the appellate court is restricted to assessing the record before it. *Vassey v. Burch*, 301 N.C. 68, 74, 269 S.E. 2d 137, 141 (1980). Only those pleadings and other materials that have been considered by the trial court for purposes of summary judgment and that appear in the record on appeal are subject to appellate review. If on the basis of that record it is clear that no genuine issue of material fact existed and that the movant was entitled to judgment as a matter of law, summary judgment was appropriately granted. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

In this case, both parties originally filed cross-motions for summary judgment based upon the coverage language of the insurance policies. The parties did not dispute either the language of the policies or the presence of certain allegations in the third-

party complaints. The sole point of their contention was the scope of the policy provisions. Resolution of this issue involves construing the language of the coverage, its exclusions and exceptions, and determining whether events as alleged in the pleadings and papers before the court are covered by the policies. As such, it is an appropriate subject for summary judgment.

The scope of review by this Court is limited by the nature of the question before it, i.e., whether the appellant companies have a duty to defend appellee TRS in the federal lawsuit. Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. *Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E. 2d 313, 318 (1968); 7C J. Appleman, *Insurance Law and Practice* § 4683 (1979 & Supp. 1984).[2] Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage. 7C J. Appleman, *Insurance Law and Practice* § 4683. In this event, the insurer's refusal to defend is at his own peril: if the evidence subsequently presented at trial reveals that the events are covered, the insurer will be responsible for the cost of the defense. *Id. See also Hartford Accident & Indem. Co. v. Aetna Life & Cas. Co.*, 98 N.J. 18, 483 A. 2d 402 (1984): "This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant

2. Of course, allegations of facts that describe a hybrid of covered and excluded events or pleadings that disclose a mere possibility that the insured is liable (and that the potential liability is covered) suffice to impose a duty to defend upon the insurer.

to pay." *Id.* at 23-24, 483 A. 2d at 406. In addition, many jurisdictions have recognized that the modern acceptance of notice pleading and of the plasticity of pleadings in general imposes upon the insurer a duty to investigate and evaluate facts expressed or implied in the third-party complaint as well as facts learned from the insured and from other sources. Even though the insurer is bound by the policy to defend "groundless, false or fraudulent" lawsuits filed against the insured, if the facts are not even arguably covered by the policy, then the insurer has no duty to defend. *See generally* 14 Couch on Insurance 2d-§ 51:46 (rev. ed. 1982); 7C J. Appleman, *Insurance Law and Practice* § 4684.01.

The critical inquiry for this Court, then, is whether the facts in this suit to determine defendants' duty to defend the federal case against TRS concern an event that is covered by the policies appellee TRS held with appellant insurance companies.

The briefs and portions of the record before this Court include parts of three third-party complaints and a deposition. Although TRS's answer is not before us, counsel for TRS said in response to our question during oral argument that it had denied the allegations in the complaints.

Stripped to their essentials, these complaints allege the intentional disposal by TRS of solid wastes during the six-year period of the landfill's operation which contributed to the contamination of groundwater beneath the landfill. They allege that the "contributions and negligent acts and omissions" by TRS and other named trash haulers constituted the "sole and proximate cause of any contamination of the aquifer and water supply in the Flemington area . . . ." The complaints do not allege that the dumping or the contamination occurred either suddenly or accidentally; indeed, the facts alleged suggest a gradual seepage of contaminants into the aquifer.

The deposition of Gerald McKeithan, an officer of TRS, described the trash collection process and noted that eight or ten of TRS's customers were manufacturing concerns. McKeithan indicated that all customers had been verbally informed that TRS did not handle chemical or hazardous wastes but that this instruction was never incorporated into contracts or otherwise put in writing during the period that the landfill was alleged to have been in operation. McKeithan agreed with deposing counsel that

he did not consider the dumping to have been "accidental," that it had been both "expected" and "intended." Absent from the deposition, as from the complaints, is any suggestion that the dumping from 1973 to 1979 or the contamination itself was "sudden."

In order to determine whether such circumstances are covered by the provisions of TRS's liability insurance with Penn and Peerless, the policy provisions must be analyzed, then compared with the events as alleged. This is widely known as the "comparison test": the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded. Any doubt as to coverage is to be resolved in favor of the insured. *See Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970); *Stout v. Grain Dealers Mutual Ins. Co.*, 307 F. 2d 521 (4th Cir. 1962).

Both the Penn and Peerless policies contained the following provisions and definitions:

> I. COVERAGE A—BODILY INJURY LIABILITY
>
> COVERAGE B—PROPERTY DAMAGE LIABILITY
>
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage A. bodily injury or
> Coverage B. property damage
>
> by which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent . . . .
>
> This insurance does not apply: . . . .
>
> (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any

> water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental . . . .

Both policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." This Court has defined "accident" as "an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty." *Tayloe v. Indemnity Co.*, 257 N.C. 626, 627, 127 S.E. 2d 238, 239-40 (1962).

In short, these policies cover occurrences (which are unexpected by definition), which may occur suddenly or gradually, and which result in damage. Excluded from such coverage is a class of injuries caused by pollution or contamination. Excepted from the exclusion is the discharge, dispersal, release, or escape of pollutants or contaminants that occurs suddenly and accidentally.

We do not perceive these provisions to be either ambiguous or, except for the repeated appearance of "accident," redundant.[3] In our view, this is an instance where nontechnical words (except for "occurrence," which is defined in the policy) can be given the same meaning they usually receive in ordinary speech. Nor does their context require us to do otherwise. *Grant v. Insurance Co.*, 295 N.C. 39, 42, 243 S.E. 2d 894, 897 (1978). This Court has held that:

> No ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay.

3. But see cases cited in note 4 *infra*. See also discussion of "sudden and accidental" exception *infra*.

Trust Co. v. Insurance Co., 276 N.C. 348, 354, 172 S.E. 2d 518, 522. Although it is possible to perceive ambiguity in the policy language, it strains at logic to do so. A common sense reading of that language reveals that the exclusion narrows a virtually limitless class of events termed "occurrences," which can occur suddenly or over the course of time, to nonpolluting events or to polluting events that occur "suddenly and accidentally."

The definition of "occurrence" and its description as an "accident" significantly restrict "occurrences" to events that are unexpected and unintended as viewed from the standpoint of the insured. *Edwards v. Akion*, 52 N.C. App. 688, 691, 279 S.E. 2d 894, 896, *aff'd per curiam*, 304 N.C. 585, 284 S.E. 2d 518 (1981). Even intentional acts, the consequences of which are unexpected, have been held to qualify as "occurrences." In *Industrial Center v. Liability Co.*, 271 N.C. 158, 155 S.E. 2d 501 (1967), this Court held that the intentional felling of shrubs and trees belonging to another was an "occurrence" where it was done in the mistaken belief, induced by a surveyor's error in locating the property line, that the trees were on plaintiff's property.

By focusing likewise on the notion of expectation or foresight, the Court of Appeals has held that potentially damaging events that can be anticipated are not "occurrences" within the meaning of the policy. In *City of Wilmington v. Pigott*, 64 N.C. App. 587, 307 S.E. 2d 857 (1983), *disc. rev. denied*, 310 N.C. 308 (1984), a building inspector had demolished a building in the performance of his governmental duties. Because the inspector's decision "did not happen by chance and was not unexpected, unusual or unforeseen," it was not an "occurrence." *Id.* at 589, 307 S.E. 2d at 859. But in *Wiggins v. City of Monroe*, 73 N.C. App. 44, 326 S.E. 2d 39 (1985), facts nearly identical to those in *Pigott* were held to comprise an "occurrence" because the building inspector had allegedly exceeded the scope of his authority. Although both sets of circumstances occurred in the ordinary course of business, the *Wiggins* court considered the demolition to be accidental and an "occurrence." It was the breach of duty, not the demolition, that could not reasonably have been anticipated by the city.

Penn and Peerless argue that the routine business conduct of intentionally dumping waste materials, as alleged, was not an "occurrence." For the same reasons that the Court of Appeals distin-

guished *Wiggins* from *Pigott*, we disagree. Whether events are "accidental" and constitute an "occurrence" depends upon whether they were expected or intended from the point of view of the insured. Just as it was not the demolition but the breach of authority that designated an otherwise routine demolition an "occurrence," it was not the routine dumping but the arguably unintended, unexpected leaching of contaminants into the groundwater that constituted the "occurrence" for the purpose of TRS's insurance coverage.

Other courts considering whether routine dumping that resulted in contamination constitutes an "occurrence" have also looked to whether the damage was expected or intended. In *Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals*, 17 Ohio App. 3d 127, 132, 477 N.E. 2d 1227, 1233 (1984), the leakage of chemicals from drums was neither expected nor intended by the company storing those chemicals. The court accordingly found that the release of those pollutants was an "occurrence." In *Mraz v. American Univ. Ins. Co.*, 616 F. Supp. 1173 (D. Md. 1985), drums were dumped in a clay pit that both the parties and county health officials had thought would contain any leaking. The resulting contamination of the environment was held to be an "occurrence" based on the reasoning of *Buckeye*. And in *Steyer v. Westvaco Corp.*, 450 F. Supp. 384 (D. Md. 1978), the court concluded that "the words 'unexpected or unintended' or words of similar import . . . with respect to the definition of 'occurrence' do not refer to unknown, unexpected, or unintended emissions from the Westvaco plant, but instead refer to unknown, unexpected, and unintended damage . . . ." *Id.* at 388.

Unlike the focus of the "occurrence" language in the policies' broad coverage provisions, the focus of the "pollution exclusion" is *not* upon intention, expectation, or even foresight.[4] Rather, the

4. *But see* 3 R. Long, *Law of Liability Insurance* App-58 (1973): "Exclusion (f) is new. It eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are excluded by definition of 'occurrence.' "

This gloss on the pollution exclusion has led more than one court astray. The concern with expectation or intention, which is already comprehended in the definition of "occurrence," has led these courts to see the exclusion as no more than a restatement of that definition and to overlook the fact that the pollution exclusion clause is concerned more with the nature of the *damage* than with the accidental

exclusion clause is concerned less with the accidental nature of the occurrence than with the nature of the damage. The exclusion limits the insurer's liability for accidental events by excluding damage caused by the gradual release, escape, discharge, or dispersal of irritants, contaminants, or pollutants. The focus of the exclusion is not upon the release but upon the fact that it pollutes or contaminates. When courts consider the release alone to be the key to the pollution exclusion clause, the sudden and accidental exception can be bootstrapped onto almost any allegations that do not specify a gradual release or emission. For example, in *Travelers Indem. Co. v. Dingwell*, 414 A. 2d 220 (Me. Sup. Jud. Ct. 1980), the pleadings alleged that Dingwell's negligence caused certain chemicals from its industrial waste facility to "permeate" the ground and "contaminate" the well water. There was no mention or suggestion that the release had been sudden and accidental. Nevertheless, the court found potential for the exception because it perceived the release, not the permeation or damage, to be the polluting occurrence. Because the manner of the release itself was not *known* to be anything but sudden, the *Dingwell* court perceived the "behavior of the pollutants in the environment, *after* release, [to be] irrelevant . . . ." *Id.* at 225. It chided the court below for failing "to distinguish between the gradual permeation of the ground, by which the water table was ultimately polluted, and the initial release of the pollutants from Dingwell's facility." *Id.* at 224. We consider the *Dingwell* court's construction of the pollution exclusion to be so restrictive as to vitiate the "sudden and accidental" exception. Only that exception plainly points to the moment of release or escape. The exclusion itself more broadly describes a contaminating discharge, an irritating emission, a polluting release into air or water or onto land.

The policy reasons for the pollution exclusion are obvious: if an insured knows that liability incurred by all manner of negli-

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nature of its cause. *See, e.g., Jackson Twp. Etc. v. Hartford Acc. & Indem.*, 186 N.J. Super. 156, 164, 451 A. 2d 990, 994 (1982) ("the clause can be interpreted as simply a restatement of the definition of 'occurrence'—that is, that the policy will cover claims where the injury was neither expected nor intended"); *United Pac. Ins. v. Van's Westlake Union*, 34 Wash. App. 708, 664 P. 2d 1262 (1983) (the pollution exclusion clause did not apply where a hole in an 80,000 gallon tank had emitted gasoline into the ground over the period of "some months" because neither the hole nor the damage had been expected or intended); *Molton, Allen and Williams, Inc. v. St. Paul F. & M. Ins.*, 347 So. 2d 95 (Ala. 1977) (pollution exclusion clause held ambiguous and meant to cover only industrial pollution and contamination).

gent or careless spills and releases is covered by his liability policy, he is tempted to diminish his precautions and relax his vigilance. Relaxed vigilance is even more likely where the insured knows that the intentional deposit of toxic material in his dumpsters, so long as it is unexpected, affords him coverage. In this case, it pays the insured to keep his head in the sand.

From the insurer's perspective, the practical reasons for the pollution exclusion are likewise clear: the lessons of Love Canal and sites like it have revealed the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances into the environment. In addition, putting the financial responsibility for pollution that may occur over the course of time upon the insured places the responsibility to guard against such occurrences upon the party with the most control over the circumstances most likely to cause the pollution.[5]

The "sudden and accidental" exception to the pollution exclusion has been the turning point for many courts concerning whether occurrences of pollution or contamination should be covered. An occurrence by definition is accidental. When it is sudden, it is covered. Yet even "sudden" has been construed as being synonymous with "occurrence" and "accidental," rendering the coverage language, its exclusion, and exception redundant and indistinguishable. The court in *Lansco, Inc. v. Environmental Protec. Dep't,* 138 N.J. Super. 275, 350 A. 2d 520 (Ch. Div. 1975), *aff'd,* 145 N.J. Super. 433, 368 A. 2d 363 (App. Div. 1976), *cert. denied,* 73 N.J. 57, 372 A. 2d 322 (1977) (quoting Webster's), construed "sudden" to be no more than another synonym for "accidental"—i.e., "happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for." "Sudden"

5. It is worth noting that since 1977 separate policies covering "environmental impairment" have been made available by some insurance brokers. These eliminate the words "occurrence" and "accidental" from the coverage language and specifically include claims arising from single, repeated, or continuing "environmental impairments." *See* Pfennigstorf, *Environment, Damages and Compensation,* 1979 ABA Research Journal at 442-44.

"Environmental impairments" coverage was not available to TRS during most of the period the contamination allegedly occurred, and its emergence has no bearing on this case. However, the existence of such coverage is enlightening concerning the underwriters' understanding of the scope of coverage in the liability policy TRS did have.

has also been construed "not [to] be limited to an instantaneous happening." *Allstate Ins. Co. v. Klock Oil Co.*, 73 App. Div. 2d 486, 426 N.Y.S. 2d 603 (1980).

An accurate construction of "sudden," however, must go beyond semantics: all three terms must be read within their contexts. "Occurrence" relates to the anticipation of an event—whether or not it was intentional or expected. The pollution exclusion relates chiefly to the fact that the release allegedly results in some polluting or contaminating damage. The exception also describes the event—not only in terms of its being unexpected, but in terms of its happening instantaneously or precipitantly. Courts that have construed "sudden" broadly, defining it in terms of the expectation element of accident rather than focusing on its temporal significance, have deemed polluting events excepted that otherwise appear to fit squarely within the exclusion. For example, the court in *Jackson Twp., Etc. v. Hartford Acc. & Indem.*, 186 N.J. Super. 156, 164, 451 A. 2d 990, 994, determined the deposit of toxic wastes in a landfill, resulting in seepage of pollutants into the aquifer, to be sudden and accidental: "regardless of how many deposits or dispersals may have occurred, and although the permeation of pollution into the ground water may have been gradual rather than sudden, the behavior of the pollutants as they seeped into the aquifer is irrelevant if the permeation was unexpected." *See also Allstate Ins. Co. v. Klock Oil Co.*, 73 App. Div. 2d 486, 426 N.Y.S. 2d 603, in which the escape of gasoline from a negligently installed tank was held to be sudden and accidental, although not "instantaneous."

Other courts, which have read "sudden" temporally, as describing an abrupt or precipitant event, have made more logical distinctions between releases that occur suddenly and accidentally and releases that do not. For example, in *Lansco, Inc. v. Environmental Protec. Dep't*, 138 N.J. Super. 275, 350 A. 2d 520, an oil spill caused by vandalism was adjudged sudden and accidental. And in *City of Milwaukee v. Allied Smelting Corp.*, 117 Wis. 2d 377, 344 N.W. 2d 523 (Wis. App. 1983), in which the discharge of acid into city storm sewers over a period from two to ten years had caused them to deteriorate, the court found the "record and common sense" to firmly refute the contention that the runoffs had been sudden and accidental. *But cf. Farm Family Mut. Ins.*

Co. v. Bagley, 64 App. Div. 2d 1014, 409 N.Y.S. 2d 294 (1978), in which damages arising from unintended dispersal of chemicals sprayed by the insured onto his neighbor's land were held to be within the exception to the pollution exclusion clause because the damage—not the release—had been sudden and accidental.[6]

The facts alleged in the pleadings of the case sub judice describe the "contribution" over a number of years of contaminating materials to a landfill, eventually rendering groundwater beneath it hazardous for human consumption and other uses. The parties do not dispute that TRS deposited waste materials at the landfill throughout the years the alleged contamination took place. Although such daily dumping, effected in the daily course of business, could not be deemed an occurrence for purposes of coverage, the leaching allegedly resulting in contamination *was* arguably "accidental," i.e., it was arguably unexpected and unintended. The result, if not the damage-engendering series of acts, was an occurrence.

Nevertheless, the events alleged in the pleadings and supported by the deposition fit squarely within the language of the exclusion clause. Waste material that has leached into and contaminated groundwater is clearly excluded by the plain terms of the pollution exclusion. And because the "sudden" release or escape of contaminants was neither expressly nor impliedly alleged in the pleadings or deposition,[7] the alleged occurrences remain outside the policy coverage.

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6. Some courts have held that when emissions occur on a regular basis or in the course of business, the "sudden and accidental" exception does not apply. Under such circumstances, even if each occurrence is viewed separately and each occurs suddenly, doubt is cast with each recurrence upon whether it was accidental: the fact that the accident recurs increases expectation and may even infer intent. In *Great Lakes Container v. National Union Fire Ins.*, 727 F. 2d 30 (1st Cir. 1984), wastes from a barrel reconditioning facility were routinely deposited and discharged into the ground. The government had charged that pollution had been "a concomitant of [the insured's] regular business activity." 727 F. 2d at 33. The First Circuit held that, as such, the migration of pollutants and contaminants into local drinking water was excluded from coverage: it was neither sudden and accidental nor, for that matter, an "occurrence." *See also American States Ins. Co. v. Maryland Cas. Co.*, 587 F. Supp. 1549 (E.D. Mich. 1984); *Barmet of Indiana v. Security Ins. Group*, 425 N.E. 2d 201 (Ind. Ct. App. 1981).

7. We reject TRS's suggestion that the sudden discovery of the contamination satisfies the exception. The exception clearly comprehends the damaging act, not the act of discovery.

The salient features of the case before us were also present in *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 487 A. 2d 820 (1984). In *Techalloy*, the complaint alleged injuries resulting from the contamination of well water by Techalloy's reckless storage or dumping of trichloroethylene. The court concluded, "At best, Techalloy could prove that the discharge was accidental. That alone, however, would not substantiate their position since the language of the policy unambiguously states that there will be no coverage for toxic discharge into the environment unless that discharge is both sudden *and* accidental." *Id.* at 826-27. The complaint "did not allege a sudden event." Rather, the allegations identified the source of the problem as "contamination which occurred on a 'regular or sporadic basis from time to time during the past 25 years.'" *Id.* at 827. *See also Transamerica Insurance Co. v. Sunnes*, 77 Or. App. 136, 711 P. 2d 212 (1985). The result is the same with the case at bar.

We hold that Penn and Peerless are under no obligation to defend TRS in the federal court actions concerning the contamination of the aquifer by the leaching of waste materials from the Flemington landfill.

Because we conclude that Penn and Peerless have no duty to defend TRS, we need not address the issue raised by the Court of Appeals whether complaints demanding indemnification for the costs of complying with an injunction, as opposed to demands for money damages, invoke the insurer's duty to defend.

The decision of the Court of Appeals is

Reversed.

CITY OF WINSTON-SALEM v. NORMAN L. COOPER AND WIFE, RUTH S. COOPER; GEORGE F. PHILLIPS, TRUSTEE; NORTHWEST PRODUCTION CREDIT ASSOCIATION

No. 34PA85

(Filed 18 February 1986)

1. **Eminent Domain § 6.9— expert witness—cross-examination concerning specific values of noncomparable properties—not allowed**

The trial court in a condemnation action correctly refused to allow the City to cross-examine the property owners' experts by propounding questions concerning or alluding to specific dollar amounts of a group of noncomparable properties.

2. **Eminent Domain § 6.2— value of other property in vicinity excluded—not comparable**

The trial court did not err in a condemnation action by refusing to allow the City to offer evidence of the sales prices of two properties which it contended were comparable to the subject property where differences in the acreage, road frontage, quality of terrain, minable sand deposits, and remoteness in time supported the court's discretionary determination that the properties were not comparable to the subject property.

3. **Eminent Domain § 6.6— condemnation—expert witness—knowledge of zoning law—goes to credibility not admissibility**

The trial court did not err in a condemnation action by denying the City's motion to strike the entire testimony of one of the property owners' experts who allegedly misunderstood the permitted uses under a zoning ordinance. Even if the witness based his ultimate opinion on a misunderstanding of the allowable uses permitted by the zoning ordinance, that misunderstanding would go to the credibility rather than the admissibility of his evidence.

Justices MITCHELL and BILLINGS took no part in the consideration or decision of this case.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 72 N.C. App. 173, 323 S.E. 2d 750 (1984), which on plaintiff's appeal found error in a trial conducted by *Hairston, J.*, at the 28 November 1983 Session of FORSYTH County Superior Court and remanded for a new trial.

Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr.; City Attorney Ronald G. Seeber and Assistant City Attorney Ralph D. Karpinos for plaintiff appellee.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready by F. Joseph Treacy, Jr., and Sapp and Mast by David P. Mast, Jr., for defendant appellants.

EXUM, Justice.

This is a condemnation proceeding in which the plaintiff condemnor City of Winston-Salem ("City") complains of several rulings on the evidence made by Judge Hairston at a jury trial conducted to determine the amount of compensation due the owners, the defendants Cooper. Judge Hairston first ruled that the City could not cross-examine the owners' experts with regard to specific selling prices of other properties in the vicinity of, but not comparable to, the property being condemned. Next, Judge Hairston sustained objections to testimony of the City's experts regarding sales prices of other properties after he determined the other properties were not comparable to the property being condemned. Finally, Judge Hairston denied the City's motion to strike the entire testimony of one of the owners' experts.

The Court of Appeals concluded that Judge Hairston erred in his ruling on the cross-examination issue and that this error entitled the City to a new trial. The Court of Appeals did not decide whether Judge Hairston erred in excluding the testimony of the City's experts because it felt the evidence as to comparability might be different at the new trial; but it did determine that Judge Hairston correctly denied the City's motion to strike the owners' expert's testimony.

We conclude Judge Hairston ruled correctly on all points and that his judgment entered on the verdict should be allowed to stand. We reverse the Court of Appeals' decision that the case be remanded for a new trial.

I.

The City instituted condemnation proceedings on 21 August 1981 to acquire a 51-acre tract of land owned by defendants Cooper. After all issues except damages were settled, a commissioners' hearing was held, resulting in a compensation award of $144,840. Owners excepted to the Commissioners' Report and demanded a jury trial. At trial both parties presented evidence, including testimony of five experts.

The owners' evidence tended to show as follows: The 51-acre tract had been in the Cooper family for three generations. It was located in southwest Forsyth County near the Davidson County line approximately five miles from Clemmons. The property was

bounded on the north by Cooper Road for approximately 1100 feet and on the west by Muddy Creek, the largest water flow in Forsyth County, for 2500 feet. At the time of taking, the westernmost portion of the property along the banks of Muddy Creek was being used as a sand mining operation. Geological surveys indicated that 13.26 acres of the property had minable and commercially salable sand deposits to an average depth of three and one-half feet. The sand deposits were "quite valuable" for use in asphalt production and for fill. The best use of 37.74 acres was for residential development. The best use of 13.26 acres was for sand mining. The residential use portion of the property was valued at $4,600 to $4,850 per acre and the sand mining portion at $9,000 to $9,500 per acre for a total value of $293,000 to $309,000.

Evidence for the City tended to show: The best use of the entire tract was for residential development which gave it a value of $2,500 to $2,700 per acre. When the value of certain improvements was added, the entire tract was worth from $135,400 to $140,700. One of the City's expert appraisers was not aware of the extent of minable sand on the property but was of the opinion that whatever the extent, it had no effect on the value. Another appraiser for the City felt that the best use for two acres of the property was for sand mining, and he valued these two acres at $6,000 an acre. This appraiser was not aware that the property had 13.26 acres suitable for sand mining. A third witness for the City testified the subject property was worth between $2,750 and $3,000 an acre; yet on cross-examination this witness admitted he had never made a formal appraisal. He said, "I've never been on the property. Now, how can I tell you what it's worth if I haven't been on it?"

The jury verdict of $278,500 was within the range of opinion testimony presented by both sides but more nearly accorded with the owners' evidence.

II.

[1] After the owners' expert real estate appraisers gave their opinions as to value and the methods whereby they arrived at those opinions, both were asked, respectively, on cross-examination a similar question to which the trial court sustained the owners' objection. Mr. Henry Shavitz was asked whether he could point out on a certain aerial photograph of the subject property

and property immediately surrounding it "any vacant acreage tract . . . that has ever sold in any time in history for three thousand dollars or more?" Mr. Fred Peters was asked with regard to the same aerial photograph whether there were "any vacant residential areas anywhere . . . that sold for three thousand dollars or more?" Presumably the dollar amounts were with reference to per-acre prices. There then followed in the case of both experts protracted voir dire examinations out of the presence of the jury.

The voir dire examinations tended to show as follows: Both witnesses, in their effort to arrive at an appraisal of the subject property, studied the sales of other properties in the general vicinity. Some were located on the aerial photograph and others were not. None of the sales were of property considered by the witnesses to be comparable to the subject property. Indeed, these witnesses could not find what they considered to be comparable property. The witnesses thus considered such sales as were available and made necessary adjustments in arriving at their appraisals of the subject property. Most of the sales considered did have the same zoning, R-6, as the subject property and were in the southwest corner of Forsyth County. Some of the sales were at per-acre values close to the per-acre value placed by the witnesses on the subject property; some were more; and some were less. Neither witness knew of any properties shown on the aerial photograph that sold for more than $3,000 per acre.

Shavitz testified before the jury that the aerial photograph portrayed only 600 to 800 acres and was "a rather restricted geographical area" so that he did not limit himself to consideration of the properties within the photograph.

Judge Hairston made it clear during the voir dire of Peters that he would permit the experts to be cross-examined as to the distance from the subject property at which they found land values equivalent to their appraisals, saying, "It's the specific value I feel is confusing to the jury."

Peters thereafter testified on cross-examination that he had to go three miles from the subject property to find "a piece of R-6 property equal in value to what [he] determined the value of the residential use on [the subject property]."

The Court of Appeals concluded that Judge Hairston erred by not permitting the owners' experts to be cross-examined with regard to whether they found any sales of property within the aerial photograph at more than $3,000 per acre. This ruling, thought the Court of Appeals, denied the City the opportunity properly to test the experts' knowledge about the selling prices "of properties within the area." *City of Winston-Salem v. Cooper*, 72 N.C. App. 173, 177-78, 323 S.E. 2d 750, 752 (1984). The Court of Appeals said, "The City did not ask about specific tracts of property nor did it ask whether there was any property worth as much as the witnesses had testified that the Cooper property was worth." *Id.* The Court of Appeals properly recognized that the controlling principles on the question presented were set out in *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980), but did not think these principles precluded the question here posed by the City.

Although the Court of Appeals correctly read *Winebarger* as "prevent[ing] a party from putting before the jury on cross-examination the prices of other pieces of noncomparable property," *City of Winston-Salem v. Cooper*, 72 N.C. App. at 177, 323 S.E. 2d at 753, it accepted the City's argument that the questions were posed not to put before the jury prices of noncomparable real estate, but to show that defendants' experts' opinions were not based on knowledge of real estate prices in the area. *Id.* at 175, 323 S.E. 2d at 753. In so doing, the Court of Appeals seemed to misinterpret the *Winebarger* holding as excluding only evidence of prices of *specific tracts* of noncomparable property and permitting evidence of "the general values of other property near the subject property." *Id.* at 178, 323 S.E. 2d at 753. Indeed, this seemed to be the legal position of the City at trial when its counsel argued to Judge Hairston, "Well, your honor, I realize we can't go to a parcel and see what did that parcel sell for; but we can test the man's credibility by asking if he knows any tract that has ever sold in excess of a given amount of dollars."

We disagree with this approach. *Winebarger* holds that, although a witness expressing an opinion on property value may be cross-examined on his *knowledge* of values of nearby noncomparable property for the limited purpose of testing his credibility or expertise, the presiding judge must confine the cross-examination's scope to matters relevant to its limited purpose. *Winebar-*

ger rested on and restated principles derived from three earlier precedents. First, in *Highway Commission v. Privett,* 246 N.C. 501, 99 S.E. 2d 61 (1957), the witness had been asked on cross-examination whether he knew of the values and sales prices of other property in the area. The questioning ended when the witness replied in the negative. This Court found no impropriety in the questions propounded because none "undertook to elicit testimony as to the valuations or sales prices of other properties, the questions being directed to whether the witness *had opinions or knowledge* with reference thereto." *Id.* at 506-07, 99 S.E. 2d at 65. Second, in *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219 (1959), the question to which the trial court sustained an objection inquired whether the condemnor's appraiser had appraised a tract abutting the subject property for $300,000. This Court found no error in sustaining the objection, holding that because of the dissimilarity of the tracts, the total appraisal value was incompetent and irrelevant to impeach the witness or to show his lack of knowledge of values in the vicinity. The Court concluded "that petitioner desired only to get the $300,000.00 figure before the jury to induce thereby a liberal award. This within itself would violate the applicable rule of evidence." *Id.* at 396, 109 S.E. 2d at 233. Third, in *State v. Johnson,* 282 N.C. 1, 191 S.E. 2d 641 (1972), this Court held competent questions to the state's expert witness regarding his knowledge of the value of other coastal lands in the area, to which the witness had responded that he himself had appraised them and knew their sales prices. We noted in *Johnson* "[t]his information satisfied the only legitimate purpose the question could have had." *Id.* at 20, 191 S.E. 2d at 654.

The *Winebarger* Court concluded that:

> [W]hile a witness' knowledge, or lack of it, of the values and sales prices of certain noncomparable properties in the area may be relevant to his credibility, the specific dollar amount of those values and prices will rarely if ever be so relevant. The impeachment purpose of the cross-examination is satisfied when the witness responds to a question probing the scope of his knowledge. Any further inquiry which states or seeks to elicit the specific values of property dissimilar to the parcel subject to the suit is at best mere surplusage. At worst it represents an attempt by the cross-examiner to con-

vey to the jury information which should be excluded from their consideration.

Winebarger, 300 N.C. at 64-65, 265 S.E. 2d at 231-32.

Winebarger also relied upon Justice (later Chief Justice) Sharp's opinion in *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964), which explained that where sales prices are material, a witness can be asked whether he knows if a certain property has been sold and, if so, whether he knows the price. If the witness does not know, his lack of knowledge is established. If he provides a sales price, even if totally erroneous, the adverse party is bound by the answer unless the purchase price is competent as substantive evidence of the value of the subject property. *Id.* at 356-57, 137 S.E. 2d at 148.

Of the four controlling principles we restated in *Winebarger*, the third and fourth are germane to the issue before us now:

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

Winebarger, 300 N.C. at 66, 265 S.E. 2d at 232-33.

Applying these principles to the case at bar, we hold Judge Hairston ruled correctly in refusing to allow the City to cross-examine Shavitz and Peters by propounding questions containing or alluding to specific dollar amounts. That the questions were directed to a group of properties rather than a single tract does not distinguish this case from *Winebarger*. Indeed, the questions here exacerbate the wrong sought to be avoided by the principles relied on in *Winebarger*. That wrong is getting before the jury specific dollar values or sales prices of noncomparable properties under the guise of witness impeachment. It makes no difference whether the noncomparables are referred to individually or as a group.

To properly propound the impeachment cross-examination under *Winebarger* and its predecessors, the City first should have asked the witnesses whether they had knowledge of sales prices of any of the tracts portrayed in the aerial photograph. If the witnesses had responded affirmatively, they could have been asked to state the sales prices provided the trial judge determined in his discretion that the impeachment value of the answer outweighed the possibility of confusing the jury with a collateral issue.

It is clear from the record that after the witnesses on voir dire had asserted their knowledges of the sales prices of some of the properties in the aerial photograph, Judge Hairston in his discretion determined that the impeachment value of these prices, if any, was outweighed by the possibility of confusing the jury. Counsel for the City asked Judge Hairston "to make a determination that the impeachment value of the answer to this question . . . outweighs the possibility of confusing the jury with collateral issues." Ultimately Judge Hairston determined in his discretion that permitting the witnesses to give specific values would be "confusing to the jury." Indeed, it would be a rare case, as we pointed out in *Winebarger*, in which the impeachment value would outweigh the possibility of confusing the jury.

The City argues also that not permitting the owners' experts to respond to questions about specific values led the jury to believe that they had examined sales prices in the area in question and found them to be comparable to and supportive of the values they assigned to the Cooper property. This argument rests

on an incorrect assessment of the testimony given to the jury by these experts. Neither testified that they relied on property in the aerial photograph as comparable or as supportive of their appraisals of the subject property. On direct examination Shavitz testified that he did not consider any of the tracts on the aerial photograph as comparable and gave them "very light consideration." Shavitz testified unequivocally on cross-examination that he found no property on the aerial photograph that he considered to be comparable because "I felt the subject property was unique and different from those sales that I found. There were sales that were made near the subject property, but in my opinion, they were not very comparable." Peters made it clear to the jury that the closest tract he found of comparable value to the Cooper tract was several miles away and not portrayed in the aerial photograph.

It would, in essence, have been no more appropriate to permit the owners' experts to be cross-examined about specific sales prices of noncomparable properties under the guise of impeachment on cross-examination than it would have been to permit them to testify on direct as to specific sales prices of noncomparable properties which exceeded their evaluations of the subject property.

III.

[2] The City sought to offer evidence of the sales prices of two properties which it contended were comparable to the subject property. One of the sales concerned the "Loflin-Hamlin" property located across Muddy Creek from the subject property. Another sale concerned the "Wake Forest" property approximately one-third of a mile from the subject property which fronted on Cooper Road. The City wanted to show that it had purchased the Loflin-Hamlin property in 1978 for approximately $1,517 per acre and that the Wake Forest property had sold on 24 January 1980 for approximately $2,000 per acre. Judge Hairston, after another protracted voir dire on the issue of comparability, determined that the Loflin-Hamlin and the Wake Forest properties were not comparable to the subject property and sustained the owners' objections to evidence of these sales. Since it ordered a new trial on the cross-examination issue, the Court of Appeals did not determine the correctness of Judge Hairston's rulings on the com-

parability question because it concluded the evidence regarding comparability *might* be different at the second trial. We, of course, must face this issue. We find no error in Judge Hairston's rulings about comparability.

It is clear that the sales prices of voluntary sales of property similar in nature, location, and condition to the land being condemned is admissible as evidence of the value of that land if the other sales are not too remote in time. Whether the properties are sufficiently similar to admit such evidence is a question to be determined by the trial judge in his sound discretion, usually after a hearing on the issue conducted out of the presence of the jury. *North Carolina State Highway Comm. v. Helderman*, 285 N.C. 645, 207 S.E. 2d 720 (1974); *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972); *City of Winston-Salem v. Davis*, 59 N.C. App. 172, 196 S.E. 2d 21, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). Decisions on matters within the trial judge's discretion will not be disturbed unless "manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985), or "so arbitrary that [the outcome] could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E. 2d 450, 465 (1985); *State v. Parker*, 315 N.C. 222, 337 S.E. 2d 497 (1985).

Applying these standards to the instant case, we cannot say that Judge Hairston abused his discretion in concluding that the Loflin-Hamlin and Wake Forest properties were not sufficiently similar to the subject property to admit evidence of their sales prices on the question of the subject property's value.

With regard to the Loflin-Hamlin sales in 1977 and 1978, evidence on voir dire tended to show as follows: The tract consisted of approximately thirty acres, of which ten acres were out of the flood zone. It was fenced in and consisted essentially of rough pasture with cows on it "that didn't do well." It was located on the other side of Muddy Creek from the Cooper property, but there was no evidence regarding the amount of sand on the property or whether it was useful for sand mining. The land was also described by the City's witness as a "totally depleted area." The City's witness said, "The Loflin-Hamlin company bought it, had cows on it. After they bought it, we [Diversified Realty, with whom the witness was employed] just basically kept the 'for sale'

sign on it." The witness also testified that land prices went up 8 or 9 percent a year between 1975 and 1981.

It seems clear to us that differences in the acreage, quality of terrain, minable sand deposits, and remoteness in time all combine to support Judge Hairston's discretionary determination that the Loflin-Hamlin property was not comparable to the Cooper property.

With regard to the Wake Forest property the evidence on voir dire tended to show as follows: This property consisted of 76.81 acres and fronted on Cooper Road and South Fork Creek approximately a third of a mile from the subject property. The land was generally rolling, with most of it being wooded. There were trees along the creek and some open fields "that used to be tended." The frontage on Cooper Road was, however, substantially less than that of the subject property, and South Fork Creek is substantially smaller than Muddy Creek. The Wake Forest property is also crossed by a large drainage ditch "which runs through the property." Although the City's witness said he thought some of the property would be suitable for a sand mining operation, he had no knowledge of the amount of sand or the depth of it on the Wake Forest property. A portion of the Wake Forest property "stands in water" during some periods of each year.

Again, we think the differences in acreage, road frontage, quality of terrain, and availability for sand mining all combine to support Judge Hairston's discretionary ruling that the Wake Forest property is not comparable to the subject property.

Even if, as trial judges, we might have come to a different conclusion on comparability, Judge Hairston's rulings are not manifestly unsupported by reason nor are they so arbitrary that they could not have been the result of a reasoned decision. We decline, therefore, to find that he abused his discretion in deciding not to admit this evidence.

The City argues that Judge Hairston did not really exercise his discretion in determining the comparability of the Wake Forest and Loflin-Hamlin properties; rather, he employed an unlawful test by requiring that properties be practically identical before evidence of the sales price of one is competent on the question of the value of another. We do not so read the record. It is true that

Judge Hairston did comment once during one of several lengthy voir dires that, "If you can show me two pieces of land that are identical and sold for the same, fine." Nevertheless, when taken in context we think it clear that this comment had its genesis in the judge's frustration with the length and repetitiveness of the voir dire examinations and does not reflect the basis for his rulings. The great bulk of the voir dire focused on the similarities and dissimilarities between the tracts sought to be compared. The record also reveals that Judge Hairston himself expressly compared the Loflin-Hamlin property and the subject property. With regard to the Wake Forest property, Judge Hairston was of the opinion that the City's own witness testified to too many adjustments when he himself tried to compare it with the subject property for the two to be comparable in law.

Finally, the City argues that Judge Hairston incorrectly determined lack of comparability when he adopted the owners' theory of highest and best use of the subject property as being, in part at least, for sand mining. We think a sufficient answer to this argument is that the availability for sand mining was only one of several differences in the properties sought to be compared and was not solely relied on by Judge Hairston in determining the comparability question.

IV.

[3] Finally, the City claims its own expert showed Shavitz' opinion was based on an erroneous understanding of the applicable zoning ordinances, thus disqualifying Shavitz as a competent expert witness. Shavitz testified that he considered the R-6 zoning to permit, among other uses, "multi-family housing" and he took these permitted uses into account in making his appraisal. On cross-examination he said he did not know precisely how many units per acre were permitted but that "it would be in the neighborhood" of nine to eleven units per acre. The City offered the testimony of one of its planners that R-6 zoning permitted only two dwelling units per acre unless water and sewer were available to the tract, in which case four units per acre were permitted. Another of the City's witnesses testified that only single-family residential units were permitted in R-6 zoning, but cluster-type planned residential developments were also permitted.

At the close of all of the testimony, the City moved to strike the entire testimony of owners' witness Shavitz on the ground that he misunderstood the permitted uses under the zoning ordinance "with respect to dwelling units on an acre of land." The motion was denied by Judge Hairston on the ground that such a misunderstanding, if any, went to the weight of the witness's testimony and not to his competence as a witness. The Court of Appeals agreed with Judge Hairston's ruling. So do we.

Even if Shavitz based his ultimate opinion as to value on a misunderstanding of the allowable uses permitted by the zoning ordinance, this would not be grounds for striking his testimony. It would constitute an attack on part of the data he might have considered in arriving at his opinion. "The process or method used . . . might be considered on the question of the credibility of the expert witnesses, but not on the competency or admissibility of their evidence." *State v. Tola*, 222 N.C. 406, 23 S.E. 2d 321 (1942); *accord*, *State v. Graham*, 35 N.C. App. 700, 242 S.E. 2d 512 (1978).

We conclude that there is no error in the trial below and the judgment of the trial court based upon the jury's verdict should be reinstated. The decision of the Court of Appeals vacating this judgment and remanding for a new trial is

Reversed.

Justices MITCHELL and BILLINGS took no part in the consideration or decision of this case.

GREAT AMERICAN INSURANCE COMPANY v. C. G. TATE CONSTRUCTION COMPANY

No. 326PA85

(Filed 18 February 1986)

Insurance § 96.1— accident—failure to give timely notice—lack of good faith

The trial court's findings were sufficient to support the conclusion of the trial court that defendant's failure to notify plaintiff liability insurer as soon as practicable after an accident lacked good faith and plaintiff was therefore relieved of its duty to honor its obligations under the policy with defendant where the trial court's findings revealed that employees and agents of defend-

ant were aware of the serious nature of the accident; a piece of defendant's construction equipment was destroyed because of its proximity to the site of the accident; eyewitnesses' versions of how the accident occurred and who was to blame conflicted with some versions indicating that defendant was to blame, and certain of defendant's employees were aware of both the blame and the conflict; the foreman of the road crew notified his superiors of the on-site accident; defendant was therefore charged with the foreman's knowledge of facts and circumstances indicating potential liability; and defendant's employees discussed the question of the necessity of reporting the accident to plaintiff but deliberately chose not to do so.

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, 74 N.C. App. 424, 328 S.E. 2d 891 (1985), which reversed the judgment signed by *Bailey, J.*, on 6 June 1984 in Superior Court, WAKE County, and remanded the cause for further proceedings. Heard in the Supreme Court 17 December 1985.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Sumner, for plaintiff appellant.

Nye & Mitchell, by Charles B. Nye and Edmund D. Milam, Jr., for defendant appellee.

MARTIN, Justice.

This case concerns insurance policy notice provisions requiring that an insured notify the insurer "as soon as practicable" and positing that the requirement operates as a condition precedent to coverage. The question of how to construe that provision and this case have been before this Court once before, in *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981).

The course of events culminating in this appeal was initiated by the collision of a fuel truck with an automobile, which occurred on 6 April 1976 on a two-lane road that was in the process of being widened by C. G. Tate Construction Company. The drivers of both vehicles and a third motorist who witnessed the accident asserted that a front-end loader had backed onto the road surface in front of the truck, causing its driver to swerve into the other lane and collide head on with the car, which had been travelling in the opposite direction. Two of Tate's employees and a bystander who had witnessed the accident reported that the truck had been travelling *behind* the car and that it had apparently braked sharply and jackknifed when the car slowed or stopped. The colli-

sion caused the tanker to disconnect from the truck, roll over the car, and burst into flames. The front-end loader, which the Tate witnesses testified had been parked ten feet from the edge of the highway, was extensively damaged by fire from the accident.

The investigating officer first interviewed the Tate employees, then spoke with the injured drivers, then returned to the accident scene where he informed A. G. Foster, the Tate foreman, of the discrepancies between the eyewitnesses' reports. The officer did not issue a citation to Tate, but television and newspaper accounts reported within thirty-six hours of the accident that it had been caused by Tate's construction vehicle, when it had pulled out onto the highway in front of the fuel truck. The investigator's official report drew the same conclusion.

That evening, Mr. Foster called Tate's general job superintendent, William Lee Robertson, and told him that an accident had occurred on the Tate job site, that the front-end loader had been damaged, and that Tate employees had been involved in pulling injured drivers from their vehicles. Mr. Robertson asked Mr. Foster whether the insurance company should be informed, but the latter replied that he thought not because "we wasn't involved in no way." Mr. Foster was aware that the media reports blamed Tate for the accident, and that the newspaper later "tried to straighten it up," but he did not relate his concern over the media's "confusion" to his superiors because he considered the correction to be more a matter of public relations than one of liability. Eddie Wyatt, the driver of the front-end loader, was likewise aware that the media reports had blamed the accident on his vehicle, and he discussed the accounts with other employees, including Mr. Foster.

The following Monday, Mr. Robertson mentioned to Mr. Tate, Sr., that the accident had occurred, and he told Mr. Tate that he had talked to Mr. Foster and to highway personnel, who had assured him that the Tates were not involved.

Tate never reported the accident to its insurer, Great American Insurance Company. The latter became aware of the accident independently, through its capacity as the workers' compensation carrier for the employer of the fuel truck driver.

Great American subsequently instituted a declaratory judgment action against Tate, requesting judicial determination of

whether Tate's failure to notify vitiated the insurer's coverage obligations. The trial judge, relying upon *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960), found for the insurer, holding that Tate's failure to notify the insurer " 'as soon as practicable' was not justified or excusable under the circumstances" and violated a condition precedent to coverage under its policy with Great American. The Court of Appeals reversed and remanded, distinguishing the facts of this case from those in *Muncie* by the presence of an explanation for the lack of notice (Tate's alleged unawareness of involvement) and by the unresolved question of whether the insurer had been prejudiced by the delay. *Insurance Co. v. Construction Co.*, 46 N.C. App. 427, 265 S.E. 2d 467 (1980).

This Court allowed Great American's petition for discretionary review and modified and affirmed the decision of the Court of Appeals. *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981) [hereinafter referred to as *Great American*]. In *Great American* we rejected a strict contract construction of the notice requirement and overruled the *Peeler-Muncie-Fleming* line of cases. *Fleming v. Insurance Co.*, 261 N.C. 303, 134 S.E. 2d 614 (1964); *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474; *Peeler v. Casualty Company*, 197 N.C. 286, 148 S.E. 261 (1929). We chose instead to follow the modern trend of construing the notice requirement in insurance contracts "in accord with its purpose and with the reasonable expectations of the parties." *Insurance Co. v. Construction Co.*, 303 N.C. at 390, 279 S.E. 2d at 771. Because the timely notice requirement exists in order to enable the insurer to prepare a defense by preserving its ability to investigate an accident, any delay[1] that did not prejudice the insurer did not vitiate coverage. *Id.* at 397, 279 S.E. 2d at 775. In order to discourage dilatoriness, however, this rule was restricted to the insured's "good faith" delay or failure to notify. We proposed a three-part test in order to determine the insurer's duty to defend:

> When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was

1. Failure to notify is effectively a delay in the insurer's receipt of notice. Our reference to "delay" therefore comprehends situations like that in the case sub judice, where the insurer became aware of the accident through some means other than notice by the insured.

> given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, *e.g.*, that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

Id. at 399, 279 S.E. 2d at 776.

On remand, the trial court measured its findings of fact against this test. The court concluded, first, that Tate had not given Great American notice of the accident and of potential claims arising therefrom as soon as practicable, and second, that the failure to notify had lacked good faith. The trial court relied upon the Restatement (Second) of Contracts § 205 at 100 (1981), and said that, in the context of business entities dealing at arm's length, "unreasonable or unfair dealings can amount to a lack of good faith." By such standards, Tate's failure to notify Great American "lacked good faith." Finally, even though it found that Tate lacked good faith in failing to notify Great American, the trial court proceeded to the third step of the test, concluding that Great American had not been prejudiced by the lack of notice and that it was therefore liable on its policy with Tate.

Great American appealed to the Court of Appeals, which reversed. *Insurance Co. v. Construction Co.*, 74 N.C. App. 424, 328 S.E. 2d 891 (1985). The Court of Appeals held that the trial court had erred in two ways: first, it had applied an objective, "reasonable man" standard to the question of good faith, rather than the subjective standard the appellate court perceived as mandated by this Court's *Great American* opinion. Second, the Court of Appeals found that the trial court had improperly considered the question of prejudice. It remanded the case once more, requiring the trial court to apply only a subjective standard to the question of good faith and to reach the question of prejudice to the insurer only if good faith was found.

We find the reasoning of the court below to have been essentially correct; but, in our view, there is no need for the evidence to be assessed by the trial court a third time. The findings of fact of the trial court are sufficient to support the conclusion that Tate's failure to notify Great American lacked good faith. Where

a lack of good faith is found, it is not necessary to determine the issue of prejudice to the insurer. *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769.

The first step of the *Great American* test is for the trier of fact "when faced with a claim that notice was not timely given, [to] . . . decide whether the notice was given as soon as practicable." 303 N.C. at 399, 279 S.E. 2d at 776. "Practicable" has been defined as "that which is performable, feasible, possible," Black's Law Dictionary 1055 (5th ed. 1979), and this Court's pre-*Great American* interpretation of the notice requirement posited that "whether . . . notice was given within a reasonable time depends on the facts and circumstances" of the case. *Harris v. Insurance Co.*, 261 N.C. 499, 135 S.E. 2d 209 (1964). "As soon as practicable" was read as permitting justified or excusable delay, and it alleviated the otherwise harsh effects of a strict contractual construction of the notice requirement.[2] In *Great American* this Court redefined the "notice as soon as practicable" provision to mean that the requirement is satisfied despite any delay in notifying the insured, so long as it is occasioned in good faith *and* the insurer is not materially prejudiced.

More precisely phrased, the first step in the *Great American* test simply requires the trial court to determine whether there has been any delay[3] in notifying the insurer. In most instances, unless the insurer's allegations that notice was not timely are patently groundless, this first part of the test is met by the fact that the insurer has introduced the issue to the court. Therefore only the good faith and prejudice steps remain to be addressed by the trial court.

2. *Insurance Co. v. Construction Co.*, 46 N.C. App. 427, 434-35, 265 S.E. 2d 467-472. In this case's first appearance before the Court of Appeals, that court attempted to reconcile the *Muncie* line of cases, in which no excuse or justification for delayed notice had been given, with cases like this one. This court rejected the appellate court's effort, finding the *Muncie* approach of strict contract construction and the Court of Appeals' proposed approach of focusing on prejudice to the insurer irreconcilable. 303 N.C. at 392, 279 S.E. 2d at 772.

3. How much time must pass between the occurrence and notice before the period is determined to be a "delay" is a question of law for the court. *See* 13A Couch on Insurance 2d § 49.81 (rev. ed. 1982). However, notice "as soon as practicable" is distinguishable from "immediate" notice only by the consideration of extenuating circumstances, justification, or excuse—factors this Court rejected in *Great American* in favor of limiting the question of reasonable or practicable notice to the good faith and prejudice tests.

The first of these, the "requirement that any period of delay beyond the limits of timeliness . . . [be] in good faith" was carefully defined by this Court in *Great American*:

> Anyone who knows that he may be at fault or that others have claimed he is at fault and who purposefully and knowingly fails to notify ought not to recover even if no prejudice results.

303 N.C. at 399, 279 S.E. 2d at 776. This test of lack of good faith involves a two-part inquiry:

1) Was the insured aware of his possible fault, and

2) Did the insured purposefully and knowingly fail to notify the insurer?

Both of these are, in the legal sense of the term, "subjective" inquiries—they ask not what a reasonable person in the position of the insured would have known, but what the insured *actually did know*. Certainly, if the insured knows that he is liable or even that he will possibly be held liable, or that others claim that he is at fault, an untimely delay in notification of the insured is a delay without good faith.[4]

The good faith test is phrased in the conjunctive: both knowledge *and* the deliberate decision not to notify must be met for lack of good faith to be shown. If the insured can show that either does not apply, then the trial court must find that the insured acted in good faith. (Only at this point would the court proceed to examine whether the insurer was prejudiced by the delay.) For example, if the insured was unaware of the accident or, if aware, he had no actual awareness of any accusation that he might be liable, then his failure to notify, though deliberate, is in good faith. Conversely, if the insured has knowledge of potential liability but is injured and cannot notify the insurer, or does not know he is covered, then his failure to notify is not purposeful,

4. Of course, if good faith is found to be lacking, the court need not inquire into and the insurer need not prove prejudice.

and the delay is in good faith.[5] Similarly, where the insured simply negligently forgets to report the accident, there is knowledge, but there is no knowing, purposeful failure to notify the insurer. But where the insured does not think he is involved but knows that claims might be filed against him, and he fails to notify the insurer because of that uncertainty, then there is both actual knowledge of possible liability *and* there is a knowing and purposeful decision not to inform the insurer. That decision is one made without good faith and the insurer is relieved of the responsibilities otherwise imposed by its policy with the insured, even if it was not prejudiced by the delay.

The judgment of the trial court, filed 7 June 1984, reported the following findings of fact:

> Thomas [the driver of the fuel truck] was seriously injured, Pegg [the driver of the automobile] injured, the automobile was destroyed as a result of the collision and ensuing fire as well as the tractor and tanker.
>
> . . . .
>
> At the time and place of the accident in question, a number of employees of the insured, including defendant's job foreman, A. G. Foster, Jr., were present and actually witnessed all or part of the accident while acting in the course and scope of their employment with the insured. . . .

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5. It is interesting to note that the two-pronged test of good faith would permit delay (except for the prejudice inquiry) under the same circumstances that, under pre-*Great American* cases, were held to justify late notice. One court using a strict contract construction approach to notice provisions identified four general situations in which late notice is excusable:

"1. Insured's lack of knowledge of the accident.

"2. Insured's belief that the accident was trivial and no claim would be made.

"3. Insured's belief that he was not covered.

"4. Insured's illness."

Employers Casualty Co. v. Scott Electric Co., 513 S.W. 2d 642 (Tex. Civ. App. 1974). North Carolina courts have likewise recognized some of these circumstances as excusing delay. *See Ball v. Employers Assurance Co.*, 206 N.C. 90, 172 S.E 878 (1934) (insured ignorant that an injury had been caused by the accident); *Mewburn v. Assurance Corporation*, 198 N.C. 156, 150 S.E. 887 (1929) (delay occasioned by shock and depression); *Rhyne v. Insurance Company*, 196 N.C. 717, 147 S.E. 6 (1929) (delay occasioned by insanity). *See also* 13A Couch on Insurance 2d §§ 49:91, :93, :94 (rev. ed. 1982).

. . . .

. . . Officer Cole . . . says that he told Mr. Foster about Mrs. Pegg's version of the manner in which the accident occurred and that her version conflicted with the version of the employees of the defendant. . . . Officer Cole further testified that he didn't remember what, if anything, Mr. Foster said, however, the Court found that Cole did, in fact, discuss the conflicting versions in spite of Mr. Foster's failure to recollect that. . . .

On the night of the accident or the night following the accident, Foster telephoned William Lee Robertson, the insured's general superintendent, at his home in Winston-Salem, North Carolina, and among other things advised Robertson that there had been an accident on the project but assured Robertson that the insured was in no manner involved in the accident and that there was no reason to report the accident to the insurer because Foster was an eyewitness and actually observed that nothing the insured did caused the accident.

On Monday following the accident, Robertson casually mentioned the accident to Mr. Tate, Sr., and Jr., who are the officers of the insured and who are located in Concord, North Carolina. Robertson advised the Tates that he had talked with Foster and highway personnel and that he had been assured that the Tates were not involved and he also assured the Tates that they were not involved.

. . . .

The scene of the accident was photographed by representatives of the local newspaper and by representatives of the local television station. Newspaper reports were published and a television report was made on the evening news, both of which indicated that the accident was caused by construction equipment belonging to the defendant coming onto the highway, causing a truck to swerve and collide head-on with Pegg's Chevrolet. Although the insured's foreman, Foster, was aware of the reports in the news media, blaming the accident on the defendant within 24 to 36 hours after the accident, he did not read the newspaper or see the television

program because he lived in Nebo, North Carolina, and commuted back and forth to work. An attempt was made the following day by the media to correct the erroneous reports.

These findings reveal that employees and agents of the C. G. Tate Construction Company were aware of the serious nature of the accident; that a piece of construction equipment was destroyed because of its proximity to the site of the accident; that eyewitnesses' versions of how the accident occurred and who was to blame conflicted, that some versions indicated that Tate was at fault, and that certain Tate employees were aware of both the blame and the conflict; and that Tate employees discussed the question of the necessity of reporting the accident to Great American but deliberately chose not to do so. These findings reveal actual knowledge on the part of Foster and other Tate employees that others claimed Tate was to blame and that the company might be held responsible. This Court has recognized the general rule that "[a] principal is chargeable with and bound by the knowledge of or notice to his agent, received while the agent is acting as such within the scope of his authority and in reference to which his authority extends." *Roberts v. Memorial Park*, 281 N.C. 48, 60, 187 S.E. 2d 721, 728 (1972). We hold that the foreman of a road crew is invested with the authority to notify his superiors of an on-site accident, as Mr. Foster did Mr. Robertson, and defendant Tate is therefore charged with Foster's knowledge of facts and circumstances indicating potential liability. *See generally* 8 J. Appleman, *Insurance Law and Practice* § 4742 (1981 & Supp. 1983).

With such knowledge—both imputed and actual—Tate authorities made a purposeful decision not to notify the insurer.[6]

6. The judgment of the trial court included the following additional findings of fact, which argue that Tate's failure to notify the insurer was in good faith:

"Robertson also discussed the accident with South Carolina State Highway Engineer D. J. Wilson, who was the resident engineer in charge of the construction project. The conversation took place within three to five days after the accident and Robertson was assured by Wilson that Tate was not involved in the accident. During the week following the accident, Robertson also visited the project and again discussed the matter with Wilson who again reiterated that Tate was not involved in the accident and that 'we had just better be glad that we wasn't involved because it was a pretty bad accident, a man got hurt in the fire and all.'

. . . .

We hold that the trial court's findings are sufficient to support the conclusion of the trial court that Tate's failure to notify the insurer "lacked good faith." Therefore, the insurer was relieved of its duty to honor its obligations under the policy with Tate.

We reverse the decision of the Court of Appeals and remand to the Court of Appeals for further remand to the trial court for entry of judgment not inconsistent with this opinion.

Reversed.

STATE OF NORTH CAROLINA v. WENDELL MASON

No. 279A85

(Filed 18 February 1986)

1. **Rape and Allied Offenses § 4.3— in camera examination—manner of performing sex acts—improper questions**

Questions to a rape and sexual offense victim about the manner in which her assailant performed the act of sexual intercourse were not the proper subject of an *in camera* examination conducted pursuant to N.C.G.S. § 8C-1, Rule 412, and were properly excluded by the trial court. Also, the trial court did not abuse its discretion by precluding repetitive cross-examination of the victim about the extent of penetration and ejaculation by her assailant during the rape.

At the time of the filing of the Complaint, the insured still had no information that it had been involved in the accident, having been assured by all of its eyewitnesses that the accident was solely caused by the speed of the tanker which overran the Chevrolet in the northbound lane of the highway when the Chevrolet stopped to make a left turn. Subsequent to the filing of the Complaint and Answer, the insurer offered evidence by Norma Jean Pegg, the driver of the Chevrolet automobile, Robert Allen Thomas, driver of the tanker, and Vernon E. Roe, which tended to contradict all of the other eyewitnesses."

These points are persuasive, but they do not convince us that the delay was in good faith. They overlook the fact that Tate's foreman was aware that his employer was being blamed for the accident by some, including the investigating officer's official report, and that eyewitness accounts differed. This was sufficient information to have provoked further inquiry, at the very least, by Tate authorities into the circumstances surrounding the accident and the records and news reports that followed it. Willful ignorance does not exemplify good faith.

2. Criminal Law § 33— relevant evidence—exclusion as prejudicial—discretion of trial judge

Whether to exclude relevant evidence under N.C.G.S. § 8C-1, Rule 403, because its probative value is substantially outweighed by possible prejudice, confusion or waste of time is a matter within the sound discretion of the trial judge.

3. Criminal Law §§ 85.2, 169.3— testimony showing defendant was jail inmate—absence of prejudice

An officer's testimony that defendant was in the Lenoir County Jail when he compared a photograph of a shoe print at the scene of a rape with the bottom of the tennis shoes defendant was wearing did not unduly prejudice defendant by portraying him as a prison inmate since such testimony could not have increased the prejudice produced by the testimony of another witness on cross-examination by defendant that he had known defendant while they were in prison together.

4. Criminal Law § 102.8— jury argument—failure of defendant to produce evidence

The prosecutor's jury argument that defendant had failed to produce witnesses and evidence to refute the State's case did not constitute an impermissible comment on defendant's failure to testify.

5. Criminal Law § 102.9— jury argument—dangerousness of defendant—impropriety cured by instruction

The prosecutor's jury argument concerning the dangerousness of defendant which went beyond the evidence and incorporated matters of the prosecutor's personal knowledge and opinion was improper, but the impropriety was cured by the trial judge's act of sustaining defendant's objection and giving a curative instruction.

6. Criminal Law § 102.6— jury argument—expertise and work load of law officers—no gross impropriety

The prosecutor's comments concerning the expertise and work load of the Onslow County law enforcement agencies were not so grossly improper as to require the trial court to intervene *ex mero motu* and did not magnify the prejudice of the prosecutor's improper argument concerning the dangerousness of defendant where defense counsel implied by questions asked the investigating officers on cross-examination that more extensive tests and comparisons should have been performed, and the prosecutor's comments were not an appeal to the jury to "do something about enforcing the law by convicting defendant" but were intended to point out to the jury that the investigating officers were not negligent in their investigation and that it was not practical for them to perform every possible test.

7. Criminal Law § 102.6— jury argument—why witness changed testimony—no gross impropriety

Although the prosecutor improperly argued to the jury facts not in evidence and her opinions as to why a State's witness changed his testimony, the argument was not grossly improper so as to require the trial judge to in-

tervene *ex mero motu* where there was a conflict between the witness's pretrial statements and trial testimony; the prosecutor merely drew the logical inference from the evidence presented that the witness was reluctant to testify because he had served time with defendant; and the prosecutor never stated that the witness changed his testimony out of a fear of defendant but suggested that the witness was afraid to identify defendant because he would be labeled an informer.

8. **Kidnapping § 1; Rape and Allied Offenses § 7— first degree kidnapping—first degree rape—improper to convict of both offenses**

Defendant could not properly be convicted and sentenced for first degree kidnapping as well as for first degree rape and first degree sexual offense where defendant was convicted of first degree kidnapping on the basis that he had sexually assaulted the victim during the kidnapping.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from the judgments entered by *Strickland, J.*, at the 31 December 1984 Criminal Session of ONSLOW County Superior Court.

Defendant was convicted of first degree rape, first degree sexual offense, and first degree kidnapping. He received concurrent sentences of life imprisonment for the rape and sexual offense and a consecutive twelve year sentence for the kidnapping.

The State's evidence tended to show that on 2 May 1984 Rebecca Hemmert, who was employed as a cab driver in Onslow County, picked up a passenger who directed her to go to the Lauradale subdivision. The passenger, a black male, sat in the front seat. When the cab reached the 200 block in Lauradale, the passenger pulled a knife, told Ms. Hemmert that he intended to rob her, and ordered her to stay calm. At that point he took Ms. Hemmert's money and the fares she had collected for operating the cab.

The passenger then directed Ms. Hemmert to drive to a house under construction in the Deerfield subdivision which is across the highway from Lauradale. While holding the knife, he forced Ms. Hemmert into the house and ordered her to disrobe. Ms. Hemmert was then forced to have vaginal intercourse and oral sex with her assailant while he held the knife to her throat. Upon completion of the sexual assaults, he took Ms. Hemmert to the part of the house where her clothes were located and gagged her. When two workmen approached the house, the assailant ceased his preparations to bind Ms. Hemmert and went out to

talk to them. He then ran away. Ms. Hemmert dressed herself and left the area in her cab.

Ms. Hemmert identified defendant as her assailant. A rape kit was prepared and at trial the State's expert, Joseph Taub, testified that he found spermatozoa present on the vaginal smear taken from Ms. Hemmert. It was his opinion that the sperm had probably been deposited in Ms. Hemmert less than twelve hours prior to collection and not more than twenty-four. He also testified that it was possible for sperm to be deposited in the vagina without a full ejaculation taking place. Ms. Hemmert testified at trial that defendant did not ejaculate during the vaginal intercourse.

Lacy H. Thornburg, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, by Gordon Widenhouse, for defendant-appellant.

BRANCH, Chief Justice.

At the conclusion of the State's case defendant requested an *in camera* hearing pursuant to N.C.G.S. § 8C-1, Rule 412. Defendant's purpose in requesting the hearing was to attempt to elicit from Ms. Hemmert evidence which would tend to show that he did not perform the sexual acts to which she testified.

N.C. R. Evid. 412 in pertinent part provides that:

> (a) As used in this rule, the term 'sexual behavior' means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.
>
> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> > (1) Was between the complainant and the defendant; or
> >
> > (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

(d) Notwithstanding any other provision of law, unless and until the court determines that evidence of sexual behavior is relevant under subdivision (b), no reference to this behavior may be made in the presence of the jury and no evidence of this behavior may be introduced at any time during the trial of:

(1) A charge of rape or a lesser included offense of rape;

(2) A charge of a sex offense or a lesser included offense of a sex offense; or

(3) An offense being tried jointly with a charge of rape or a sex offense, or with a lesser included offense of rape or a sex offense.

Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for

the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the proponent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the in camera hearing or at a subsequent in camera hearing scheduled for that purpose, shall accept evidence on the issue of whether that condition of fact is fulfilled and shall determine that issue. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

Pursuant to N.C. R. Evid. 412 the trial judge convened an *in camera* hearing and required defendant's counsel to state what questions he intended to ask. Defense counsel proposed to ask Ms. Hemmert if she had been involved in any sexual activity during the twenty-four hours preceding the assault as well as a number of questions concerning the manner in which the act of rape was performed and her visual observations during the rape. The trial judge ruled that defendant could only ask Ms. Hemmert about sexual activity during the twenty-four hours preceding the assault. When he did so, Ms. Hemmert denied having engaged in any sexual activity during that period of time. When the trial judge asked if defendant had any other questions to offer, his counsel answered that he could think of nothing else to ask.

Defendant assigns as error the trial judge's refusal to allow him during the *in camera* hearing to ask all of the questions he proposed. He argues that his constitutional rights were violated because he was denied the full opportunity to present evidence, cross-examine witnesses, and in general make his offer of proof as provided by N.C. R. Evid. 412. We disagree.

The sixth amendment of the Federal Constitution as applied to the states through the fourteenth amendment guarantees the right of a defendant in a criminal trial to be confronted with the witnesses against him. *Pointer v. Texas*, 380 U.S. 400, 13 L.Ed. 2d 923 (1965). The principal purpose of confrontation is to secure to the defendant the right to test the evidence of the witnesses against him through cross-examination. *Davis v. Alaska*, 415 U.S.

308, 39 L.Ed. 2d 347 (1974). However, the right of cross-examination is not absolute and may be limited in appropriate cases. *State v. Fortney*, 301 N.C. 31, 36, 269 S.E. 2d 110, 113 (1980). Trial judges retain broad discretion to preclude cross-examination that is repetitive or that is intended to merely harass, annoy or humiliate a witness. *State v. Fortney*, 301 N.C. 31, 36, 269 S.E. 2d 110, 113; *Davis v. Alaska*, 415 U.S. 308, 316, 39 L.Ed. 2d 347, 353.

[1] In this case the trial judge acted well within his authority when he refused to allow defendant to question Ms. Hemmert about the manner in which her assailant performed the act of sexual intercourse. These questions did not present inquiry into evidence of sexual activity of Ms. Hemmert other than the sexual acts which were in issue, *i.e.*, the rape and sexual offense, and so were not the proper subject of an *in camera* examination conducted pursuant to N.C. R. Evid. 412. Further, defendant had already cross-examined Ms. Hemmert about the extent of penetration and ejaculation by her assailant during the rape, and the trial judge did not abuse his discretion by precluding repetitive cross-examination on that issue.

Defendant is simply in error when he claims that the trial judge terminated the hearing and denied his request for further examination after Ms. Hemmert testified that she had not engaged in any sexual activity in the twenty-four hours preceding the assault. Following Ms. Hemmert's negative answer the trial judge inquired of defendant's counsel whether he would like to proffer additional questions other than those that had already been ruled out. In declining to proffer further questions defense counsel stated that without having been able to ask any further questions, *i.e.*, those questions that the trial judge had forbidden, he had no idea what else to ask. Since defendant did not proffer additional questions, he cannot show that his constitutional rights were violated. This assignment of error is overruled.

[2] Defendant next assigns as error the State's introduction of testimony that contained references to his incarceration prior to trial. Defendant contends that these references were improper because they portrayed him as a prison inmate and their prejudicial effect outweighed their probative value. Defendant's objections were overruled and his motion for mistrial was denied.

"[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is relevant. N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985). Relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (Cum. Supp. 1985). Unfair prejudice has been defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Commentary to N.C. R. Evid. 403. Whether or not to exclude evidence under Fed. R. Evid. 403 is a matter within the sound discretion of the trial judge. *United States v. MacDonald*, 688 F. 2d 224 (4th Cir. 1982). We believe the *MacDonald* rule is a proper interpretation of Fed. R. Evid. 403 and adopt it for our N.C. R. Evid. 403, which is identical to its federal counterpart.

In other than capital cases a motion for mistrial is addressed to the sound discretion of the trial judge, *State v. Yancey*, 291 N.C. 656, 664, 231 S.E. 2d 637, 642 (1977), and his ruling may be reversed for an abuse of discretion only upon a showing that it "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Thompson*, 314 N.C. 618, 626, 336 S.E. 2d 78, 82 (1985).

[3] During the investigation of the crime, a shoe print made by a tennis shoe was discovered at the scene of the rape and photographed. Officer Steve Smith interviewed defendant in the Lenoir County Jail and following a *voir dire* testified that he compared a photograph of the shoe print with the bottom of the tennis shoes defendant was wearing at the time of the interview. During the interview defendant told Officer Smith that the shoes were not his and that they had been supplied to him by the jail or belonged to a cellmate. Officer Smith made inquiries at the jail and told defendant that the shoes were not supplied to him by the Lenoir County Jail. Defendant then told Officer Smith that the shoes were his. Defendant's objections to this testimony were overruled.

After carefully examining the testimony of Officer Smith, we hold that the trial judge did not err in allowing its admission into evidence.

Defendant's contention that reference to his presence in the Lenoir County Jail by Officer Smith unduly prejudiced him by portraying him as a prison inmate is untenable. Defendant had previously elicited testimony from State's witness Richard Parsons on cross-examination that Parsons had known defendant while they were in prison together. Officer Smith's testimony that defendant was in the Lenoir County Jail, presumably as a result of his arrest for the assaults on Ms. Hemmert, could not possibly have increased the prejudice produced by Mr. Parsons' testimony. Since defendant did not object to the testimony of Mr. Parsons concerning his prior incarceration, his objection and exception to the testimony of Officer Smith that he was in the Lenoir County Jail cannot be sustained. 1 Brandis on North Carolina Evidence § 30 (1982). *Cf. Durham v. Realty Co.*, 270 N.C. 631, 155 S.E. 2d 231 (1967). For the same reason, the trial judge properly denied defendant's motion for mistrial.

We next consider defendant's argument that the prosecutor's closing argument to the jury was improper and constituted prejudicial error. Defendant contends that the trial judge erred in failing to sustain his objection and in refusing to grant his motion for mistrial.

[4] During her argument the prosecutor pointed out to the jury that defendant had not exercised his rights to call witnesses and produce evidence to refute the State's case. Defendant objected, and the trial judge overruled the objection. Defendant argues that these statements by the prosecutor were an improper reference to his exercise of his constitutional right not to testify and that the trial judge committed prejudicial error in overruling his objection and refusing to grant a mistrial.

A prosecutor may not make any reference to or comment on a defendant's failure to testify. *State v. McCall*, 286 N.C. 472, 486, 212 S.E. 2d 132, 141 (1975) (interpreting N.C.G.S. § 8-54); *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106 (1965) (fifth amendment as applied to the states through the fourteenth forbids comment by the prosecution on an accused's silence). However, a "defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument." *State v. Jordan*, 305 N.C. 274, 280, 287 S.E. 2d 827, 831 (1982).

In this case the prosecutor did no more than comment on defendant's failure to produce witnesses and evidence to refute the State's case. Such statements do not constitute an impermissible comment on defendant's failure to take the stand.

[5] Defendant also objects to certain of the prosecutor's arguments that he contends went beyond the scope of the evidence and invited the jurors to act on their fears and frustrations.

In one portion of her argument, the prosecutor stated:

> I can tell you one thing, though. Wendell Mason is a dangerous man. I've been a prosecutor for four years, and three and a half of those years have been in Superior Court, prosecuting major felonies; prosecuting rapes, burglary, armed robberies; murder; all those, and I can tell you one thing, in the four years that I've been in this system as a prosecutor, this man right over there is the most dangerous man I have ever seen. He really is. You can tell he is dangerous. I've never seen so much security in a courtroom in my life.

Defendant objected and the trial judge instructed the jury to disregard the statement made by the prosecutor.

Arguments that a defendant is dangerous are proper when supported by evidence in the record. *State v. Ruof*, 296 N.C. 623, 635, 252 S.E. 2d 720, 728 (1979). This argument goes beyond the evidence because it incorporates matters of the prosecutor's personal knowledge and opinion. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). It was clearly improper, but the impropriety was cured by the trial judge's act of sustaining defendant's objection and giving a curative instruction. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

[6] Defendant contends that the prejudicial effect of the prosecutor's reference to his dangerousness is amplified by her statements concerning the investigation of the crime by local law enforcement agencies. The prosecutor argued that:

> Mr. Raynor is going to bring out there's no fingerprints, and there's no telling what all else he's going to bring out. I'm sure of that, but I can tell you one thing. Onslow County has an excellent law enforcement agency, not only in the Sheriff's

> Department, but in the Police Department, and they do an excellent job, but they can't do everything. I can't do everything, and everytime I go to try a case, I get to trying it and I realize there's something I should have done, but I didn't do; but there's not time to do everything. I'm spread thin; they're spread thin and they have a heavy case load and they do the best they can with all the case load they've got, but they can't devote all their time to one case, and they have done an excellent job on this case. You know, it's like the old saying I've always heard. You can't make a silk purse out of a sow's ear.

Defendant contends that the prosecutor was impermissibly appealing to the emotions of the jurors by imploring them to do their part for law enforcement and convict him. Defendant relies on *State v. Phifer*, 197 N.C. 729, 150 S.E. 353 (1929) (prosecutor improperly asked jury to do something about enforcing the law by convicting defendant), and a number of cases from other jurisdictions. *See also Boatwright v. State*, 452 So. 2d 666 (Fla. 1984) (error to ask jury to send a message that they will not tolerate crime); *Commonwealth v. Cherry*, 474 Pa. 295, 378 A. 2d 800 (1977) (arguments of this type invite jury to act unreasonably); *State v. Agner*, 30 Ohio App. 2d 96, 283 N.E. 2d 443 (1972) (error to tell jury that it has responsibility to stamp out drug traffic).

We first note that defendant did not object to this argument at trial. When counsel fails to object to the jury argument of opposing counsel the trial judge does not err in failing to intervene *ex mero motu* unless the argument was grossly improper. *State v. Miller*, 315 N.C. 773, 340 S.E. 2d 290 (1986); *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983); *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). Here we do not find the prosecutor's arguments to be grossly improper. Further, we do not find that the prosecutor's comments concerning the caliber of the Onslow County law enforcement agencies magnified the prejudice of her argument concerning the dangerousness of defendant.

During cross-examination defendant questioned the investigating officers concerning their methods of investigation and implied that more extensive tests and comparisons should have been

performed. The prosecutor apparently anticipated that defendant would argue to the jury that the investigating officers had not made a sufficiently thorough investigation. Her comments on the expertise and work load of the Onslow County law enforcement agencies were intended to point out to the jury that the investigating officers were not negligent in their investigation and that it was not practical for them to perform every possible test. This argument was not an appeal to the jury to "do something about enforcing the law by convicting defendant" and was not prejudicial under the circumstances. The prosecutor may defend his tactics, as well as those of the investigating authorities, when their propriety is challenged. *State v. Payne*, 312 N.C. 647, 665, 325 S.E. 2d 205, 217 (1985). *See also State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984) (defendant opened the door to prosecutor's defense of his conduct by suggesting there was an "underhanded deal" involving a sentence reduction for the State's witness); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974) (not prejudicial error for prosecutor to answer defense argument that the police had not done all they could to preserve evidence of the crime by stating that the police could not ignore all other matters and concentrate solely on defendant's rape case), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1205 (1976).

[7] Lastly, defendant argues that the prosecutor's lengthy statement regarding the testimony of State's witness Richard Parsons was plain error. Again, since defendant failed to object to this argument the proper standard of review as previously stated is whether the prosecutor's argument was grossly improper.

Detective Simpson testified that prior to trial Mr. Parsons identified defendant from a photographic lineup as the black male he had observed at the scene of the crime. When examined by the State, Mr. Parsons admitted that he had selected a picture of defendant as one closely resembling the man he had seen at the time the crime was committed. However, he stated that he could not identify defendant as the man that he had seen. During cross-examination Mr. Parsons also admitted that he had known defendant while they were in prison together.

In her closing argument, the prosecutor pointed out to the jury the inconsistency of Mr. Parsons' in-court testimony with his pretrial statement. Her explanation for Mr. Parsons' behavior is as follows:

> Now, I'm sure you twelve people thought I was the most foolish person in the world yesterday, and I felt sort of foolish in a way, but I can assure you one thing, I was just as shocked at his testimony as you were. Now, Mr. Simpson testified that he talked to that man on May, the second, and as I recall around May the 23rd, and I talked to him too, and I can assure you I don't know what happened to him, but something happened between the time Mr. Simpson and I talked to him and the time he testified yesterday. He had a change of heart. Of course, I had my suspicions as to what happened and I'm sure you may have, too. As I recall, somehow he volunteered the information on this witness stand that he had a vision that he had, I believe his words were that he and Wendell Mason, the defendant, had served time together in Newport and that he knew Wendell and didn't realize he knew him until he got on the witness stand and then all of a sudden, Richard Parsons didn't know a thing, didn't know anything about anything. Didn't know anything. Well, there's a word that I'm very familiar with that you twelve people I'm sure don't know. It's a word called 'snitch' . . . . [A snitch is] a person that tells on somebody else or a person who testifies against somebody else, and one inmate doesn't testify against another one. They don't tattletale, and I'll tell you why they don't. Because it's a rough life, because by Richard Parsons testifying, his life could be made miserable. He would be a snitch; he'd have to live the rest of his life as a snitch and he'd never make it if he was back in prison. Never. And even if he was out, he wouldn't make it, because everybody knows a snitch and they remember them, and that's why he had a change of heart.

Defendant contends that in these statements the prosecutor improperly expressed her opinion as to Mr. Parsons' honesty and defendant's dangerousness in light of his implied ability to coerce Mr. Parsons into changing his testimony. Defendant argues that the trial judge should have excluded this portion of the prosecutor's argument *ex mero motu.*

"Arguments of counsel are largely in the control and discretion of the trial court." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122 (1984), *cert. denied*, --- U.S. ---, 85 L.Ed. 2d 169 (1985). The trial judge's decision to allow improper argument will

not be reversed unless the impropriety of the remarks is extreme and is clearly calculated to prejudice the jury. *Id.* The parties may argue to the jury the facts and all reasonable inferences to be drawn therefrom. *Id.* at 112, 322 S.E. 2d at 123.

We hold that the prosecutor improperly argued to the jury her opinions as to why Mr. Parsons changed his testimony and facts not in evidence. *State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283. *See State v. Huffstetler,* 312 N.C. 92, 322 S.E. 2d 110. Though erroneous, we hold that the prosecutor's argument was not grossly improper in light of the conflict between Mr. Parsons' pretrial statements and his trial testimony. The prosecutor merely drew the logical inference from the evidence admitted through Mr. Parsons and Detective Simpson that Mr. Parsons was reluctant to testify because he had served time with defendant in prison. Contrary to defendant's argument, the prosecutor was not so much attacking Mr. Parsons' honesty as she was attempting to explain the inconsistencies in his testimony. Likewise, the prosecutor never stated that Mr. Parsons changed his testimony out of a fear of defendant. Rather, she suggested that Parsons was afraid to identify defendant because he would be labeled an informer and subjected to the obloquy and, should he be imprisoned in the future, the danger that name brings.

We hold that viewed separately or together the prosecutorial arguments to which defendant objects are not reversible error and that the trial judge did not abuse his discretion in denying defendant's motion for mistrial.

[8] Lastly, defendant assigns as error his conviction of, and sentencing for, first degree kidnapping as well as for first degree rape and first degree sexual offense. We agree.

Defendant was convicted of first degree kidnapping on the basis that he had sexually assaulted Ms. Hemmert during the kidnapping. For the reasons stated in *State v. Freeland,* 316 N.C. 13, 340 S.E. 2d 35 (1986), defendant may not be separately punished for each offense. Therefore, a new sentencing hearing is required. The trial court may arrest judgment on the first degree kidnapping conviction and resentence for second degree kidnapping, or it may arrest judgment on one of the sexual assault convictions.

New sentencing hearing.

STATE OF NORTH CAROLINA v. JACKIE DARRELL MOORE

No. 285PA85

(Filed 18 February 1986)

1. **Kidnapping § 1.2— confinement or removal for purpose of *terrorizing victim*— evidence sufficient**

The trial judge did not err by submitting a kidnapping charge to the jury on the theory that a purpose for the confinement or removal was to terrorize the victim where the evidence was sufficient to support a finding that defendant intended by his actions to put the victim in a state of intense fright or apprehension so that she would agree to stay with him, and that he removed her to a trailer and confined her there for that purpose. N.C.G.S. § 14-39.

2. **Kidnapping § 1— confinement for holding hostage—must be coercion of third party**

In determining whether the evidence supported a finding that a defendant in a kidnapping case intended to hold his wife as a hostage, evidence of his attempts to coerce her to come back to him was not considered; rather, the determination was whether there was evidence that defendant intended to hold the victim as security for the performance or forbearance of some act by a third person.

3. ***Kidnapping* § 1.2— *confinement* for purpose of holding hostage—evidence sufficient**

The evidence in a kidnapping case was sufficient to support a finding that the defendant confined the victim as security for the prevention of his arrest by law enforcement authorities where there was no evidence that defendant intended to hold the victim as a hostage at the time he first removed her from her employer's parking lot but there was evidence from which the jury could have found that defendant confined the victim for the purpose of negotiating his own release once the situation got out of hand.

4. **Kidnapping § 1.2— confinement or removal for purpose of inflicting serious bodily harm—evidence not sufficient**

The trial court erred in a kidnapping prosecution by instructing the jury that it could consider the infliction of serious bodily harm as a purpose for the defendant's confinement or removal of the victim where the only evidence of actual injury was that the defendant struck the victim with a rifle in order to force her to get into the car and thereafter made no attempt to harm her physically. The assault was the means rather than the purpose of the removal.

5. **Criminal Law § 171— kidnapping—three theories—one not supported by evidence—new trial**

A kidnapping prosecution was remanded for a new trial where three underlying purposes for the kidnapping were submitted to the jury, one of the purposes was not supported by the evidence, and the jury did not indicate which purpose formed the basis for its guilty verdict.

PETITION by the State for discretionary review pursuant to N.C.G.S. § 7A-31 and petition by the defendant for writ of certiorari pursuant to N.C. R. App. P. 21(a)(2) to review the decision of the Court of Appeals, 74 N.C. App. 464, 328 S.E. 2d 864 (1985), which awarded the defendant a new trial on the kidnapping charge. Judgment was entered 12 December 1983 in Superior Court, ALAMANCE County, *Judge Thomas H. Lee* presiding. Heard in the Supreme Court on 18 November 1985.

The defendant was charged in bills of indictment, proper in form, with first degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury. Upon his plea of not guilty, he was convicted by a jury of first degree kidnapping and assault with a deadly weapon inflicting serious injury. He was sentenced to twelve years for the kidnapping and three years for the assault. The Court of Appeals found that the defendant had abandoned his appeal of the conviction of assault with a deadly weapon inflicting serious injury but ordered a new trial on the kidnapping charge.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellee.

BILLINGS, Justice.

Although the defendant contended in the Court of Appeals that the evidence was insufficient to justify submission of the kidnapping charge to the jury on any theory, after the Court of Appeals awarded the defendant a new trial on the ground that there was insufficient evidence to support the charge of kidnapping upon the theory that the defendant confined or removed the victim for the purpose of holding her as a hostage, it declined to consider the sufficiency of the evidence on the other theories, saying: "Having awarded a new trial we need not reach the other issues brought forth by the defendant."

The State appealed the award of the new trial, and the defendant asked us to determine whether the two other theories of kidnapping on which the jury was instructed were supported by

the evidence. We conclude that although there was sufficient evidence to support the verdict upon two theories under the kidnapping statute (that the defendant's purpose was to hold the victim as a hostage and to terrorize her), there was insufficient evidence to support a verdict upon the theory that the defendant confined or removed the victim for the purpose of doing serious bodily harm. Because the jury was instructed on all three theories, we are unable to determine whether the verdict was based upon the theory which was not supported by the evidence. Therefore, we modify and affirm the decision of the Court of Appeals to grant the defendant a new trial.

The evidence offered at trial tended to show the following facts:

The defendant, Jackie Darrell Moore, and the victim, Priscilla Moore, were married in 1973. Three children were born of the marriage. In September 1983 the parties separated, and the victim and the two daughters moved into her parents' home. The couple's three-year-old son, Josh, stayed with the defendant. On 3 October 1983 at approximately 5:10 p.m. as the victim was leaving her place of employment, she saw the defendant sitting in his car in her employer's parking lot. Josh was also in the car and called out to his mother. The victim approached the car, lifted Josh out through the window, and started to leave with him, saying to the defendant that he could pick Josh up later at her mother's house. The defendant ordered her to put the child back into the car and to get into the front seat. The victim placed the child back into the car but refused to get into the vehicle. The defendant then picked up a rifle, pointed it at the victim and again ordered her into the car. The victim refused and ducked beside the car. The defendant then exited the vehicle and attempted to push the victim into the car. When she continued to resist, the defendant struck her in the head with the butt of the rifle. The victim then got into the car. As the defendant was getting back into the car, the victim attempted to flee, but the defendant caught her, struck her with the rifle again and returned her to the car. These blows opened a wound in the victim's head which required nine stitches to close.

The defendant then drove the victim to a trailer which was their former marital home. As they were driving, the victim told

her husband he was going to have to take her to a hospital to get her head sewn up. He refused but said that he would take care of her when he got her home. When they pulled into the driveway at the trailer, the defendant told the victim that he would shoot her if she tried to run. They went inside and he washed off her head and made an ice pack for her. The victim convinced the defendant to let her call her parents; she told her father she needed medical treatment. Her father said help was on the way.

During the period the couple and their son were in the trailer, a little less than three hours, the defendant received several phone calls. The victim testified about the defendant's side of a telephone conversation in which the defendant said he did not want to go to jail and that he was not coming out unless they promised him he would not go to jail. The victim testified that at one point the defendant was talking on the phone with his brother and said that the victim was trying to take away his kids and that he would kill her first before she did that. The defendant held a gun almost constantly when the parties were inside the trailer and threatened to kill himself several times. At one point, he asked the victim to pull the trigger to kill him. The victim testified that she was convinced the defendant would have shot her had she tried to leave the trailer.

An ambulance arrived and two men came to the door, but the defendant did not let them in. Shortly thereafter the defendant's brother arrived and talked to the defendant, who refused to let anyone in and refused to let anyone leave the trailer. Finally, the defendant agreed to let one emergency medical technician in. The person who went in was a police officer dressed as an ambulance service member. After frisking him for weapons, the defendant let the officer remain inside long enough to dress the victim's wound. The defendant kept a rifle pointed at the officer or at the victim while the officer was inside the house. He complained of pain in his chest but did not want to go to the hospital and would not let the officer take Josh or the victim out of the trailer.

Eventually, after the victim assured the defendant that she would stay with him and stand by him while he got help, he agreed to leave the trailer. The defendant, the victim and Josh came out of the trailer at 8:14 p.m., and the defendant was taken into custody.

The defendant testified in his own behalf. He stated that he and his wife had separated on a previous occasion, and that when she left him the second time he begged her to change her mind. He admitted going to her place of employment on 3 October 1983, but stated that his intention was only to talk to her and convince her to come back and live with him. When she began to run away, he struck her with the gun. He helped her into the car and drove to the trailer because he was scared.

Kidnapping is defined by statute 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, restraining [sic] 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.G.S. § 14-39 (1981 and Cum. Supp. 1985).

Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute. The indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment. *State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *rehearing denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983). Although the indictment may allege more than one purpose for the kidnapping, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping. *State v. Sellars*, 52 N.C. App. 380, 278 S.E. 2d 907, *appeal dismissed and cert. denied*, 304 N.C. 200, 285 S.E. 2d 108 (1981). The indictment in the present case alleged the following:

> 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 Priscilla Moore, a person who had attained the age of 16 years, by unlawfully confining her and by removing her from one place to another, without her consent, and for the purpose of holding her as a hostage, doing serious bodily injury to her and terrorizing her. Priscilla Moore was seriously injured.

The trial judge submitted to the jury all three purposes alleged in the indictment. The charge to the jury contained the following:

> Third, the State must prove beyond a reasonable doubt that the defendant, Jackie Darrell Moore, did this, that is, that he unlawfully confined Priscilla Moore or unlawfully removed her from one place to another for one or more of the following purposes: For the purpose of holding Priscilla Moore as a hostage. To hold a person as a hostage means to hold her as security for the performance or the forbearance of some act by some third person. The State contends, and the defendant denies, that the defendant held Priscilla Moore as security for the purpose of preventing or delaying law enforcement officers to make a lawful arrest of the defendant. The second purpose that you may consider is for the purpose

of terrorizing Priscilla Moore. Terrorizing means more that just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension. And the third purpose that you may consider is for the purpose of doing serious bodily injury to Priscilla Moore. Serious bodily injury is defined in the law as such physical injury as causes great pain or suffering. If you rely on this purpose to satisfy the third element, you must also be satisfied beyond a reasonable doubt that the unlawful confinement in the automobile or trailer or the unlawful removal from the parking lot to the trailer was a separate complete act independent of and apart from the infliction of the serious bodily injury.

So the third element, members of the jury, to summarize, requires that the State prove beyond a reasonable doubt that the unlawful confinement or removal of Priscilla Moore by the defendant was for one of those—one or more of those three purposes, for the purpose of holding her as a hostage as that has been defined for you or for the purpose of terrorizing Priscilla Moore or for the purpose of doing serious bodily injury to Priscilla Moore, and in which case if you rely on that purpose you must also be satisfied beyond a reasonable doubt that the unlawful confinement in the automobile or trailer or the unlawful removal from the parking lot to the trailer was a separate and complete act independent of and apart from the infliction of serious bodily injury upon Priscilla Moore.

All that is required, members of the jury, for the State to satisfy the third element is that the defendant's purpose was to hold Priscilla Moore as a hostage or terrorize her or inflict upon her serious bodily injury. You need not find, to satisfy the third element beyond a reasonable doubt, that any of those three purposes were actually accomplished.

The jury returned a verdict finding the defendant guilty of first degree kidnapping, but it did not specify which purpose or purposes contained in the indictment formed the basis for its verdict.

[1] The defendant contends that the trial judge erred in allowing the jury to consider kidnapping on the theory that the defendant

confined or removed the victim for the purpose of terrorizing her. In determining the sufficiency of the evidence to support the jury's verdict on that question, the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize her.

The trial judge correctly defined terrorizing as "more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *See State v. Jones*, 36 N.C. App. 447, 244 S.E. 2d 709 (1978).

In the instant case, the evidence showed that the defendant had already beaten the victim with his rifle, bruising her shoulder and opening up a gash in her head that required nine stitches to close. When they pulled into the driveway at the trailer, the defendant threatened to shoot the victim if she tried to run. During a telephone conversation with his brother during the hours in the trailer, the defendant said that he would kill the victim before letting her take his children away from him. The defendant kept a gun with him constantly when they were in the trailer. At times he pointed the gun at the victim or at the police officer who was treating the victim's wound, and at times he pointed it at himself. Several times he threatened suicide, and at one point he begged the victim to pull the trigger to kill him.

Although we have found no cases in which threatening to commit suicide has alone been held to constitute terrorizing, the threat of suicide was a component in a Minnesota case in which the defendant was convicted of terroristic threats after making phone calls to his former wife's sister threatening to kill the former wife, the wife's fiance, and himself if his former wife and her fiance got married. *State v. Fischer*, 354 N.W. 2d 29 (Minn. Ct. App. 1984). Here, the defendant did not merely threaten to commit suicide; he held the victim at gunpoint for almost three hours after inflicting a serious head injury upon her, during which time he threatened to shoot himself in her presence and in the presence of their three-year-old son, and he tried to get her to shoot him. The victim testified, "I was very scared. I was horrified. I just knew he was going to shoot—shoot me and then shoot himself." In addition, he made threats against her life if she tried to take the children away from him. Considered in the light

most favorable to the State, the evidence would support a finding that the defendant intended by these actions and threats to put the victim in a state of intense fright or apprehension so that she would agree to stay with him, and that he removed her to the trailer and confined her there for that purpose. The defendant's assignment of error to the trial judge's submission of the kidnapping charge to the jury on the theory that a purpose for the confinement or removal was to terrorize the victim is without merit.

[2] Next, we consider the defendant's contention, with which the Court of Appeals agreed, that the evidence did not support a finding that the defendant intended to hold the victim as a hostage.

The trial judge instructed the jury that to "hold a person as a hostage means to hold her as security for the performance or the forbearance of some act by some third person. The State contends, and the defendant denies, that the defendant held Priscilla Moore as security for the purpose of preventing or delaying law enforcement officers to make a lawful arrest of the defendant." The definition of hostage which the trial judge gave requires that the victim be held to coerce forbearance or performance by a third party, not by the person held. This is the language used in the North Carolina pattern jury instruction on kidnapping (*see* N.C.P.I.—Crim. 210.20), and neither party assigns error to the definition given. Although this court has not had occasion to discuss the definition of hostage, the Court of Appeals adopted the above definition in *State v. Lee*, 33 N.C. App. 162, 234 S.E. 2d 482 (1977), relying on *State v. Crump*, 82 N.M. 487, 484 P. 2d 329 (1971). In *Crump*, the New Mexico Supreme Court said that a definition of hostage that allowed consideration of demands made directly on the victim was too broad. *Id.* at 492, 484 P. 2d at 334.

We agree with the definition of hostage adopted by the Court of Appeals in *Lee* and applied by the trial judge in this case. Therefore, in determining whether the evidence in the instant case supports a finding that the defendant intended to hold his wife as a hostage, we do not consider evidence of his attempts to coerce her to come back to him. Rather, we must determine whether there is evidence that he intended to hold the victim as security for the performance or the forbearance of some act by a third person.

[3] After quoting N.C.G.S. § 14-39, the kidnapping statute, the Court of Appeals' opinion says: "In order to be guilty of kidnapping the defendant must have formed the intent to do one of these eight purposes at the time he confined, restrained or removed the victim. *See State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984)." 74 N.C. App. at 467, 328 S.E. 2d at 866. Then, in finding that the evidence did not support a finding that the defendant's purpose was to hold the victim as a hostage, the court further said: "Our examination of the record reveals no evidence to support a finding that *at the time the defendant originally confined, restrained and removed the victim* he did so for the purpose of holding her as a hostage within the meaning of the North Carolina law." *Id.* at 469, 328 S.E. 2d at 867 (emphasis added).

We believe the Court of Appeals incorrectly applied this Court's recent case of *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984), and therefore incorrectly concluded that the evidence in the instant case was insufficient to support a finding that the defendant confined the victim for the purpose of holding her as a hostage.

In *Alston*, the defendant was charged in an indictment which alleged that the defendant removed the victim for the purpose of facilitating the commission of the felony of second degree rape. This Court said that under that indictment "the State was, therefore, required to introduce substantial evidence tending to show that the defendant had the intent to rape Brown *at the time he removed her*." *Id.* at 405, 312 S.E. 2d at 474 (emphasis added). The Court then found that the evidence was insufficient to support conviction because there was no evidence that at the time the defendant, by force and intimidation, removed the victim from one place to another, he had an intention to rape her. In fact, the positive evidence from the victim showed that the defendant's desire to engage in sexual relations arose after the removal, and there was no substantial evidence of forcible confinement, restraint or removal thereafter for the purpose of committing rape. Clearly, a different case would have been presented if, although not having formed an intent to commit rape at the time of the initial removal, the defendant had *further removed* the victim after forming an intent to rape her, or had restrained or confined her beyond the restraint inherent in the crime of rape (*see State v.*

Fulcher, 294 N.C. 503, 243 S.E. 2d 338 (1978)) for the purpose of facilitating the commission of the rape.

In the instant case, there is no evidence that at the time the defendant first removed the victim from the employer's parking lot he intended to hold her as a hostage. The positive evidence was that at that time his purpose was to convince her to return to him. However, there is evidence from which the jury could have found that once the situation got out of hand for the defendant, he confined the victim for the purpose of negotiating his own release.

After testifying that the defendant would not take her to the hospital for treatment of her head injury, the victim said that the defendant allowed her to call her father who told her that help (apparently meaning medical help) was on the way. She was then asked: "Did the defendant say anything about help being on the way? Did he make any statement regarding . . . ." Her answer was: "He was—he was scared that they were coming after him for what he had done." Thereafter, the defendant prevented the victim and Josh from leaving the trailer and refused to let anyone except the one police officer dressed as an ambulance service member enter the trailer. He talked with other people, including his brother, by telephone, and "He would just tell them that he wasn't going to do anything unless they could promise him that he wouldn't go to jail . . . ." Thus, the evidence was sufficient to support a finding that the defendant confined the victim as security for prevention of his arrest by law enforcement authorities and to extract from them a promise that he would not go to jail, which constitutes holding as a hostage within the meaning of the kidnapping statute. This assignment of error is overruled.

[4] Finally, we examine the defendant's contention that there is insufficient evidence to support a verdict based upon a theory that his acts were for the purpose of doing serious bodily harm to the victim. The only evidence of actual infliction of injury was that the defendant struck the victim with a rifle in order to force her to get into the car. He did not force her into the car or confine her in order to assault her with the rifle. Thereafter he made no attempt to harm her physically and in fact permitted someone to enter the trailer to render medical aid. Although he told her that he would shoot her if she tried to run and told someone on

the telephone that he would kill his wife if she tried to take the children, none of this evidence establishes that a purpose for the removal or confinement was to inflict injury. Because there was no evidence of intent to do bodily harm other than the harm that actually was inflicted when the defendant struck the victim with the rifle, and that assault was the *means* rather than the *purpose* of the removal, it was error for the trial judge to instruct the jury that it could consider the infliction of serious bodily harm as a purpose for the defendant's confinement or removal of the victim.

[5] It is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence. *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977). The jury did not indicate which of the three purposes that it was allowed to consider formed the basis for its verdict. Although two of the purposes which the jury was allowed to consider were supported by the evidence, we cannot say that the verdict was not based upon the purpose erroneously submitted. Therefore, we remand the case to the Court of Appeals for further remand to the Superior Court of Alamance County for a new trial on the charge of first degree kidnapping.

Modified and affirmed.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS RIDDICK

No. 113A85

(Filed 18 February 1986)

1. Criminal Law § 87.1— children as witnesses—leading questions proper

The trial court in a murder and arson case did not err in allowing the prosecutor to ask leading questions of an 11-year-old and a 15-year-old who were in the house when it was burned where the witnesses had trouble in understanding certain questions asked of them. N.C.G.S. 8C-1, Rule 611(a) and (c).

2. Criminal Law § 33.2— admissibility of defendant's statements—personal knowledge of witness

In a prosecution for murder, arson and assault there was no merit to defendant's contention that a witness who was in the house at the time of the

fire could not properly testify as to statements allegedly made by defendant, since the witness's testimony that she in fact heard defendant make the statements in question *ipso facto* amounted to testimony that she had the ability to hear him make those statements; no more was required to establish her personal knowledge of the matter pursuant to N.C.G.S. 8C-1, Rule 602; and the witness's testimony also established that she was near defendant when she heard him make the statements.

3. **Arson § 3— kerosene odor in house—questions assuming facts not in evidence—no prejudice**

Even if the trial court in an arson case erred in allowing two witnesses to answer questions as to what they could smell while in the house because the questions assumed facts not yet in evidence, such error was not prejudicial since the record was replete with evidence that kerosene was in the house at all times in question and had been used by defendant to start a fire in a wood heater so that there would have been nothing remarkable about an odor of kerosene in the house.

4. **Arson § 3— arson victim—evidence of defendant's physical mistreatment—admissibility to show motive**

In a prosecution of defendant for arson of a house he shared with a woman and her four children, evidence that defendant physically mistreated the woman when she returned home after spending time elsewhere was admissible as it tended to show the defendant's motives and state of mind at the time the crimes occurred, though motive was not an element of the crimes for which defendant was on trial, since motives and state of mind at the time of the fire certainly were facts of consequence to the determination of the action. N.C.G.S. 8C-1, Rule 401.

5. **Criminal Law § 51— qualification of expert—necessity for specific objection**

Defendant could not complain that testimony of an eleven-year veteran of the city fire department opining that a flammable liquid was burning on the living room floor and "trailing" towards the kitchen was inadmissible because the fireman was never qualified as an expert witness, since defendant merely made a general objection to the testimony and did not object specifically to the witness's qualifications as an expert.

6. **Assault and Battery § 5.2— burning of occupied house—fire as deadly weapon**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, evidence tending to show that the victim of the assault was five years old and asleep at the time defendant set fire to the house was sufficient to justify the trial court in permitting the jury to find that the fire in the present case was used as a deadly weapon.

7. **Arson § 4.1; Assault and Battery § 14.1; Homicide § 21.5— arson—first degree murder—assault with deadly weapon—sufficiency of evidence**

In a prosecution for first degree murder, first degree arson, and assault with a deadly weapon inflicting serious injury, evidence was sufficient to be submitted to the jury where it tended to show that defendant lived in a house with a woman and her four children; defendant thought the woman had been

staying with other men at times when she absented herself from him; he had beaten her on more than one occasion for this reason, most recently a day or two before the fire; he had also treated her children in a "mean" fashion; on the night of the fire defendant bought kerosene in a five-gallon can and took it home with him; excluding defendant, all the occupants of the home went to sleep; sometime thereafter, the occupants who survived were awakened by a large fire which was burning in the living room and "trailing backwards" to the kitchen; defendant was the only person awake in the house at the time the fire broke out; expert testimony tended to show that the "pour pattern" established that from 2½ to 5 gallons of flammable liquid had burned on the living room and kitchen floors; defendant was the only person in the house to use a flammable liquid on the night of the fire; and defendant was smiling when he stated a short time after the fire, "That was a lot of money riding on this fire," and "I messed up."

APPEAL by the defendant from judgments entered on 4 October 1984 by *Small, J.*, in Superior Court, PASQUOTANK County.

The defendant was convicted upon proper indictments for first degree murder, first degree arson, and assault with a deadly weapon inflicting serious injury. He was sentenced to separate terms of life imprisonment for murder and arson and to imprisonment for ten years for the assault. All three prison terms were ordered to run consecutively.

The defendant appealed the murder and arson convictions and resulting life sentences to the Supreme Court as a matter of right. His motion to bypass the Court of Appeals on his appeal of the assault conviction was allowed by the Supreme Court on 15 March 1985. Heard in the Supreme Court 17 October 1985.

Lacy H. Thornburg, Attorney General, by Reginald L. Watkins, Special Deputy Attorney General, for the State.

William T. Davis for the defendant-appellant.

MITCHELL, Justice.

By his assignments, the defendant contends that the trial court made several errors. He contends the trial court erred by allowing witnesses to respond to leading questions, to questions for which a proper foundation had not been laid, and to a question that assumed facts not yet in evidence. The defendant also contends the trial court erred by admitting irrelevant testimony and by allowing a witness not qualified as an expert to give opinion

testimony. Finally, he contends that the trial court erred by denying his motions to dismiss the charges against him. We find no error.

The State's evidence tended to show that on the night of 12 January 1984, the Elizabeth City Fire Department responded to an alarm for a fire at 208 Oak Grove Avenue. The house which burned was the dwelling place of Ruth Cowell and her four children: Don Earl Davis, Michele Cowell, Latoyia Cowell and Lateyia Cowell. The defendant, William Thomas Riddick, was living with them at the time of the fire. Lateyia Cowell was killed as a result of the fire, and Latoyia and Don were burned.

Around 10:00 p.m. on 12 January 1984, Marie Brooks looked out of her window and across the street and saw smoke coming from 208 Oak Grove. She told her daughter to call the fire department. Her daughter called the fire department and reported the fire. By that time Ruth Cowell's house at 208 Oak Grove was "in blazes."

Michele Cowell, eleven years old, testified that she lived at 208 Oak Grove with her mother Ruth Cowell, the defendant William Riddick, and her three siblings. Approximately four days before the fire, Vernon Brooks, Ruth's friend and Lateyia's father, picked up Ruth and the children. They stayed at various places and went to Godley Temple's house on the day of the fire. Ruth sent Michele to the defendant's shop to ask him to send her food stamps and a television. The defendant told Michele that Ruth would have to come and get them. The defendant later came to Godley Temple's house. Upon his assurances that he would not beat Ruth anymore, Ruth told her daughters to get into the defendant's car. The defendant took the girls to his shop where they were later joined by Ruth and Don.

At nightfall Ruth and her four children left the shop and went to 208 Oak Grove with the defendant. It was cold in the house, so the defendant lit a fire in the wood heater located in the living room by putting wood, paper, and kerosene in the heater. He got the kerosene from a can located on the back porch and returned the can to the porch. Michele testified that this was the first time that she had seen the defendant put kerosene in the wood heater. No other heater was lit in the house that night.

Michele got a quilt, and she and Lateyia covered up on a chair located about one foot from the heater and fell asleep. Ruth and Latoyia went to sleep on a couch in the bedroom. The defendant was in the kitchen.

Michele testified that she was awakened when she felt something warm on her back. She turned and saw fire in the kitchen and going into the dining room. The room she was in was also on fire with fire coming from the wood heater and spreading. Michele smelled a strong odor of kerosene. She felt for Lateyia but could not find her. She moved a table that was in her way and went out the front door. She then heard Lateyia and Latoyia crying in the house.

Michele went to the house of a neighbor, Mr. Lamb, and then to the house of Miss Spellman, another neighbor. While at Miss Spellman's she heard the defendant say: "Umm that house caught on fire like that." He also said: "That was a lot of money riding on this fire." and "I messed up." *The defendant was smiling* when he came to Miss Spellman's from the fire.

Michele testified that the defendant treated Lateyia "kind of mean." He forced a hotdog down her throat once because she ate slowly. He would make her stand on one leg on a chair if she did something wrong, and if she put the other leg down he "would beat her." Michele also testified that she had seen the defendant throw Lateyia down and "[t]ake her by the back of the neck and pick her up."

Ruth Davis Cowell testified that she and her children left the house at 208 Oak Grove for four days because she and the defendant had been arguing. While they were running errands before returning home on the night of the fire, the defendant purchased kerosene which he put in a five gallon can and placed in the back of the truck. After the defendant started the fire in the wood heater, he carried a kerosene heater into the bedroom. Ruth then fell asleep. She was awakened by the defendant who pulled her and said: "Get out. The house is on fire." He pulled her from the house. Then he ran around the house calling Don and breaking out windows. When Ruth was awakened she detected a strong odor of kerosene.

Ruth testified that she had a $5,000 life insurance policy on each of her four children. She is the beneficiary of each policy and

received payment under the policy on Lateyia. She had attempted to make the defendant a beneficiary but was unsuccessful because he was not a relative.

Ruth's son Don testified that when he came home the night of the fire, he went to the kitchen and warmed food for everyone. He ate some cake, and went to the back bedroom where he fell asleep. Next, he heard the defendant calling him, so he went to the back door but could not get it open. When Don first came out of the bedroom he "smelled something like gas . . . ." The house was full of smoke and fire. He finally got the back door open and escaped. His ears and nose were burned. Don also testified that this was the first time he had seen the defendant use kerosene to light the wood heater. He corroborated Michele's accounts of the defendant's treatment of Lateyia.

Louise A. Spellman lived next door to 208 Oak Grove Avenue. The defendant came to her house the day following the fire. Her testimony concerning the conversation she had with the defendant on that occasion included the following:

> Q. And did you—what, if anything, did he—did he say about money?
>
> . . . .
>
> A. Well, we were talking about the children and he said to me "There is a lot of money riding on those children." So I said, "How do you know?" He said "I ought to know. I helped pay it sometime."
>
> Q. Pay what?
>
> A. The insurance.

She also testified that the defendant brought up the subject of insurance on the children's lives, and that she had never mentioned the subject to him because it was none of her business.

James Michael Meads testified he was one of the firemen who responded to the alarm for the fire at 208 Oak Grove Avenue. He entered the flaming house and rescued Latoyia. He also found Lateyia dead in the living room and described her as "[a] mass of burnt tissue."

Lieutenant James Stanley, an eleven-year veteran with the fire department, also responded to the alarm. He stated that: "[In] my opinion, a flammable liquid was used or was burning at this residence." Specifically, he testified that in his opinion a flammable liquid was burning "[i]n the living room trailing backwards to the kitchen."

Cecil Richardson, Jr. and Floyd Douglas Allen were found by the trial court to be experts on the origin and causes of the fire. Both witnesses corroborated Stanley's testimony regarding the presence of a flammable liquid. Allen testified that in his opinion two and one-half to five gallons of a flammable liquid were poured onto the floor at the time of the fire. Richardson examined the kerosene heater located in the bedroom shared by Ruth Cowell and the defendant. He testified that it showed no signs of having been used and contained no fuel. Allen testified that the kerosene heater in the bedroom was not associated with the fire's origin.

The defendant testified in his own behalf and offered several character witnesses. He testified that on the night of the fire he refueled the kerosene heater in the bedroom and the woodburning heater in the living room and started fires in both. He then went to get some water. When he returned and opened the bedroom door, fire rushed out at him. The defendant testified that he did not pour kerosene on the floor nor did he set fire to the house or have any intention to harm the children or Ruth. He said that he considered Ruth and her children his family and would not hurt them.

[1] By his first assignment of error, the defendant contends that the trial court committed prejudicial error by allowing Michele Cowell and Don Davis to respond to leading questions asked by the prosecutor. "A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no." *State v. Britt*, 291 N.C. 528, 539, 231 S.E. 2d 644, 652 (1977). The general rule is that leading questions should be asked only on cross-examination. N.C.G.S. § 8C-1, Rule 611(c) (Cum. Supp. 1985). However, a trial judge must "exercise reasonable control over the mode . . . of interrogating witnesses . . . ." N.C.G.S. § 8C-1, Rule 611(a) (Cum. Supp. 1985). Leading questions should be permitted on direct examination when necessary to develop the witness's testimony. N.C.G.S. § 8C-1, Rule 611(c)

(Cum. Supp. 1985). Among other things, this means that it is within the discretionary power of the trial judge to allow leading questions on direct examination. Counsel may be allowed to lead a witness on direct examination when the witness has difficulty in understanding the question because of immaturity or advanced age. *See State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 236 (1974). Rulings by the trial judge on the use of leading questions are discretionary and reversible only for an abuse of discretion. *See State v. Smith*, 290 N.C. 148, 160, 226 S.E. 2d 10, 18, *cert. denied*, 429 U.S. 932, 50 L.Ed. 2d 301 (1976).

We assume *arguendo* that all of the questions directed to these two witnesses and assigned as error were leading. Michele Cowell was eleven years old and Don Davis was fifteen years old at the time of trial. Both had trouble in understanding certain questions asked of them. A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985); *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985). We find no such abuse of discretion by the trial court in allowing the questions to be asked and answered.

[2] By his next assignment the defendant contends that the trial court erred by overruling his objection to a question asked Michele Cowell regarding statements allegedly made by the defendant. Michele's testimony was that she heard the defendant say: "That was a lot of money riding on this fire." and "I messed up." The defendant argues that the prosecutor did not establish a proper foundation for the question because he did not show the proximity of the witness to the defendant and, thus, there was no evidence that the witness could hear the defendant.

The North Carolina Rules of Evidence state that: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." N.C.G.S. § 8C-1, Rule 602 (Cum. Supp. 1985). Michele's testimony that she in fact heard the defendant make the statements in question *ipso facto* amounted to testimony that she had the ability to hear him make those statements. No more was required to establish her personal

knowledge under Rule 602, but the defendant was, of course, free to cross-examine her as to such matters. In the present case, however, Michele's testimony also established that she was near the defendant when she heard him make the statements. The testimony of Michele was sufficient to show her ability to perceive and hear the defendant's statements and thus, to support a finding that she had personal knowledge of the matters in question. This assignment of error is meritless.

[3] By his next assignment of error the defendant contends that the trial court erred by overruling his objections to questions asked of Michele Cowell and Don Davis as to what they could smell while in the house. The defendant argues that these questions assumed facts not yet in evidence because they assumed there was something present to be smelled, i.e., a flammable liquid.

Assuming *arguendo* that the trial court erred by overruling the defendant's objections to such questions, we perceive no resulting prejudice to the defendant. The record is replete with evidence that kerosene was in the home at all times in question and had been used by the defendant to start the fire in the wood heater. Therefore, there would have been nothing remarkable about an odor of kerosene in the house. For these reasons there was no reasonable possibility that a different result would have been reached at trial had the errors in question not been committed. The defendant has shown no prejudice resulting from such errors. *See* N.C.G.S. § 15A-1443 (1983).

[4] The defendant next assigns as error the admission of testimony tending to show that he physically mistreated Ruth Cowell when she returned home after spending time elsewhere. This assignment is without merit. The North Carolina Rules of Evidence provide that: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985). Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (Cum. Supp. 1985). We conclude that the evidence complained of was admissible as it tended to show the defendant's motives and state of mind at the time the crimes occurred. N.C.G.S. § 8C-1, Rule 404(b) (Cum. Supp. 1985).

Although motive is not an element of any of the crimes for which the defendant stands convicted, his motives and state of mind at the time of the fire certainly were facts "of consequence to the determination of the action. . . ." N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985). The trial court did not err by admitting such evidence.

[5] The defendant also assigns as error the trial court's ruling allowing Lieutenant James Stanley, an eleven-year veteran of the Elizabeth City Fire Department, to opine that a flammable liquid was burning on the living room floor and "trailing" towards the kitchen. The defendant argues that Stanley was never qualified as an expert witness, and that opinions such as the one given here may not be introduced through lay witnesses.

Justice Copeland, writing for this Court in *State v. Hunt,* 305 N.C. 238, 243, 287 S.E. 2d 818, 821 (1982), said:

> An objection to a witness's qualifications as an expert in a given field or upon a particular subject is waived if it is not made in apt time upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent review.

The defendant merely made a general objection to the testimony which is the subject of this assignment. Therefore, any objection to the witness testifying as an expert was waived, and the assignment is overruled.

The defendant's contention that Stanley's testimony invaded the province of the jury because his opinion embraced an ultimate issue of fact is also without merit. That Stanley's opinion testimony as an expert embraced an ultimate issue to be decided by the trier of fact did not make it objectionable. N.C.G.S. § 8C-1, Rule 704 (Cum. Supp. 1985).

By his next assignment the defendant contends that the trial court erred by denying his motion to dismiss all charges at the close of all of the evidence. The defendant argues that the evidence was insufficient to permit the submission to the jury of the charges against him. This assignment is without merit.

At the close of the State's evidence and at the close of all evidence, the defendant moved to dismiss the charges against him

for first degree murder, first degree arson and felonious assault with a deadly weapon—fire—with intent to kill and inflicting serious injuries. When a defendant moves under N.C.G.S. § 15A-1227(a)(2) for dismissal at the close of all the evidence, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E. 2d 649, 651-52 (1982). The trial court is to view all of the evidence in the light most favorable to the State and give it all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). "The trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." *Id.* at 101, 261 S.E. 2d 118. The trial court must determine as a matter of law whether the State has offered "substantial evidence of all elements of the offense charged so any rational trier of fact *could find* beyond a reasonable doubt that the defendant committed the offense." *State v. Thompson*, 306 N.C. 526, 532, 294 S.E. 2d 314, 318 (1982) (emphasis added).

[6] The defendant was charged among other things with assault with a deadly weapon with the intent to kill inflicting serious injury. He was convicted of the lesser included offense of assault with a deadly weapon inflicting serious injury. The defendant contends that the trial court erred in submitting either the original charge or the lesser included offense to the jury. Citing *State v. Palmer*, 293 N.C. 633, 239 S.E. 2d 406 (1967), he argues that a "deadly weapon" is an "instrument" which is likely to produce death or great bodily harm under the circumstances of its use. The defendant argues that fire is not an "instrument" and, therefore, cannot in and of itself ever be a deadly weapon within the meaning of the law. We do not agree.

Justice Parker, later Chief Justice, writing for this Court in *State v. Cauley*, 244 N.C. 701, 707, 94 S.E. 2d 915, 920 (1956) stated:

> A deadly weapon is not one that must kill. It is an instrument which is likely to produce death or great bodily harm, under the circumstances of its use. Some weapons are *per se*

> deadly, *e.g.*, a rifle or pistol: others, owing to the great and furious violence and manner of use, become deadly. 'The deadly character of the weapon depends sometimes more upon the manner of its use and the condition of the person assaulted than upon the intrinsic character of the weapon itself.' Where the deadly character of the weapon is to be determined by the facts and circumstances, the relative size and condition of the parties and the manner in which it is used, it becomes a question for the jury under proper instructions from the court.

(Citations omitted.)

It is unnecessary for this Court to decide in the context of this case whether fire is a deadly weapon *per se*. *Cauley* clearly suggests that, at the very least, fire can be a deadly weapon according to its manner of use. *See State v. Price*, 265 N.C. 703, 144 S.E. 2d 865 (1965). In the present case, the State's evidence tended to show that the victim of the assault, Lateyia Cowell, was five years old and asleep at the time the defendant set fire to the house. This evidence was sufficient to justify the trial court in permitting the jury to find that the fire in the present case was used as a deadly weapon. The defendant's argument to the contrary is without merit.

[7] The defendant next argues that there was no eyewitness testimony tending to show that he set the fire in the home or did any other criminal act. He also points out that he made no specific admission of wrongdoing to anyone and that there has been no showing that he in fact gained financially due to the fire and resulting death and injuries. The defendant therefore contends that all of the charges against him should have been dismissed. We do not agree.

When considered in the light most favorable to the State, as it must be for purposes of considering the defendant's motion to dismiss, the evidence tends to show that the defendant thought that Ruth Cowell had been staying with other men at times when she absented herself from him. He had beaten her on more than one occasion—most recently a day or two before the fire—for this reason. He had also treated her children by other men in a "mean" fashion. For example, he once forced a hot dog down five-year-old Lateyia's throat because she ate slowly. He often made

her stand on one leg on a chair and beat her if she put the other leg down.

On the night of the fire in question, the defendant bought kerosene in a five gallon can and took it home with him. The evidence tended to show that, excluding the defendant, all occupants of the home went to sleep. Sometime thereafter the occupants who survived were awakened by a large fire which was burning in the living room and "trailing backwards" to the kitchen. The defendant's own evidence viewed in the light most favorable to the State, tended to show that he was the only person awake in the house at the time the fire broke out. Although the defendant testified that he did not pour any kerosene on the floor, expert testimony was introduced tending to show that the "pour pattern" established that from two and one-half to five gallons of flammable liquid had burned on the living room and kitchen floors. All evidence tended to show that the defendant was the only person in the house to use a flammable liquid on the night of the fire. Although the defendant consistently stated at trial that Ruth Cowell and her children were like his children and he considered them his children, the defendant was smiling when he stated a short time after the fire: "That was a lot of money riding on this fire." and "I messed up."

The foregoing evidence was sufficient to permit but not compel a rational trier of fact to find among other things that the defendant intentionally and maliciously lit a fire in and burned the Cowell dwelling house with the intent to kill the entire family, and that his actions actually caused death and other serious bodily injury within. Therefore, the trial court did not err in denying the defendant's motion to dismiss the charges against him. This assignment of error is without merit and is overruled.

The defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOSEPH J. DELEONARDO

No. 691A84

(Filed 18 February 1986)

1. Rape and Allied Offenses § 5— first degree sexual offense—evidence sufficient

The evidence in a prosecution for two charges of first degree sexual offense was sufficient to permit the jury to find beyond a reasonable doubt that defendant penetrated the anal openings of both his sons with his penis where both children testified and demonstrated by anatomically correct dolls the manner in which defendant inserted his penis into their backsides. N.C.G.S. 14-27.4.

2. Witnesses § 1.2— first degree sexual offense—child witness—competent

The trial court did not err in a prosecution for first degree sexual offense by denying defendant's motion to suppress the testimony of one of the victims, his twelve-year-old son, on the grounds that he was an incompetent witness where the son's answers to questions demonstrated a sufficient level of intelligence to express himself concerning the matter involved so as to be understood and an understanding of the importance of telling the truth; the trial judge relied not only on the testimony of others but primarily on his personal observation of the child's demeanor and responses to inquiry on the *voir dire* exam; and it was clear that the trial court considered the overall competency of the witness as to his mental capacity and age as those factors affected his ability to understand and relate under oath facts concerning the charge of first degree sexual offense committed upon him. N.C.G.S. 8C-1, Rule 601(a).

3. Rape and Allied Offenses § 4.1; Criminal Law § 34.9— first degree sexual offense—evidence of a separate offense—admissible

In a prosecution for first degree sexual offenses committed by defendant against his sons, evidence relating to sexual activity involving defendant's three-year-old daughter was properly admitted where the challenged evidence tended to establish a common plan or scheme on the part of defendant to sexually abuse his children, the evidence met the test of relevancy in that it tended to make the crimes for which defendant was charged more probable than they would be without the evidence, and the probative value of the challenged evidence was not outweighed by the danger of unfair prejudice because both defendant's sons testified and demonstrated with anatomically correct dolls that defendant had abused them and there was no evidence to the contrary. Moreover, defendant failed to show that a different result would have been reached had this evidence not been admitted. N.C.G.S. 8C-1, Rule 404(a), N.C.G.S. 8C-1, Rule 404(b), N.C.G.S. 8C-1, Rule 401, N.C.G.S. 8C-1, Rule 403, N.C.G.S. 15A-1443(a).

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

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing concurrent sentences of life imprisonment, entered by *Seay, J.*, at the 15 August 1984 Criminal Session of Superior Court, ROWAN County, upon jury verdicts of guilty upon two indictments charging first-degree sexual offense in violation of N.C.G.S. § 14-27.4.

Lacy H. Thornburg, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the State.

R. Darrell Hancock and David B. Wilson, for defendant-appellant.

FRYE, Justice.

Defendant was charged in two bills of indictment with first-degree sexual offense in violation of N.C.G.S. § 14-27.4. The cases were consolidated for trial. Evidence for the State tended to show that on 2 May 1984 the victims were at home with their father, defendant in this case. Defendant called the boys,[1] ages nine and twelve, into a bedroom and directed them to remove their clothing. Defendant then lay on top of the older boy and inserted his penis into the boy's anus. When the child began to cry, defendant choked him and beat him on his head and arms with a shoe. Defendant did not attempt to assault the younger son at this time. The boys then dressed and left the bedroom.

The State's evidence also disclosed that on or about 25 April 1984, defendant sexually assaulted the younger son by inserting his penis in the boy's anus. The younger son testified and demonstrated the act with anatomically correct dolls. The younger son also testified that defendant made him attempt to insert his penis into his younger sister's vagina five times, and that he actually placed his penis inside her on one occasion.

Both victims testified that defendant had sexually assaulted them numerous times in the past year or more, and that he had made them perform fellatio on him on some occasions.

One of the State's witnesses, Lavelle Smith, a Salisbury Police Officer, testified that she saw the younger son on 3 May

1. References to the names of the victims have been deleted throughout the opinion in order to avoid further unnecessary embarrassment to them.

1984 and again on 9 May 1984, and that he told her that defendant had placed his penis into the backsides of the younger son and his brother and that defendant had made him place his penis inside his younger sister's vagina.

Defendant did not testify at trial. The jury returned verdicts of guilty of first-degree sexual offense in each case.

I.

Defendant brings forward four assignments of error. We shall consider them in inverse order.

[1] Defendant assigns as error the denial by the trial court of his motions to dismiss the two charges of first-degree sexual offense on the grounds that the evidence was insufficient to support the offenses charged. By these assignments of error defendant contends that the State's evidence failed to show the element of penetration of the victims' anal openings by defendant, and therefore was insufficient to prove the crimes of first-degree sexual offense in violation of N.C.G.S. § 14-27.4. This statute provides in pertinent part as follows:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim;

N.C.G.S. § 14-27.4(a)(1) (Cum. Supp. 1985).

The term "sexual act" as used in this statute means cunnilingus, fellatio, analingus, or anal intercourse. It also means the penetration, however slight, by any object into the genital or anal opening of another person's body. N.C.G.S. § 14-27.1(4) (1981). Anal intercourse requires penetration of the anal opening of the victim by the penis of the male. *State v. Atkins*, 311 N.C. 272, 316 S.E. 2d 306 (1984).

Both children testified and demonstrated with anatomically correct dolls the manner in which defendant inserted his penis into their backsides. This evidence was sufficient to permit the jury to find beyond a reasonable doubt that defendant penetrated the anal openings of both of the boys with his penis. The motions to dismiss were properly denied.

II.

[2] We next consider defendant's contention that the trial court erred in denying his motion to suppress the testimony of the older son on the grounds that he was an incompetent witness, and therefore incapable of testifying against defendant.

At defendant's trial the judge excused the jury and conducted a *voir dire* hearing in order to determine the competency of the older son to testify as a witness for the State. The trial court found the witness competent to testify and entered the following ruling:

> In the absence of the jury, voir dire examination was conducted to determine the competency, insofar as age is concerned, of the witness, [the older son], and by the evidence offered by the State and by the defendant, the Court finds as a fact that [the older son] is age 12. That he has completed the fifth grade in the school system of [name of school system], taking some of his classes under special education, but had been advanced to the sixth grade, and is to begin the sixth grade at [a certain] Junior High School. That he knew his home address and the name of the principal at [name of school]. That IQ test [sic] given at the school indicated an IQ of 64. That the Wechsler Child Intelligence Test-Full Scale indicated an IQ of 55, placing the child . . . in the mildly retarded area. The Court further finds and determines that the witness is literate and can read and write and is capable of writing reports in cursive. That he understands what it means to tell the truth and knows that he is a member of the [name of church], and that it is wrong to lie, and that it is a sin to lie, and the Court finds that on point of age and understanding, the witness . . . is competent to testify, and the objection of the defendant—will this be a motion to suppress his testimony. All right. Motion to suppress his testimony is denied and dismissed.

The law in North Carolina with respect to determining a child's competency to testify was stated clearly by Justice Lake in *State v. Turner*, 268 N.C. 225, 230, 150 S.E. 2d 406, 410 (1966):

> There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capac-

> ity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness.

See also State v. Jones, 310 N.C. 716, 722, 314 S.E. 2d 529, 533 (1984); *State v. Oliver*, 302 N.C. 28, 48-49, 274 S.E. 2d 183, 196 (1981).

The rule on determining the mental competency of a witness to testify was stated in *State v. Benton*, 276 N.C. 641, 650, 174 S.E. 2d 793, 799 (1970) as follows:

> Unsoundness of mind does not per se render a witness incompetent, the general rule being that a lunatic or weak-minded person is admissible as a witness if he has sufficient understanding to apprehend the obligation of an oath and is capable of giving a correct account of the matters which he has seen or heard with respect to the questions at issue. The decision as to the competency of such a person to testify rests largely within the discretion of the trial court.

Competency of a witness to testify in criminal and civil cases in the courts of this State is now governed by the North Carolina Rules of Evidence.[2] The general rule is that every person is competent to be a witness unless disqualified by the Rules of Evidence. N.C.G.S. § 8C-1, Rule 601(a) (Cum. Supp. 1985). Rule 601(b) provides as follows:

> (b) Disqualification of Witness in General. A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

This subdivision (b) establishes a minimum standard for competency of a witness and is consistent with North Carolina practice.

2. The North Carolina Rules of Evidence became effective 1 July 1984. 1983 N.C. Sess. Laws ch. 701, § 3.

Commentary, N.C.G.S. § 8C-1, Rule 601(b) (Cum. Supp. 1985). *See generally*, 1 Brandis on North Carolina Evidence § 55 (1982).

The record in this case discloses that the son involved was not disqualified as a witness under Rule 601(b) and the cases cited above. His answers to questions demonstrated a sufficient level of intelligence to express himself concerning the matter involved so as to be understood and an understanding of the importance of telling the truth. The trial judge, in exercising his discretion in ruling on the competency of the child as a witness, relied not only on the testimony of others, but primarily on his personal observation of the child's demeanor and responses to inquiry on the *voir dire* examination. *State v. Fearing*, 315 N.C. 167, 337 S.E. 2d 551 (1985). We find no basis for concluding that the trial court abused its discretion in finding the child competent to testify. Although the trial court in its ruling stated that the reason for conducting the *voir dire* hearing was "to determine the competency, insofar as age is concerned," it is clear that the trial court considered and determined the overall competency of the witness as to his mental capacity and his age as these factors affected his ability to understand and relate under oath facts concerning the charge of first-degree sexual offense committed upon him. We reject defendant's assignment of error.

III.

[3] Next, defendant contends that the trial judge erred in admitting evidence relating to defendant's sexual activity involving his minor daughter since the introduction of such evidence was an attempt by the prosecution to introduce evidence of defendant's bad character and to show that he acted in conformity therewith. Defendant argues that such an attempt by the prosecution is prohibited under Rule 404(a) of the North Carolina Rules of Evidence.[3] The State contends that the challenged evidence was correctly admitted to show intent and plan or design on the part of defendant to commit the crimes charged, a recognized exception under Rule 404(b).

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3. For actions and proceedings commenced after 1 July 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 after the effective date of the evidence code, Rule 404(b) states the applicable rule of evidence to be applied.

The State presented evidence of the offenses charged beginning with the testimony of defendant's younger son. He testified that:

> [a]fter my father was arrested, I told my mother something that I had never told her before. I told her that we had been sexually abused.
>
> Q. When you say "we" who do you mean?
>
> A. Me, my brother and my sister.
>
> MR. HANCOCK: Object to reference to sister.
>
> THE COURT: Overruled.
>
> I then told my mother the reason [the older son] had gotten hit and abused was, well, my daddy was sexually abusing [the older son] by sticking his penis in [the older son's] rear side, and well, he got mad and strangled him, put him on the floor and took his shoe and hit him with it on his arms and on his head. This happened on May 2, the day before my father was arrested.

Without objection from defendant, the younger son further testified and demonstrated with anatomically correct dolls that defendant "made me stick my penis in [his sister's] penis [sic]" while defendant lay on the bed watching.

Defendant's twelve-year-old son also testified and demonstrated with anatomically correct dolls a sexual act of anal intercourse performed on him by defendant on 2 May 1984. During his testimony, the assistant district attorney asked:

> Q. [Calling older son by his first name], has he ever done anything with [your sister] while you've been there?
>
> MR. HANCOCK: Objection.
>
> THE COURT: Overruled.
>
> Q. . . . did you understand my question?
>
> A. Yes.
>
> Q. Have you ever seen him do anything with [your sister]?
>
> A. No.

Another State's witness, Lavelle Smith, a Salisbury Police Officer assigned to sex crimes and child abuse cases, testified that she saw defendant's younger son on 3 May and 9 May 1984. The prosecuting attorney then asked:

> Q. Did you go into the kind of specific details and specifics of the acts on May 3, or was that later, May 9, when you were able to go through the specifics?
>
> A. On May 3, [the younger son] told me that his father had placed his genitals in his rear side. He had also placed his genitals in [the older son's] rear side, and that [defendant] had [the younger son] to place his genitals in [his sister's] genitals.
>
> MR. HANCOCK: Objection.
>
> THE COURT: Overruled.

Since *State v. McClain*, 204 N.C. 171, 81 S.E. 2d 364 (1954), it has been accepted as an established principle in North Carolina that "the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime." *State v. Williams*, 303 N.C. 507, 513, 279 S.E. 2d 592, 596 (1981). This principle is now codified in Rule 404(b) of the North Carolina Rules of Evidence which also lists several well-recognized exceptions. *See* N.C.G.S. § 8C-1, Rule 404(b) (Cum. Supp. 1985).

Rule 404(b) of the North Carolina Rules of Evidence provides as follows:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Rule 404 is identical to Federal Evidentiary Rule 404, except for the addition of the word "entrapment" in the last sentence of subdivision (b). Subdivision (b) permits the introduction of specific "crimes, wrongs, or acts" for a legitimate purpose other than to

prove the conduct of a person. In so doing, subdivision (b) is consistent with North Carolina practice prior to its enactment. It should be noted that the list of purposes in the last sentence of the subdivision is not exclusive and the fact that evidence cannot be brought within a category does not necessarily mean that the evidence is inadmissible. While the rule does not offer a "mechanical solution," once it is established that the evidence is admissible under Rule 404(b), the determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. *See* Commentary, N.C.G.S. § 8C-1, Rule 404(b) (Cum. Supp. 1985).

The challenged evidence would have been admissible under the rule stated in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364. In that case, this Court held that evidence that the defendant committed similar offenses is admissible

> when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.

Id. at 176, 81 S.E. 2d at 367.

"Our Court has been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule." *State v. Williams*, 303 N.C. 507, 513, 279 S.E. 2d 592, 596. In *Williams* (judgment reversed on the grounds of fatal variance between allegations and proof), the defendant was charged with two counts of first-degree sexual offense. The trial court admitted the testimony of a third girl who testified that shortly after the date of the offense charged, the defendant had lifted her shirt and rubbed her breasts for about twenty minutes. This Court held that this evidence was properly admitted to show intent and plan or design on the part of the defendant to commit the charged crimes.

In *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983), the victim's testimony disclosed similar circumstances between the sexual offense charged (anal intercourse) and another sexual offense (fellatio) which occurred approximately two weeks later, and

this Court stated that the testimony concerning the latter incident was admissible to show a common plan or scheme on the part of the defendant to commit the crime charged.

In *State v. Goforth*, 59 N.C. App. 504, 297 S.E. 2d 128, *rev'd and remanded for resentencing on other grounds*, 307 N.C. 699, 307 S.E. 2d 162 (1983), the defendant was found guilty of attempted first-degree rape of his ten-year-old stepdaughter. Over objection by the defendant, the State presented evidence that the defendant began abusing his two other older stepdaughters as they approached puberty and that defendant had nonconsensual intercourse with his eldest stepdaughter regularly from the time she was twelve until two days before the attempt on the youngest child. The Court of Appeals held that this evidence was properly admitted to show that "defendant systematically engaged in nonconsensual sexual relations with his stepdaughters as they matured physically, a pattern of conduct embracing the offense charged." *Id.* at 506, 297 S.E. 2d at 129.

In the case *sub judice*, as in *Williams*, *Effler*, and *Goforth*, the challenged evidence tends to establish a common plan or scheme on the part of defendant to sexually abuse his children. Therefore, the evidence relating to sexual activity involving defendant's three-year-old daughter was properly admitted under Rule 404(b).

IV.

Finally, we consider defendant's contention that the trial judge committed prejudicial error in admitting evidence relating to defendant's sexual activity involving his three-year-old daughter[4] on the grounds that such evidence lacks probative value and its admission constitutes prejudicial error under N.C.G.S. § 15A-1443(a). The State contends that the challenged evidence was clearly relevant to the charges of first degree sexual offense and that the probative value of the evidence was not outweighed by its prejudicial effect.

The evidence of the sexual acts involving defendant's young daughter in conjunction with defendant's sons' testimony shows a

4. This is the same evidence to which defendant assigns error in Part III of this opinion.

continuing course of sexual abuse by defendant of his children. The challenged evidence thus tends to make the existence of the crimes for which defendant was charged more probable than it would be without the evidence.[5] Thus it meets the test of relevancy. *See* N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985); *see also State v. Pridgen*, 313 N.C. 80, 326 S.E. 2d 618 (1985); *cf. State v. Stone*, 240 N.C. 606, 83 S.E. 2d 543 (1954) (possession of prophylactics insufficient to prove incest or sexual intercourse seven months earlier). Notwithstanding its relevancy, evidence may nevertheless be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, ..." N.C.G.S. § 8C-1, Rule 403 (Cum. Supp. 1985). "Unfair prejudice," as used in Rule 403, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." Commentary, N.C.G.S. § 8C-1, Rule 403 (Cum. Supp. 1985). We have carefully reviewed defendant's sons' testimony and that of the Salisbury Police Officer and we do not find the probative value of the challenged evidence to be substantially outweighed by the danger of any unfair prejudice to defendant. Both of defendant's sons testified and demonstrated with anatomically correct dolls that defendant had sexually abused them. There was no evidence to the contrary. Under these circumstances we find no suggestion that the jury may have reached its decision on an improper basis. Even assuming error *arguendo*, defendant has failed to meet his burden of showing that a reasonable possibility exists, that had the evidence relating to sexual activity involving his daughter not been admitted, a different result would have been reached at his trial. *See* N.C.G.S. § 15A-1443(a) (1983); *see also State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981). Defendant received a fair trial free from prejudicial error.

No error.

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

5. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the [case] more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985).

STATE OF NORTH CAROLINA v. JERRY LEE MILLER

No. 365A84

(Filed 18 February 1986)

1. **Homicide § 21.6; Robbery § 4.6— armed robbery—felony-murder—acting in concert**

The evidence supported defendant's convictions of armed robbery and felony-murder in a convenience store parking lot under the theory of acting in concert where it tended to show that defendant convinced his twenty-year-old brother and eighteen-year-old friend to participate in a robbery of the convenience store and supplied them with transportation, weapons, socks to cover their hands, and masks; when a car drove into the parking lot during the robbery of the convenience store, defendant ordered his brother, who was serving as the lookout, to keep the passengers out of the store; shortly thereafter, the three gunmen rushed from the store and defendant participated in the robberies of the two victims by helping to surround their car and hold them at gunpoint; defendant's brother shot and killed one of the automobile occupants while robbing him; and defendant drove the getaway car and later distributed the proceeds of the robbery among the three participants.

2. **Criminal Law § 102.7— jury argument—opinion as to credibility of witness—no gross impropriety**

Assuming that the prosecutor's remarks in his jury argument concerning the abilities of a State's witness as an investigating officer amounted to an improper expression of opinion as to the witness's credibility, they were not so grossly improper that the trial judge was required to intervene *ex mero motu.*

3. **Criminal Law § 102.6— jury argument—urging jury to do something about crime**

The prosecutor did not exceed the bounds of permissible argument by encouraging the jury to consider their obligation to do something about serious crime.

4. **Criminal Law § 138— aggravating factors—position of leadership—inducing others—sufficiency of evidence**

The evidence supported the trial court's findings as factors in aggravation of defendant's punishment for an armed robbery in a convenience store parking lot that defendant occupied a position of leadership or dominance over the other participants in the commission of the offense and that he induced others to commit the crime where the evidence showed that defendant, who was twenty-six years old, convinced his twenty-year-old brother and eighteen-year-old friend to participate in robbing a convenience store and supplied them with transportation, weapons, socks to cover their hands, and masks; defendant later gave specific instructions as to each person's role in executing the convenience store robbery; when a car drove into the parking lot during the convenience store robbery, defendant ordered his brother, who was serving as the lookout, to keep the passengers out of the store; shortly thereafter, the three

gunmen rushed from the store and defendant participated in the robberies of the car's occupants by helping to surround the car and hold its occupants at gunpoint; and defendant drove the getaway car and later distributed the proceeds of the robbery among the three participants.

Justice EXUM concurs in the result.

THE defendant was convicted before *Judge Snepp* and a jury at the 4 April 1984 Criminal Session of HENDERSON County Superior Court of first degree murder, assault with a deadly weapon inflicting serious injury, and three counts of armed robbery. Following a sentencing hearing, the defendant was sentenced to life imprisonment on the murder conviction and to consecutive terms of forty years on the first armed robbery conviction, thirty years on the second armed robbery conviction and ten years on the assault conviction. Judge Snepp arrested judgment on the third armed robbery conviction because that offense served as the predicate felony for defendant's conviction of first degree murder under a theory of felony murder. The defendant appealed the life sentence to this Court as a matter of right pursuant to N.C.G.S. § 7A-27(a), and on 13 March 1985 we granted his motion to bypass the Court of Appeals on the remaining convictions pursuant to N.C.G.S. § 7A-31(a).

The State's evidence tended to show that on the night of 7 August 1982 the defendant, the defendant's brother Tim Miller, and Donnie Rice attended a party in South Carolina. The defendant left the party with Miller and Rice at around 1:30 a.m. and on the way to Hendersonville, North Carolina on Interstate 26, the defendant asked his companions if they would agree to help him rob a convenience store. Tim Miller and Rice assented to the plan. Defendant provided weapons for the two of them, giving Rice a .22 caliber pistol and his brother a shotgun. He admonished each of them, however, not to shoot anyone. Defendant was also armed with a pistol. Defendant gave Tim Miller and Rice masks, and socks to cover their hands. When the three arrived at Norm's Minute Mart on Upward Road in Henderson County, they parked the car across the street and all three approached the store. The defendant and Rice entered the store and Tim Miller remained outside.

Vernon King testified that during the early morning hours of 8 August 1982 he was working alone at Norm's Minute Mart. He

remembered that on that morning he was in the cooler when he heard a voice behind him. He turned around and "looked right square into a pistol" pointed at him by a black male wearing a red ski mask. This masked man was identified by Donnie Rice as the defendant. According to King, the masked gunman asked him where the safe was located. When King responded that there was no safe, the defendant struck King in the face with the pistol and forced him to the back of the store. At that time, King noticed another black male with a shotgun near the front door of the store and a third man at the cash register. The defendant then shoved King toward the register and ordered him to open the drawer. One of the men grabbed money and food stamps. King testified that he was shot in the shoulder as he stepped back from the register. He fell back into a chair and heard the defendant tell the others to "get cigarettes and stuff." At that point, the men heard the roar of an automobile engine and Rice alerted the defendant that a car had driven into the store parking lot. The defendant told his brother to "keep the white trash from coming in." King was thrown into the cooler and the gunmen ran out the door.

Rice testified that when he and the defendant came outside, Tim Miller was already at the car with his shotgun. Rice stated that the driver attempted to leave the parking lot but they "all surrounded the car." Rice positioned himself next to the driver, Tim Miller remained on the passenger side, and the gunmen began cursing the occupants and demanded that they get out of the car.

The jury heard testimony from Johnny Corpening and Sherri Heatherly regarding the events that transpired in the convenience store parking lot during the early morning hours of 8 August 1982. Heatherly testified that she and her friends Anthony Corn and Johnny Corpening drove to Norm's Minute Mart to purchase cigarettes. She stated that she saw someone at the end of the check-out counter wearing a mask and that she told Corpening, who was driving the car, to leave. Before Corpening could back up, some masked men with guns ran from the store. One gunman pointed a pistol at Corpening through the car window and another was on the passenger side of the car. Heatherly testified that the masked gunmen wanted money and "everyone proceeded to hand everything they had to them." Corpening stated

that he saw three gunmen and that "they started ordering us out of the car." Each of the occupants followed the gunmen's demands. Corpening said that after he got out of the car, one gunman ordered him to throw his money out, and he threw about $47.00 on the pavement. The money scattered, and as the gunman on the driver's side of the car reached down to gather it, Corpening ran toward the store. He heard gunshots as he ran away.

Sherri Heatherly testified that when she and Anthony Corn got out of the car, the gunman armed with the shotgun ordered her and Corn to the back of the car. Heatherly said that Corn stood between her and the gunman, shielding her with his body. When Corpening ran for the store, Heatherly testified that a shot was fired at him. Moments later, a second shot was fired and she felt Corn "go up against her back" and slowly fall to the ground. She stated that she then saw a lot of foot movement and as the robbers fled she heard someone yell, "Let's get out of here," and "Why did you shoot?"

Defendant presented three alibi witnesses. Their testimony tended to show that defendant was in New York on 8 August 1982.

Lacy H. Thornburg, Attorney General, by Reginald L. Watkins, Special Deputy Attorney General, for the State.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant.

BILLINGS, Justice.

The defendant brings forward three assignments of error. He argues that: (1) the evidence was insufficient as a matter of law to prove that the defendant was acting in concert with Donnie Rice and Tim Miller in the armed robbery of Johnny Corpening and the armed robbery and murder of Anthony Corn; (2) the trial judge committed reversible error in overruling his objection to an improper jury argument by the prosecutor; and (3) the trial court erred in finding as aggravating factors with respect to the Corpening armed robbery that the defendant occupied a position of leadership or dominance over the other participants in the commission of the offense and that he induced others to participate in the robbery.

[1] We first consider the defendant's contention that his convictions for the armed robbery of Johnny Corpening and the armed robbery and murder of Anthony Corn must be reversed for failure of the State to prove that defendant acted in concert with others to commit these crimes.

It is true that the State prosecuted the defendant for the felony murder of Anthony Corn on the theory that Tim Miller killed Corn during the perpetration of an armed robbery and defendant acted in concert with Tim Miller in committing this robbery. The basis of the defendant's conviction for armed robbery of Johnny Corpening was that defendant acted in concert with Rice in committing this offense.

Under the principle of acting in concert, a person may be found guilty of an offense if he is "present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979). The defendant argues that his convictions for the armed robbery of Corpening and the felony murder of Corn cannot be sustained under a theory of acting in concert because the State presented no evidence that defendant shared a common plan or purpose with Tim Miller or Rice to commit the robberies in the convenience store parking lot. Defendant concedes that the evidence shows that he invited Rice and Tim Miller to participate in the robbery of the convenience store, but he maintains that there is no record evidence which shows that he did anything to effectuate the additional robberies or that his plan to rob the store encompassed a scheme to rob innocent bystanders who posed a threat to the successful completion of the original crime. In support of his argument that the State's case is insufficient under a theory of acting in concert, the defendant cites certain testimony of prosecution witnesses which, he claims, *negates* an inference that defendant had a plan to execute any crime other than the robbery of Norm's Minute Mart. He notes Rice's testimony that defendant told his companions on the way to Hendersonville not to shoot anyone, and Sherri Heatherly's testimony that as the robbers fled, one of them shouted something like "Why did you shoot?"

We do not agree with the defendant's assertion that the evidence fails to show his participation in the robberies of Corn and Corpening. The defendant himself initiated an encounter with the three individuals who drove in while the convenience store robbery was in progress. The defendant ordered his brother, who was armed with a firearm which the defendant had provided him, to "stop the white trash from coming in." Donnie Rice's testimony places the defendant outside when the robberies were committed and reveals that the defendant helped to effectuate them. Rice stated: "We started out the door and the car was backing out and we all surrounded the car." Johnny Corpening's testimony also implicates the defendant. Corpening testified that he saw three gunmen, and he stated that "[t]hey started ordering us out of the car." Finally, we deem it significant that defendant shared in the proceeds of the Corn and Corpening robberies.

In reaching our conclusion that the evidence supports the defendant's convictions of armed robbery and felony murder under a theory of acting in concert, we also rely on the following statement of the law from this Court's opinion in *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E. 2d 572, 586 (1971), *death penalty vacated*, 408 U.S. 939, 33 L.Ed. 2d 761 (1972):

> [I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose; that is, the common plan to rob, or as a natural or probable consequence thereof.

See also State v. Oliver, 302 N.C. 28, 274 S.E. 2d 183 (1981).

Defendant himself participated in the perpetration of the crimes in the convenience store parking lot, and these crimes were committed, at least in part, to ensure the successful completion of the original robbery. The defendant's arguments that the State's evidence was insufficient as a matter of law to prove that he was acting in concert with Tim Miller and Donnie Rice are therefore without merit.

The defendant next contends that the trial court committed reversible error by overruling defense counsel's objection to the following remarks by the prosecutor during his closing argument to the jury:

> I'll guarantee you one thing if David Carpenter or anybody else other than the three men that's been named had anything to do with this crime, Steve Morely [sic] [the police officer in charge of the investigation] would have had them sittin' right over at that table right there. They did an excellent job investigating this case but there's not one thing that they can do. The buck stops in these 12 seats right here. If anything is going to be done about serious crime—this case . . .
>
> MR. HARRIS: Objection.
>
> THE COURT: Overruled.
>
> or any other case where 12 people can come in and occupy these 12 seats, that's what if comes down to and I know that you're conscientious individuals and people with abundance of reason and common sense and I'm going to sit down here in just a moment confident that you're going to do the right thing and I suggest to you the right thing is to find Jerry Miller guilty of three counts of armed robbery . . . .

The defendant argues that this prosecutorial argument improperly communicated to the jury the message that defendant's arrest by State's witness Morley was a guarantee of his guilt. He also takes the position that the trial court erroneously permitted the district attorney to exhort the jurors "to decide guilt or innocence out of a preconceived sense of civic duty."

[2] We do not consider the defendant's first argument, that the prosecutor erred by referring to Steve Morley's abilities as an investigating officer, for the reason that no objection was made to this line of argument at trial. It was only when the district attorney moved on to the argument regarding the jurors' obligation to do something about serious crime that defense counsel interposed an objection. Therefore, assuming *arguendo* that the prosecutor's reference to Officer Morley amounted to an improper expression of personal opinion as to the witness's credibility, the trial judge's failure to recognize the error and intervene *ex mero motu* is reviewable only if the improper argument amounts to gross impropriety. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1978); *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740 (1983). These few remarks

could not possibly have influenced the jury's verdict in light of the overwhelming evidence of the defendant's participation in the crimes charged. Neither were they so grossly improper that the trial judge erred in failing to intervene *ex mero motu.*

[3] Turning to the defendant's contention that the prosecutor exceeded the bounds of permissible argument by encouraging the jury to consider thoughtfully their obligation to do something about serious crime, we note that counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Hockett,* 309 N.C. 794, 309 S.E. 2d 249 (1983); *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975). Whether counsel abuses this privilege is a matter which rests within the sound discretion of the trial judge, and absent such gross impropriety in the argument as would be likely to influence the jury's verdict, this Court will not disturb the trial judge's discretionary ruling. *State v. Myers,* 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976).

Applying these legal principles to our review of the prosecutor's argument in this case, we find no such gross impropriety as would justify a reversal of the defendant's conviction. The argument made in the instant case carries the same import as that made by the prosecutor in *State v. Britt,* 291 N.C. 528, 231 S.E. 2d 644 (1977). In *Britt,* the district attorney informed the jury in his closing argument that "only jurors may fail to bring criminals to justice in our system." This Court dismissed the defendant's contention that this prosecutorial comment was improperly permitted by saying that "the district attorney was simply explaining how our legal system works. We do not see how this could be prejudicial to defendant." *Id.* at 539, 231 S.E. 2d at 652. A similar jury argument was made by the prosecutor in *State v. Salem,* 50 N.C. App. 419, 274 S.E. 2d 501, *disc. rev. denied,* 302 N.C. 401, 279 S.E. 2d 355 (1981). In that case, the district attorney told the jury that they had a responsibility like that of law enforcement officials to "clean up crime in this county." *Id.* at 431, 274 S.E. 2d at 509. The court held that the trial judge did not abuse his discretion in overruling the defendant's objections to these remarks. *See also State v. Locklear,* 291 N.C. 598, 604, 231 S.E. 2d 256, 260 (1977) (prosecutor argued it was up to jury to either find defendant guilty of first degree murder or "let him walk out of the courtroom"); *State v. Peterson,* 149 N.C. 533, 536, 63 S.E. 87, 88

(1908) ("It has been a long time since such a crime as this has happened in Yancey County, because you have punished crime and put a stop to it."); *State v. Braswell*, 67 N.C. App. 609, 613, 313 S.E. 2d 216, 219 (1984) (district attorney said this country overrun by violence because "we compromise with violent people").

On the basis of the above-cited authorities, we hold that the trial judge did not abuse his discretion in overruling the defendant's objection to the prosecutor's argument.

[4] Finally, we turn to the defendant's arguments relating to the sentence he received for the Corpening armed robbery. The trial court found in aggravation of the defendant's punishment for this crime that he occupied a position of leadership or dominance over the other participants in the commission of the offense and that the defendant induced others to commit the crime. N.C.G.S. § 15A-1340.4 (1983). The defendant here makes an argument similar to that advanced under his first assignment of error. He takes the position that these aggravating factors are not supported by the evidence because the Corpening robbery was separate and distinct from the one committed in Norm's Minute Mart and defendant had no knowledge of Donnie Rice's intention to rob Corpening.

For many of the same reasons set forth in our discussion of the defendant's first argument, we reject his contention that the trial judge erred in finding these aggravating factors. The defendant, who was 26 years old, masterminded this entire criminal escapade. He convinced his 20-year-old brother and 18-year-old Donnie Rice to participate, and he supplied them with transportation, weapons, masks to conceal their identities, and socks to prevent detection of their fingerprints. He later gave specific instructions as to each person's role in executing the convenience store robbery. When Corpening's car drove into the parking lot, the defendant ordered his brother, who was serving as the lookout, to keep the passengers out of the store. Shortly thereafter, the three gunmen rushed from the store and the defendant participated in the robberies of Corpening and Corn by helping to surround the car and hold its occupants at gunpoint. The defendant also drove the get-away car and later distributed the proceeds of the robbery among the three participants.

We hold that the aggravating factors found by the trial judge are supported by the evidence and therefore the sentence imposed for the Corpening armed robbery should not be disturbed.

The defendant received a fair trial, free of prejudicial error.

No error.

Justice EXUM concurs in the result.

APPENDIXES

CORRECTION OF RULES
OF PROFESSIONAL CONDUCT

PRESENTATION OF
ERVIN PORTRAIT

CORRECTION OF TYPOGRAPHICAL ERROR IN THE NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT

The Rules of Professional Conduct which were approved by The Supreme Court on October 7, 1985 contain a typographical error which was committed in transcription of the certification to the Supreme Court.

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that Rule 5.11 Imputed Disqualification: General Rule. COMMENT: contains a typographical error in the last sentence which refers to "the conditions of Rule 5.5(B) and (C) concerning confidentiality have been met." Rule 5.5 should read Rule 5.11.

The Rules of Professional Conduct were printed in Volume 312 N.C. at 845 and the reference to this particular provision appears at the bottom of Page 887.

B. E. JAMES
Secretary-Treasurer

CEREMONY FOR THE PRESENTATION OF THE PORTRAIT OF FORMER ASSOCIATE JUSTICE SAM J. ERVIN, JR.

On January 22, 1987, at 10:00 a.m., the Supreme Court of North Carolina convened for the purpose of receiving the portrait of the Honorable Sam J. Ervin, Jr., former Associate Justice of the Supreme Court of North Carolina.

Upon the opening of Court on the morning of January 22, 1987, the Clerk of the Supreme Court sounded the gavel and announced:

> "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina."

All persons in the Courtroom rose, and upon the members of the Court reaching their respective places on the bench, the Clerk announced:

> "Oyez, Oyez, Oyez—The Supreme Court of North Carolina is now sitting in ceremonial occasion for the presentation of the portrait of former Associate Justice Sam J. Ervin, Jr. God save the State and this Honorable Court."

The Clerk was then seated.

Chief Justice James G. Exum, Jr., welcomed official and personal guests of the Court, and recognized the Honorable Robinson O. Everett, Chief Judge of the U.S. Court of Military Appeals:

> It is always an especially meaningful occasion when this Court and others close to it gather for the presentation to it of a portrait of one of its former members—in this case the late United States Senator and former Associate Justice Sam J. Ervin, Jr. We have so many distinguished guests and friends of the Court present today that I will not unduly detract from the business at hand by welcoming them all by name. All here are welcome and we are glad to have you. I would, however, like to acknowledge especially, first, the presence of our esteemed Lieutenant Governor Robert Jordan and, second, the presence of two persons who served this Court long and ably, first as Associate Justices and then as Chief Justices. They are former Chief Justice William Bobbitt and former Chief Justice Susie Sharp.
>
> I also wish to express the Court's appreciation to all the members of the family of Sam J. Ervin, Jr., who honor us with their presence here today. I want, however, to acknowl-

edge the Honorable Sam J. Ervin, III, Judge of the United States Court of Appeals for the Fourth Circuit and son of the late Senator. I also especially welcome the Honorable Dickson Phillips, also a Judge of the Fourth Circuit Court of Appeals and former Dean of the University of North Carolina School of Law.

I now recognize the Honorable Robinson Everett, Chief Judge of the United States Court of Military Appeals and former counsel and consultant to the United States Senate's Judiciary Committee's subcommittee on Constitutional Rights, which was chaired by Senator Ervin. Judge Everett was instrumental in drafting the Uniform Code of Military Justice and is the author of the principal treatise on this subject. The Everett and the Ervin families have been close friends for several generations. It is most appropriate that Judge Everett will make the memorial address of presentation.

REMARKS OF ROBINSON O. EVERETT IN PRESENTING THE PORTRAIT OF SENATOR SAMUEL J. ERVIN, JR. TO THE NORTH CAROLINA SUPREME COURT ON JANUARY 22, 1987

My last direct contact with Senator Sam Ervin, Jr., was in November 1984, when he sent me a copy of his autobiography "Preserving the Constitution." In a handwritten note at the front of the book, he referred to his friendship with my family, which had begun when he and my father were legislative colleagues in the 1923 General Assembly. As I read that note, I recalled the great fondness that father had for Senator Ervin; and how he had expressed to me his admiration of the Senator's unique career—which included distinguished service as a North Carolina legislator, a trial judge, a Congressman, and a State Supreme Court Justice.

I initially became acquainted with Senator Ervin through his judicial opinions, which I read with great diligence in preparing for the North Carolina bar examination in 1950. I realized at once that he could explain even the most complicated legal propositions in an understandable, persuasive, and often colorful manner. His autobiography mentions that he assumed his seat on the Supreme Court "with a determination to write my opinions in plain English requiring neither explanation or interpretation." That he wrote "with unmistakable clarity" was confirmed later by a

judge's tribute to him "that a person did not need to be a lawyer to understand his opinions."

During his 6 years as a justice, he was prolific; and he wrote 291 opinions for the Court, as well as some concurring, dissenting, and per curiam opinions. As an appellate judge I can recognize the significance of this accomplishment—especially since then there was no intermediate appellate court and all appeals to the Supreme Court were matters of right.

When he was appointed in June 1954 to fill the Senate seat left vacant by Senator Hoey's death, there was almost universal praise of the appointment. For example, the Winston-Salem Journal said:

> By many of the criteria used in measuring the stature of public officials Sam Ervin, Jr., Associate Justice of the State Supreme Court, is one of North Carolina's biggest men. He has brains; he has integrity, courtesy, poise, tact, a never-failing sense of humor and a warm human touch which makes friends for him among his sharpest critics. Moreover, he has a broad social vision which makes him unafraid of new ideas, and an exhaustive knowledge of his State, its history and contemporary problems.

I was working in Washington at that time and I recall how, even as a Junior Senator, he immediately made a significant contribution by serving on the Special Committee which conducted the McCarthy hearings and ultimately recommended censure. Soon, he became a prominent member of the Judiciary Committee and the Armed Services Committee of the Senate; and for a number of years he chaired the Subcommittee on Constitutional Rights of the Judiciary Committee. I testified as a witness before that subcommittee and later served as a counsel for it from 1961 to 1964, and so I had an excellent vantage point to observe his deep devotion to the Constitution and his determination that the rights guaranteed Americans by that document must not be abridged. The hearings conducted by the Subcommittee on Constitutional Rights under his chairmanship made important contributions to protecting the rights of the mentally ill, defendants in federal criminal trials, American Indians, and many others. He perhaps was the first legislator to appreciate fully the danger to privacy that was being created by new technology for surveillance and data retrieval. His efforts led to bail reform and to speedy trial legislation; and with equal vigor and success, he fought against preventive detention, as proposed by the Nixon administration.

I was especially involved in his subcommittee's hearings on the rights of military personnel. Thus, I am well aware that millions of Americans who have served in the armed forces over the past two decades owe Senator Ervin a great debt because of his leadership in devising the Military Justice Act of 1968. That Act greatly enhanced the fairness and efficiency of courts-martial and reconciled the demands of justice with those of discipline. Currently, as Chief Judge of the Court of Military Appeals, I see daily the benefits that have resulted from this important legislation.

Of course, every North Carolinian can take pride in Senator Ervin's leadership in bringing our Government through the constitutional crisis of Watergate. Like him, I am a Presbyterian; and perhaps for this reason, I tend to believe that his important role at that crucial time was divinely ordained. Certainly, he was the right man in the right place at the right time.

His performance as a Senator on that occasion and many others exemplified the courage which he demonstrated throughout his life. Indeed, his valor was attested early in his life by numerous decorations he received for his service during World War I. Also, it is reflected by his resigning his officer's commission so that he could immediately reenlist as an enlisted man and thereby obtain combat service.

Senator Ervin was his own man. He would vote against a bill that he thought was wrong, even if he might be casting the only negative vote; and likewise, he would support persistently any measure he thought was right. For example, the Military Justice Act of 1968 was the result of a 6-year struggle on his part. The Speedy Trial Act of 1974 was enacted by Congress, almost as a personal tribute to him, after many years' effort on his part to obtain such legislation.

Many think of Senator Ervin as a conservative; and in many ways he fits that description. He sought to conserve and protect the values enshrined in the Constitution and the Bill of Rights. However, I also view him as a liberal in the tradition of political thinkers like John Locke, who believed that governmental interference with private citizens should be reduced to the minimum. Senator Ervin always was concerned with preserving individual freedom against undue concentration of power in Government—especially in the Federal Government. His views in that regard were sometimes unpopular in many quarters—as when he opposed the proposed equal rights amendment to the Constitution and the prayer-in-the-schools amendment. However, his positions

were consistent with the premise that governmental intervention in private affairs, even for desirable ends, is dangerous. Under no circumstances would he tolerate governmental interference that was not clearly authorized by the Constitution—for which his reverence was second only to his reverence for the Bible.

I have heard that a documentary about him may be produced under the title "The Last of the Founding Fathers." That title would be quite appropriate, for Senator Ervin was probably more attuned to the ideals of the draftsmen of our Constitution and Bill of Rights than any other person in public life since the early days of our Republic. Indeed, in view of his dedication to the Constitution, it is especially fitting that his portrait is being presented to this Court in this bicentennial year.

Senator Ervin had a deep faith in God, a keen mind, a unique ability to communicate, a great sense of humor, and touching humility. Also, he was blessed with the love and support of a remarkable and devoted wife and a fine family and the affections of his fellow citizens.

The members of this Court can take pride that he once served here as a Justice. The citizens of our State can feel proud that he represented us in the United States Senate. All the people of our Country can be grateful that he was one of us. Therefore, with great pleasure, and in behalf of his family, friends, and his innumerable admirers, I present to this Court the portrait of its distinguished former Justice, Senator Samuel J. Ervin, Jr.

The Chief Justice announced the unveiling of the portrait by Dr. Jean Ervin, sister of the former Associate Justice.

[UNVEILING OF PORTRAIT]

The Chief Justice then made his remarks accepting the portrait:

> On behalf of the Court, let me say thank you to the Ervin family for the gift of this impressive portrait and to Judge Everett for his informative address. Both go a long way toward capturing the essence of the great man whom they memorialize. Judge Everett's address will be spread upon the minutes of this Court and will be printed in a volume of the North Carolina Reports. The portrait will be hung in an appropriately prominent place on the third floor of this building. There it will serve to remind those who enter and serve here of Sam J. Ervin, Jr.'s profound and enduring contributions to the law of this State. Of all the living

members and former members of this Court, only former Chief Justice Bobbitt actually served here with Justice Ervin, but all of us knew Justice Ervin to be a man of uncommon eruditeness and skill in both speaking and writing the English language. All of us have read after him and thereby have learned from him. His portrait will remind us of these things and will be a source of strength and encouragement to us and our successors for many years to come.

The Clerk then escorted the Ervin family to their places in the receiving line. Members of the Supreme Court, official guests of the Court, and special friends proceeded through the receiving line until all had so proceeded. The ceremony was thereupon concluded.

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ADVERSE POSSESSION

§ 3. Hostile Character of Possession as Affected by Belief that Land is Included in Description of Claimant's Deed

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse. *Walls v. Grohman*, 239.

§ 17.1. Color of Title; Deeds Generally

Where a 1948 deed conveyed a driveway easement subject to defeasance if the owners of the dominant tract failed to maintain the driveway in an all-weather condition, and the jury found that the driveway was not maintained as required, a 1971 deed to defendants' grantors which contained no specific reference to an easement, conveyed the fee with "all privileges and appurtenances thereto belonging," and referred to the description in a previous deed conveying both the land and easement did not constitute color of title. *Higdon v. Davis*, 208.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court and Matters Necessary to the Determination of Appeal

In an appeal of right to the Supreme Court because of a dissent in the Court of Appeals, only the issue addressed by the dissenting opinion is properly before the Supreme Court for review. *Blumenthal v. Lynch, Sec. of Revenue*, 571.

§ 5. Supervisory Jurisdiction of Supreme Court

When issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest, the Supreme Court will exercise its inherent residual power to suspend or vary operation of its published rules or its authority under Rule 2 of the North Carolina Rules of Appellate Procedure and address those issues though they are not properly raised on appeal. *Blumenthal v. Lynch, Sec. of Revenue*, 571.

ARSON

§ 1. Nature and Elements of Offense

A conviction under G.S. 14-67.1 does not require that the State prove a burning but requires only that a defendant willfully and wantonly attempt to set fire to or burn any building or structure. *S. v. Avery*, 1.

§ 3. Competency of Evidence

Even if the trial court in an arson case erred in allowing two witnesses to answer questions as to what they could smell while in the house because the questions assumed facts not yet in evidence, such error was not prejudicial since the record was replete with evidence that kerosene was in the house at all times in question and had been used by defendant to start a fire in a wood heater so that there would have been nothing remarkable about an odor of kerosene in the house. *S. v. Riddick*, 749.

Evidence that defendant physically mistreated the woman who lived with him in a house which burned was admissible to show defendant's motives and state of mind at the time of the fire. *Ibid.*

ARSON — Continued

§ 4. Sufficiency of Evidence in General

The evidence was sufficient to support defendant's conviction for attempting to set fire to or burn a building. *S. v. Avery,* 1.

§ 4.1. Evidence Sufficient

The State's evidence was sufficient for the jury in a prosecution of defendant for first degree arson in the burning of a house which defendant shared with a woman and her four children. *S. v. Riddick,* 749.

ASSAULT AND BATTERY

§ 4. Criminal Assault in General

If a victim dies as the result of an assault, a defendant cannot be convicted of assault with a deadly weapon inflicting serious injury for the particular assaultive conduct. *S. v. Ledford,* 599.

§ 5.2. What Constitutes a Deadly Weapon

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, evidence that the assault victim was five years old and asleep at the time defendant set fire to the house was sufficient to permit the jury to find that the fire was used as a deadly weapon. *S. v. Riddick,* 749.

§ 14.1. Sufficiency of Evidence; Assault with a Deadly Weapon

The State's evidence was sufficient for the jury in a prosecution of defendant for assault with a deadly weapon inflicting serious injury by setting a fire which burned a five-year-old child. *S. v. Riddick,* 749.

§ 14.6. Sufficiency of Evidence; Assault on a Law Officer

Knowledge by defendant that the victim was a law enforcement officer is an essential element of the crime of assault with a firearm upon a law enforcement officer in violation of G.S. 14-34.2. *S. v. Avery,* 1.

§ 15.2. Instructions; Assault with a Deadly Weapon with Intent to Kill or Inflicting Serious Bodily Injury

The trial court did not err in a prosecution for assault with a deadly weapon by refusing to instruct on self-defense. *S. v. Hunter,* 371.

ATTORNEYS AT LAW

§ 7.5. Allowance of Fees as Part of Costs

The trial court erred by awarding plaintiff attorney fees in a paternity action where the trial court did not include the attorney fees as part of the costs, did not make a finding of good faith by the plaintiff, and gave no indication of what portion of the fees were attributable to the custody and support aspects of the case. N.C.G.S. 50-13.6, N.C.G.S. 6-4, N.C.G.S. 6-21(10). *Smith v. Price,* 523.

AUTOMOBILES AND OTHER VEHICLES

§ 2.4. Suspension or Revocation of License; Drunk Driving

The statute providing for a mandatory, pre-hearing ten-day license revocation for drivers charged with an impaired driving offense who fail a breath analysis test does not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, the Law of the Land Clause of Art. I, § 19 of the N.C. Constitution, or

AUTOMOBILES AND OTHER VEHICLES – Continued

equal protection rights guaranteed by the state and federal constitutions. *Henry v. Edmisten and Barbee v. Edmisten,* 474.

The portion of N.C.G.S. § 20-16.5 providing that if the person is not currently licensed "the revocation continues until 10 days from the date the revocation order is issued and the person has paid the applicable costs" means that the revocation continues until the person has paid the applicable costs and at least ten days have elapsed from the date the revocation order is issued. The statute did not authorize the clerk of court to extend the revocation period to plaintiff's new license when he appeared to pay the restoration fee well after ten days from the date revocation of his license was ordered. *Ibid.*

The statute providing for a mandatory, ten-day license revocation for drivers charged with an impaired driving offense who fail a breath analysis test does not violate Art. XI, § 1, of the N.C. Constitution, which sets forth permissible punishments, since the summary revocation procedure of the statute is not a punishment but a highway safety measure. *Ibid.*

BANKS AND BANKING

§ 3. Duties to Depositors

The superior courts of this state have the inherent power to order a banking corporation to disclose to the district attorney a customer's bank account records when reasonable grounds exist to believe that they are likely to bear upon the investigation of a crime, and to order the bank not to disclose the examination for a specified period of time. *In re Superior Court Order,* 378.

BASTARDS

§ 10. Civil Action By Illegitimate Child to Compel Father to Furnish Support

The trial court erred in a paternity action by granting plaintiff's motion for a judgment n.o.v. *Smith v. Price,* 523.

The issue of whether the trial court erred by granting a directed verdict against defendant on his counterclaim for fraud in a paternity action was rendered moot by the reversal of the trial court's judgment n.o.v. *Ibid.*

BILLS OF DISCOVERY

§ 6. Compelling Discovery

Defendant was not entitled to discovery of a description of the facts and circumstances surrounding statements made by defendant, a list of the State's witnesses and others having knowledge of the cases against defendant, or the criminal records of prospective witnesses. *S. v. Bruce,* 273.

The trial court properly denied defendant's motion to discover "any notes taken or reports made by investigating officers which would tend to exculpate the defendant, mitigate the degree of the offense, or contradict other evidence presented by the State" where the State had specifically indicated that it would comply fully with the requirements of *Brady v. Maryland. Ibid.*

The trial court did not err in failing to suppress portions of defendant's in-custody statement made to a detective which were not included in a statement disclosed to defendant pursuant to his discovery request or to grant a continuance and compel disclosure of the differences in and additions to the disclosed statement. *S. v. Gladden,* 398.

BILLS OF DISCOVERY – Continued

The trial court did not abuse its discretion in failing to impose any sanctions on the State, including the exclusion of evidence, for its failure to comply with discovery. *S. v. McClintick*, 649.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1. Definition

Four connected buildings in an IBM complex did not constitute only one building under the breaking or entering statute because the buildings are connected by passageways that permit unrestricted access from one building to another. *S. v. Avery*, 1.

§ 3. Indictment

The trial court did not err by failing to dismiss the charge of felonious breaking and entering for the purpose of committing larceny on the grounds that all of the evidence indicated that defendant entered the victim's house with the intent to commit rape where the victim testified that she had seven dollars in her purse prior to the defendant's entry into her home and that upon his departure the money was missing. *S. v. Wilson*, 157.

§ 3.1. Indictment; Description of Victim and Premises

An indictment for second degree burglary that specified that defendant broke and entered an unoccupied tool shed at nighttime with felonious intent should have been quashed because an outbuilding used to house and secure tools and other items of personal property does not immediately serve the comfort and convenience of those who inhabit the dwelling house. *S. v. Fields*, 191.

§ 5.2. Sufficiency of Evidence; Time of Offense

The State's evidence was sufficient to show that the offense was committed at night so as to support defendant's conviction of felony murder based on the underlying felony of first degree burglary. *S. v. Ledford*, 599.

§ 5.8. Sufficiency of Evidence; Breaking and Entering and Larceny of Residential Premises

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of felonious breaking or entering and larceny. *S. v. Covington*, 352.

§ 7. Instructions on Lesser Included Offenses

Defendant's statement that he entered the victim's trailer after a companion broke into it and that he assisted his companion in accomplishing rape did not establish a basis for an instruction on lesser included offenses. *S. v. McClintick*, 649.

CONSTITUTIONAL LAW

§ 20. Equal Protection

The statute providing for a mandatory, ten-day license revocation for drivers charged with an impaired driving offense who fail a breath analysis test does not violate equal protection rights guaranteed by the state and federal constitutions. *Henry v. Edmisten and Barbee v. Edmisten*, 474.

CONSTITUTIONAL LAW — Continued

§ 23. Scope of Protection of Due Process

When the furtherance of a legitimate state interest requires the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state's interest, the law of the land ordinarily requires no more than that before such action is undertaken, a judicial officer determined there is probable cause to believe that the conditions which would justify the action exist. *Henry v. Edmisten and Barbee v. Edmisten*, 474.

§ 30. Discovery

Defendant was not entitled to discovery of a description of the facts and circumstances surrounding statements made by defendant, a list of the State's witnesses and others having knowledge of the cases against defendant, or the criminal records of prospective witnesses. *S. v. Bruce*, 273.

The trial court properly denied defendant's motion to discover "any notes taken or reports made by investigating officers which would tend to exculpate the defendant, mitigate the degree of the offense, or contradict other evidence presented by the State" where the State had specifically indicated that it would comply fully with the requirements of *Brady v. Maryland*. *Ibid.*

§ 34. Double Jeopardy

Defendant's conviction and sentencing for both felonious breaking or entering and felonious larceny did not violate the prohibitions against double jeopardy. *S. v. Gardner*, 444.

§ 48. Effective Assistance of Counsel

Defendant received ineffective assistance of counsel where his counsel in a murder prosecution admitted his guilt during closing arguments without his consent. *S. v. Harbison*, 175.

§ 60. Racial Discrimination in Jury Selection

Selection of the jury pool from the county voter registration list did not violate defendant's right to be tried by a jury drawn from a representative cross-section of the community. *S. v. Avery*, 1.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

The death qualification of a jury in a first degree murder trial did not violate defendant's rights to due process and trial by a jury drawn from a representative cross-section of the community. *S. v. Avery*, 1; *S. v. Williams*, 310; *S. v. Brown*, 40.

§ 65. Right of Confrontation

The trial court in a prosecution for felonious possession of cocaine erred in permitting a police officer to read into evidence the contents of a search warrant affidavit because statements contained therein were incompetent hearsay evidence which denied defendant his rights of confrontation and cross-examination. *S. v. Edwards*, 304.

§ 74. Self-Incrimination

Neither cross-examination questions nor defendant's responses constituted an impermissible comment upon defendant's invocation of his constitutional right to remain silent. *S. v. Gardner*, 444.

CONSTITUTIONAL LAW — Continued

§ 80. Death and Life Imprisonment Sentences

The North Carolina death penalty statute is constitutional. *S. v. Brown*, 40.

The mandatory life sentence for first degree rape is constitutional. *S. v. McClintick*, 649.

CRIMINAL LAW

§ 5. Insanity

Insanity is an affirmative defense which must be proved by the defendant. *S. v. Avery*, 1.

§ 5.1. Determination of Issue of Insanity

The State is not unconstitutionally relieved of its burden of proof in a prosecution for murder by placing the burden of proof of insanity on the defendant. *S. v. Mize*, 285.

§ 22. Arraignment and Pleas

The trial court did not err by trying defendant for first degree murder without first conducting a formal arraignment. *S. v. Brown*, 40.

§ 26. Plea of Former Jeopardy

Where a first degree murder conviction was premised on the underlying felony of burning or attempting to burn a certain building used in trade, the trial court could properly impose separate punishments for felonious entry convictions and two other felonious burning convictions. *S. v. Avery*, 1.

§ 26.5. Former Jeopardy; Same Acts or Transaction Violating Different Statutes

Defendant's conviction and sentencing for both felonious breaking or entering and felonious larceny did not violate the prohibitions against double jeopardy. *S. v. Gardner*, 444.

§ 29. Mental Capacity to Plead or Stand Trial

The trial court did not err in ruling that defendant had the mental capacity to stand trial notwithstanding defendant was suffering from an impaired memory concerning the events at issue. *S. v. Avery*, 1.

§ 33. Facts in Issue and Relevant to Issues in General

Whether to exclude relevant evidence under Rule of Evidence 403 because its probative value is substantially outweighed by possible prejudice is a matter within the sound discretion of the trial judge. *S. v. Mason*, 724.

§ 33.2. Evidence as to Motive, Knowledge, or Intent

A witness's testimony that she was near defendant when she heard him make certain statements established her personal knowledge of the matter so as to permit her to testify as to the statements. *S. v. Riddick*, 749.

§ 34.9. Guilt of Other Offenses; to Show Disposition to Commit Consensual Sex Offense

In a prosecution for first degree sexual offenses committed by defendant against his sons, evidence relating to sexual activity involving defendant's three-year-old daughter was properly admitted. *S. v. DeLeonardo*, 762.

CRIMINAL LAW – Continued

§ 43. Maps, Diagrams, and Photographs

Where photographs of defendant and deceased's wife were admitted as substantive evidence of defendant's motive for killing deceased, their admission was not improper because no witness testified that they fairly and accurately represented the scene described by the testimony or because they did not illustrate the testimony of any witness. *S. v. Gladden*, 398.

§ 43.4. Gruesome, Inflammatory or Otherwise Prejudicial Photographs

A defendant charged with homicide was not prejudiced by the number of photographs of defendant and the victim's wife admitted into evidence because he is black and the photographs revealed to the jury that the victim's wife was white. *S. v. Gladden*, 398.

§ 45.1. Particular Experimental Evidence

Defendant was not prejudiced by the admission of a detective's testimony concerning his pattern search for a knife allegedly used by deceased after throwing a metal object simulating a knife into the woods at the crime scene and his inability to find a knife during the search. *S. v. Gladden*, 398.

§ 51. Qualification of Experts

Defendant could not complain that a witness was never qualified as an expert witness where defendant merely made a general objection and did not object specifically to the witness's qualifications as an expert. *S. v. Riddick*, 749.

§ 53. Medical Expert Testimony

A physician was properly allowed to state his opinion that injuries he observed during his examination of a child were caused by "a male penis" even though the opinion was not qualified by the words "could" or "might." *S. v. Smith*, 76.

The Child Medical Examiner of Brunswick County was properly permitted to state his expert medical opinion that it was "highly likely" that two female children had had sexual intercourse based upon the contents of another doctor's medical report and information supplied to the witness by two colleagues. *Ibid.*

§ 60.5. Fingerprints; Competency and Sufficiency of Evidence

The trial court did not err in refusing to instruct the jury that fingerprint evidence lacked probative force unless the evidence showed that the prints could have been made only at the time of the crime where there was no evidence that defendant had ever been in the victim's trailer at any time before the night of the crimes. *S. v. McClintick*, 649.

§ 61.2. Footprints or Shoe Prints

A boot print found at a murder scene was properly admitted into evidence. *S. v. Ledford*, 599.

§ 62. Lie Detector Tests

Evidence concerning a polygraph test may be admissible in a voir dire hearing to determine the admissibility of a confession. *S. v. Harris*, 556.

§ 63.1. Nature, Competency, and Effect of Evidence

The trial court did not err in refusing to allow defendant's surrebuttal witness to testify concerning the length of his own "flashbacks" concerning Vietnam. *S. v. Avery*, 1.

CRIMINAL LAW — Continued

The trial court did not err in a prosecution for murder at which defendant claimed insanity by admitting into evidence the contents of a report by a doctor at Broughton Hospital who did not testify at trial. *S. v. Mize*, 285.

§ 66.1. Competency of Witness; Opportunity for Observation

The male victim had sufficient opportunity to observe defendant on an occasion a week before the crimes and at the time of the crimes to permit his in-court identification of defendant. *S. v. Covington*, 352.

§ 73. Hearsay Testimony

There was no merit to defendant's contention that testimony by a doctor concerning decedent's statement to the effect that he had removed money from his bank account in order to enter into a partnership amounted to inadmissible hearsay upon hearsay and was highly prejudicial to him as a link in the State's theory that defendant's motive for killing the victim was to remove him from the partnership and thereby to obtain financial gain, since there was other evidence, not objected to by defendant, as to the business relationship between defendant and deceased, and the testimony merely corroborated defendant's own testimony that he and deceased entered into a joint business venture. *S. v. Morgan*, 626.

§ 73.1. Admission of Hearsay as Prejudicial or Harmless Error

The trial court in a prosecution for felonious possession of cocaine erred in permitting a police officer to read into evidence the contents of a search warrant affidavit because statements contained therein were incompetent hearsay evidence which denied defendant his rights of confrontation and cross-examination. *S. v. Edwards*, 304.

§ 73.2. Statements Not Within Hearsay Rule

It is the duty of the proponent of a hearsay statement proffered under the N.C.G.S. 8C-1, Rule 803(24) catchall exception to the hearsay rule to alert the trial judge that the statement is being offered as a hearsay exception under Rule 803(24). Upon being notified that the proponent is seeking to admit the statement pursuant to that exception, the trial judge must have the record reflect that he is considering the admissibility of the statement pursuant to Rule 803(24), and only then should the trial judge proceed to analyze the admissibility by undertaking the six-part inquiry required of him by the rule. *S. v. Smith*, 76.

In order to admit hearsay testimony under the "catchall" or "residual" exception of N.C.G.S. 8C-1, Rule 803(24), the trial court must: (1) make the initial determination that proper written notice was given to the adverse party and must include that determination in the record, although detailed findings of fact in making this determination are not required; (2) determine that the hearsay statement is not specifically covered by any of the other 23 exceptions and enter this conclusion on the record; (3) make findings of fact and conclusions of law supporting a determination that the proffered statement possesses circumstantial guarantees of trustworthiness equivalent to those required for admission under the enumerated exceptions; (4) include in the record a statement that the proffered evidence is offered as evidence of a material fact; (5) make findings of fact and conclusions of law supporting a determination that the proffered evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (6) enter a conclusion on the record that admission of the proffered evidence will best serve the general purposes of the Rules of Evidence and the interests of justice. *Ibid.*

CRIMINAL LAW – Continued

Testimony by two Rape Task Force volunteers as to statements made by two child rape and sexual offense victims which did not corroborate the victims' testimony at trial was not admissible under the Rule 803(24) residual exception to the hearsay rule where the trial court failed to make the findings and conclusions required by Rule 803(24). *Ibid.*

§ 73.4. Hearsay; Spontaneous Utterances

Statements made by two young girls to their grandmother about sexual assaults between two and three days after the assaults occurred were admissible under the excited utterance exception to the hearsay rule. *S. v. Smith,* 76.

§ 73.5. Hearsay; Medical Diagnosis or Treatment Exception

Statements made by two girls to their grandmother concerning sexual assaults which immediately resulted in their receiving medical treatment and diagnosis were admissible as substantive evidence under the medical diagnosis or treatment exception to the hearsay rule, but statements made by the girls to Rape Task Force volunteers after they had already reached the hospital and had received medical treatment and diagnosis were not so admissible. *S. v. Smith,* 76.

A statement by a child to her grandmother that it was defendant who had caused her injuries was admissible under the medical diagnosis or treatment exception to the hearsay rule. *Ibid.*

§ 75.1. Confessions; Delay in Arraignment

There was no unnecessary delay in taking defendant before a magistrate where defendant was arrested at about 3:15 a.m. and taken directly to the police station but was not taken before a magistrate until about 5:00 a.m. *S. v. Martin,* 667.

§ 75.3. Effect of Confronting Defendant with Evidence

Defendant's confession after a polygraph operator told defendant he did not believe defendant was telling the truth was properly found by the trial court to have been voluntarily and understandingly made. *S. v. Harris,* 556.

Defendant was not tricked into making a statement to officers in that he believed an accomplice had confessed when the accomplice's testimony was exculpatory. *S. v. Martin,* 667.

§ 75.14. Defendant's Mental Capacity to Confess or Waive Rights

The trial court did not err in a murder prosecution by refusing to suppress defendant's statement based on a lack of mental capacity to understand the statement and waiver of rights forms. *S. v. Martin,* 667.

§ 78. Admissions and Stipulations

A stipulation that the female victim would be unable to identify either of her two assailants at trial was not violated when the State examined the victim as to whether she had ever seen defendant prior to the night of the offenses or when the victim referred to defendant as "the tall one." *S. v. Covington,* 352.

§ 79.1. Acts or Declarations of Codefendants Subsequent to Commission of Crime

Defendant was not denied a fair trial by the State's failure during pretrial discovery to attribute to the other defendant a statement made at the crime scene where the statement would be admissible in the trial of either defendant as part of the res gestae. *S. v. Sidden,* 539.

CRIMINAL LAW – Continued

§ 80.2. Books, Records, and Other Writings; Discovery and Inspection

The superior courts of this state have the inherent power to order a banking corporation to disclose to the district attorney a customer's bank account records when reasonable grounds exist to believe that they are likely to bear upon the investigation of a crime, and to order the bank not to disclose the examination for a specified period of time. *In re Superior Court Order*, 378.

§ 85. Character Evidence Relating to Defendant; When Admissible

Both Rules 404(b) and 608(b) require the trial judge, prior to admitting extrinsic conduct evidence, to engage in a balancing, under Rule 403, of the probative value of the evidence against its prejudicial effect. *S. v. Morgan*, 626.

§ 85.2. Character Evidence Relating to Defendant; State's Evidence

An officer's testimony that defendant was in jail when he compared a photograph of a shoe print at the scene of a rape with the bottom of the tennis shoes defendant was wearing did not unduly prejudice defendant by portraying him as a prison inmate. *S. v. Mason*, 724.

§ 85.3. Character Evidence; State's Cross-examination of Defendant

The prosecutor's cross-examination of defendant concerning specific instances of assaultive misconduct was improper under Rule 608(b) because extrinsic instances of assaultive behavior are not probative of the witness's character for truthfulness or untruthfulness. *S. v. Morgan*, 626.

Cross-examination of defendant about prior acts of assault was not proper under Rule 404(b) to show that defendant was the aggressor in the affray which resulted in the homicide in question. *Ibid.*

§ 86.4. Credibility; Prior Arrests, Indictments, and Accusations of Crime

The trial court erred in permitting the prosecutor to ask defendant on cross-examination if he had used a certain name because he knew he was "wanted" in California under another name, but such error was not prejudicial. *S. v. McClintick*, 649.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

The trial court did not err in allowing the State to cross-examine defendant for impeachment purposes about his alleged involvement in certain sex offenses and other crimes in California for which he had not been tried, and the questions were not improperly framed so as to assert in advance the untruth of defendant's denials because they were prefaced or followed by such expressions as, "Isn't it a fact." *S. v. McClintick*, 649.

§ 86.9. Accomplices; Impeachment

The trial court did not err in a prosecution for robbery, burglary, larceny, and murder by allowing the State on redirect examination to impeach one of defendant's companions who was testifying for the State. *S. v. Fields*, 191.

§ 87.1. Direct Examination; Leading Questions

The trial court did not err in allowing the prosecutor to ask leading questions of an 11-year-old and a 15-year-old who were in a house when it burned. *S. v. Riddick*, 749.

CRIMINAL LAW — Continued

§ 87.4. Redirect Examination

There was no error in admitting testimony from a police officer which indicated that defendant had stolen seven dollars from the victim's purse before he raped her where the evidence was explanatory of evidence elicited on cross-examination. *S. v. Wilson*, 157.

The trial court did not err by admitting on redirect examination evidence explanatory of testimony brought out on cross-examination even though it might not have been admissible in the first instance. *S. v. Williams*, 310.

§ 88.2. Questions and Conduct Impermissible on Cross-examination

The trial court did not err in refusing to permit defendant to ask an expert witness questions about his familiarity with the facts of certain criminal cases involving the Post Traumatic Stress Disorder defense. *S. v. Avery*, 1.

§ 88.4. Cross-examination of Defendant

Where defendant testified on direct examination as to the nature of his relationship with the victim's wife, the prosecution could properly cross-examine defendant through use of a poem he had written in which he professed his love for the victim's wife and stated that he did not intend to break off their relationship. *S. v. Gladden*, 398.

§ 89.1. Character Witnesses

Failure of a witness to state that an eyewitness's reputation was "good" before proceeding to enumerate the character traits which accounted for the eyewitness's good reputation was not reversible error. *S. v. Sidden*, 539.

The trial court did not err in denying motions to strike testimony of two witnesses concerning an eyewitness's good character on the ground that neither witness had sufficient knowledge of the eyewitness's present reputation upon which to rest an opinion. *Ibid.*

The trial court did not err in allowing an S.B.I. agent to testify that one of the defense witnesses was known as a large dealer in controlled substances after the agent testified he was familiar with the general character and reputation of the defense witness. *Ibid.*

Testimony that a witness has never heard anything bad about another person is admissible as testimony of good reputation. *Ibid.*

Though it was error to allow a character witness to testify that another witness had "drinking problems" and was "not real truthful" without requiring him first to state that the witness's reputation was "bad," such error was not prejudicial. *Ibid.*

§ 89.2. Credibility of Witnesses; Corroboration

An instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such an instruction, and a general objection will not suffice. *S. v. Smith*, 76.

If evidence is admissible for substantive purposes, none of the "corroboration" limitations apply, and a party is not entitled to an instruction limiting its admissibility to that purpose, whether he requests one or not. *Ibid.*

§ 89.3. Credibility of Witness; Prior Statements

Testimony by the victim's mother and an emergency room nurse that the victim told them she had been raped and a written statement of the victim were properly admitted to corroborate the victim's testimony. *S. v. McClintick*, 649.

CRIMINAL LAW – Continued

§ 90.2. When Cross-examination of Own Witness May be Permitted

Prosecutor's questioning of his own witness to clear up confusion and enable him to testify correctly did not constitute an impermissible impeachment of his own witness under the old impeachment rule or under Rule of Evidence 607. *S. v. Covington*, 352.

§ 99.3. Conduct of the Court; Remarks and Other Conduct in Connection with the Admission of Evidence

The trial judge did not express an opinion on the credibility of a witness by allowing copies of the witness's statement implicating defendant to be photocopied and distributed to each juror. *S. v. Harris*, 556.

§ 101. Conduct or Misconduct Affecting Jurors

The trial court properly denied defendant's motion for a mistrial where the sheriff who was acting as bailiff seated himself directly behind or adjacent to the prosecutor when jury selection began and the trial judge took immediate steps to correct the situation. *S. v. Brown*, 40.

§ 101.2. Jurors; Exposure to Publicity or to Evidence Not Formally Introduced

Defendant was not prejudiced when the trial court failed to admonish the jurors to avoid contact with any accounts of the trial outside the courtroom and several jurors read a newspaper article covering the voir dire hearing on the admissibility of defendant's confession. *S. v. Harris*, 556.

§ 102. Argument and Conduct of Counsel; Who is Entitled to Conclude Argument; Time Limits

Although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three may argue for as long as they wish and each may address the jury as many times as he desires, but if the defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument. *S. v. Gladden*, 398.

§ 102.3. Argument of Counsel; Objection to and Cure of Impropriety

Possible prejudice from the prosecutor's reference to defendant's other daughter in a rape and incest case in a statement in the jury argument concerning "the life of another little girl" was removed by the court's curative instruction. *S. v. Bruce*, 273.

The trial court did not err by failing to act *ex mero motu* to correct a prosecutor's closing argument on character evidence. *S. v. Martin*, 667.

§ 102.4. Conduct During Trial Generally

Assertions made in the prosecutor's opening statement in a murder case that defendant was very upset because he was unable to see the victim's wife on a regular basis, that the victim's wife was also charged with the victim's murder, and that defendant offered a friend one thousand dollars to kill the victim were a fair and substantially accurate preview of the actual evidence. *S. v. Gladden*, 398.

§ 102.6. Particular Conduct and Comments in Argument to Jury

The trial court did not abuse its discretion in overruling defendant's objection to a remark by the prosecutor that she "took an oath of office to uphold the Constitution." *S. v. Bruce*, 273.

In this prosecution for first degree murder, the prosecutor's jury argument that the evidence showed that the bullet that struck the victim between the eyes

CRIMINAL LAW — Continued

was fired while he was lying in the ditch was supported by the evidence; the prosecutor's argument that there was no evidence to substantiate defendant's assertion that the victim stabbed him was a reasonable inference from the evidence presented; the prosecutor's argument that the victim's wife tried to establish an alibi through a friend was a reasonable inference from the evidence presented; and the prosecutor's argument that defendant had offered an acquaintance one thousand dollars to "knock off" the victim was supported by the evidence. *S. v. Gladden*, 398.

Although the defendant did not make a statement attributed to him by the prosecutor that he had told a fellow inmate to instruct the victim's wife to lie, the trial court was not required to intervene *ex mero motu* since the thrust of the prosecutor's argument was that defendant had attempted to tell the victim's wife to lie, and this assertion was amply supported by defendant's own testimony. *Ibid.*

The prosecutor's jury argument to the effect that the wounded and dying murder victim could hear his wife and defendant laughing at him was supported by the evidence. *Ibid.*

The prosecutor's comments concerning the expertise and work load of the Onslow County law enforcement agencies were not so grossly improper as to require the trial court to intervene *ex mero motu*. *S. v. Mason*, 724.

The prosecutor's improper jury argument of facts not in evidence and her opinions as to why a State's witness changed his testimony was not grossly improper so as to require the trial judge to intervene *ex mero motu*. *Ibid.*

The prosecutor did not exceed the bounds of permissible argument by encouraging the jury to consider their obligation to do something about serious crime. *S. v. Miller*, 773.

§ 102.7. Argument of Counsel; Comment on Character and Credibility of Witnesses

The prosecutor's improper jury argument expressing a personal opinion as to the credibility of the sheriff was not so grossly improper as to require the trial court to intervene *ex mero motu*, and the prosecutor's argument concerning the credibility of a detective was in response to defense counsel's attacks on the detective as a witness and was not improper. *S. v. Gladden*, 398.

Any prejudice from the prosecutor's misstatement of the law that "prior inconsistent statements show that a person is not credible or believable" was cured when the trial judge properly instructed on the weight to be accorded to prior inconsistent statements. *Ibid.*

Assuming the prosecutor's jury argument concerning the abilities of a State's witness as an investigating officer amounted to an improper expression of opinion as to the witness's credibility, it was not so grossly improper so as to require the trial judge to intervene *ex mero motu*. *S. v. Miller*, 773.

§ 102.8. Argument of Counsel; Comment on Failure to Testify

The prosecutor's jury argument that defendant had failed to produce evidence to refute the State's case did not constitute an impermissible comment on defendant's failure to testify. *S. v. Mason*, 724.

§ 102.9. Argument of Counsel; Comment on Defendant's Character and Credibility

The prosecutor's jury argument that defendant was not telling the truth and "if I was in his shoes, I probably wouldn't either" was not so grossly improper as to require the trial judge to intervene *ex mero motu*. *S. v. Gladden*, 398.

CRIMINAL LAW – Continued

The prosecutor's jury argument concerning the dangerousness of defendant which incorporated matters of the prosecutor's personal knowledge and opinion was improper, but the impropriety was cured by the trial court's instruction. *S. v. Mason,* 724.

§ 105.1. Making and Renewal of Motion to Dismiss

Where defendant offered evidence following the trial court's denial of his motion for dismissal at the close of the State's evidence, the trial court's denial of that motion was not properly before the appellate court for review. *S. v. Bruce,* 273.

§ 106.4. Proof of Corpus Delicti

It is no longer necessary in noncapital cases that there be independent proof tending to establish the corpus delicti of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness. *S. v. Parker,* 222.

There was sufficient substantial independent evidence which would tend to establish that defendant was telling the truth when he confessed where defendant confessed to an armed robbery and there was no evidence of the corpus delicti independent of defendant's confession. *Ibid.*

§ 112.6. Instructions on Burden of Proof and Presumptions; Insanity

The trial court's instruction that "if you are in doubt as to the insanity of the defendant, the defendant is presumed to be sane and you would find the defendant guilty" did not improperly convey to the jury that defendant was required to overcome all doubt on this issue when considered in context. *S. v. Avery,* 1.

The trial court did not err in a prosecution for murder by instructing the jury to consider evidence of defendant's insanity only if it found that the State had proved beyond a reasonable doubt all the elements of the crimes submitted to it. *S. v. Mize,* 285.

§ 113.1. Recapitulation or Summary of Evidence

The trial court's statement in summarizing the evidence that the State offered evidence tending to show that defendant told another Marine "that his girlfriend and he wanted [the victim] dead" when the Marine testified only that defendant told him that the victim's wife had asked him to kill her husband constituted a minor discrepancy not prejudicial to defendant where another witness had testified that defendant told him that "he and his girlfriend" wanted the victim killed. *S. v. Gladden,* 398.

The trial court did not err in instructing the jury that the State offered evidence tending to show that "defendant made a statement to one of the officers that he was wearing black pants" at the time the victim died when the officer stated at one point that defendant said he was wearing *black* pants and at another point that defendant told him he was wearing *dark* pants. *Ibid.*

The trial court's failure to include in its recapitulation of the evidence in the original charge any reference to defendant's claim that the victim initially attacked him with a knife was cured when the trial court subsequently instructed the jury that defendant offered evidence tending to show that there was an initial attack upon defendant by the victim. *Ibid.*

§ 114.2. No Expression of Opinion in Court's Statement of Evidence or Contentions

The trial court's statement that the State offered evidence tending to show that defendant told a detective "that he went into the ditch and crouched or lay

CRIMINAL LAW — Continued

down" while waiting for the victim was in substantial accord with the actual testimony and did not amount to an improper expression of opinion by the trial court. *S. v. Gladden*, 398.

§ 119. Requested Instructions

The trial court gave instructions substantially in accord with defendant's requested instructions pertaining to general criminal intent or *mens rea*, specific intent and willfulness insofar as the requested instructions were a correct statement of the law and proper in the context of the case. *S. v. Avery*, 1.

§ 122.2. Additional Instructions upon Failure to Reach Verdict

The trial court's inquiry into the jury's numerical division was not error *per se*, but the court erred by giving the instructions set out in N.C.G.S. 15A-1235(b)(1) and (2), but not the instructions set out in N.C.G.S. 15A-1235(b)(3) and (4); however, defendant did not object to the incomplete instruction and it was not "plain error" entitling defendant to a new trial. *S. v. Williams*, 310.

§ 126.3. Acceptance of Verdict; Impeachment of Verdict

The trial court did not err by denying defendant's motion to re-poll the jury after a juror attempted to change her vote. *S. v. Martin*, 667.

§ 135.4. Judgment and Sentence in Capital Cases; Separate Sentencing Proceeding

In a prosecution in which defendant was found guilty of first degree murder based on four theories, the Supreme Court declined to initiate a rule requiring the jury to rank the theories upon which its murder verdict rested. *S. v. Fields*, 191.

A sentence of death imposed in a first degree murder case was not disproportionate to the penalty imposed in similar cases. *S. v. Gladden*, 398.

§ 135.6. Judgment and Sentence in Capital Cases; Competency of Evidence at Sentencing

The trial court did not err during the sentencing phase of a prosecution for murder by allowing the State to present evidence of the circumstances surrounding his prior convictions even though defendant was willing to stipulate the existence of the convictions and that they all involved the use or threat of violence. *S. v. Brown*, 40.

§ 135.7. Judgment and Sentence in Capital Cases; Instructions in Sentencing Phase

The trial court did not err in the sentencing phase of a prosecution for murder by characterizing the jury's sentencing decision as a recommendation. *S. v. Brown*, 40.

§ 135.8. Judgment and Sentencing in Capital Cases; Aggravating Circumstances

The trial court did not err during the sentencing phase of a prosecution for murder by submitting the aggravating factor that the killing was especially heinous, atrocious or cruel. *S. v. Brown*, 40.

A finding of the especially heinous, atrocious or cruel aggravating circumstance for first degree murder is permissible only when the level of brutality involved exceeds that normally found in first degree murder crimes, when the first degree murder in question was conscienceless, pitiless or unnecessarily torturous to the victim, or when the killing demonstrates an unusual depravity of mind on the part of defendant beyond that normally present in first degree murder. N.C.G.S. § 15A-2000(e)(9). *S. v. Gladden*, 398.

CRIMINAL LAW – Continued

The evidence supported submission to the jury of the especially heinous, atrocious or cruel aggravating circumstance for a first degree murder on the ground that the murder was physically agonizing for the victim and on the ground that the killing demonstrated an unusual depravity of mind on the part of defendant. *Ibid.*

§ 135.9. Judgment and Sentencing in Capital Cases; Mitigating Circumstances

The trial court did not err in a prosecution for murder by submitting to the jury the mitigating factor of no significant history of prior criminal activity over defendant's objection. *S. v. Brown,* 40.

There was no prejudice in the sentencing phase of the prosecution for murder where the State was allowed to present evidence during its case in chief of defendant's six convictions for felonious breaking and entering and felonious larceny. *Ibid.*

The trial court did not err in failing peremptorily to instruct the jury on the existence of the statutory mitigating circumstance that defendant had no significant history of prior criminal activity or on the mitigating circumstance that the victim was a voluntary participant in defendant's homicidal act. *S. v. Gladden,* 398.

§ 135.10. Judgment and Sentence in Capital Cases; Review

The record in a prosecution for murder and robbery fully supported the submission of the aggravating factors which were found by the jury, there was no indication of the influence of passion or prejudice, and the sentence was not disproportionate. *S. v. Brown,* 40.

§ 138.13. Fair Sentencing Act

Defendant is entitled to a new sentencing hearing on his felonious larceny conviction where the State contended that a mere clerical error resulted in the file number of the first degree murder offense being placed on the Findings form and that the trial judge intended his findings to relate only to the felonious larceny conviction, but the trial judge erred by finding two aggravating circumstances—that the victim was very old and that the offense was especially heinous, atrocious, and cruel—which were, under the facts of this case, totally unrelated to the crime of felonious larceny, and if there was no clerical error, the trial judge clearly erred by sentencing defendant to a term in excess of the presumptive sentence without making written findings in aggravation and mitigation. *S. v. Ledford,* 599.

§ 138.14. Fair Sentencing Act; Consideration of Aggravating and Mitigating Factors

The trial court did not abuse its discretion when sentencing defendant for murder, armed robbery, and kidnapping by finding that the aggravating factor outweighed the three mitigating factors. *S. v. Parker,* 249.

The Court of Appeals' language in *State v. Baucom,* 66 N.C. App. 298, that only one factor in aggravation is necessary to support a sentence greater than the presumptive term, will not always be true. *Ibid.*

§ 138.15. Fair Sentencing Act; Aggravating Factors

The record reveals that the trial court made a separate finding in aggravation that defendant is a dangerous and mentally abnormal person for each crime in accordance with the rule stated in *State v. Ahearn,* 307 N.C. 584, 300 S.E. 2d 689. *S. v. Avery,* 1.

§ 138.16. Aggravating Factors; Position of Leadership

The evidence supported the trial court's findings as factors in aggravation of defendant's punishment for armed robbery that defendant occupied a position of

CRIMINAL LAW — Continued

leadership or dominance over the other participants and that he induced others to commit the crime. *S. v. Miller,* 773.

§ 138.17. Aggravating Factors; Avoiding Arrest

The trial court erred in a prosecution for murder, armed robbery, and kidnapping by finding as an aggravating factor that defendant was motivated by a desire to escape the processes of the law. *S. v. Parker,* 249.

§ 138.29. Aggravating Factors; Other Factors

The trial court's finding as an aggravating factor that "defendant is a dangerous and mentally abnormal person whose commitment for an extended period of time is necessary for the protection of the public" did not punish defendant for being mentally ill and was proper. *S. v. Avery,* 1.

The trial court's findings in aggravation that defendant is a dangerous and mentally abnormal person and that defendant engaged in a pattern or course of violent conduct were not improperly based on the same evidence. *Ibid.*

The trial court did not err in a prosecution for armed robbery by finding as an aggravating factor that defendant had repudiated his previously acknowledged wrongdoing while under oath and that such repudiation was untrue. *S. v. Brown,* 40.

The trial court erred in a prosecution for murder, armed robbery, and kidnapping by finding in aggravation that defendant showed a lack of remorse for the crimes. *S. v. Parker,* 249.

§ 138.30. Fair Sentencing Act; Mitigating Factors

The trial court did not err in failing to find as mitigating factors in non-capital felony cases all of the mitigating factors found by the jury in the sentencing phase of a capital case tried with the non-capital cases. *S. v. Avery,* 1.

§ 138.33. Mitigating Factors; Passive Participant

The trial court did not err in a prosecution for murder, armed robbery, and kidnapping by failing to find the mitigating factor that defendant was a passive participant. *S. v. Parker,* 249.

§ 142.2. Probation; Form of Judgment

The trial court did not err when sentencing defendant for assault with a deadly weapon by including without findings a condition of probation that defendant pay the victim's medical bills not covered by insurance. *S. v. Hunter,* 371.

§ 146.2. Defects on the Face of the Record

The issue of whether the trial court erred when sentencing defendant for assault with a deadly weapon by failing to make findings of fact when imposing a condition for probation was properly presented for appellate review because defendant's appeal standing alone presented the face of the record for review, the judgment is a part of the record, and the judgment disclosed the lack of findings. N.C. Rule of App. Procedure 9(3)(v)ii. *S. v. Hunter,* 371.

§ 154.1. Transcript

The closing argument by defendant's counsel was preserved in the record in a form adequate to permit appellate review. *S. v. Harbison,* 175.

CRIMINAL LAW — Continued

§ 156.2. Certiorari Granted or Denied in Particular Cases

The Supreme Court elected to consider the effectiveness of defendant's counsel under its power of discretionary review even though defendant failed to raise the issue during a prior direct appeal of his conviction. *S. v. Harbison*, 175.

§ 161. Exceptions

A defendant who contends that an exception was deemed preserved or taken without objection made at trial has the burden of establishing his right to appellate review and must assert the manner in which the exception was preserved or how the error may be noticed. *S. v. Gardner*, 444.

§ 162. Objections

Assuming that a witness's reference to a codefendant by name and by description as "the short one" violated a stipulation that the witness was unable to identify her assailants at trial, defendant's failure to object constituted a waiver of objection, and the testimony did not constitute plain error. *S. v. Covington*, 352.

Defendant waived his objection to testimony when testimony of a similar character was admitted without objection. *S. v. Bruce*, 273.

§ 165. Exceptions to Argument of Prosecutor

An appellate court may review the prosecution's opening statement in a capital case even though no objection was made at trial, but review is limited to an examination of whether the statement was so grossly improper that the trial judge abused his discretion in failing to intervene *ex mero motu*. *S. v. Gladden*, 398.

§ 169. Harmless and Prejudicial Error in the Admission or Exclusion of Evidence

The appellate court cannot determine whether defendant was prejudiced by the exclusion of testimony where defendant failed to put into the record what the witnesses would have testified if they had been permitted to do so. *S. v. McClintick*, 649.

§ 171. Error Relating to One Count or to One Degree of Crime Charged

A kidnapping prosecution was remanded for a new trial where the jury did not indicate which of three underlying purposes formed the basis of its verdict and one purpose was not supported by the evidence. *S. v. Moore*, 738.

§ 173. Invited Error

Defendant opened the door to the State's introduction of written exhibits showing the facts surrounding his involvement in an alleged court action for the purpose of impeaching defendant's testimony on cross-examination denying any involvement in or knowledge of such a court action. *S. v. Avery*, 1.

§ 181. Post-conviction Hearing

The trial court did not err in a prosecution for murder and robbery by denying defendant's post-guilt phase motions to set aside the verdict as contrary to the evidence and to law, for a new trial, and to arrest judgment. *S. v. Brown*, 40.

The trial court did not err in a prosecution for murder and robbery by denying defendant's post-penalty motions to set aside the verdicts as contrary to the evidence and the law. *Ibid.*

§ 181.4. Post-conviction Hearing; Sufficiency of Showing

Defendant's motion for appropriate relief filed with the Supreme Court was dismissed where the matter was remanded to the superior court, denied, and no exceptions were taken. *S. v. Martin*, 667.

DEEDS

§ 9. Deeds of Gift

An obligation imposed upon the grantees in a right-of-way deed to maintain an all-weather driveway across the right-of-way constituted sufficient consideration for the deed so that it was not a deed of gift. *Higdon v. Davis*, 208.

§ 15. Special Limitations

When an easement is granted subject to a condition subsequent, the right of re-entry passes with the fee to the owner of the servient tract. Also, if a determinable easement terminates, it reverts to the owner of the servient tract rather than to the original grantor or his heirs. *Higdon v. Davis*, 208.

EASEMENTS

§ 8. Nature and Extent of Easement

The right of re-entry for an easement granted subject to a condition subsequent passes with the fee to the owner of the servient tract, and if a determinable easement terminates, it reverts to the owner of the servient tract rather than to the original grantor or his heirs. *Higdon v. Davis*, 208.

§ 8.1. Construction of Easement Instruments

In construing a conveyance of an easement, whether or not executed prior to the effective date of N.C.G.S. § 39-1.1, the deed is to be construed in such a way as to effectuate the intention of the parties as gathered from the entire instrument. *Higdon v. Davis*, 208.

EMINENT DOMAIN

§ 6.2. Evidence of Value; Property in Vicinity

The trial court did not err in a condemnation action by refusing to allow the City to offer evidence of the sales prices of two properties which the court determined were noncomparable. *City of Winston-Salem v. Cooper*, 702.

§ 6.6. Evidence of Value; Qualification of Witness

The trial court did not err in a condemnation action by denying the City's motion to strike the entire testimony of an expert who allegedly misunderstood the permitted uses under a zoning ordinance. *City of Winston-Salem v. Cooper*, 702.

§ 6.9. Evidence of Value; Cross-examination of Witness

The trial court in a condemnation action correctly refused to allow the City to cross-examine the property owners' experts as to specific dollar values of noncomparable properties. *City of Winston-Salem v. Cooper*, 702.

GRAND JURY

§ 3.3. Challenge to Composition; Racial Discrimination

There was no systematic exclusion of non-whites from the jury pool from which the grand jury was drawn so as to deny defendant equal protection under the Fourteenth Amendment. *S. v. Avery*, 1.

HOMICIDE

§ 4.2. Murder In Commission of Felony

Fire bombs used by defendant were deadly weapons used in the perpetration of the felony of attempting to burn a building used for trade, and this felony could serve as the underlying felony under the felony murder rule. *S. v. Avery,* 1.

A homicide victim's death occurred during the perpetration of a larceny, not after its completion, where defendant and his companions had entered a storage shed and removed a chain saw and maul and were checking to see if the house was occupied when the victim approached to investigate. *S. v. Fields,* 191.

A killing was effected during the perpetration of a felony committed with the use of a deadly weapon where defendant carried a gun during the commission of a larceny but did not use it to commit the larceny. *Ibid.*

§ 7. Insanity

The trial court did not err in a prosecution for first degree murder by not directing a verdict of not guilty by reason of insanity. *S. v. Mize,* 285.

§ 12.1. Indictment; Premeditation and Deliberation, Perpetration of Felony

An indictment was sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder. *S. v. Avery,* 1.

§ 15.2. Relevancy and Competency of Evidence; Defendant's Mental Condition

A witness's testimony that he heard masculine laughter coming from a murder scene shortly after shots were fired was admissible against defendant to show his mental state at the time of the shooting. *S. v. Gladden,* 398.

§ 15.5. Expert and Opinion Evidence As to Cause of Death

A pathologist's testimony that injuries suffered by the victim were a proximate cause of her death, unqualified by the terms "could" or "might," did not amount to an expression of opinion as to the ultimate issue or invade the province of the jury. *S. v. Ledford,* 599.

Testimony by a pathologist that injuries sustained by the victim were a "proximate cause" of her death did not constitute an improper legal conclusion but did constitute testimony that a legal standard had been met, but its admission was harmless error. *Ibid.*

§ 18. Evidence of Premeditation and Deliberation

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; (6) evidence that the killing was done in a brutal manner; and (7) the nature and number of the victim's wounds. *S. v. Gladden,* 398.

§ 18.1. Particular Circumstances Showing Premeditation and Deliberation

The trial court did not err by submitting to the jury the charge of first degree murder based on premeditation and deliberation. *S. v. Brown,* 40.

The evidence supported defendant's conviction for first degree murder based on premeditation. *S. v. Fields,* 191.

The State's evidence, including evidence of a boot print and cigarette butts found at the crime scene, was sufficient to support a finding that defendant was the perpetrator of a felony murder. *S. v. Ledford,* 599.

HOMICIDE — Continued

§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder

There was sufficient evidence of premeditation and deliberation to support defendant's conviction for the first degree murder of his girlfriend's husband. *S. v. Gladden*, 398.

The State's evidence was sufficient for the jury in a prosecution of defendant for first degree murder in the burning death of a child. *S. v. Riddick*, 749.

§ 21.6. Sufficiency of Evidence of Homicide In Perpetration of Felony

State v. Franklin, 308 N.C. 682, did not abandon the rule that there must be some evidence of the *corpus delicti* in addition to defendant's confession, but simply held that this rule is fulfilled in a felony murder prosecution when the fact of death is independently shown. *S. v. Parker*, 222.

The State's evidence was sufficient to show that the offense was committed at night so as to support defendant's conviction of felony murder based on the underlying felony of first degree burglary. *S. v. Ledford*, 599.

The evidence supported defendant's conviction under the theory of acting in concert of felony-murder of a customer who drove into a convenience store parking lot during a robbery of the convenience store. *S. v. Miller*, 773.

§ 25. First Degree Murder

The trial court did not err in its instructions to the jury in a first degree murder prosecution by instructing the jury to consider whether a frying pan or a telephone cord were dangerous weapons. *S. v. Williams*, 310.

§ 28.3. Aggression or Provocation by Defendant; Use of Excessive Force

The trial court's failure to instruct the jury on defendant's right to stand his ground if it found that he was not the aggressor did not constitute plain error. *S. v. Morgan*, 626.

§ 30. Submission of Guilt of Lesser Degrees of the Crime

The trial court did not err in a first degree murder prosecution by refusing to instruct the jury on second degree murder. *S. v. Williams*, 310.

§ 30.3. Involuntary Manslaughter

The trial court in a first degree murder prosecution did not err in refusing to submit to the jury the lesser included offense of involuntary manslaughter. *S. v. Avery*, 1.

INCEST

§ 1. Generally

The State introduced sufficient evidence of penetration to permit the jury to find defendant guilty of incest with and rape of his daughter where the child victim testified at trial that defendant had penetrated her. *S. v. Bruce*, 273.

INDICTMENT AND WARRANT

§ 6.2. Warrants; Sufficiency of Evidence to Support Issuance

The facts presented to a magistrate were sufficient to support a determination of probable cause to arrest, and the omission of a prior inconsistent statement by the witness and the fact that the detective interrogating the witness did not believe the rest of his account were not material. *S. v. Martin*, 667.

INDICTMENT AND WARRANT – Continued

§ 13. Bill of Particulars

The State's responses to defendant's motion for a bill of particulars, when considered with the indictments, sufficiently gave defendant notice of what role the State claimed he played in the offenses charged so as to allow him adequately to prepare his defense. *S. v. McClintick*, 649.

INSURANCE

§ 87. Omnibus Clause; Drivers Insured

An automobile liability insurance policy issued to a rental car company covered the nineteen-year-old daughter of lessee despite a provision in the rental agreement which prohibited the use of vehicles by drivers under twenty-one. *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 341.

§ 95.1. Cancellation of Compulsory Insurance; Notice to Insured

The "Premium Notice" mailed by an automobile liability insurer to the insured constituted a manifestation of the insurer's willingness to renew the policy within the meaning of G.S. 20-310(g)(1) so that the notice requirements of G.S. 20-310(f) did not apply in order for the policy to be terminated for nonpayment of premium. *Smith v. Nationwide Mut. Ins. Co.*, 262.

§ 96.1. Notice of Accident or Claim; Time for Giving Notice

The trial court properly concluded that the failure of defendant insured to notify plaintiff liability insurer as soon as practicable after an accident lacked good faith and that plaintiff was therefore relieved of its obligations under the policy. *Great American Ins. Co. v. C. G. Tate Construction Co.*, 714.

§ 110. Payment; Extent of Liability of Insurer

Defendant insurance company was liable only for the statutory minimum where it had provided coverage to a car rental company and a lessee asked his nineteen-year-old daughter to drive the car in violation of the rental agreement. *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 341.

§ 149. General Liability Insurance

Where plaintiff trash collector intentionally dumped waste materials onto a landfill over a period of years, the unexpected leaching of contaminants from the waste materials into the groundwater beneath the landfill was accidental and thus an "occurrence" within the meaning of liability policies issued to plaintiff, but the alleged occurrence was excluded from coverage by a pollution exclusion clause in the policies. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 688.

JURY

§ 6. Voir Dire Generally

The trial court did not err in a prosecution for murder and robbery by denying defendant's motion for sequestration and individual voir dire for prospective jurors. *S. v. Brown*, 40.

§ 6.3. Propriety and Scope of Examination

The trial court did not abuse its discretion in refusing to permit defense counsel to ask two prospective jurors certain questions relating to the insanity defense where the questions were hypothetical and tended to stake out the jurors and cause them to pledge themselves to a future course of action at a stage of the

JURY — Continued

trial when no evidence had been presented and no instructions had been given on the applicable law. *S. v. Avery*, 1.

§ 6.4. Voir Dire; Belief in Capital Punishment

The trial court did not err in a prosecution for murder and robbery by sustaining the State's objection to defendant asking a potential juror whether there was anything to make him believe that a death sentence would not be carried out. *S. v. Brown*, 40.

§ 7.4. Sufficiency of Evidence of Racial Discrimination

Selection of the jury pool from the county voter registration lists did not violate defendant's right to be tried by a jury drawn from a representative cross-section of the community. *S. v. Avery*, 1.

§ 7.7. Waiver of Right to Challenge for Cause

Defendant was not prejudiced when the trial court denied his challenge for cause to a prospective juror where defendant exercised a peremptory challenge to remove the juror and failed to exhaust all of his peremptory challenges. *S. v. Avery*, 1.

§ 7.8. Particular Grounds for Challenge and Disqualification

The trial court did not err in excusing five prospective jurors for cause based on reasons of employment, conflicts, religious opinions, opposition to the death penalty, and prejudicial knowledge of defendant's parole opportunity if convicted. *S. v. Avery*, 1.

§ 7.11. Scruples Against, or Belief In, Capital Punishment

The death qualification of a jury in a first degree murder trial did not violate defendant's rights to due process and trial by a jury drawn from a representative cross-section of the community. *S. v. Avery*, 1.

Twelve potential jurors were properly excused for cause under the requirements of *Witherspoon v. Illinois*, 391 U.S. 510 and N.C.G.S. 15A-1212(8) where each of the jurors indicated that they could not vote for the death penalty under any circumstances. *Ibid.*

The practice of death qualifying the jury did not deprive defendant of a fair trial. *S. v. Brown*, 40; *S. v. Williams*, 310.

§ 7.12. Capital Punishment; Disqualifying Scruples or Beliefs

In a prosecution for robbery and murder, the trial court did not err by excluding a juror who explicitly stated that he could not vote to return a sentence of death under any circumstances; *Witherspoon v. Illinois*, 391 U.S. 510, did not set out any specific terminology or ritualistic form of questioning which must be employed when delving into a juror's views on capital punishment. *S. v. Brown*, 40.

KIDNAPPING

§ 1. Elements of Offense

Where defendant was convicted of first degree kidnapping on the basis that he had sexually assaulted the victim during the kidnapping, defendant could not properly be convicted and sentenced for first degree kidnapping as well as for first degree rape and first degree sexual offense. *S. v. Mason*, 724.

KIDNAPPING — Continued

The determination in a kidnapping prosecution based on holding a hostage was whether there was evidence that defendant intended to hold the victim as security for the performance or forbearance of some act by a third person. *S. v. Moore*, 738.

§ 1.2. Sufficiency of Evidence

The trial judge did not err by submitting a kidnapping charge to the jury on the theory that a purpose for the confinement or removal was to terrorize the victim. *S. v. Moore*, 738.

The evidence in a kidnapping case was sufficient to support a finding that defendant confined the victim as security for the prevention of his arrest. *Ibid.*

The trial court erred in a kidnapping prosecution by instructing the jury that it could consider the infliction of serious bodily harm as a purpose for the defendant's confinement or removal of the victim where the assault was the means rather than the purpose of the removal. *Ibid.*

LARCENY

§ 4. Warrant and Indictment

The trial court erred in a prosecution for first degree rape, felonious breaking and entering, and felonious larceny by not dismissing the charge of felonious larceny where the indictment alleged that defendant feloniously stole seven dollars but contained no allegation that the larceny was committed pursuant to a violation of N.C.G.S. 14-51, 14-53, 14-54, or 14-57, or that the larceny was committed pursuant to a burglary of any kind or to an unlawful entry or breaking in or out of any building. *S. v. Wilson*, 157.

§ 7.8. Felonious Breaking and Entering and Larceny; Evidence Sufficient

The State's evidence was sufficient to support submission of issues of defendant's guilt of felonious breaking or entering and larceny and larceny of an automobile. *S. v. Covington*, 352.

MASTER AND SERVANT

§ 68. Occupational Diseases

The legislature cannot by enacting 1977 N.C. Sess. Laws ch. 1305 retroactively alter a 1977 judgment of the Industrial Commission that plaintiff had no claim to compensation for byssinosis. *Hogan v. Cone Mills Corp.*, 127.

§ 87. Claim under Compensation Act As Precluding Common Law Action

Summary judgment was properly entered for defendants in a negligence action against an employer by the estate of an employee who allegedly died as a result of defendant's willful and wanton negligence where the plaintiff had already recovered benefits under the Workers' Compensation Act. *Barrino v. Radiator Specialty Co.*, 500.

§ 93. Proceedings Before the Commission

The Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act. *Hogan v. Cone Mills Corp.*, 127.

§ 94.2. Award and Judgment of Commission

An order of dismissal of plaintiff's 1976 workers' compensation claim, entered at the instance of defendants, was a final adjudication of the merits for res judicata purposes rather than a voluntary dismissal. *Hogan v. Cone Mills Corp.*, 127.

MASTER AND SERVANT — Continued

Plaintiff is not barred from relief from a 1977 judgment dismissing his workers' compensation claim because he had never filed a motion with the Industrial Commission seeking such relief. *Ibid.*

§ 94.3. Rehearing and Review By Commission

The Industrial Commission has inherent power, analogous to that conferred on courts by G.S. 1A-1, Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a claim requires it. *Hogan v. Cone Mills Corp.*, 127.

There were sufficient facts in the record to warrant a remand of this case to the Industrial Commission in order for it to consider whether to set aside its 1977 judgment dismissing plaintiff's workers' compensation claim for byssinosis where plaintiff presented evidence tending to show that plaintiff believed the 1977 dismissal of his claim was without prejudice to his right to refile his claim and that his attorney acted without authority when he did not contest the 1977 order dismissing his claim with prejudice. *Ibid.*

MUNICIPAL CORPORATIONS

§ 30.14. Zoning; Gasoline Stations

The record did not support the conclusion of the Court of Appeals that defendants' performance of automotive repairs not in conjunction with a gasoline service station in a Highway Commercial zoning district was not in violation of the Durham County Zoning Ordinance, and the case is remanded for a determination of the type of repairs being performed by defendants and whether the rationale of *In re Couch*, 258 N.C. 345, applies to permit defendants to perform such repairs on their premises. *County of Durham v. Maddry & Co., Inc.*, 296.

PARENT AND CHILD

§ 7. Parental Duty to Support Child

A non-custodial parent's payment of court-ordered child support does not as a matter of law bar a third party from seeking reimbursement from the non-custodial parent, under the common law "Doctrine of Necessaries," for non-emergency medical services furnished to the child. *Alamance County Hospital v. Neighbors*, 362.

Because the third party provider's right to recovery against a parent for "necessaries" furnished to the parent's child is based upon the child's right to support, the third party provider must show that the services or goods provided were legal necessaries and that the parent against whom relief is sought has failed or refused to provide them. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 17.1. Failure to Inform Patient of Risks or Side Effects of Treatment

A claim for wrongful life on behalf of a Down's Syndrome child is not cognizable at law in North Carolina. *Azzolino v. Dingfelder*, 107.

An action for wrongful birth by the parents of a child born with Down's Syndrome is not cognizable at law in North Carolina. *Ibid.*

The trial court did not err by dismissing a medical malpractice claim by the siblings of a Down's Syndrome child. *Ibid.*

PRINCIPAL AND AGENT

§ 1. Creation and Existence of Relationship

The nineteen-year-old daughter of an automobile lessee was the agent of the father under the provisions of G.S. 20-281 even though the father knowingly violated the rental agreement by allowing her to drive the car. *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 341.

RAPE AND ALLIED OFFENSES

§ 4.1. Proof of Other Acts and Crimes

Evidence relating to sexual activity involving defendant's three-year-old daughter was properly admitted in a prosecution for first degree sexual offenses against defendant's sons. *S. v. DeLeonardo*, 762.

§ 4.2. Physical Condition of Prosecutrix

A physician was properly allowed to state his opinion that injuries he observed during his examination of a child were caused by "a male penis" even though the opinion was not qualified by the words "could" or "might." *S. v. Smith*, 76.

The Child Medical Examiner of Brunswick County was properly permitted to state his expert medical opinion that it was "highly likely" that two female children had had sexual intercourse based upon the contents of another doctor's medical report and information supplied to the witness by two colleagues. *Ibid.*

§ 4.3. Character or Reputation of Prosecutrix

Questions to a rape victim about the manner in which her assailant performed the act of sexual intercourse were not a proper subject of an in camera examination conducted pursuant to Rule of Evidence 412. *S. v. Mason*, 724.

§ 5. Sufficiency of Evidence

The evidence was sufficient to support submission to the jury of issues as to defendant's guilt of first degree rape and first degree sexual offense against a four-year-old child and a five-year-old child. *S. v. Smith*, 76.

The evidence in a prosecution for two charges of first degree sexual offense was sufficient. *S. v. DeLeonardo*, 762.

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of first degree rape. *S. v. Covington*, 352.

The State introduced sufficient evidence of penetration to permit the jury to find defendant guilty of incest with and rape of his daughter where the child victim testified at trial that defendant had penetrated her. *S. v. Bruce*, 273.

§ 6.1. Instructions; Lesser Degrees

The trial court did not err in a prosecution for rape by refusing to submit second degree rape as a possible verdict where defendant did not request such an instruction and all of the evidence was that defendant was either guilty or innocent of first degree rape. *S. v. Wilson*, 157.

The evidence of penetration in a prosecution for first degree rape and first degree sexual offense against two children did not require the trial court to instruct on the lesser included offenses of attempted first degree rape and attempted first degree sexual offense. *S. v. Smith*, 76.

Defendant's statement that he entered the victim's trailer after a companion broke into it and that he assisted his companion in accomplishing rape did not establish a basis for an instruction on lesser included offenses. *S. v. McClintick*, 649.

RAPE AND ALLIED OFFENSES — Continued

§ 7. Sentence and Punishment

Where defendant was convicted of first degree kidnapping on the basis that he had sexually assaulted the victim during the kidnapping, defendant could not properly be convicted and sentenced for first degree kidnapping as well as for first degree rape and first degree sexual offense. *S. v. Mason*, 724.

The mandatory life sentence for first degree rape is constitutional. *S. v. McClintick*, 649.

ROBBERY

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

The State's evidence was sufficient to support submission of an issue as to defendant's guilt of armed robbery. *S. v. Covington*, 352.

The evidence was sufficient to support a conviction for armed robbery where defendant took the shotgun the victim had been carrying after killing the victim. *S. v. Fields*, 191.

§ 4.6. Multiple Perpetrators; Evidence Sufficient

The evidence supported defendant's conviction under the theory of acting in concert of armed robbery of a customer who drove into a convenience store parking lot during a robbery of the convenience store. *S. v. Miller*, 773.

RULES OF CIVIL PROCEDURE

§ 1. Scope of Rules

The Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act. *Hogan v. Cone Mills Corp.*, 127.

§ 59. New Trials

The trial court erred in a paternity action tried before 1 July 1984 by granting a conditional new trial on the basis of juror misconduct where the misconduct was improperly proved solely by the juror's affidavit and testimony. *Smith v. Price*, 523.

SEARCHES AND SEIZURES

§ 7. Search and Seizure Incident to Arrest

A knife found in a jacket 3 or 4 feet from defendant when defendant was arrested was properly admitted as having been obtained by a valid search incident to arrest. *S. v. Parker*, 222.

Physical evidence seized from defendant and pretrial statements made by defendant after his arrest for murder and robbery were admissible where officers had probable cause to arrest. *S. v. Brown*, 40.

§ 40. Execution of Search Warrant; Items Which May be Seized

A padlock was lawfully seized from a motel room where defendant was arrested where the lock was found as the result of a search carried out under a warrant specifying items of bloody clothing as the items to be seized. *S. v. Williams*, 310.

STATE

§ 4. Actions Against the State

A contractor is not precluded from recovery under G.S. § 143-135.3 for breach of a construction contract by the State by failure of the contract to specify a remedy for the alleged breach. *Davidson and Jones, Inc. v. N. C. Dept. of Administration,* 144.

An unexpected overrun exceeding 400% in the amount of rock to be excavated under a construction contract with the State was a mutual mistake entitling plaintiff contractor to recover its duration-related costs incurred after the originally scheduled completion date as "extra costs" contemplated by the contract, but extra home office costs were not contemplated by the contract and could not be recovered. *Ibid.*

The trial court properly concluded that plaintiff did not waive or release its claim to duration-related costs caused by a massive overrun in the amount of rock to be excavated under a contract with the State when it executed a change order providing for payment for some extra expenses and for rock at the unit price and referring to "adjustment of all other construction caused thereby." *Ibid.*

TAXATION

§ 32. Taxes on Solvent Credits and Intangibles

Plaintiff executor is not eligible for an exemption from the intangibles tax with respect to the property he holds as executor on the ground that he himself, as executor, is a charitable organization or on the ground that the estate is a charitable organization. *Blumenthal v. Lynch, Sec. of Revenue,* 571.

The fiduciary exemption of G.S. § 105-212(3) is unavailable with respect to intangibles held and controlled by any personal representative of a resident decedent at any time during administration of the estate. *Ibid.*

Corporate stock held by an executor was not taxable for intangibles tax purposes as accounts receivable because it was subject to a buy-back agreement between decedent and the issuing company. *Ibid.*

WILLS

§ 56. Sufficiency of Description of Land or Chose

A devise of a specified number of acres, not described by metes and bounds, out of a larger tract is not void for vagueness. *Stephenson v. Rowe,* 330.

It is reasonable to infer that testator intended that his wife have the power to make a reasonable selection of a 30-acre tract "immediately surrounding the homeplace," and the wife's selection of the 30-acre tract was reasonable under the circumstances of this case. *Ibid.*

WITNESSES

§ 1.2. Competency of Witness; Children

The trial court erred in a prosecution for first degree rape, incest, and taking indecent liberties with a child by adopting counsel's stipulation in concluding that the child victim was incompetent to testify without personally examining or observing the child during a voir dire. *S. v. Fearing,* 167.

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The trial court did not err in a prosecution for first degree sexual offense by denying defendant's motion to suppress the testimony of his twelve-year-old son on the grounds that he was an incompetent witness. *S. v. DeLeonardo*, 762.

§ 1.3. Competency of Witness; Physical Condition

The trial court did not err in a prosecution for murder, robbery, larceny, and burglary by admitting the testimony of defendant's two companions, who were abusers of alcohol and hallucinogenic and psychotropic drugs. *S. v. Fields*, 191.

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