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SUPREME COURT OF NORTH CAROLINA

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

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

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

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

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

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KATHY E. MANNING ..... Greensboro, applied from the District of Columbia
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Given over my hand and Seal of the Board of Law Examiners this 29th day of June, 1987.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. BOBBY DEAN TRIPLETT, JR.

No. 650A84

(Filed 18 February 1986)

1. Homicide § 21.4— defendant as perpetrator of murder—sufficiency of evidence

The State's evidence was sufficient to support a reasonable inference that defendant murdered his mother where it tended to show that defendant shared a home with his mother; defendant was the last person to see his mother on the night of February 13; in the early morning hours of February 14, he was seen down a fifty-foot embankment and very near the spot where his mother's body was later found; cigarette butts of the brand defendant smokes were found near the body; defendant had made prior threats to his mother and had attacked her and choked her on occasions; defendant had told others that he would inherit all of his mother's property; and defendant had a motive for the killing in that he and his mother had argued over the fact that she would not allow defendant's estranged wife to move into her house.

2. Criminal Law § 73.2— hearsay testimony—admissibility under Rule 804(b)(5)—guidelines for trial court

In the exercise of its supervisory jurisdiction, the Supreme Court adopts guidelines for the admission of hearsay testimony under N.C.G.S. § 8C-1, Rule 804(b)(5) which parallel those guidelines adopted by the Court in *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833, for the admission of hearsay testimony under the "catchall" or "residual" hearsay exception of N.C.G.S. § 8C-1, Rule 803(24).

3. Criminal Law § 73.2— hearsay testimony—admission under Rule 804(b)(5)—unavailability of declarant

In order for hearsay testimony to be admitted under Rule 804(b)(5), the trial judge must first find that the declarant is unavailable before commencing the six-part inquiry prescribed by *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833.

4. Criminal Law § 73.2— hearsay testimony—admission under Rule 804(b)(5)—six-part inquiry by trial court

Once the trial court determines that the declarant is unavailable, in order to admit hearsay testimony under Rule 804(b)(5) the court must then (1) determine that the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars, although detailed findings of fact are not required; (2) enter a conclusion on the record that the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4); (3) make findings of fact and conclusions of law that the statement possesses equivalent circumstantial guarantees of trustworthiness; (4) include in the record a determination that the proffered statement is offered as evidence of a material fact; (5) make findings and conclusions that the hearsay statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, although the inquiry may be less strenuous than in Rule 803(24) cases since the declarant will be unavailable; and (6) enter a conclusion on the record that the general purposes of the Rules of Evidence and the interests of justice will best be served by admission of the statement into evidence.

5. Criminal Law § 73.2— hearsay testimony—admission under Rule 804(b)(5)—prospective application of guidelines

The requirements adopted by the Supreme Court as to the detail with which the trial judge must make the determinations specified in Rule 804(b)(5) will apply only to those cases in which the trial begins after the certification date of this opinion. In those cases to which such requirements do not apply, the appellate courts will examine each appeal on a case-by-case basis to determine whether the ruling of the trial judge admitting or excluding evidence under Rule 804(b)(5) may be sustained on the contents of the record on appeal.

6. Criminal Law § 73.2— hearsay testimony—admission under Rule 804(b)(5)—circumstantial guarantees of trustworthiness

Statements by a murder victim to two witnesses concerning defendant's threats and attacks against her possessed equivalent circumstantial guarantees of trustworthiness to permit admission of hearsay testimony by the witnesses concerning such statements where the first witness was a close friend of the victim and the victim was thus very likely to be honest when she told the witness of defendant's threats, the second witness was the victim's daughter, and the only apparent motive for the victim's statements to both witnesses was her concern for her own safety.

7. Criminal Law § 73.2— hearsay testimony—admission under Rule 804(b)(5)—sufficiency of notice

The trial court could reasonably conclude that written notice on the day defendant's trial began of the State's intent to offer hearsay statements of the murder victim, when considered in light of prior oral notice, provided defendant a fair opportunity to prepare to meet the statements and to contest their use as required under Rule 804(b)(5) where the evidence tended to show that, three weeks prior to defendant's trial, the prosecutor informed defendant's counsel of his intention to introduce statements made to two witnesses by the victim regarding defendant's attacks and threats toward her; defendant filed a

pretrial motion *in limine* as to statements made by the victim to any witnesses; and subpoenas were issued for these witnesses prior to the hearing of the motion and were available to defendant.

APPEAL by the defendant from judgment entered by *Judge Claude Sitton* at the July 30, 1984 Criminal Session of Superior Court, CALDWELL County.

The defendant was indicted for the first degree murder of his mother, Sumie Takamoto Triplett. He entered a plea of not guilty. The jury found the defendant guilty of the offense charged. Since the prosecutor had informed the trial court that there were no aggravating circumstances, the case was not tried as a capital case. The defendant was sentenced on August 2, 1984 to life imprisonment upon his conviction for first degree murder.

The defendant appealed his conviction for first degree murder and the resulting life sentence to the Supreme Court as a matter of right. Heard in the Supreme Court September 9, 1985.

Lacy H. Thornburg, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

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

MITCHELL, Justice.

The defendant has brought forth two assignments of error on appeal. He first contends that the trial court erred by denying his motion to dismiss the charge of first degree murder. He also contends that the trial court erred by allowing the State's witnesses to testify as to statements made to them by the victim prior to her death concerning threats made against her by the defendant. These contentions are without merit.

The State's evidence tended to show that the victim, Sumie Triplett, left her second shift mill job at 11:00 p.m. on Monday, February 13, 1984. Around 11:30 p.m., she arrived at her home which she shared with her son, the defendant.

At about 4:30 a.m. on February 14, 1984, a deputy sheriff on routine patrol spotted the victim's car at a "pull-off" area of U.S. Highway 321. After observing the empty car, the officer spotted

the defendant down a fifty-foot embankment. The defendant returned to the car and explained that he had gone to the woods "to use the bathroom." The officer noticed that the defendant's hair was wet. It had been raining earlier that night. The next morning, the defendant was again seen driving his mother's car within a couple of miles of the location at which the officer had seen him. The victim's body was eventually discovered nearby.

Late in the afternoon of February 14th, the defendant called his brother and told him that their mother was missing. The defendant told his brother and sister that he had last seen the victim around 11:30 the previous night. He said that his mother had told him that she was going out and would be back in a little while. The brother testified that the defendant did not seem upset that the victim was missing. Other witnesses testified that the defendant said that he would inherit all of his mother's property.

A search began after the police were notified that the victim was missing. On February 15th, a one-hour search of the area off U.S. Highway 321 where defendant's vehicle was seen the previous night produced a white sock and cigarette lighter. On February 18th, the search was resumed and the officers spotted a trail of blood splatters going down the highway embankment to an old roadbed. Following the trail of blood, the search party found three Marlboro Light cigarette butts and a woman's right shoe. The searchers followed the trail of blood for about three hundred feet and discovered the victim's body hidden under a branch and a pile of leaves. The victim had died from strangulation by ligature three or four days earlier.

Janie Cline, a friend of the victim, and Ann Marie Burns, the victim's daughter, both testified that the victim told them of recent incidents during which the defendant threatened her with harm. Ms. Cline testified that less than a month before the victim's death, she had stated that the defendant had threatened her with a knife and grabbed and choked her. Mrs. Burns testified that the victim had told her that the defendant had threatened the victim with a butcher knife.

The State also introduced evidence that the defendant smoked Marlboro Lights, the same brand as the cigarette butts found near the body. However, the police were unable to determine the blood type of the smoker from saliva residue on the

butts or whether the smoker was a secretor. The defendant was a blood type A-secretor. All three cigarettes found near the body had identical code numbers indicating that they came from the same machine and probably from the same pack, although code numbers on Marlboro Light cigarette butts found in the ashtray of the victim's car did not match those on the butts found near the body.

[1] In his first assignment of error, the defendant contends that the trial court erred by denying his motion to dismiss the charge of first degree murder on the ground that there was insufficient evidence to support a finding that the defendant was the perpetrator of the murder. This contention is without merit.

In testing the sufficiency of the evidence to sustain a conviction and to withstand a motion to dismiss, the reviewing court must determine whether there is substantial evidence of each essential element of the offense and that the defendant was the perpetrator. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978); *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). When as here the motion to dismiss puts into question the sufficiency of circumstantial evidence, the court must decide whether a reasonable inference of the defendant's guilt may be drawn from the circumstances shown. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). If so the jury must then decide whether the facts establish beyond a reasonable doubt that the defendant is actually guilty. *Id.*

The State offered sufficient evidence to support a reasonable inference that the defendant murdered his mother. That evidence tended to show that the defendant was the last person to see his mother on February 13th. In the early morning hours of February 14th, he was seen down a fifty-foot embankment and very near the spot where his mother's body was later found. Cigarette butts of the brand he smokes were found near the body. The evidence also tended to show that the defendant had made prior threats to his mother and had attacked her and choked her on occasion. The defendant had told others that he would inherit all of his mother's property.

The State's evidence also tended to show that the defendant was living apart from his pregnant estranged wife. The defendant and his mother argued over the fact that she would not allow the defendant's wife to move into the house. His wife had told him that she would return if he got a job and a place to live. Although the State is not required to establish a motive for the crime, this evidence also tends to support an inference that the defendant was the perpetrator of the murder.

Based on the foregoing, we conclude that the evidence was sufficient in the present case to support a reasonable inference that the defendant committed the crime charged. No more was required since the evidence need not be inconsistent with every reasonable hypothesis of innocence in order to withstand a defendant's motion to dismiss. *Id.* at 101, 261 S.E. 2d at 118; *State v. Burton*, 272 N.C. 687, 158 S.E. 2d 883 (1968); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). Therefore, the trial court did not err by denying the defendant's motion to dismiss.

The defendant next assigns as error the trial court's actions in allowing the State's witnesses, Janie Cline and Ann Marie Burns, to testify about statements made to them by the victim regarding the defendant's threats and attacks against her. The defendant contends that their hearsay testimony about such statements was inadmissible under Rule 804(b)(5) of the North Carolina Rules of Evidence because (1) the statements did not have the required circumstantial guarantees of trustworthiness, and (2) the State did not provide written notice as required by Rule 804(b)(5).

Rule 804 which became effective July 1, 1984 provides in pertinent part:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions [for former testimony, statements under belief of impending death, statements against interest and statements of personal or family history] 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 produce 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.

N.C.G.S. 8C-1, Rule 804(b).

[2] In the recent decision of *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985), this Court exercised its supervisory power by adopting guidelines for the admissibility of hearsay testimony under the "catchall" or "residual" hearsay exception established by Rule 803(24). Because Rule 804(b)(5) and Rule 803(24) are substantively nearly identical, we now adopt parallel guidelines for the admission of hearsay testimony under Rule 804(b)(5).

Rule 804(b)(5) is a verbatim copy of Rule 803(24), except that Rule 804(b)(5) also requires that the declarant be unavailable before the hearsay may be admitted and Rule 803(24) does not. Rule 804(a) defines "unavailability as a witness" to include situations in which the declarant:

> (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
>
> (3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

N.C.G.S. 8C-1, Rule 804(a).

[3] Just as in Rule 803(24) cases, before the hearsay testimony can be admitted under Rule 804(b)(5), the trial judge must engage in the six-part inquiry prescribed in *Smith*. In Rule 804(b)(5) cases, however, the trial judge first must find that the declarant is unavailable before commencing the six-part inquiry. *United States v. Thomas*, 705 F. 2d 709 (4th Cir.), *cert. denied*, 464 U.S. 890 (1983) (finding of "unavailability" that proponent unable to procure attendance of declarant). The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case. For example, in the present case, the declarant is dead. The trial judge's determination of unavailability in such cases must be supported by a finding that the declarant is dead, which finding in turn must be supported by evidence of death. *See, e.g., United States v. Sindona*, 636 F. 2d 792, 804 (2d Cir. 1980). Situations involving out-of-state or ill declarants or declarants invoking their fifth amendment right against self-incrimination may require a greater degree of detail in the findings of fact. *See, e.g., Parrott v. Wilson*, 707 F. 2d 1262 (11th Cir.), *cert. denied*, 464 U.S. 936 (1983) (duration of illness was found to be long enough that trial could not be postponed).

[4] Once the trial judge determines the declarant is unavailable, he must proceed with the six-part inquiry prescribed by *Smith*. A complete analysis of the requirements for each part of the *Smith* inquiry is not necessary since that case itself provided such

analysis. However, a brief review of the requirements of *Smith* may prove helpful. First, the trial judge must determine that the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars. *State v. Smith*, 315 N.C. at 92, 337 S.E. 2d at 844. *See Furtado v. Bishop*, 604 F. 2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980). Detailed findings of fact are not required. After the trial judge determines the notice requirement has been met, he must next determine that the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4). *See State v. Smith*, 315 N.C. at 93, 337 S.E. 2d at 844. The trial judge need only enter his conclusion in this regard in the record. The trial judge also must include in the record his findings of fact and conclusions of law that the statement possesses "equivalent circumstantial guarantee of trustworthiness." *See State v. Smith*, 315 N.C. at 93, 337 S.E. 2d at 844-45; Rule 804(b)(5). Further, the trial judge must include in the record a determination that the proffered statement is offered as evidence of a material fact. *See State v. Smith*, 315 N.C. at 94, 337 S.E. 2d at 845.

The trial judge next must consider whether the hearsay statement "is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts." N.C.G.S. 8C-1, Rule 804(b)(5). Since under the requirements of Rule 804(b)(5) the declarant must be unavailable, the necessity for use of the hearsay testimony often will be greater than in the cases involving Rule 803(24). Nevertheless, the trial judge still must make findings and conclusions regarding the hearsay's probative value. *de Mars v. Equitable Life Assurance*, 610 F. 2d 55, 61 (1st Cir. 1979). However, the inquiry in such cases may be less strenuous than in Rule 803(24) cases, since the declarant will be unavailable.

The last inquiry under Rule 804(b)(5) 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." N.C.G.S. 8C-1, Rule 804(b)(5). The trial judge need only state his conclusion in this regard.

[5] For reasons identical to those fully discussed in *Smith*, the foregoing requirements as to the detail with which the trial judge must make the determinations specified in Rule 804(b)(5) will ap-

ply only to those cases in which the trial begins after the certification date of this opinion. *See State v. Smith*, 315 N.C. at 98, 337 S.E. 2d at 847. Such requirements 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 which no appeal was taken from the trial judgment. In these cases to which the requirements adopted herein do not apply—such as the present case—the appellate courts will examine each appeal on a case-by-case basis to determine whether the ruling of the trial judge admitting or excluding evidence under Rule 804(b)(5) may be sustained based on the contents of the record on appeal. If the record on appeal will not support the ruling of the trial judge, that ruling will be held to be error and the appellate court will then proceed to determine whether the error was reversible error under N.C.G.S. § 15A-1443.

We turn, then, to determine the issue in light of the defendant's contentions in the case at bar. The defendant contends the admission of the hearsay testimony regarding his attacks and threats against the victim were inadmissible under Rule 804(b)(5) because (1) the statements did not have the required circumstantial guarantees of trustworthiness, and (2) the State did not provide written notice as required under the Rule. Unlike the trial judge in *Smith*, the trial judge in the present case made findings of fact that, although not as detailed as will now be necessary under the requirements we have adopted today, are sufficient to support his holding that the hearsay testimony is admissible under the catchall Rule 804(b)(5). We find no error.

Except for differences as to the time and manner in which the proponent of a hearsay statement must give notice of his intent to offer the statement, North Carolina Rule of Evidence 804(b)(5) and Federal Rule of Evidence 804(b)(5) are substantively identical. Therefore, it is proper for this Court to look to federal decisions when determining whether a statement falls within the "other exceptions" of our Rules 804(b)(5) and 803(24).

We have previously held that in weighing the "circumstantial guarantees of trustworthiness" of a hearsay statement for purposes of Rule 803(24), the trial judge must consider among other factors (1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the

truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination. *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). Such factors also must be considered in weighing the "circumstantial guarantees of trustworthiness" under Rule 804(b)(5). Also pertinent to this inquiry are factors such as the nature and character of the statement and the relationship of the parties. *Herdman v. Smith*, 707 F. 2d 839 (5th Cir. 1983).

Janie Cline testified on *voir dire* that she was a close friend of the deceased, Sumie Triplett. Ms. Cline testified that on one occasion Mrs. Triplett said that the defendant had gotten mad at her, slung her around, and threatened her with a knife. After this incident, the deceased called her daughter to come over. Mrs. Triplett also told Ms. Cline that the defendant had choked her on another occasion.

Ann Marie Burns, the deceased's daughter, testified that on Saturday, January 28, 1984 at 9:00 p.m., her mother called and asked her to come over as soon as possible. When Mrs. Burns arrived, her mother stated that the defendant had thrown her around the room and then pulled a butcher knife from the counter, stating that he would cut her throat. Mrs. Burns testified that her mother then asked her to take a gun from the house because she was afraid to have it in the house with the defendant.

[6] The defendant contends that these statements by the victim did not possess circumstantial guarantees of trustworthiness equivalent to those of the other hearsay exceptions of Rule 804. He argues that the declarant consciously or unconsciously exaggerated the conflict between herself and the defendant and that the witnesses were biased. These arguments are unpersuasive.

Applying the factors set forth in *Herdman*, we find sufficient circumstantial guarantees of trustworthiness in the declarant's statements to Ms. Cline. Since the declarant and Ms. Cline enjoyed a close friendship, the declarant was very likely to be honest when she told Ms. Cline of the defendant's threats. Maternal love and concern ordinarily would keep a mother from falsely accusing her son. We consider it much more likely that a mother would slant facts to protect her children or present them in a favorable light than to harm them. The only apparent motivation

for the victim's statements to Ms. Cline in the present case was the victim's concern for her own safety.

The victim's statements to Mrs. Burns also possessed sufficient guarantees of trustworthiness. The only apparent motive for those statements was the victim's fear for her own safety. The evidence at trial gave no indication that the victim had any reason or desire to falsely accuse her son of the actions she described to her daughter.

Cases decided prior to the North Carolina Rules of Evidence, N.C.G.S. Ch. 8C, also support the admission of the hearsay testimony concerning the victim's statements. Those cases held that hearsay testimony was admissible when two factors were shown to exist: necessity and a reasonable probability of truthfulness. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). In *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983), this Court found a reasonable probability of truthfulness in statements made by the victim/declarant to a law enforcement officer which described ill will between the defendant and the victim and the victim's fear of the defendant. The statements by the victim in the present case, describing prior attacks upon her by the defendant and her fear of the defendant, possess the "circumstantial guarantees of trustworthiness" necessary under Rule 804(b)(5).

[7] We next consider the notice requirement of Rule 804(b)(5) which requires the proponent of the statement to give

> written notice stating his intention to offer the statement and the particulars of it, including the name and the 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 defendant contends the State failed to give written notice sufficiently in advance of offering the statements to provide him with a fair opportunity to prepare to meet them.

On July 30, 1984, the day the trial began, the State served written notice of its intent to offer the victim's statements. Notice served the first day of the trial often will not be sufficiently "in advance of offering the statement" to satisfy the requirements of the Rule. However, most courts have interpreted the notice requirement somewhat flexibly, in light of the express

policy of providing a party with a fair opportunity to meet the proffered evidence. *See Furtado v. Bishop*, 604 F. 2d 80, 92 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980) (applying the notice requirement of Federal Rule of Evidence 804(b)(5)).

In the present case, the evidence tended to show that three weeks prior to the defendant's trial, the prosecutor informed the defendant's counsel of his intention to introduce statements made to Ms. Cline and Mrs. Burns by the deceased regarding the defendant's attacks and threats toward her. On July 26, 1984, the defendant filed a motion *in limine* as to statements made by the deceased to any witnesses. Further, subpoenas were issued for these witnesses prior to the hearing of the motion and were available to the defendant.

The record clearly shows that the defendant had ample actual notice of the State's intention to offer the statements. From such evidence the trial judge could reasonably infer that the written notice on the day the defendant's trial began, when considered in light of the prior oral notice, provided the defendant a fair opportunity to prepare to meet the statements and to contest their use. Therefore, the trial judge did not err by admitting them into evidence.

No error.

STATE OF NORTH CAROLINA v. RONALD EDWARD FREELAND

No. 249A84

(Filed 18 February 1986)

1. Criminal Law § 89.1 — mother of rape victim — character evidence improperly admitted — no prejudice

Though the trial court in a rape case erred in allowing the seven-year-old victim's mother to give opinion testimony vouching for the veracity of her daughter and to testify to specific acts by the victim as indicative of her character, defendant failed to show that there was a reasonable possibility that, had the evidence been excluded, a different result would have been reached at trial, and admission of the evidence was therefore not prejudicial, since the victim gave a detailed and accurate description of defendant, corroborated by her father; she gave clear and consistent testimony at trial; and defendant failed to impeach her credibility in any way.

2. Constitutional Law § 76; Criminal Law § 48.1— evidence of defendant's post-arrest silence—prejudice cured by instruction

The trial court's curative instruction was sufficient to cure the prejudicial effect of testimony by a detective that defendant requested a lawyer and asserted his right to silence after being arrested and informed of his constitutional rights, since the prosecutor was not attempting to capitalize on defendant's silence or his request for counsel when the detective made his statements but was instead merely attempting to elicit from the detective the facts and circumstances surrounding a tape-recorded interview the detective had had with the victim on the night of the assault; immediately after the statements concerning defendant's exercise of his constitutional rights, defendant's counsel objected and moved to strike; the trial court immediately sustained defendant's objection and instructed the jury to disregard the statements and not to consider them in their deliberations; the jurors indicated by raising their hands that they could follow the instruction; and the evidence of defendant's guilt was very strong.

3. Constitutional Law § 34; Criminal Law § 26.5— conviction for first degree kidnapping and first degree rape—double jeopardy

Defendant was placed in double jeopardy by being convicted of first degree kidnapping based on removal of the victim to facilitate a sexual assault as well as being convicted of first degree rape and first degree sexual offense.

4. Constitutional Law § 34; Criminal Law § 26.5— same conduct violating two statutes—double jeopardy—amount of punishment—intent of legislature

When a defendant is tried in a single trial for violations of two statutes which punish the same conduct, the amount of punishment allowable under the double jeopardy clause of the Federal Constitution and the law of the land clause of the N.C. Constitution is determined by the intent of the legislature; therefore, if the legislature has specifically authorized cumulative punishment for the same conduct under two statutes, the prosecutor may seek and the trial court may impose cumulative punishment under such statutes in a single trial, but if cumulative punishment is not so authorized, a defendant may be punished under only one statute.

Justices EXUM, MARTIN and FRYE concur in the result.

APPEAL by defendant as a matter of right pursuant to N.C.G.S. § 7A-27(a) from the judgments entered by *Hobgood, J.*, at the 6 February 1984 Criminal Session of ALAMANCE County Superior Court. Judgments entered 16 February 1984.

Defendant was convicted of first degree rape, first degree sexual offense and first degree kidnapping. Following the sentencing hearing Judge Hobgood sentenced defendant to terms of life imprisonment for first degree rape and first degree sexual offense, the sentences to run concurrently, and to a thirty-year term of imprisonment for first degree kidnapping, that sentence to run consecutively with the life sentences.

The State's evidence tended to show that defendant approached Elizabeth Boyd, the seven year old victim, while she was playing near her home. Defendant convinced her to accompany him to a nearby wooded area where he inserted his finger in her vagina. Subsequent to this act he raped her. Semen, consistent with defendant's blood type, was found on the victim's underwear.

Elizabeth told her mother, Ellen Boyd, that her assailant was a white male who was wearing a dark blue baseball cap and T-shirt, each with white lettering, a pair of blue jeans and a pair of blue and white Nike tennis shoes. She also recalled that he was carrying a radio-tape player. Wilson Boyd, Elizabeth's father, had seen defendant walking on the road in front of his house prior to the assault. Steve Johnson, who lived near the Boyd residence, saw an individual matching Elizabeth's description of her assailant cut through his yard shortly after the assault had taken place. At trial in defendant's presence Johnson stated that he did not see that individual in the courtroom.

After Elizabeth recounted what had happened to her Mrs. Boyd called the Sheriff's Department, told them her daughter had been raped, and described the assailant. Shortly after the Sheriff's Department received this description of the assailant, defendant, who matched the description, was spotted by Lieutenant Perkins along Highway 87 and stopped. Lieutenant Perkins asked that defendant accompany him to the Boyd residence to clear up a certain matter and defendant agreed. Upon their arrival Elizabeth was brought outside and identified defendant as her assailant. He was then arrested.

Defendant took the stand in his own behalf and gave alibi testimony which was corroborated by several witnesses. He denied any knowledge of the assault on Elizabeth.

Lacy H. Thornburg, Attorney General, by David S. Crump, Special Deputy Attorney General, for the State.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

Defendant assigns as error the admission of certain opinion and character testimony by Mrs. Boyd offered to bolster the credibility of Elizabeth. Defendant further challenges the trial court's failure to declare a mistrial following testimony by Detective Ron Overman that defendant asserted his right to silence following his arrest. We hold that the trial court ruled correctly on the second issue and find no prejudicial error in the first issue. Defendant also assigns as error the entry of judgment on the charge of first degree kidnapping based on a sexual assault when judgment had already been entered against him for the two sexual assaults he committed. We agree and remand for a new sentencing hearing.

Because this case was tried before 1 July 1984 the North Carolina Rules of Evidence will not be addressed.

I

[1] Defendant first argues that the trial court impermissibly allowed Elizabeth's mother to give opinion testimony vouching for the veracity of her daughter and to testify to specific acts by Elizabeth as indicative of her character.

Following cross-examination of Elizabeth during which she admitted that she sometimes told lies, the State called Mrs. Boyd to the stand. She testified that Elizabeth had indeed told stories or lies in the past. The prosecution then asked Mrs. Boyd what she would do in those instances and she testified as follows:

> A. I can look at her face and tell whether she's telling me the truth or not. And I'll look down at her, 'Now, Beth, are you sure that's right?'
>
> And then she tells me the truth.
>
> MR. MOSELEY: I object; move to strike.
>
> THE COURT: Overruled; denied.
>
> Q. (Mr. Hunt) What has been your experience as Beth's mother regarding fantasizing?
>
> A. Beth has never, you know—
>
> MR. MOSELEY: I object.

THE COURT: Overruled.

THE WITNESS: She's never—she knows the difference between reality—

MR. MOSELEY: Object.

THE WITNESS: —and fantasy.

THE COURT: Overruled.

THE WITNESS: Now, when she's playing, she'll play with her dolls and she will play school, for instance. And she'll be the teacher, and she'll be the students and all. But that is a play-type situation. She knows who she is.

MR. MOSELEY: Object. Move to strike.

THE COURT: Overruled; denied.

We agree with defendant that this evidence was improperly admitted but hold that its admission was harmless error.

It is the general rule in this jurisdiction that an impeaching or sustaining character witness "may testify concerning a person's character only after he qualifies himself by affirmatively indicating that he is familiar with the person's general character and reputation." *State v. Cox*, 303 N.C. 75, 80, 277 S.E. 2d 376, 380 (1981). The witness's opinion of the character of another is inadmissible, *State v. Brown*, 306 N.C. 151, 175, 293 S.E. 2d 569, 585, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982), as is his testimony concerning specific acts indicative of character, *State v. Denny*, 294 N.C. 294, 298, 240 S.E. 2d 437, 439 (1978). In the instant case the trial court erred in allowing Mrs. Boyd to refer to specific acts and occurrences tending to show that Elizabeth has a good character for truthfulness and can distinguish fantasy from reality.

Errors relating to rights that do not arise under the Federal Constitution are prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C.G.S. § 15A-1443(a) (1977) (codifying our rule set forth in *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966)). In this case we hold that there is no reasonable possibility that a different result would have been reached at trial had the error not occurred. The substance of the

evidence in question was that Mrs. Boyd could tell when Elizabeth was lying, that when confronted by her mother Elizabeth would tell the truth and that she could distinguish between reality and fantasy. At no point did Mrs. Boyd express an opinion that her daughter was telling the truth when she testified at trial. It is important to note that the jury would naturally assume that Mrs. Boyd was prejudiced in favor of her daughter and believed that her daughter was telling the truth. Any testimony by Mrs. Boyd indicating that it was her opinion that Elizabeth was telling the truth would not materially enhance the effect of her character testimony.

Defendant's reliance on *State v. Coble*, 63 N.C. App. 537, 306 S.E. 2d 120 (1983), is misplaced. In *Coble*, a character witness testified over objection that in her opinion the State's sole eyewitness to the crime was a truthful person. *Id.* at 541, 306 S.E. 2d at 122. The Court of Appeals held that admission of this improper testimony could not be considered harmless when combined with the fact that the defendant was effectively precluded from presenting his defense by the trial court's erroneous exclusion of evidence favorable to him. *Id.* at 541-42, 306 S.E. 2d at 123. In the instant case defendant was able to fully develop his defense of alibi.

In view of the victim's detailed and accurate description of defendant, corroborated by her father, her clear and consistent testimony at trial and defendant's failure to impeach her credibility in any meaningful way, we hold that defendant has failed to show that there is a reasonable possibility that had Mrs. Boyd's testimony been excluded a different result would have been reached at trial. Therefore, its admission into evidence was harmless error.

II

[2] Defendant next assigns as error the trial court's failure to declare a mistrial following the testimony by Detective Overman that defendant requested a lawyer and asserted his right to silence after being arrested and informed of his constitutional rights. Use of a defendant's exercise of his right to silence after he has been arrested and informed of his constitutional rights for impeachment purposes is a violation of the due process clause of the fourteenth amendment. *Doyle v. Ohio*, 426 U.S. 610, 619, 49

L.Ed. 2d 91, 98 (1976). The prosecution may use a defendant's *pre-arrest* silence for impeachment purposes. *Jenkins v. Anderson*, 447 U.S. 231, 239-40, 65 L.Ed. 2d 86, 95-96 (1980). Courts have also condemned reference by the prosecution to an accused's exercise of his right to counsel. *See United States v. Daoud*, 741 F. 2d 478 (1st Cir. 1984). Under the facts and circumstances of this case we hold that the trial court's curative instruction was sufficient to cure the prejudicial effect of Detective Overman's testimony.

"Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt." *State v. Taylor*, 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972); N.C.G.S. § 15A-1443(b) (1977).

In contrast with the cases relied on by defendant and many of those that our own research has discovered, the prosecutor in this case was not attempting to capitalize on defendant's silence or his request for counsel. *See Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91; *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980); *United States v. McDonald*, 620 F. 2d 559 (5th Cir. 1980); *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974). Rather, the prosecutor simply asked Detective Overman whom he had seen when he went to the Alamance County Sheriff's Department on the night of the offense. At that point the detective made the improper statement indicating that defendant had asserted his right to counsel and to remain silent. In his next question the prosecutor asked specifically if the detective had talked with Elizabeth Boyd that night and what Elizabeth had told him. It is clear that the prosecutor was merely attempting to elicit from Detective Overman the facts and circumstances surrounding the tape recorded interview the Detective had had with Elizabeth on the night of the assault.

Immediately after Detective Overman made the statement concerning defendant's exercise of his constitutional rights, defendant's counsel objected and moved to strike the testimony. The trial court immediately sustained defendant's objection and instructed the jury to disregard Detective Overman's statement and not to consider it in their deliberations. The jurors were then asked to raise their right hands if they could follow the instruc-

tion. All did so. In denying defendant's motion for mistrial the trial judge noted that he had been facing the jury box during Detective Overman's testimony and did not detect any change of expression or show of emotion on the faces of the jurors that might indicate that the testimony had had a significant effect on them. This is to be contrasted with the cases cited by defendant in which the evidence was admitted over objection and no curative instructions were given. *See State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273; *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848.

When these factors are considered along with the very strong evidence of defendant's guilt and the presumption that the jury will follow the trial court's instructions that it disregard improperly admitted evidence, *Wands v. Cauble*, 270 N.C. 311, 154 S.E. 2d 425 (1967), we hold that Detective Overman's objectionable statement was harmless error beyond a reasonable doubt. *See United States v. Milstead*, 671 F. 2d 950 (5th Cir. 1982) (per curiam) (passing reference to defendant's retention of counsel followed by strong curative instruction not prejudicial error).

III

[3] In his final assignment of error defendant argues that he was placed in double jeopardy by being convicted of first degree kidnapping based on removal of the victim to facilitate a sexual assault as well as being convicted of first degree rape and first degree sexual offense. We agree.

Section 14-39(b) of the General Statutes of North Carolina provides that:

> (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.

The language of N.C.G.S. § 14-39(b) states essential elements of the crime of first degree kidnapping. *State v. Jerrett*, 309 N.C. 239, 261, 307 S.E. 2d 339, 351 (1983).

In his final mandate during the charge on first degree kidnapping the trial judge, among other things, instructed the jury that in order to find defendant guilty it must find that he had sexually assaulted Elizabeth Boyd. The only sexual assaults committed by defendant against Elizabeth were the rape and sexual offense for which he was separately convicted. Therefore, in finding defendant guilty of first degree kidnapping the jury must have relied on the rape or sexual offense to satisfy the sexual assault element. As a result defendant was unconstitutionally subjected to double punishment under statutes proscribing the same conduct. *See State v. Price*, 313 N.C. 297, 327 S.E. 2d 863 (1985) (proof of the rape not necessary to satisfy sexual assault element because defendant committed a separate sexual assault for which he was not prosecuted).

[4] The general rule is that the double jeopardy clause of the Federal Constitution protects an individual " 'from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' " *Missouri v. Hunter*, 459 U.S. 359, 365, 74 L.Ed. 2d 535, 542 (1983) (quoting *Green v. United States*, 355 U.S. 184, 187, 2 L.Ed. 2d 199, 204 (1957)). When a defendant is tried in a single trial for violations of two statutes that punish the same conduct the amount of punishment allowable under the double jeopardy clause of the Federal Constitution and the law of the land clause of our State Constitution is determined by the intent of the legislature. *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986). If the legislature has specifically authorized cumulative punishment for the same conduct under two statutes " 'the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.' " *Id.* at 460-61, 340 S.E. 2d at 712 (quoting *Missouri v. Hunter*, 459 U.S. at 368-69, 74 L.Ed. 2d at 544). If cumulative punishment is not so authorized, a defendant may only be punished under one statute. *Id.* Since defendant's conviction of the rape or the sexual offense is a necessary element of first degree kidnapping in this case, the trial judge erred in sentencing defendant for all three crimes unless the legislature specifically authorized cumulative punishment. Since we find nothing in the pertinent statutes explicitly authorizing cumulative punishment, we must apply the *Gardner* test for determining legislative intent by examining the subject,

language and history of the statutes. *Gardner*, 315 N.C. at 461, 340 S.E. 2d at 712. Because N.C.G.S. § 14-27.2 and N.C.G.S. § 14-27.4 do not refer to kidnapping we will concentrate on N.C.G.S. § 14-39.

From 1933 to 1975 kidnapping was not divided into degrees and was punishable by life imprisonment. 1933 N.C. Sess. Laws ch. 542, § 2. In 1975 the legislature completely rewrote N.C.G.S. § 14-39. 1975 Sess. Laws ch. 843, § 1. Subsection (b) of the revised statute set the punishment for kidnapping at not less than twenty-five years imprisonment and not more than life imprisonment unless the victim was released by the defendant in a safe place and had not been sexually assaulted or seriously injured. N.C.G.S. § 14-39 (1975) (now amended). If that was the case, punishment was set at not more than twenty-five years imprisonment, or a fine of not more than ten thousand dollars, or both. *Id.* Prior to the Supreme Court's ruling in *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535, we held that a defendant could be given the maximum sentence allowed for kidnapping based on the fact that the victim was sexually assaulted as well as being separately punished for the rape that was used to establish that a sexual assault occurred. *State v. Williams*, 295 N.C. 655, 664-69, 249 S.E. 2d 709, 716-19 (1978). *See State v. Banks*, 295 N.C. 399, 405-07, 245 S.E. 2d 743, 748-49 (1978). This decision was based on our determination that the then existing version of N.C.G.S. § 14-39 did not divide kidnapping into two degrees. *Williams*, 295 N.C. at 664-65, 249 S.E. 2d at 716-17. Rather, the absence of sexual assault or serious injury to the victim combined with the release of the victim in a safe place were mitigating circumstances which resulted in a lesser sentence. *Id.* at 666-69, 249 S.E. 2d at 717-19.

The fact that kidnapping was not divided into two degrees in 1978 was significant because of our opinion in *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66 (1967), which we relied on in *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709. The rule of *Midyette* is as follows: When one is convicted and sentenced for an offense he may "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.*" *Midyette*, 270 N.C. 229, 233, 154 S.E. 2d 66, 70 (emphasis added). "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. In *Midyette* we held that a defendant convicted of assault with a deadly weapon could not also be convicted of resisting a public officer when it was alleged that the assault was the means by which the public officer was resisted. *Id.* In *State v. Williams* we concluded that the rule of *Midyette* did not apply because a sexual assault on the victim was not an element of the single offense of kidnapping established by N.C.G.S. § 14-39 or an aggravating factor that would result in a greater sentence. 295 N.C. at 669, 249 S.E. 2d at 719.

State v. Williams was filed 28 November 1978. The legislature passed the present version of N.C.G.S. § 14-39 on 4 June 1979. 1979 N.C. Sess. Laws ch. 760, § 5. This new version of N.C.G.S. § 14-39(b) divided kidnapping into two degrees and made the commission of a sexual assault on the victim an element of the crime of first degree kidnapping. *See State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339. The *Williams* decision had made it clear that under a kidnapping statute drafted in this manner a defendant could not be convicted of both first degree kidnapping and a sexual assault that raised the kidnapping to first degree. Therefore, we can only conclude that in revising the statute the legislature did not intend that defendants be punished for both the first degree kidnapping and the underlying sexual assault. In reaching this conclusion we find it important that *Williams* and *State v. Banks* were the first decisions of this Court to deal with the issue of double punishment under former N.C.G.S. § 14-39 and that following our opinion in those cases the legislature promptly revised the statute.

We recognize that by adopting the United States Supreme Court's decision in *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535, *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701, has overruled that portion of the holding of *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66, which stated that what the State may not do by separate indictments returned successively and tried successively, it may not do by separate indictments returned simultaneously and consolidated for simultaneous trial. However, *Williams* and *Midyette* were the law of this State in 1979, and in determining the intent of the legislature when it revised N.C.G.S. § 14-39(b) in 1979, we must assume that the legislature was aware of this fact. Therefore, defendant was erroneously subjected to double punish-

ment, and it will be necessary to remand this case to the trial court for a new sentencing hearing.

The trial court may arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping or it may arrest judgment on one of the sexual assault convictions.

For the reasons stated this case is remanded to the trial court for a new sentencing hearing.

Remanded for new sentencing hearing.

Justices EXUM, MARTIN and FRYE concur in the result.

STATE OF NORTH CAROLINA v. RICHARD MARK SWIMM

No. 289PA85

(Filed 18 February 1986)

1. **Criminal Law § 138.13— court's comments on good time and gain time when setting sentence—no error**

The trial court did not improperly consider the effect of good time and gain time on the length of the sentence in imposing a sentence in excess of the presumptive term for obtaining property by false pretenses where a close reading of the judge's remarks reveals that they were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were a response to defense counsel's argument concerning the fact that defendant would be required to serve other sentences at the expiration of the false pretense sentence. Furthermore, the trial judge's comments were an accurate statement of the law.

2. **Criminal Law § 138.14— proper sentencing consideration**

A trial judge may consider defendant's conduct while in prison between his initial incarceration and resentencing in setting the new term of imprisonment; good behavior may constitute a mitigating factor which would support a sentence less than that originally imposed, while bad behavior may be found as an aggravating factor to be utilized in determining whether to impose a sentence no greater than that originally imposed. Conduct while incarcerated prior to the original trial or sentencing may be considered as a nonstatutory mitigating or aggravating factor by the trial judge at the initial sentencing hearing. N.C.G.S. 15A-1335, N.C.G.S. 15A-1340.4(a), N.C.G.S. 15A-1340.7(b).

3. Criminal Law § 138.42— prison behavior—mitigating factor on resentencing—evidence insufficient

The trial court did not err when resentencing defendant for obtaining property by false pretenses by failing to consider as a nonstatutory mitigating factor defendant's good conduct in prison where the only evidence presented in support of the factor was defense counsel's statement that he had been informed that defendant had not incurred any infractions for violations of prison conduct rules.

ON defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 74 N.C. App. 309, 328 S.E. 2d 307 (1985), finding no error in the judgment entered by *Albright, J.*, at the 12 December 1983 Criminal Session of Superior Court, GUILFORD County, sentencing defendant to a term of imprisonment of ten years upon his plea of guilty to the offense of obtaining property by false pretense.

Lacy H. Thornburg, Attorney General, by Lucien Capone III, Assistant Attorney General, for the State.

Frederick G. Lind, Assistant Public Defender for the Eighteenth Judicial District, for defendant-appellant.

MEYER, Justice.

At the 12 August 1982 Criminal Session of Superior Court, Guilford County, the defendant pled guilty to obtaining property by false pretense, five counts of conspiracy to file a false insurance claim, and two counts of filing a false insurance claim. On defendant's conviction of obtaining property by false pretense, the trial judge made findings in aggravation and mitigation, found that the aggravating factors outweighed the mitigating factors, and sentenced the defendant to the maximum ten-year term of imprisonment. The remaining charges were consolidated for judgment into three separate judgments. The defendant received the presumptive sentence for each of these three offenses, and the term of imprisonment for each was ordered to run consecutively beginning at the expiration of the ten-year sentence.

The defendant appealed from the imposition of the ten-year sentence on the obtaining property by false pretense charge. In an unpublished opinion filed 20 September 1983, the Court of Appeals held that the trial judge erred in finding certain factors in aggravation of the sentence and remanded the case for resentenc-

ing. At the completion of the resentencing hearing, the trial judge again sentenced the defendant to a term of imprisonment of ten years. The Court of Appeals found no error.

[1] The defendant brings forward two assignments of error. He initially contends that the trial judge considered improper factors in sentencing him to a term of imprisonment in excess of the three-year presumptive sentence for the crime of obtaining property by false pretense. Specifically, he argues that the trial judge improperly considered the effect of "good time"[1] and "gain time"[2] on the length of any sentence which might be imposed. In support of this argument, the defendant points to the following exchange between defense counsel and the trial judge:

> [MR. LIND:] Also, Judge, it has come out that it was a mitigating circumstance that other people were apprehended and did come to court. We were hoping—We were hoping the first time that Your Honor would impose the presumptive sentence. He doesn't want this case in court anymore. I can't understand—I couldn't understand the 10 year sentence on that at the time and I still can't. The other sentences were stacked up at the expiration. They were all presumptives. I want Your Honor to keep in mind whatever sentence Your Honor gives him, he has a four year active sentence at the expiration of it.
>
> THE COURT: Of course, that's the—He has good time, gain time, all these other matters for which that sentence gets cut drastically.
>
> MR. LIND: I understand that, but he has sentences—
>
> THE COURT: My point is, under the Fair Sentencing Act, the way the Legislature set that thing up now, it's a quick release option; the whole emphasis is on quick release, so

1. "Good time" is a procedure whereby an inmate receives credit for good behavior while incarcerated. Under "good time," an inmate is entitled to have one day deducted from his sentence for each day he remains in custody without a major infraction of prison conduct rules. N.C.G.S. § 15A-1340.7(b) (1985).

2. "Gain time" is a procedure whereby inmates receive credit in the form of time to be deducted from their sentences for work performed inside or outside the prison. The amount of credit awarded may vary from two days per month to six days per month. N.C.G.S. § 148-13(d) (1985).

that 14 years—If he had to serve 14 years—That was the theory under which originally the Fair Sentencing Act was being sold across the state, in which he got the sentence—that's what you would serve. There was no uncertainty; everybody would know that the Judge's sentence meant what it said. Well, that's not the case the way this matter is construed now, my point only being that any sentence the Court hands down by operation of law is reduced in half by good time and then reduced further by gain time and all these other things they are doing that I read about where it's presenting a defendant with a quick release option if he behaves himself. Of course, he doesn't have to get that good credit.

MR. LIND: Judge, the point I was going to make, that depends on his behavior; and of course, we submit he would be good and he would get that.

THE COURT: I am told they are letting them out fast, real fast.

The defendant argues that these comments by the trial judge clearly indicate that in imposing the maximum ten-year sentence for obtaining property by false pretense, the judge improperly considered the possible effect that "good time" and "gain time" might have on the length of the sentence. We do not agree.

The standard of review to be employed by appellate courts when scrutinizing a judge's decision to impose a sentence which deviates from the presumptive term was set out in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). There, we stated:

> "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 (*quoting from State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 130 (1962)). The defendant therefore bears the burden of showing that the sentence imposed is in-

valid due to an abuse of discretion on the part of the trial judge or on the basis of procedural conduct or other circumstances prejudicial to him.

In prior cases, our courts have held that a defendant's sentence must be vacated and the case remanded for resentencing when the record affirmatively shows that the sentence was imposed after the trial judge stated dissatisfaction with the length of time committed offenders remain in custody and after he expressed an incorrect assumption as to the timing of parole eligibility. *State v. Hodge*, 27 N.C. App. 502, 219 S.E. 2d 568 (1975); *State v. Snowden*, 26 N.C. App. 45, 215 S.E. 2d 157, *cert. denied*, 288 N.C. 251, 217 S.E. 2d 675 (1975). However, we find neither of these factors to be present in this case.

A close reading of the trial judge's remarks concerning the effect of "good time" and "gain time" reveals that they were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison. Instead, it is clear that they were made in an effort to respond to defense counsel's impassioned argument concerning the fact that the defendant would be required to serve other sentences totalling four years at the expiration of the sentence imposed on the false pretense conviction. We find no support for the defendant's allegation that "the trial court was using the sentencing process to thwart the Fair Sentencing Act." Furthermore, the trial judge's comments regarding the effect of "good time" and "gain time" were accurate statements of law. *See* N.C.G.S. § 15A-1355(c) (1985); N.C.G.S. § 15A-1340.7(b) (1985); N.C.G.S. § 148-13(d) (Cum. Supp. 1985). This assignment of error is overruled.

[2] The defendant next argues that the trial court erred by failing to find as a nonstatutory mitigating factor that he had exhibited good conduct since entering prison and had incurred no infractions. The Court of Appeals rejected this argument for two reasons: (1) the defendant failed to present sufficient evidence in support of this mitigating factor, and (2) good prison conduct is not an appropriate factor for consideration in mitigation of a sentence. We will examine these conclusions in reverse order.

Under the Fair Sentencing Act, the trial judge may consider any nonstatutory mitigating or aggravating factor that is proved by a preponderance of the evidence and which is reasonably relat-

ed to the purposes of sentencing. N.C.G.S. § 15A-1340.4(a) (1985). One of the purposes of sentencing is to impose a punishment commensurate with the injury inflicted by the offense, taking into account factors which may diminish or increase the offender's culpability. N.C.G.S. § 15A-1340.3 (1985).

Good prison conduct is not one of the specifically enumerated mitigating factors set out in N.C.G.S. § 15A-1340.4(a)(2). In *State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985), we said that while a failure to find a *statutory* mitigating factor which was supported by uncontradicted, substantial, and manifestly credible evidence is reversible error, a trial judge's failure to find a *nonstatutory* mitigating factor, even when that factor is (1) requested by defendant; (2) proven by uncontradicted, substantial, and manifestly credible evidence; and (3) mitigating in effect, will not be disturbed absent a showing of abuse of discretion. *Spears* makes it clear that the decision of whether to find nonstatutory mitigating factors is a matter entrusted to the sound discretion of the trial judge. However, by holding that good prison conduct is not an appropriate factor for consideration in mitigation of a sentence, the Court of Appeals has ruled that a trial judge is absolutely precluded from considering a defendant's behavior while incarcerated in determining the sentence to be imposed.

We begin our discussion by noting that there are two scenarios under which this issue could arise. First, the defendant's conduct while incarcerated prior to trial could be raised at the sentencing hearing. Second, his conduct during the period between his initial incarceration after conviction and any resentencing hearing could be raised at the resentencing hearing.

With regard to the second possibility, the United States Supreme Court held, in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed. 2d 656 (1969), that a defendant's behavior while incarcerated may be considered by the trial judge at a resentencing hearing to determine the sentence to be imposed. In holding that neither double jeopardy principles nor the equal protection clause imposes an absolute bar to the imposition of a more severe sentence upon reconviction following a successful appeal, the Court stated:

> A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subse-

> quent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." *Williams v. New York*, 337 US 241, 245, 93 L Ed 1337, 1341, 69 S Ct 1079. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York, supra*, that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Id.*, at 247.

Id. at 723, 23 L.Ed. 2d at 668. *Pearce* clearly contemplates that a defendant's conduct while incarcerated after a conviction, whether good or bad, may be taken into consideration should it become necessary to resentence him.[3]

At least one other jurisdiction has recognized that a defendant's subsequent conduct while incarcerated may be taken into account by the trial judge upon resentencing. *See Osborne v. Commonwealth*, 378 Mass. 104, 389 N.E. 2d 981 (1979). We also note that another panel of our Court of Appeals has recognized that prison conduct may be considered as a nonstatutory mitigating factor. *State v. Corley*, 75 N.C. App. 245, 330 S.E. 2d 819 (1985), *on remand from* 310 N.C. 40, 311 S.E. 2d 540 (1984). Furthermore, our courts have held that when a defendant's sentence is vacated and the case remanded for resentencing due to the trial court's failure to find that he would not benefit from treatment provided youthful offenders, the court may consider his subsequent conduct while incarcerated in determining whether he would benefit from treatment as a committed youthful offender. *State v. Watson*, 65 N.C. App. 411, 309 S.E. 2d 2 (1983); *State v. Lewis*, 38 N.C. App. 108, 247 S.E. 2d 282 (1978).

3. Although *Pearce* involved a situation where a defendant was sentenced following a retrial, the Court's reasoning is equally applicable to situations where a defendant's conviction is upheld but he receives a new sentencing hearing due to error occurring at a prior sentencing hearing.

The State contends, however, that good prison conduct is a matter to be dealt with by the Department of Correction and is not a judicial concern. It is true that the Department of Correction is required to award "good time" for good behavior while incarcerated. N.C.G.S. § 15A-1355 (1985). Under "good time," an inmate is entitled to have one day deducted from his sentence for each day he remains in custody without a major infraction of prison conduct rules. N.C.G.S. § 15A-1340.7(b) (1985). The reduction in the time which an inmate must serve which results from the awarding of "good time" credits is therefore directly related to the length of the sentence imposed. We believe that a defendant's conduct while in prison during the interval between his initial incarceration after conviction and any resentencing hearing is a factor which the trial judge may consider in fixing the term of imprisonment against which the "good time" credits are awarded. A resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. *State v. Jones*, 314 N.C. 644, 336 S.E. 2d 385 (1985). A defendant's behavior while incarcerated is relevant to a determination of his potential for rehabilitation and is thus a factor "reasonably related to the purposes of sentencing." Therefore, we hold that a defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act.

We note that N.C.G.S. § 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served. Thus, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and the resentencing hearing to *increase* his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed so long as the new sentence is no more severe than the original one.

The other scenario under which this issue could arise is that a defendant's conduct while incarcerated prior to the original trial and/or sentencing could be raised at the initial sentencing hearing. In this situation, an inmate's good behavior prior to the

original trial and/or the sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor.

[3] Another reason given by the Court of Appeals to support its holding that the trial court did not err in refusing to find this nonstatutory mitigating factor was its conclusion that the defendant failed to present sufficient evidence in support of this factor. The only evidence presented by the defendant in support of the existence of this factor was defense counsel's statement to the trial judge that the defendant and a parole officer with the Department of Correction had informed him that the defendant had not incurred any infractions for violations of prison conduct rules.

Under the Fair Sentencing Act, a trial court may not find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). Likewise, statements made by defense counsel during argument at the sentencing hearing do not constitute evidence in support of statutory mitigating factors. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Such statements may, of course, constitute adequate evidence of the existence of aggravating or mitigating factors if the opposing party so stipulates. Based on *Jones*, we conclude that absent a stipulation by the prosecution, statements made by defense counsel during argument at the sentencing hearing do not constitute evidence which would support a finding of nonstatutory mitigating factors. Here, there was no stipulation by the prosecutor as to the correctness of defense counsel's statement concerning the defendant's good behavior while incarcerated. Furthermore, there is no evidence in the record or transcript which would support a finding of this nonstatutory factor. In short, there was simply no evidence upon which the trial court could base a finding of this mitigating circumstance. Based on this evidentiary failure, we hold that the Court of Appeals correctly found that the trial court did not err in failing to find this nonstatutory mitigating factor.

To summarize, under the Fair Sentencing Act, a trial court may, in its discretion and upon proper proof, consider a defendant's conduct while in prison during the interval between his ini-

tial incarceration after conviction and any resentencing hearing in setting his new term of imprisonment. Behavior during that time, if good, may constitute a mitigating factor which would support the imposition of a term of imprisonment less than that originally imposed. Defendant's conduct during that same time frame, if bad, may not be used as a basis to increase his sentence, but may be found as an aggravating factor to be utilized in determining whether to impose a sentence not greater than that originally imposed. Also, a defendant's conduct while incarcerated prior to his original trial and/or sentencing may be considered as a nonstatutory mitigating or aggravating factor by the trial judge at the initial sentencing hearing.

As modified herein, the decision of the Court of Appeals finding no error in the defendant's case is affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. ALTON LEAMONTE WALKER

No. 409A85

(Filed 18 February 1986)

Constitutional Law § 76; Criminal Law § 48.1 – right to remain silent – cross-examination improper – no plain error

Though the prosecutor's cross-examination of defendant concerning his silence about an alibi after he was arrested and advised of his constitutional rights violated the implicit assurance contained in the *Miranda* warnings that silence will carry no penalty, such questioning did not amount to plain error entitling defendant to relief since the prosecutor was developing defendant's testimony and did not dwell on the fact that defendant had not mentioned his alibi defense to authorities following his arrest; when the questions complained of were asked on cross-examination, defendant gave answers which the jury in all probability found provided a clear, cogent and reasonable explanation for his having failed to mention or think about his alibi; defendant's answers indicated that, when first informed that he was being charged with rape, he did not know when or where the crime was alleged to have taken place or the identity of the victim; the jury could have found nothing unusual in his failure to mention a potential alibi witness before he had such information; the victim's identification of defendant as the perpetrator of the offense was unqualified and unwavering; and other evidence placed defendant in the presence of the victim near the scene of the crime on the same night it occurred.

APPEAL by the defendant from a judgment entered on 3 April 1985 by *Stephens, J.*, in Superior Court, JOHNSTON County. Heard in the Supreme Court on 17 December 1985.

Lacy H. Thornburg, Attorney General, by James Peeler Smith, Assistant Attorney General, for the State.

Malcolm R. Hunter, Jr., Acting Appellate Defender, by Louis D. Bilionis, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant was convicted upon a proper indictment of one count of first degree rape. He appealed his conviction and mandatory sentence of life imprisonment to this Court as a matter of right.

By his assignment the defendant contends that, despite his failure to object at trial, he must have a new trial because of the trial court's "plain error" in permitting the prosecutor to cross-examine him concerning his post-arrest silence. We do not agree.

The State's evidence tended to show that around 8:15 p.m. on Friday, 16 November 1984, David Soard and the defendant Alton Leamont Walker went to a convenience store in Selma, North Carolina. Soard testified that when they arrived at the store, his niece Anita Gibson was present together with a fifteen-year-old girl identified in the indictment as the victim in this case. Soard introduced the defendant Walker to the victim and told Walker that she was his niece's friend. Soard and the defendant then left the store together, had a few drinks, and parted company around 10:00 p.m.

Anita Gibson testified that she was with the victim on the night of 16 November 1984 at the convenience store. Her testimony tended to corroborate Soard's account of having introduced the victim to the defendant at the store. Gibson testified that she parted company with the victim but saw her later the same night at Disco 82, a local nightclub. Gibson saw the victim and the victim's brother at the club and noticed that the defendant was also present. After talking with the victim twenty or thirty minutes, Gibson went to the bathroom and did not see the victim again that night.

The victim also testified. She corroborated prior testimony concerning her introduction to the defendant at the convenience store on the evening of 16 November 1984. She testified that later that night she and her brother walked to Disco 82. On the way they drank some beer and split a marijuana cigarette. After arriving at the club around 11:00 p.m., they went inside. The victim talked with Anita Gibson until about 11:45 p.m. The victim then went to the lobby to get some fresh air. While she was in the lobby, the defendant walked through the front door and approached her.

She and the defendant went to a nearby washerette to smoke a marijuana cigarette. The defendant asked her to kiss him but she refused. He grabbed her jacket and pulled her closer to him and tried to kiss her. She attempted to pull away from him. The victim testified that she then "hit him up beside of his head and he started smacking me." The defendant's blows loosened three of the victim's teeth and "broke a bone in her gum." She ran outside, but he overtook her, hit and choked her, and ripped her jacket. She testified that he said: "You better calm down because I got a gun in my pocket and if you don't do what I say, I'll use it." She never saw a gun but obeyed him because she was frightened. The defendant then dragged her into the back of an alley and directed her to pull down her pants. He struck her with his hand causing her to fall to the ground. Her nose and mouth were bleeding. The defendant then had sexual intercourse with the victim against her will.

O. E. Evans, head of the Detective Division of the Selma Police Department, testified that he interviewed the victim the morning following the rape. He testified to various physical injuries that he observed on the victim. He also read the statement the victim made to him during the interview. The statement tended to corroborate her testimony at trial. Evans testified that the victim told him that the defendant was the man who had raped her. She also picked the defendant out of a photographic lineup.

The defendant was the only witness for the defense. He denied ever having intercourse with the victim. He testified that he was at the convenience store with David Soard on the night in question but denied having been introduced to the victim. He also did not recall seeing Soard's niece Anita Gibson at the store. The

defendant testified that he went to Disco 82 on the night in question around 9:50 p.m. and left after twenty or thirty minutes. He denied having seen the victim at Disco 82 and denied smoking any marijuana that evening.

The defendant said that after leaving Disco 82, he went to a bootlegger's house where he met a friend, Rebecca King. He testified that he was having problems with his girl friend and that he talked with King about these problems for an hour to an hour and a half while walking around downtown Selma. He did not know how to get in touch with King at the time of the trial, but he believed she was in the Job Corps.

The defendant contends that his rights under the Constitution of the United States and the Constitution of North Carolina were violated when the prosecutor cross-examined him concerning his silence after he was arrested and advised of his constitutional rights in the present case. He argues that this deprivation of rights entitles him to a new trial.

During the course of the cross-examination of the defendant, the prosecutor questioned him as follows:

> Q. You didn't tell Ricky Evans anything about Rebecca King at any time, did you?
>
> A. I didn't do too much talking with any of them, because I know they had me charged.
>
> * * *
>
> Q. You say you don't know what Ricky Evans was charging you with when he—
>
> A. No, I sure didn't.
>
> Q. And you didn't tell him—
>
> A. Until they came to the house. They came to the house that Sunday and told me they wanted to talk to me down at the police department. When they got downtown, he said "I am charging you with first degree rape." That's exactly the words he told me.

Q. You didn't think about Rebecca King then, did you?

A. No. Why should I? I was thinking about who he said I had raped. That's what I was thinking about.

The defendant did not object, except, move to strike or otherwise indicate at trial that he was dissatisfied with the foregoing line of questions and answers. We have often stated that "a failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal." *State v. Oliver*, 309 N.C. 326, 334, 307 S.E. 2d 304, 311 (1983). *Accord* Rule 10, North Carolina Rules of Appellate Procedure (1985). We have emphasized that Rule 10 of the North Carolina Rules of Appellate Procedure is an important vehicle to prevent avoidable errors and the resulting unnecessary appellate review. *State v. Oliver*, 309 N.C. at 334, 307 S.E. 2d at 311. In *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983), however, we indicated that in cases involving certain particularly egregious evidentiary errors, we would apply a "plain error" rule and require a new trial even though no objection or exception was made to the evidence when presented and admitted at trial. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) (same rule where error in jury instructions without objection). We have specifically stated that:

> Reading the language of Rule 10(b)(1) that an exception may be properly preserved "by objection noted *or which by rule or law was deemed preserved or taken without any such action*," together with the language of *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804, and *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375, we conclude as follows:
>
> 1. A party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of Rule 10(b).
>
> 2. Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error.

> In so doing, a party must, prior to arguing the alleged error in his brief, (a) alert the appellate court that no action was taken by counsel at the trial level, and (b) establish his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court. We caution that our review will be carefully limited to those errors.

State v. Oliver, 309 N.C. at 335, 307 S.E. 2d at 311-12.

The cross-examination about which the defendant belatedly complains violated the implicit assurance contained in the *Miranda* warnings that silence will carry no penalty. The Supreme Court of the United States has made it clear that "breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires." *Wainwright v. Greenfield*, --- U.S. ---, 88 L.E. 2d 623, 630, 54 U.S.L.W H077 (14 Jan 86) (No. 84-1480). *Accord Doyle v. Ohio*, 426 U.S. 610, 49 L.E. 2d 91 (1976). Therefore, fundamental rights of the defendant were violated by the cross-examination of the prosecutor.

We turn, then, to decide whether the defendant, having failed to object or except at trial, is entitled to any relief on appeal as a result of the error. Counsel for the defendant properly alerted this Court that no action had been taken by trial counsel concerning the offensive line of cross-examination. *State v. Oliver*, 309 N.C. at 335, 307 S.E. 2d at 312. The record fails to establish, however, any manner in which the defendant was entitled to an exception by rule of law. Therefore, the only remaining consideration is whether the offensive line of questioning "amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court." *Id.* We conclude that it did not.

Doyle and subsequent cases by the Supreme Court of the United States have made it clear that breaching the implied assurance of the *Miranda* warnings denies due process. But neither those cases nor our own decision in *Lane* is controlling on the question of whether such conduct is "plain error" which, although not called to the attention of the trial court, entitles the defendant to a new trial. We have stated that:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Black, 308 N.C. 736, 740-41, 303 S.E. 2d 804, 806-07 (1983), *quoting with approval United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L.Ed. 2d 513 (1982).

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).

Although the error in the case *sub judice* affected a fundamental right of the defendant, our required review of the entire record leads us to conclude that it was not "plain error." It appears that the prosecutor was developing the defendant's testimony and did not dwell on the fact that the defendant had not mentioned his alibi defense to the authorities following his arrest. Further, when the questions complained of were asked on cross-examination, the defendant gave answers which the jury in all probability found provided a clear, cogent and reasonable explana-

tion for his having failed to mention or "think about" Rebecca King. The defendant's answers indicated that when first informed that he was being charged with rape, he did not know when or where the crime was alleged to have taken place or the identity of the victim. Certainly the jury could have found nothing unusual in his failure to mention Rebecca King before he had such information. Nor do his other answers to this line of cross-examination appear likely to have caused him harm.

Further, the overwhelming evidence against the defendant prevented the error complained of from rising to the level of "plain error" within the meaning of *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983) and *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). The evidence that the victim had been beaten and seriously injured as well as raped was not seriously contested. The only question directly put at issue by the defendant's evidence in the form of alibi testimony was the identity of the perpetrator. In this regard, the victim's identification of the defendant was unqualified and unwavering. Two disinterested witnesses, David Soard and his niece Anita Gibson, testified that they had introduced the defendant to the victim on the night the attack upon her occurred. Gibson also testified that she saw both the defendant and the victim at a nightclub near the point where the attack occurred and during the same evening on which the attack occurred.

Given the peculiar facts of this case, we do not conclude that the error committed caused the jury to reach a different verdict than it would have reached otherwise. *See State v. Black*, 308 N.C. at 740-41, 303 S.E. 2d at 806-07. Therefore, the defendant has not carried his burden of showing "plain error." *Id.*; *State v. Oliver*, 309 N.C. at 335, 307 S.E. 2d at 311-12. We wish to emphasize to the prosecutors of this State, however, that we strongly disapprove of any such cross-examination of a defendant concerning his exercise of his post-arrest right to silence and that such tactics may often amount to "plain error" and require a new trial.

The trial of the defendant was free of reversible error.

No error.

STATE OF NORTH CAROLINA v. JOHN DEAN HAMLET

No. 437A85

(Filed 18 February 1986)

Burglary and Unlawful Breakings § 5.4— possession of stolen property not recent

The State failed to show that possession of stolen property by defendant was so recent as to support a presumption of his guilt of breaking or entering and larceny where the evidence showed a time interval of approximately thirty days between the time the theft was discovered and the property was found in defendant's possession, and the stolen articles—a television set, towels, linens and a fan—were of the type of property normally and frequently traded in lawful channels.

Justice MARTIN dissenting.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from a decision of the Court of Appeals (*Wells, J., Whichard, J.*, concurring, and *Becton, J.*, dissenting) finding no error in the trial before *Howell, J.*, at the 23 January 1984 Criminal Session of CALDWELL County Superior Court.

Defendant was charged in an indictment, proper in form, with felonious breaking or entering, felonious larceny, and felonious possession of stolen goods belonging to Carl Leroy Dill.

At trial, the State offered evidence tending to show that at about 7:00 p.m. on 16 May 1983 defendant was stopped by Officer Hutchins of the Caldwell County Sheriff's Department as he drove an automobile belonging to the wife of Jerry Johnson into his driveway. Mr. Johnson, a passenger in the car, was immediately arrested on a matter unrelated to the charges in this case. At the time of the arrest, Officer Hutchins observed a large console TV in the trunk of the car as well as towels, linens and a fan in the passenger area of the automobile. He noticed that a fiberglass piece around the headlight of the vehicle had been broken. Thereafter, a piece of fiberglass found at the scene of the breaking or entering was "matched" with the broken fiberglass of the vehicle driven by defendant. Upon the officer's inquiry as to the ownership of the personal property, defendant stated that it was his property and that he was just moving in. As he was leaving the scene, Officer Hutchins saw defendant carrying the personal property from the automobile into his trailer. On 17 May 1983 defendant sold a television which was later identified as the

television taken from Mr. Carl Leroy Dill's cabin. On 18 May 1983 Mr. Dill discovered that his cabin had been broken into and that his television, a rotor and booster, an old wagon wheel and linens had been taken from his cabin. At trial Mr. Dill testified that he last visited his cabin about a month before discovering the breaking and entry and that all the missing items were in the cabin at that time.

Defendant testified and denied that he had ever been on Mr. Dill's property. He stated that he first saw the television set on 16 May 1983 at about 4:30 p.m. in the trunk of Mrs. Johnson's automobile. At that time Jerry Johnson requested that defendant drive him across town and he agreed to do so. Upon their return to defendant's dwelling, Officer Hutchins stopped them and arrested Johnson. Defendant further stated that he sold the TV to a Mr. Hamby and that he only admitted to the police officers that it was his property because he was "asked to say that."

Defendant also offered other witnesses who gave testimony tending to corroborate his statement that on 16 May 1983 Jerry Johnson drove his wife's automobile into defendant's driveway with a television in the trunk of that automobile.

The jury returned verdicts of guilty on all three charged offenses. Judge Howell arrested judgment on the verdict of guilty of possession of stolen property. He then imposed a sentence of ten years' imprisonment on the verdict of guilty of felonious breaking or entering and a consecutive five-year sentence on the verdict of guilty of felonious larceny.

Lacy H. Thornburg, Attorney General, by Archie W. Anders, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether the Court of Appeals erred in holding that the doctrine of recent possession supported the convictions of felonious breaking or entering and larceny. We recognize that defendant has not complied with Rule 10(b)(3). However, pursuant to our Rule 2, we

elect to consider his contention as to the insufficiency of the evidence.

In instant case there was no direct evidence to support defendant's conviction of breaking or entering and larceny. Consequently, the State relied solely on the doctrine of recent possession to carry the case to the jury.

This Court has long warned that in a criminal case presumptive evidence must be viewed with caution. In *State v. Adams*, 2 N.C. (1 Hayw.) 464 (1797), we find this language:

> When a horse is stolen, and is found in possession of a man at such a distance from the place where the horse was missing in so short a time after as shows he must have come directly from that place, and without any loss of time, that is such evidence as a jury may infer the guilt of the prisoner upon, as it raises a violent presumption against him that he was the taker. It is, however, not conclusive. Any circumstance inducing a probability that the prisoner may have gotten him honestly will render it improper for a jury to convict. The case in Hale, where a thief was pursued, finding himself pressed, got down, desiring a man in the road to hold his horse till he returned, and the innocent man was taken with the horse, proves how necessary it is to use caution in convictions founded upon presumptive testimony.

Id. at 464.

The purpose of the recency requirement is to determine whether the accused's possession of stolen property is sufficiently short under the circumstances of the case to rule out the possibility of a transfer of the stolen property from the thief to an innocent party. The possession must be so recent after the breaking or entering and larceny as to show that the possessor could not have reasonably come by it, except by stealing it himself or by his concurrence. *State v. Weinstein*, 224 N.C. 645, 31 S.E. 2d 920 (1944), *cert. denied*, 324 U.S. 849, 89 L.Ed. 1410 (1945); *Gregory v. Richards*, 53 N.C. (8 Jones) 410 (1861). Annot. "What Is 'Recently' Stolen Property," 89 A.L.R. 3rd 1202, 1212 (1979). Although the passage of time between the theft and the discovery of the property in a person's possession is a prime consideration in establishing whether property has recently been stolen, our

North Carolina Courts have also recognized that the nature of the property is a factor in determining whether the recency is sufficient to raise a presumption of guilt. Thus, if the stolen property is of a type normally and frequently traded in lawful channels, a relatively brief time interval between the theft and the finding of an accused in possession is sufficient to preclude an inference of guilt from arising. Conversely, when the article is of a type not normally or frequently traded in lawful channels, then the inference of guilt may arise after the passage of a longer period of time between the larceny of the goods and the finding of the goods in the accused's possession. *State v. McRae*, 120 N.C. 608, 27 S.E. 78 (1897); *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969). Annot. "What Is 'Recently' Stolen Property," 89 A.L.R. 3rd 1202, 1213 (1979).

The doctrine of recent possession is well stated in *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981). There, Justice Huskins, for a unanimous Court, in part wrote:

> The State relies, as indeed it must in this case, on the doctrine of recent possesson (sic). That doctrine is simply a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property. *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Allison*, 265 N.C. 512, 144 S.E. 2d 578 (1965). The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in defendant's possession. *State v. Williams*, 219 N.C. 365, 13 S.E. 2d 617 (1941). Furthermore, when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering. *State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216, *cert. denied* 409 U.S. 1046, 34 L.Ed. 2d 498, 93 S.Ct. 547 (1972). The presumption or inference arising from recent possession of stolen property 'is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of

the defendant's guilt.' *State v. Baker*, 213 N.C. 524, 526, 196 S.E. 829, 830 (1938); *accord, State v. Greene*, 289 N.C. 578, 223 S.E. 2d 365 (1976).

Proof of a defendant's recent possession of stolen property, standing alone, does not shift the burden of proof to the defendant. That burden remains on the State to demonstrate defendant's guilt beyond a reasonable doubt. *State v. Baker, supra.* In order to invoke the presumption that the possessor is the thief, the State must prove beyond a reasonable doubt each fact necessary to give rise to the inference or presumption. When the doctrine of recent possession applies in a particular case, it suffices to repel a motion for nonsuit and defendant's guilt or innocence becomes a jury question.

In summary then, the presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966); *State v. Turner*, 238 N.C. 411, 77 S.E. 2d 782 (1953); *State v. Epps*, 223 N.C. 741, 38 S.E. 2d 219 (1943); and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilty. *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968).

Id. at 673-74, 273 S.E. 2d at 293.

In instant case, the State has shown beyond a reasonable doubt that the property described in the bill of indictment was stolen and that the stolen goods were found in defendant's custody and subject to his control and disposition. However, there remains the question of whether defendant's possession was recently after the breaking or entering and larceny. We note that the stolen articles are of the type of property normally and frequently traded in lawful channels and that the evidence shows a time interval of approximately thirty days between the time the theft was discovered and the property found in defendant's possession.

We hold, therefore, that under the circumstances of this case the State has failed to show that possession of the property by defendant was so recent as to support a presumption of guilt of breaking or entering and larceny. Thus, nonsuit was appropriate and the decision of the Court of Appeals finding no error in the trial judge's denial of defendant's motion to dismiss is

Reversed.

Justice MARTIN dissenting.

Whether the doctrine of possession of recently stolen property is sufficient to repel a motion for nonsuit must be determined on the facts and circumstances of each case. *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969). Here, the evidence in the light most favorable to the state discloses: Mr. Dill's property (about $4,000 in value) was stolen sometime between 18 April and 16 May 1983; defendant was found in possession of some of the property on 16 May; he told the officers that the property belonged to him and moved it into a house; the next day he sold the TV to a Mr. Hamby; defendant testified that he had never seen the TV until 16 May when it was in the trunk of the car; the antenna wire on the TV had been cut when the officer saw it in the car; also in the car defendant was driving was a blue window fan, towels, linens, and other property; defendant and his girlfriend drove to Florida in the car immediately after the TV was sold on 17 May; when defendant was arrested in Florida on 30 May, the towels and linens were still in the car; a piece of broken fiberglass was found by the officers at the scene of the theft where the metal gate had been pushed open; this fiberglass matched a broken place in the fiberglass of the car defendant was driving when stopped by the officer.

The majority notes, and relies upon its perception, that the stolen articles are of the type "normally and frequently traded in lawful channels." While that may be true of the stolen property when the items are considered separately, such diverse property as found in defendant's possession is rarely, if ever, sold collectively. Under such circumstances, the inference engendered by the doctrine survives a longer time interval. *Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472. The time interval in *Blackmon* was twenty-seven days, only one day less than the maximum of

twenty-eight days under the evidence of this case, and when the evidence is viewed in the light most favorable to the state, as we must, the inference is that the time interval was even shorter. It is unlikely that the pushed-over metal gate on Mr. Dill's driveway could have existed for a long time unnoticed. The amount and diversity of the stolen property made it difficult for it to be assimilated into lawful trade channels. At least the towels and linens still remained in the possession of defendant *in the car* when he was arrested in Florida.

This appeal is very similar to *State v. Gove*, 289 A. 2d 679 (Me. 1972). In *Gove*, the victim closed her house for the winter on 29 November 1970, and a break-in was discovered on 27 January 1971. Defendant, when arrested in a car on 27 January, had possession of various items of the stolen property, including pieces of china and a radio. As here, defendant Gove was in someone else's car. The Maine court held that the passage of fifty-nine days was not sufficient to prevent the jury finding beyond a reasonable doubt that the property found in defendant's possession was recently stolen.

So in the case before us, the passage of twenty-eight days (at the most) is not sufficient to foreclose the jury finding that the property in defendant's possession was recently stolen. Furthermore, defendant's lame and contradictory attempt to explain his possession of the stolen property is severely damaged by defendant's lack of credibility arising from his four prior convictions of breaking or entering and larceny and a conviction for forgery.

I find that the doctrine of recent possession, the placing at the crime scene of the car defendant was driving, defendant's continued possession of some of the property in the car when he was arrested, defendant's flight to Florida immediately following his sale of the television, and defendant's contradictory attempt to explain his possession of the property are sufficient to repel defendant's motion for directed verdict.

I vote to find no error in defendant's trial.

STATE OF NORTH CAROLINA v. EDGAR EARL MIZE

No. 662A84

(Filed 18 February 1986)

Homicide § 28.1 — first degree murder — self-defense — refusal to instruct — no error

The trial court did not err by refusing to submit self-defense to the jury in a prosecution for first degree murder where defendant undeniably was the aggressor in the final confrontation when he went to the victim's trailer at about 3:00 a.m., woke him, and shot him to death; virtually all the evidence presented at trial indicated that defendant went to the trailer armed and with murderous intent; witnesses testified that defendant told them of his plans to kill the victim immediately before going to the victim's trailer; and defendant testified that he believed it necessary to kill the victim before the victim killed him. Defendant would not even be entitled to the doctrine of imperfect self-defense because he was the aggressor with murderous intent in the fatal confrontation.

DEFENDANT appeals as of right under N.C.G.S. § 7A-27(a) from judgment of *Gaines, J.*, entered at the 20 August 1984 Criminal Session of GASTON County Superior Court imposing a life sentence upon defendant's conviction of first degree murder.

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

Adam Stein, Appellate Defender, by Robin E. Hudson, Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

The only question presented on appeal is whether the trial court erred in not submitting the defense of self-defense to the jury pursuant to defendant's request. We hold there is no evidence of self-defense and the trial court properly denied the request.

The evidence presented at trial tended to show that the defendant, Edgar Earl ("George") Mize, and the victim, Joe McDonald, had been friends for several years until a disagreement arose concerning payment McDonald owed Mize for some tree cutting work they had done together. Relations between the two deteriorated further on 31 March 1984, the Saturday evening before the killing. On that evening Kathy Haney, McDonald's live-in girlfriend, was visiting neighbors Darryl Craven and Ruth

Smith in the trailer park where they all lived. Mize and another woman, Diane Pennington, were also present. The group sat around for several hours talking, drinking beer, and using cocaine until McDonald, angry that Mrs. Haney was not at home, appeared at the door and demanded that she return to their trailer with him. After a brief argument Mrs. Haney agreed to go, but on her way out asked Mize and Mrs. Pennington to follow her to her trailer because she feared McDonald would beat her up as he had done before. Her fears turned out to be well founded, as she and McDonald got into a physical struggle in the bedroom of their trailer. Mize burst into the room with a pocketknife drawn to break up the fight and McDonald cut his hand trying to take the knife away.

After this altercation Mize left with Kathy Haney and drove her to a nearby convenience store and then on to her mother's house. They decided not to stop there because they noticed McDonald's truck in the yard, so they rode around awhile and smoked marijuana. Mize then parked the car on a dirt road where he and Kathy Haney engaged in sexual relations. The two parties' testimony conflicted on whether it was consensual, with Mize denying Mrs. Haney's claim that he had threatened her with a knife and raped her.

Apparently Mrs. Haney related her version of the sexual encounter to McDonald, thus increasing his enmity for the defendant. As a result, on 3 April 1984 Mrs. Haney accompanied a furious Joe McDonald to the mill where both McDonald and Mize worked so they could confront Mize. Mize, however, had gone home early because having heard McDonald was "out to get" him, he was too nervous and upset to work. After he returned home, Mize began drinking with his father and two of his brothers. Over a several hour period, he consumed half of a fifth of vodka, several beers, and injected himself with the powder from nine Percodan pills, a pain reliever of mid-range potency. While Mize was in a bedroom in the rear of the house injecting himself with Percodan, he heard Joe McDonald, his brother Matt McDonald, Kathy Haney, and Steve Page outside the house looking for him. He also heard them yelling at Joe McDonald to get the bumper jack, which McDonald used as a weapon. Finally, Mize's sister and grandmother told the group to leave. Mize then took some "nerve pills" and "lost track of himself for awhile."

Mize later went to Darryl Craven and Ruth Smith's trailer next to McDonald's trailer. He was still drinking beer and carried his shotgun with him. Darryl Craven testified that Mize repeatedly expressed his intention to go next door and kill Joe McDonald after Mize finished drinking his beer. Ruth Smith and Craven also testified Mize told them he had taken Percodan and drunk beer so it would appear he had committed the murder because he was on drugs. Five minutes after Mize left, Craven heard four shots. Mize returned and told Craven to "[t]ell Ruth I got him."

Mize testified concerning his activities after leaving Darryl Craven's trailer early in the morning of 4 April 1984. He went to McDonald's trailer, knocked on the door, and hid underneath the trailer, holding the shotgun with the safety off. When McDonald went to the front door and asked who was there, Mize did not respond. McDonald then started back to the bedroom but Mize knocked again, this time on the back door. When McDonald opened the back door a crack, Mize rolled out from underneath the trailer, shotgun in hand, and fired three times through the door. Mize then took a shell out of his pocket, pushed the door open and saw McDonald lying there. Before firing a fourth shot which struck McDonald in the left leg, Mize said to him, "Are you dead, [obscenity omitted]? Are you dead?" Mize said he did not aim the shotgun to kill McDonald.

On cross-examination Mize admitted that he was not aware of any guns McDonald kept in the trailer, and that McDonald never directly threatened to kill him. All the threats Mize had heard were reported by others. When Mize fired the shots he did not see any weapons in McDonald's possession, but stated that McDonald could have been holding his knife. Nevertheless, Mize testified he killed McDonald "because he was out to kill me," despite his apparently contradictory testimony that he was not aiming the gun to kill McDonald.

Defendant presented witnesses who testified to his good character, to the friction between the victim and Mize, to the victim's violent acts on the evening before his death and to Mize's nervousness at the mill earlier that day. Defendant also offered the testimony of a psychiatrist regarding the effects of the drugs he (Mize) had taken on the night he killed McDonald. In the psychiatrist's opinion, the Percodan likely made Mize more aggressive and the alcohol diminished his capacity for reasoning and

judgment, thus intensifying defendant's fear. Without the influence of drugs and alcohol, the psychiatrist testified, Mize probably would have beaten up McDonald but would not have killed him.

The defendant requested the court to instruct the jury on self-defense, but the court refused. Mize was convicted of first degree murder and sentenced to life imprisonment. He requests a new trial based on the trial judge's failure to instruct the jury on self-defense.

The sole issue in this case is whether, viewing the facts in the light most favorable to defendant, the evidence at trial was sufficient to invoke the doctrine of self-defense and support a jury instruction on that doctrine. *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899 (1979). We answer in the negative, affirming Judge Gaines' decision, and hold that defendant's sole assignment of error is without merit.

> A defendant is entitled to an instruction on perfect self-defense as an excuse for a killing when it is shown that, at the time of the killing, the following four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Bush, 307 N.C. 152, 158, 297 S.E. 2d 563, 568 (1982) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E. 2d 570, 572-73 (1981)).

State v. Wallace, 309 N.C. 141, 147-48, 305 S.E. 2d 548, 552-53 (1983).

Our cases note further:

> On the other hand, if defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

State v. Wilson, 304 N.C. 689, 695, 285 S.E. 2d 804, 808 (1982) (quoting *State v. Norris*, 303 N.C. at 530, 279 S.E. 2d at 573) (citations omitted).

An imperfect right of self-defense is thus available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so *without* murderous intent, and (2) might have used excessive force. Imperfect self-defense therefore incorporates the first two requirements of perfect self-defense, but not the last two. *State v. Wallace*, 309 N.C. at 149, 305 S.E. 2d at 553, *citing State v. Bush*, 307 N.C. at 159, 297 S.E. 2d at 568. Murderous intent means the intent to kill or inflict serious bodily harm.

> 'If . . . one brings about an affray with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect self-defense; and if he kills during the affray he is guilty of murder. "[I]f one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from

> his own act, but his offense is reduced from murder to manslaughter." *State v. Crisp* . . . 170 N.C. at 793, 87 S.E. 2d at 515.'

State v. Wetmore, 298 N.C. 743, 750, 259 S.E. 2d 870, 875 (1979), *citing State v. Potter*, 295 N.C. 126, 144, n. 2, 244 S.E. 2d 397, 409, n. 2 (1978).

Applying these principles to the instant case, we hold that defendant presented no evidence at trial to warrant a jury instruction on perfect or imperfect self-defense. Mize undeniably was the aggressor in the final confrontation when he went to McDonald's trailer at about 3 a.m., woke him, and shot him to death. Virtually all the evidence presented at trial indicated that Mize went to McDonald's trailer armed and with murderous intent. Darryl Craven and Ruth Smith testified Mize told them of his plans to kill McDonald immediately before going to McDonald's trailer. Mize himself testified he believed it necessary to kill McDonald before McDonald killed him. Under North Carolina law as outlined above, Mize would not even be entitled to the doctrine of imperfect self-defense because he was the aggressor with murderous intent in the fatal confrontation. *See, e.g., State v. Wetmore*, 298 N.C. 743, 259 S.E. 2d 870; *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397.

Several of the cases already cited arose from situations similar to the one at bar. Here, although the victim had pursued defendant during the day approximately eight hours before the killing, defendant Mize was in no imminent danger while McDonald was at home asleep. When Mize went to McDonald's trailer with his shotgun, it was a new confrontation. *See, e.g., State v. Wilson*, 304 N.C. at 695, 285 S.E. 2d at 808 (defendant, after a fistfight with the victim who then threatened to kill defendant, went home to get a pistol, returned to the scene of the initial fight and shot victim, who was unarmed, in the back). Therefore, even if Mize believed it was necessary to kill McDonald to avoid his own imminent death, that belief was unreasonable. *See, e.g., State v. Wallace*, 309 N.C. 141, 305 S.E. 2d 548 (no evidence that defendant, who testified he shot his unarmed girlfriend in self-defense, was afraid of or vulnerable to victim); *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (defendant, 20-year-old Marine, stabbed unarmed 65-year-old man who was yelling at him to leave but was standing between defendant and the door).

Our decision in *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981), upon which defendant mistakenly relies, can be distinguished easily from the present case. In *Norris*, the defendant waited outside the trailer where the victim, her recently estranged husband, lived with his girlfriend. She intended only to ask him for money, but he began cursing, threatening, and beating her, breaking her nose and knocking her to the ground. When defendant got up, her husband was coming towards her. The victim, a heavy drinker, had abused defendant physically during their marriage. The victim's girlfriend also came out of the trailer. Defendant, afraid that if they both got to her she would be killed, shot her husband as he came towards her. We held the jury should have been instructed on imperfect self-defense, and ordered a new trial for defendant on the grounds that (1) she sought out the victim *without* murderous intent and (2) reasonably believed it necessary to kill him to avoid serious bodily injury because of her husband's history of brutality towards her, and because she was outnumbered. In the present case, although defendant heard indirectly of threats from the victim, the latter had neither assaulted nor threatened him directly. Moreover, the victim posed no imminent threat to Mize at the time of the homicide.

Mize's testimony that he did not aim the shotgun to kill McDonald avails him nothing. If this were true, the first requirement of self-defense, that defendant believed it necessary to kill the victim, would not be met. Furthermore, Mize's testimony shows he intended at least to inflict serious bodily harm upon the victim, which is enough to establish his murderous intent.

We therefore hold that the evidence did not support a jury instruction on self-defense, and that defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOHN THOMAS SATTERFIELD, JR.

No. 576A84

(Filed 18 February 1986)

Criminal Law § 73.1— hearsay—conduct equivalent to statement—admission as prejudicial error

The trial court in a prosecution for first degree rape and armed robbery erred in the admission of testimony by a detective that defendant's father, in response to an inquiry, showed the police the drawer where a knife was supposedly kept, since the conduct of defendant's father was the equivalent of a statement, and the detective's testimony constituted hearsay evidence. Furthermore, the admission of the hearsay testimony was prejudicial error since it was the only evidence at trial tending to corroborate the victim's testimony regarding the identification of defendant and his use of a knife. N.C.G.S. § 8C-1, Rules 801 and 802.

Justice MARTIN dissenting.

APPEAL by the defendant from the judgment of *McLelland, J.*, entered 12 September 1984 in Superior Court, ALAMANCE County.

The defendant was convicted of armed robbery and first degree rape. He received a sentence of imprisonment for fourteen years for the armed robbery conviction and a life sentence for the first degree rape conviction. The defendant appealed the rape conviction to the Supreme Court as a matter of right under N.C.G.S. § 7A-27(a). On 7 March 1985, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal in the armed robbery case. Heard in the Supreme Court 17 October 1985.

Lacy H. Thornburg, Attorney General, by Henry T. Rosser, Assistant Attorney General, for the State.

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

MITCHELL, Justice.

The defendant brings forth several assignments of error. We need address only one of them, however, since we hold that the trial court's error in allowing the admission of certain hearsay evidence entitles the defendant to a new trial.

The State's evidence tended to show that on 5 December 1983 the defendant went to the home of Mrs. Sarah G. Dill, a sixty-seven-year-old widow, and asked to use the bathroom. Mrs. Dill had known the defendant, a friend of her children, for more than ten years. The defendant stayed in the bathroom for twenty minutes. After the defendant left the bathroom, he walked towards the front door where Mrs. Dill was standing, produced a hawkbill knife and put it against Mrs. Dill's throat.

The defendant demanded money from Mrs. Dill. When asked why, the defendant replied that he was a junky. After her attempts to change his mind failed, Mrs. Dill gave the defendant thirty dollars from her pocketbook. He then dragged her down the hall into the bedroom, told her he wanted her body, put her on the bed and raped her. The defendant stuck her stomach with the knife. She testified that this caused a slight wound which bled and stained her clothes. As he left the defendant threatened further harm if Mrs. Dill told anyone what had happened.

Several hours after the alleged attack occurred, Mrs. Dill was examined by an emergency room physician. He testified that he did not discover any cuts across Mrs. Dill's stomach area.

In a statement to the police, Mrs. Dill stated that the defendant told her the knife belonged to his father, and he was going to take it home and put it back in a drawer. At trial Detective Gary W. Barrow testified to the following:

> Q. Now there was reference made in State's Exhibit Number 1 about Mr. Satterfield stating that the knife was his father's knife?
>
> A. Yes, sir, there was.
>
> Q. As a result of Mrs. Dill's statement, what did you do about the knife?
>
> A. Sergeant Jordan and I went to the residence of Mr. Satterfield's parents.
>
> . . . .
>
> Q. And when you got there, say whether or not you asked Mr. Satterfield, Sr., about whether or not he kept a knife in a drawer in his house.

A. Yes, sir, we did.

Q. As a result of that question, say whether or not Mr. Satterfield showed you any place in the house.

A. He showed us a chest of drawers located in the house, where the knife was supposedly kept.

MR. THOMPSON: Objection and move to strike.

THE COURT: Overruled. Denied.

EXCEPTION No. 2.

Q. Now without saying what Mr. Satterfield, Sr., said to you, what, if anything, did you observe him do at this chest of drawers?

A. The top drawer of the chest of drawers was pulled open, and there was no knife located in the drawer.

No knife was ever found by the police during the investigation of this case.

The defendant presented evidence tending to show that he was with friends at the time of the alleged robbery and rape. He specifically denied being in the victim's home on that morning. The defendant said that he had a brief sexual relationship with Mrs. Dill fifteen years earlier and that she had recently suggested that they renew the relationship. On rebuttal, Mrs. Dill denied any earlier sexual relationship with the defendant.

The defendant assigns as error the trial court's denial of his objection and motion to strike Detective Barrow's testimony that the defendant's father "showed us a chest of drawers located in the house, where the knife was supposedly kept." The defendant contends that the testimony was hearsay and was inadmissible under N.C.G.S. § 8C-1, Rule 802. He further contends that the hearsay evidence was extremely prejudicial because it was the only evidence which tended to corroborate Mrs. Dill's identification of the defendant and her testimony regarding the knife. We agree.

Rule 801 of the North Carolina Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to

prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). A "statement" may be a written or oral assertion or nonverbal conduct intended by the declarant as an assertion. N.C.G.S. § 8C-1, Rule 801(a). An act, such as a gesture, can be a statement for purposes of applying rules concerning hearsay. *See State v. Fulcher*, 294 N.C. 503, 517, 243 S.E. 2d 338, 348 (1978) (decided before adoption of the North Carolina Rules of Evidence).

In *State v. Suits*, 296 N.C. 553, 251 S.E. 2d 607 (1979), the trial court allowed the State to present evidence that the police went to the defendant's home and asked his wife if he had a knife. In response to the inquiry, the wife left the room and returned with a small pocketknife. This Court concluded that such "conduct was the equivalent of the wife stating, 'Yes, the defendant has a knife, and here it is.'" 296 N.C. at 558, 251 S.E. 2d at 609.

In the present case, the defendant's father, in response to an inquiry, showed the police the drawer where the knife was supposedly kept. Similar to the situation in *Suits*, this conduct by the defendant's father was the equivalent of a statement that "This drawer is where I kept the knife, and it is gone." The conduct was a "statement" within the meaning of Rule 801(a).

The State offered the evidence to prove the existence of a knife and its use by the defendant as testified by Mrs. Dill. Therefore, the testimony regarding the defendant's father's conduct was hearsay and inadmissible under Rule 802. *See State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977). Its admission was error.

Since the knife was not introduced into evidence and the physician found no cuts on Mrs. Dill, Mrs. Dill's testimony was the only evidence that she had been cut. The inadmissible hearsay was the only evidence at trial tending to corroborate her testimony regarding the defendant's use of the knife. The introduction of the evidence created a reasonable possibility that a "different result" would be reached at trial. N.C.G.S. § 15A-1443(a). Therefore, the defendant is entitled to a new trial.

We do not reach the remaining issues addressed by the defendant as they are unlikely to arise in a new trial.

New trial.

Justice MARTIN dissenting.

Believing as I do that no prejudicial error occurred in defendant's trial, I respectfully dissent. The majority holds that prejudicial error occurred when the state's witness answered the one question to which defendant belatedly objected and then moved to strike the answer. This answer in effect stated that Mr. Satterfield, defendant's father, showed the officers a chest of drawers in the house where the knife was supposedly kept.

This testimony must be considered in the light of the other evidence in determining if error was committed by the trial judge in denying the motion to strike. The state had already introduced evidence without objection that defendant told Mrs. Dill, the victim, that the knife which he used to threaten her during the robbery and rape belonged to his father and that he was going to carry it back home and put it back in the drawer. Further, immediately after the challenged testimony, the officer testified without objection: "The top drawer of the chest of drawers was pulled open, and there was no knife located in the drawer."

This Court has long held that where evidence is admitted over objection, but evidence of the same import has theretofore or thereafter been admitted without objection, the benefit of the objection is lost. *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984); *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982); 1 Brandis on North Carolina Evidence § 30 (1982). This rule applies to the facts of this case.

The majority relies upon *State v. Suits*, 296 N.C. 553, 251 S.E. 2d 607 (1979). However, *Suits* involved a wife's testimony being used against her husband. The testimony was incompetent because of the statute, and there was no waiver of the objection by the admission of similar unobjected-to testimony. This appeal is not affected by a statutory prohibition of evidence as occurred in *Suits*.

Even assuming that any error was not lost by defendant, the testimony in my view was not prejudicial error. There is just no *reasonable* possibility that absent the challenged testimony a different result would have been reached. *State v. Powell*, 306 N.C. 718, 295 S.E. 2d 413 (1982); N.C.G.S. § 15A-1443(a) (1985). The

state's evidence was strong and direct. Mrs. Dill, a sixty-seven-year-old black woman, had known the defendant for years; her children had gone to school with him. Defendant, thirty-four years old, made no effort to disguise his appearance. Defendant does not contend that a knife was not used in the assault upon Mrs. Dill; he relies entirely upon alibi, saying that he was with his girlfriend until she went to work; he then drank beer and wine with his friend Buck. He denied that he saw Mrs. Dill at all on the day in question.

I find that defendant had a fair trial, free of prejudicial error.

STATE OF NORTH CAROLINA v. REGINALD DEWAYNE LONG

No. 185A85

(Filed 18 February 1986)

1. **Criminal Law § 138.40— failure to find voluntary acknowledgment of wrongdoing—confession after warrants and arrest—no error**

The trial court did not err by failing to find the mitigating factor that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process where he did not confess until twelve days after warrants were issued for his arrest and one day after he was actually arrested. Defendant was not entitled to the mitigating factor under these facts and it cannot be said that the trial judge's ruling was so arbitrary that it could not have been the result of a reasoned decision.

2. **Criminal Law § 138.14— sentence less than presumptive term—no mitigating factors—any error in aggravating factors harmless**

A sentence of ten years imprisonment for four consolidated convictions of first degree kidnapping was less than the presumptive sentence for that crime and, where the trial judge found no mitigating factors, any error in the aggravating factors was harmless.

3. **Criminal Law § 146.2— life sentence for burglary—judgment fatally flawed—remanded**

A sentence of life imprisonment for first degree burglary was fatally flawed where the Judgment and Commitment correctly stated that defendant had been charged with first degree burglary and felonious larceny but listed only first degree burglary as the offense for which defendant was being sentenced and, after correctly identifying first degree burglary as a Class C felony, incorrectly stated that the sentence for that crime was mandatory life imprisonment. The trial judge was clearly acting under a misapprehension of law.

4. Criminal Law § 138.24— assaults—victims' ages eleven and fourteen—aggravating factor of youth—error

The trial judge erred when sentencing defendant for felonious assault by finding as an aggravating factor that the child victims, ages eleven and fourteen, were very young. The victims were not at the beginning of the age spectrum and the State failed to show that they were rendered more vulnerable to defendant's assault than the average person would be by reason of their age. N.C.G.S. 15A-1340.4(a)(1)(j).

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from the judgments entered by *Walker, J.*, at the 4 March 1985 Criminal Session of FORSYTH County Superior Court.

Defendant pleaded guilty to first degree burglary and felonious larceny, four charges of first degree kidnapping consolidated for judgment, and assault with a deadly weapon inflicting serious injury. Defendant received a sentence of life imprisonment for burglary and larceny, a concurrent sentence of ten years for kidnapping, and a sentence of ten years for felonious assault to run consecutively to the kidnapping sentence.

At approximately 2:15 p.m. on 15 November 1984 defendant came to the residence of Dorothy Houlihan in Winston-Salem. Mrs. Houlihan recognized defendant as the son of the man who did her yard work and let him into her house to use the telephone.

After using the telephone defendant grabbed Mrs. Houlihan, pulled her forward and backward by the hair and slapped her face on both sides. In the struggle, Mrs. Houlihan fell over a table and defendant put out a cigarette on her eyelid. When she called her dog, defendant asked her if she wanted him to kill her dog and if she wanted to die. He also held pruning shears to her throat.

Sometime later defendant released Mrs. Houlihan and she asked for a glass of water. He allowed her to go to the kitchen to get some water and had her bring him a beer. When defendant asked Mrs. Houlihan to close some drapes, she ran out of a door and across the street to a neighbor's house. She saw defendant run out of her house and go to a parked car which he had pointed out to her earlier.

On the same day at approximately 10:00 p.m., defendant entered the residence of Mary Ann Steintrager of Winston-Salem through an unlocked door. He was carrying a metal baseball bat.

Mrs. Steintrager and her two daughters, Megan, age eleven, and Rebecca, age fourteen, were in the house when defendant entered. When Mrs. Steintrager confronted defendant, he struck her with the baseball bat. At this point Megan began to run and defendant hit her with the baseball bat. All of this occurred on the second floor. When Rebecca came running up the stairs defendant struck her with the baseball bat and kicked her in the mouth. The Steintragers were then forced down a hallway where defendant used sheets, pillowcases, and appliance cords to bind them. After securing the Steintragers, defendant demanded money and forced Mrs. Steintrager to go toward the kitchen, which was on the second floor, to get her purse. Defendant grabbed the purse which contained approximately $5.00 and also took two rings, one of which was Mrs. Steintrager's wedding band. After defendant grabbed Mrs. Steintrager's purse he dragged her to a small passageway and told her to raise her gown. She refused and defendant struck her on the head with the baseball bat. Mrs. Steintrager then told her children to make noise. Defendant, appearing to have been frightened by the noise, forced the family members to go back up to the second floor. Mrs. Steintrager managed to lock herself and the children in a bedroom. She then escaped with the children onto a deck and crossed the street to a neighbor's house to call the police.

Megan suffered a ruptured spleen which required surgery and a stay in the hospital of approximately five days. A number of Mrs. Steintrager's ribs were broken and her kidneys and lungs were bruised. Rebecca was badly bruised all over her body.

Mrs. Steintrager identified defendant as her assailant and testified that he was a helper of a Mr. Hill who had done lawn work for her.

Defendant admitted that he had attacked Mrs. Houlihan but testified that he was under the influence of intoxicants including heroin. This testimony contradicted his out-of-court statement to the police that he had not used any drugs on 15 November 1984. Defendant claimed that he had lied to the police because he feared another felony charge. He also testified that he brought a baseball bat with him to the Steintrager residence because he knew that dogs were kept there and that he struck the Steintragers because he panicked when he discovered people in the residence.

Lacy H. Thornburg, Attorney General, by T. Buie Costin, Special Deputy Attorney General, for the State.

Berrell F. Shrader, Attorney for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant received sentences for first degree burglary and felonious assault that were greater than the presumptive terms. By his first assignment of error defendant argues that he was entitled to a finding by the trial judge of the mitigating factor that he voluntarily acknowledged his wrongdoing to a law enforcement officer at an early stage of the prosecution. We disagree.

> Under the Fair Sentencing Act, the trial court must consider every statutory mitigating factor where, as is the case here, sentences in excess of the presumptive term are imposed. G.S. § 15A-1340.4(a). G.S. § 15A-1340.4(a)(2)(l) lists as a mitigating factor that '[p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.' In *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983), we said that, with regard to this mitigating factor, 'criminal process' begins upon either the issuance of a warrant or information, upon the return of a true bill of indictment or presentment, or upon arrest. We went on to hold that a defendant was *entitled* to a finding of this statutory mitigating factor if his confession was made prior to the issuance of a warrant or information, prior to the return of a true bill of indictment or presentment, or prior to arrest, *whichever comes first.*

State v. Thompson, 314 N.C. 618, 625, 336 S.E. 2d 78, 82 (1985).

If defendant fails to confess before the first of these events occurs he is no longer entitled as a matter of right to a finding of this statutory mitigating factor. *State v. Brown*, 314 N.C. 588, 594, 336 S.E. 2d 388, 392 (1985). In that case it is for the trial judge to determine in the exercise of his discretion whether the confession was made sufficiently early in the criminal process to qualify as a mitigating factor. *Id.* at 595, 336 S.E. 2d at 392.

Warrants for defendant's arrest were issued on 16 November 1984. Defendant was arrested eleven days later on 27 Novem-

ber 1984. He did not admit his guilt until the day after his arrest. Under these facts it is clear that defendant is not *entitled* to a finding that he acknowledged his guilt at an early stage of the criminal process. In exercising his discretion the trial judge determined that defendant's statement was not made sufficiently early in the criminal process to qualify as a mitigating factor.

Matters within the discretion of the trial court are not subject to reversal by an appellate court absent a clear abuse of that discretion. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). "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. Thompson*, 314 N.C. 618, 626, 336 S.E. 2d 78, 82.

In the instant case defendant did not confess until twelve days after warrants were issued for his arrest and one day after he was actually arrested. In light of this evidence we cannot say that the trial judge's ruling was so arbitrary that it could not have been the result of a reasoned decision. Therefore, we hold that the trial judge did not abuse his discretion.

[2] Before considering defendant's remaining assignments of error, which concern the trial judge's finding of aggravating factors, we note that defendant's sentence of ten years imprisonment for the four consolidated convictions of first degree kidnapping is less than the presumptive sentence for that crime. Since the trial judge found no mitigating factors to exist, any error in the aggravating factors found is harmless so far as defendant's sentence for kidnapping is concerned.

[3] Defendant challenges the life sentence he received for first degree burglary on the basis that the trial judge improperly found certain aggravating factors. We need not consider this argument because the sentence for first degree burglary entered against defendant is fatally flawed. *See State v. Hunter*, 315 N.C. 371, 338 S.E. 2d 99 (1986) (judgment is a part of the record and appeal presents the face of the record for review); *State v. Cooper*, 288 N.C. 496, 219 S.E. 2d 45 (1975) (appeal is an exception to the judgment and raises the issue of whether there is error appearing on the face of the record).

Defendant pleaded guilty to first degree burglary and felonious larceny. The Judgment and Commitment correctly states that

defendant had been charged with both offenses, but lists only first degree burglary as an offense for which defendant was being sentenced. Further, the Judgment and Commitment, after correctly identifying first degree burglary as a Class C felony, incorrectly states that the sentence for that crime is mandatory life imprisonment.

"[I]t is uniformly held by decisions of this Court that where it appears that the judge below has ruled upon matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light." *Stanback v. Stanback*, 270 N.C. 497, 507, 155 S.E. 2d 221, 229 (1967) (quoting *State v. Grundler*, 249 N.C. 399, 402, 106 S.E. 2d 488, 490 (1959)). In the instant case the trial judge was clearly acting under a misapprehension of the law when he determined that the penalty for first degree burglary, a Class C felony, was a mandatory life sentence. Under these circumstances the trial judge could not have exercised his discretion in passing sentence, and it will be necessary to remand defendant's burglary conviction for a new sentencing hearing.

The crimes of first degree burglary and felonious larceny to which defendant pleaded guilty were charged as separate counts in the same indictment. "In cases in which there is a verdict or plea of guilty to more than one count in a warrant or bill of indictment, and the Court imposes a single judgment . . . a consolidation for the purpose of judgment will be presumed." *State v. McCrowe*, 272 N.C. 523, 524, 158 S.E. 2d 337, 339 (1968). On resentencing the larceny and burglary convictions will be consolidated.

[4] Defendant's remaining assignment of error concerns the trial judge's finding of the aggravating factor that the child victims, Megan Steintrager, eleven, and Rebecca Steintrager, fourteen, were very young. He argues that the evidence does not support this finding and that it was error for the trial judge to aggravate his sentence for felonious assault with this factor. We agree.

One of the aggravating factors established by N.C.G.S. § 15A-1340.4(a)(1)(j) is that the victim was very young, or very old or mentally or physically infirm. The *vulnerability* of the victim due to age and mental or physical infirmity is the concern addressed by this factor. *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E. 2d 689, 701 (1983) (factor properly found where child victim

was twenty-four months old). In *Ahearn* the child's vulnerability was established by his tender age of twenty-four months. *State v. Hines*, 314 N.C. 522, 526, 335 S.E. 2d 6, 8 (1985). "In cases like *Ahearn* involving victims near the beginning or end of the age spectrum, the prosecution may establish vulnerability merely by relating the victim's age and the crime committed." *Id.* The age of the victim does not aggravate the crime unless the victim is more vulnerable than he would otherwise be due to his age. *Id.* at 525, 335 S.E. 2d at 8.

In this case Megan and Rebecca were not at the beginning of the age spectrum and the State has failed to show that they were rendered more vulnerable to defendant's assault than the average person would be by reason of their age. Had the State shown that due to their ages Megan and Rebecca were less able to flee or resist or were more likely to be seriously injured by defendant's assaults than the average person the trial judge could properly have found this aggravating factor. *State v. Hines*, 314 N.C. 522, 525, 335 S.E. 2d 6, 8.

Since this factor was not properly found, we must vacate the felonious assault sentence and remand for a new sentencing hearing. We need not consider if the remaining aggravating factors were properly found or could properly be applied to defendant's convictions.

We note that in this case the same set of aggravating factors was applied to each offense. Though this is not the basis of our decision in this case, we strongly disapprove of the indiscriminate use of factors present in one offense to aggravate other offenses. Care must be taken to see that all aggravating factors are relevant to the offenses to which they are applied.

Nos. 84CRS52237)
85CRS2213)—First degree kidnapping—no error.
85CRS2294)
85CRS2295)

No. 84CRS52227—First degree burglary and felonious larceny—new sentencing hearing.

No. 84CRS2214—Assault with a deadly weapon with intent to kill inflicting serious injury—new sentencing hearing.

FRED W. MAUNEY v. JAMES H. MORRIS AND WIFE, DOROTHY W. MORRIS, MORRIS RENTALS, INC., A NORTH CAROLINA CORPORATION, AND MORRIS CASEWORKS, INC., A NORTH CAROLINA CORPORATION

No. 231PA85

(Filed 18 February 1986)

1. **Laborers' and Materialmen's Liens § 3.2; Rules of Civil Procedure § 15— motion to amend to allege lien—timeliness of motion**

The effective date of plaintiff's action to enforce a laborer's or materialman's lien was 8 December 1983, the date he filed his motion to amend his complaint to allege such an action, rather than 11 January 1984, the date the trial court ruled on his motion to amend; therefore, plaintiff's amendment was not barred by the statute of limitations where the last day he furnished material or labor to defendants' property was 15 June 1983, and he filed his motion to amend on 8 December 1983, within the 180-day limit of N.C.G.S. 44A-13.

2. **Laborers' and Materialmen's Liens § 3.2; Rules of Civil Procedure § 15— motion to amend to allege lien—denial improper**

The trial court erred in denying plaintiff's motion to amend his complaint to enforce a laborer's or materialman's lien, since the motion was filed within the statutorily prescribed period of limitations; plaintiff could instead have filed a new complaint initiating a separate action; allowing plaintiff's motion to amend would not have prejudiced defendants; and it would have promoted judicial economy to allow the motion.

ON discretionary review of a decision of the Court of Appeals, 73 N.C. App. 589, 327 S.E. 2d 248 (1985), affirming an order denying plaintiff's motion to amend his complaint pursuant to Rule 15 of the North Carolina Rules of Civil Procedure entered by *Grist, J.*, at the 10 January 1984 Civil Session of Superior Court, MECKLENBURG County. Heard in the Supreme Court 19 December 1985.

DeLaney, Millette & McKnight, P.A., by Steven A. Hockfield, for plaintiff-appellant.

No counsel contra.

FRYE, Justice.

The primary question before this Court is whether the trial judge erred in denying plaintiff's motion to amend his complaint to add a cause of action to enforce a materialman's or laborer's lien where the motion was filed within the statutory period al-

lowed for bringing an action to enforce such a lien. For the reasons outlined below, we find that plaintiff's motion should have been granted.

Plaintiff began an action against the individual defendants James and Dorothy Morris and corporate defendant Morris Rentals on 18 July 1983 by filing a summons and a notice of lis pendens to have an equitable lien placed upon defendants' property. He also moved to extend time to file his complaint. This motion was granted, and plaintiff filed an unverified complaint and moved to include corporate defendant Morris Caseworks, Inc., on 8 August 1983.

Plaintiff's original complaint alleged that he had performed demolition and construction work and other services for defendants, including work on a nightclub ("The Club") that defendants were trying to start. Included in the services plaintiff rendered defendants were the following:

> 23. From [late September or early October, 1982], the plaintiff devoted all of his time, energies and services to the improvement of the real property, the building and operation of The Club and his work for defendant Casework [sic] and defendant James Morris as general contractor.
>
> 24. The time which the plaintiff devoted to the defendants for the work described in paragraph 23 above was in excess of four thousand (4,000) hours from late September 1982 through late June or early July 1983. Plaintiff devoted seven (7) days per week on an average basis of at least fifteen (15) hours per day to the enterprises of the defendants.
>
> . . . .
>
> 26. The plaintiff devoted his hours as described above in the following manner: at least 200 hours to the providing services for defendant James H. Morris as general contractor, at least 700 hours to making actual physical improvements on the real property, at least 1,720 hours to working in The Club and overseeing its operation, at least 600 hours working for defendant Casework [sic] and at least 780 hours operating as a vice president of defendant Rentals and promoting and setting up the concept for The Club.

. . . .

28. In addition to the contribution of his time, services and all of his energies to the enterprise of the defendants, the plaintiff contributed the following to the defendants for the improvement of the real property and for the paying off of the mortgage on the real property:

a. Eight thousand (8,000) old brick having a fair market value of One Thousand Four Hundred Dollars ($1,400.00);

b. Seventeen (17) table stands having a fair market value of Three Hundred Forty Dollars ($340.00);

c. A sound system having a fair market value of Eight Thousand Dollars ($8,000 [sic]);

d. Old antique wood for the entrance to The Club having a fair market value of One Thousand Dollars ($1,000.00);

e. Maple wood for the dance floor for The Club having a fair market value of Five Hundred Dollars ($500.00); and

f. Two Thousand Dollars ($2,000.00) in cash which the plaintiff had received for payment of a debt owed to him.

Plaintiff also alleged that he contributed two 1953 Chevrolet dump trucks, a forty-foot box trailer, a 1952 Chevrolet flatbed truck and a 1974 Chevrolet pickup truck having a combined value of $6,700, and the use of his tools. Then, according to plaintiff, in July 1983, defendants wrongfully barred him from The Club and kept the trucks, the trailer, and plaintiff's tools.

As reimbursement for these efforts, plaintiff alleged that defendants orally promised to pay him by taking him into a partnership and conferring various other benefits upon him. Because defendants had failed to perform according to this agreement, plaintiff therefore sought damages and an equitable lien on the real property on a theory of unjust enrichment, specific performance of the oral contract, and an accounting of defendants' various enterprises.

Defendants answered on 8 September 1983 and moved to strike the notice of lis pendens on the grounds that the action was one to secure a personal judgment for the payment of money and plaintiff was therefore not entitled to file a notice of lis

pendens. Defendants' motion was granted on 3 October 1983. On 8 October, plaintiff filed a Claim of Lien in the amount of $27,950, giving 20 September 1982 as the first date and 15 June 1983 as the last date goods and services were furnished to defendants' property. On 8 December 1983, plaintiff filed a motion to amend his complaint, along with the proposed amendment. In the amendment, plaintiff stated a claim against defendants for materials and labor furnished by him for improvements to defendants' real property and sought to enforce the Claim of Lien. Defendants opposed this motion. The trial judge denied plaintiff's motion to amend on 11 January 1984. From this denial, plaintiff appealed to the Court of Appeals.

In its opinion, the Court of Appeals decided first that the order denying plaintiff's motion to amend, although interlocutory, was appealable because a substantial right was involved. *Mauney v. Morris*, 73 N.C. App. at 591, 327 S.E. 2d at 250. While this decision certainly appears to be correct, we do not consider it here because defendants have failed to file a brief or to argue this or any other issue before this Court. The issue is therefore deemed abandoned. N.C.R. App. P. 28.

The question remaining for this Court's consideration is the one decided against the plaintiff in the court below, whether the trial court erred in denying his motion to amend. Rule 15(a) of the North Carolina Rules of Civil Procedure reads in pertinent part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C.R. Civ. P. 15(a) (1983).

Correctly noting that plaintiff had no automatic right to amend his complaint at the time he filed his motion, the Court of Appeals held that the trial judge did not abuse his discretion by denying the motion because to do so would have had the effect of extending the statute of limitations governing materialmen's and

laborers' liens. In reaching this holding, the court below first decided that the amendment to the complaint stated a new cause of action. Therefore, despite the fact that the trial judge had found, and the Court of Appeals agreed, that this cause of action arose out of the same transactions and occurrences as those stated in the original complaint, the Court of Appeals concluded that the new cause of action could not relate back to the original filing date. We note, however, that under the Rules of Civil Procedure, whether an amendment will relate back does not depend upon whether it states a new cause of action but upon whether the original pleading gave defendants sufficient notice of the proposed new claim. *See Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984); *Burcl v. Hospital*, 306 N.C. 214, 293 S.E. 2d 85 (1982).

More importantly, the Court of Appeals reasoned that plaintiff's amendment would need to relate back to the original complaint because it would otherwise be barred by N.C.G.S. § 44A-13. That statute reads in pertinent part:

> An action to enforce the lien created by this Article may be instituted in any county in which the lien is filed. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

N.C.G.S. § 44A-13(a) (1985). The statute thus imposes a 180-day limitation for plaintiff to bring his action. The Court of Appeals considered the effective date of plaintiff's action to be the date the trial judge ruled on his motion in this case, 11 January 1984. Because 11 January 1984 is beyond the 180-day limit required by the statute, the Court of Appeals concluded that the new claim was barred unless it related back to the original complaint. *Mauney v. Morris*, 73 N.C. App. at 593-94, 327 S.E. 2d at 251-52.

[1] We disagree with the reasoning of the Court of Appeals described above. Plaintiff filed his motion to amend with his amended complaint on 8 December 1983. The last day he furnished material or labor to defendants' property was 15 June 1983. His motion was thus filed within the 180-day period set forth in N.C.G.S. § 44A-13(a). The date of the filing of the motion, rather than the date the court rules on it, is the crucial date in measuring the period of limitations. The timely filing of the motion to amend, if later allowed, is sufficient to start the action

within the period of limitations. Plaintiff's amendment was therefore not barred by the statute of limitations, and whether it would "relate back" to the filing of the original complaint was immaterial.

[2] Returning to the question at hand, once the opposing party has filed a responsive pleading, a party can only amend a pleading with the consent of the trial judge. N.C.R. Civ. P. 15(a) (1983). A judge's decision in this matter will not be reversed on appeal absent a showing of abuse of discretion. *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326. However, amendments should be freely allowed unless some material prejudice to the other party is demonstrated. *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972). The burden is upon the opposing party to establish that that party would be prejudiced by the amendment. *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). *See also Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977).

Here, defendants have failed to establish that allowing plaintiff to amend his complaint would have prejudiced them in any way. Plaintiff filed his motion to amend within the statutorily prescribed period of limitations. He could instead have filed a new complaint initiating a separate action. Defendants argued before the Court of Appeals that plaintiff should have followed the latter procedure. Defendants, however, are not prejudiced by plaintiff's choice, because plaintiff's motion to amend was filed within the time plaintiff could still have filed a complaint. Allowing plaintiff's motion would thus not have prejudiced defendants. Moreover, it would have promoted judicial economy by avoiding the necessity for separate trials or for plaintiff to file first a separate complaint and then a motion to join the two actions. Plaintiff's motion should therefore have been allowed.[1]

1. We note that it might be argued that plaintiff's amendment should be more properly denominated a supplemental pleading rather than an amendment because plaintiff had not filed his Claim of Lien when he filed his original complaint. Supplemental pleadings are distinguished from amendments because they deal with acts occurring after the filing of the complaint. *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E. 2d 319 (1971). However, "it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum v. Surles*, 281 N.C. at 99, 187 S.E. 2d at 702. *See* N.C.R. Civ. P. 15(d) (1983); *see also Burcl v. Hospital*, 306 N.C. 214, 293 S.E. 2d 85.

For the reasons given above, the decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the Superior Court, Mecklenburg County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

VIRGINIA ELECTRIC AND POWER COMPANY v. MARSHALL F. TILLETT, JR. AND WIFE, BLYTHE TILLETT

No. 227PA85

(Filed 18 February 1986)

Eminent Domain § 7.1; Rules of Civil Procedure § 1— condemnation proceeding by private condemnor—Rules of Civil Procedure applicable

N.C.G.S. 40A-12 and N.C.G.S. 1-393 give trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings instituted pursuant to N.C.G.S. Ch. 40A, at least to the extent that those rules do not directly conflict with procedures specifically mandated by Ch. 40A.

ON discretionary review of the decision of the Court of Appeals, 73 N.C. App. 512, 327 S.E. 2d 2 (1985) vacating and remanding summary judgment entered 24 February 1984 by *Watts, J.*, in the Superior Court, DARE County. Heard in the Supreme Court 16 December 1985.

Hornthal, Riley, Ellis & Maland, by Robert W. Bryant, Jr., and L. P. Hornthal, Jr., for the plaintiff appellee.

Shearin & Archbell, by Roy A. Archbell, Jr., for the defendant appellant.

MITCHELL, Justice.

This appeal involves a condemnation proceeding which the appellee Virginia Electric and Power Company (hereinafter "VEPCO") commenced by filing a petition in Superior Court to condemn an easement over property in which the appellants, Marshall F. Tillett, Jr. and his wife, Blythe Tillett, claim an ownership interest.

In May 1982, VEPCO began constructing power lines over land that it allegedly had purchased from Estelle B. Tillett in 1981. The appellant, Marshall F. Tillett, refused to allow VEPCO employees to proceed with construction claiming that he and his family owned an undivided interest in the 9.565 acre tract. VEPCO's claim to title to the land in question purports to originate with a grant from the State of North Carolina issued in 1928. The appellants claim title to the land through a State grant issued in 1896.

The parties engaged in negotiations resulting in an agreement whereby VEPCO was allowed to proceed with construction of the power lines while the conflicting claims of ownership were being resolved in legal proceedings. Judge Allsbrook signed the agreement as a consent order which contained the following language:

> The parties acknowledge without prejudice to Respondents' rights to contend otherwise that Petitioner [VEPCO] claims fee simple title to all of the land within the boundaries of the 9.565 acre tract of land described in the aforesaid deed to Petitioner recorded in Deed Book 332, page 161, Dare County Registry, subject only to an undivided interest in a portion of said tract owned by the Respondent, Marshall F. Tillett, Jr., and that Petitioner claims said undivided interest to be less than six percent. The descriptive term "easement" applied to the strip of land upon which Petitioner intends to construct facilities shall not prejudice Petitioner's claim of title to all of said 9.565 acre tract subject only to such interest in such portion thereof as may be adjudged in this proceeding to be owned by Respondents.

On 20 July 1982, VEPCO filed a petition in Superior Court initiating the condemnation proceeding. The land sought to be condemned was described as "an undivided interest owned by Marshall F. Tillett, Jr. in a portion of the 9.565 acre tract of land in Nags Head Township, Dare County." Included in the petition was the description of the tract as set out in the 1981 deed from Estelle B. Tillett to VEPCO. Contemporaneous with the filing of the petition, a summons was issued and duly served on the appellants.

In response to the condemnation petition, the appellants claimed that in 1973, Marshall Tillett, Sr., one of their predecessors in title, filed a boundary line proceeding against Estelle B. Tillett. She in turn filed a counterclaim denying title in Tillett, Sr. The proceeding was converted into an action to quiet title. A directed verdict was entered against Tillett, Sr. and Ms. Tillett took a voluntary dismissal of her counterclaim. No appeal was taken. On 3 December 1981, VEPCO acquired from Estelle B. Tillett a deed purporting to convey fee simple title to land that includes the land involved in the 1973 action and to which the appellants claim title.

The appellants contend that by filing the condemnation petition, VEPCO admitted that the appellants own an interest in the land in question. In addition to the six percent interest which the appellants contend VEPCO admitted they owned, the appellants also claim an additional sixty-four percent interest under a 1982 deed from Marshall F. Tillett, Sr., the petitioner against whom a directed verdict was entered in the 1973 action. The appellants claim that since VEPCO admitted an ownership interest in them, it was barred from attempting to assert a superior title to the same land in the condemnation proceeding. In separate counterclaims, the appellants claim that (1) the 1981 deed from Estelle B. Tillett to VEPCO constitutes a cloud on their title, and (2) they have been damaged by VEPCO's unauthorized entry on their land.

VEPCO filed a responsive pleading denying the material allegations of the appellants' answer and asserting that the appellants were estopped from asserting any defense inconsistent with the terms of the consent order. In response to the counterclaims, VEPCO contends that the appellants are barred by *res judicata* and collateral estoppel from asserting title based on any deeds from Marshall F. Tillett, Sr. VEPCO contends that the 1973 action between Tillett, Sr. and Estelle B. Tillett was conclusive as to the parties in the present action. VEPCO further contends that the consent order gave rise to an estoppel preventing the appellants from having any claim for damages for trespass.

Both parties filed motions for summary judgment. Prior to the hearing on the motions, the appellants filed a motion to join additional parties. On 28 November 1983, a hearing was held be-

fore Judge Watts. After the hearing VEPCO filed motions to strike certain portions of affidavits introduced by the appellants at the hearing. On 24 February 1983, Judge Watts denied the appellants' motion to join additional parties, denied VEPCO's motion to strike, denied the appellants' motion for summary judgment and granted VEPCO's motion for summary judgment. On 1 March 1984, the appellants appealed to the Court of Appeals.

The Court of Appeals vacated and remanded the decision of the trial court with instructions that the action be dismissed. 73 N.C. App. 512, 327 S.E. 2d 2. The Court of Appeals concluded that the trial court had erred by applying the North Carolina Rules of Civil Procedure in the condemnation proceeding. More specifically, the Court of Appeals also concluded that the trial court had erred by applying Rule 15(b) in such a way as to convert the condemnation proceeding, with the consent of the parties, into an action to quiet title. The Court of Appeals vacated the judgment of the trial court and remanded the cause for dismissal by the trial court. In so doing the Court of Appeals did not address issues that had been raised on appeal before that court.

On appeal to this Court, all parties agree that the Rules of Civil Procedure may be applied to condemnation proceedings brought by private condemnors. We conclude that the North Carolina Rules of Civil Procedure may be applied in condemnation proceedings brought by private condemnors and reverse the decision of the Court of Appeals. Giving proper deference to the Court of Appeals, we decline to address the remaining issues raised by the parties but not addressed by that court in its opinion in this case. Instead, we remand the case to the Court of Appeals so that it may address those issues initially on appeal and prior to their being decided by this Court.

In its opinion, the Court of Appeals acknowledged that a condemnation proceeding under Chapter 40A of The General Statutes of North Carolina is a special proceeding. *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953). Even where an action is a special proceeding, the Rules of Civil Procedure are made applicable by N.C.G.S. § 1-393 which provides that "[t]he Rules of Civil Procedure and the provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided." *See Nantahala Power & Light Co. v.*

Whiting Manufacturing Co., 209 N.C. 560, 184 S.E. 48 (1936). The Court of Appeals further acknowledged that the Rules of Civil Procedure have been applied to condemnation proceedings brought by the State. *Collins v. Highway Commission*, 237 N.C. 277, 283, 74 S.E. 2d 709, 715 (1953); *Board of Transportation v. Royster*, 40 N.C. App. 1, 251 S.E. 2d 921 (1979).

The Court of Appeals continued its analysis, however, by stating that: "in actions by private condemnors, however, a separate procedure is specified and that procedure is the exclusive means by which private condemnors may condemn land." 73 N.C. App. 512, 518, 327 S.E. 2d 2, 6 (1985). The Court of Appeals relied on N.C.G.S. § 40A-1 (1984) which states in pertinent part:

> It is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors. All other provisions in laws, charters, or local acts authorizing the use of other procedures by municipal or county governments or agencies or political subdivisions thereof, or by corporations, associations or other persons are hereby repealed effective January 1, 1982.

By focusing on the language in N.C.G.S. § 40A-1, the Court of Appeals failed to address the effect of another provision of the same Chapter, N.C.G.S. § 40A-12 (1984), which states:

> Where the procedure for conducting an action under this Chapter is not expressly provided for in this Chapter or by the statutes governing civil procedure, or where the civil procedure statutes are inapplicable, the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter. The practice in each case shall conform as near as may be to the practice in other civil actions.

N.C.G.S. § 40A-12 together with N.C.G.S. § 1-393 give trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by

Chapter 40A. The trial court's application of Rule 15(b) did not involve any such direct conflict.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WILKES LYDELL KING

No. 305A85

(Filed 18 February 1986)

1. **Constitutional Law § 63; Jury § 7.11— death qualified jury—no error**

The practice of death qualifying the jury in a first degree murder case does not result in the selection of a jury biased in favor of the prosecution on the issue of guilt and does not deprive a defendant of his right to be tried by a representative cross-section of the community.

2. **Homicide §§ 4.2, 21.6— felony-murder rule—felony of discharging firearm into occupied property**

The crime of discharging a firearm into occupied property may properly serve as the underlying felony supporting a first degree murder conviction under the felony-murder rule.

3. **Homicide § 4.2— felony-murder rule—refusal to adopt merger doctrine**

The Supreme Court refused to adopt the "merger doctrine" which would bar the application of the felony-murder rule whenever the predicate felony directly results in or is an integral element of the homicide.

4. **Homicide § 4.2— felony-murder rule—underlying felony—absence of firearm use not required**

The felony-murder statute, N.C.G.S. § 14-17, will not be interpreted to mean that only those offenses which are expressly set out and felonies where the use of a deadly weapon is not an element of the felony may serve as underlying felonies for purposes of the felony-murder rule.

BEFORE *Ross, J.*, at the 18 February 1985 Criminal Session of Superior Court, FORSYTH County, defendant was convicted of two counts 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 two consecutive terms of life imprisonment. The defendant appeals as a matter of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 17 December 1985.

Lacy H. Thornburg, Attorney General, by William N. Ferrell, Jr., Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

The State's evidence tended to show that, for a time during high school, the defendant was a boyfriend of Angela Roberts, but that relationship ended at some point. Later, in 1982, the defendant threatened and assaulted Angela. The incident which is the subject of this case occurred in 1984.

Jackie Lee Transou, a neighbor of the Roberts, testified that on the evening of 25 September 1984, the defendant entered her home carrying a shotgun. Without saying anything, he proceeded to look around Transou's room and then left.

Angela Roberts testified that on that evening of 25 September, she was at Jackie Transou's house. She stated that, as she came out of the bathroom, she saw the defendant in the house. When she saw that he was holding a shotgun, she went out the back door and ran home. The defendant, however, followed Roberts and shot at her as she reached the porch of her house. Present at the Roberts home were Angela's sisters, Bridgette and Toni, her mother, Jean, and two friends, Reginald Flint and Carl Williams. Angela, along with her mother, Jean, and sister Toni, ran to a back bedroom where Angela hid under a bed. Angela then heard two shots followed by her sister Bridgette screaming that she had been shot in the back. Two shots were then fired through the bedroom window striking Angela's mother and sister Toni. Angela testified that she then heard the defendant walking through the house, calling her names, and asking where she was. Shortly thereafter, the defendant left.

Angela Roberts' sister, Toni, Reginald Flint, and Carl Williams gave testimony that was substantially similar to Angela's.

Toni Roberts and Reginald Flint were wounded during the attack and were hospitalized.

Angela's mother died from chest wounds which resulted from the shotgun blast through the bedroom window. Angela's sister Bridgette died from head and chest wounds inflicted from a shotgun blast fired through the bathroom window.

The defendant took the stand and testified that on the evening in question, he was visiting his grandmother. He denied having any knowledge of the events occurring at the Roberts' house on 25 September 1984.

The jury found the defendant guilty of first-degree murder under the felony-murder rule, with the felony of discharging a firearm into occupied property, N.C.G.S. § 14-34.1, serving as the underlying felony. Following a sentencing hearing, the jury recommended that the defendant be sentenced to life imprisonment for each of the two murders, and the trial court entered judgments of consecutive life sentences.

[1] The defendant initially argues that the trial court erred by allowing the State to "death-qualify" the jury prior to the guilt-innocence phase of his trial. He contends that this practice results in the selection of a jury biased in favor of the prosecution on the issue of guilt. We have repeatedly rejected this argument. *E.g.*, *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (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). He also contends that the practice of "death-qualifying" the jury deprives defendants of their right to be tried by a representative cross-section of the community. We have consistently rejected this argument as well. *E.g.*, *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *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 decline the defendant's request to reconsider these decisions. This assignment of error is overruled.

[2] The defendant next contends that N.C.G.S. § 14-34.1, discharging a firearm into occupied property, may not properly

serve as the underlying felony supporting a first-degree murder conviction under the felony-murder rule. Under N.C.G.S. § 14-17, a defendant may be convicted of first-degree murder for a murder "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.*" (Emphasis added.) We have specifically held that the offense of discharging a firearm into occupied property may serve as the underlying felony for a first-degree murder conviction based on the felony-murder rule. *E.g., State v. Mash*, 305 N.C. 285, 287 S.E. 2d 824 (1982); *State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982).

[3] The defendant urges this Court to adopt the "merger doctrine" to bar the application of the felony-murder rule to homicides committed during the perpetration of the felony of discharging a firearm into occupied property. Defendant argues that the "merger doctrine" prohibits the application of the felony-murder rule whenever the predicate felony directly results in or is an integral element of the homicide. *See* Comment, *The Merger Doctrine as a Limitation on the Felony-Murder Rule: A Balance of Criminal Law Principles*, 13 Wake Forest L. Rev. 369 (1977). In *State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982), we were asked to adopt the "merger doctrine" but declined to do so, stating:

> Defendant argues that this Court should adopt the merger doctrine espoused in *People v. Ireland*, 70 Cal. 2d 522, 450 P. 2d 580, 75 Cal. Rptr. 188 (1969), which would bar his conviction of first-degree felony murder based upon the underlying felony of discharging a firearm into an occupied vehicle. The *Ireland* case held that in California "a . . . felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged." (Emphasis in original.) *Id.* at 539, 450 P. 2d at 590, 75 Cal. Rptr. at 198. The felony of discharging a firearm into occupied property, G.S. 14-34.1, appears to be such an integral part of the homicide in instant case as to bar a felony-murder conviction under the California merger doctrine. This Court, however, has expressly upheld convictions for first-degree felony murder based on the underlying felony of dis-

> charging a firearm into occupied property. *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Capps*, 134 N.C. 622, 46 S.E. 730 (1904). We elect to follow our own valid precedents.

304 N.C. at 612-13, 286 S.E. 2d at 71. The defendant has presented no argument to warrant a change in our position.

[4] The defendant also contends that the General Assembly did not intend to include the offense of discharging a firearm into occupied property as a possible felony which would support first-degree murder under the felony-murder rule. He argues that the felony-murder language contained in N.C.G.S. § 14-17 should be interpreted to mean that only those offenses which are expressly set out and felonies where the use of a deadly weapon is not an element of the felony may serve as underlying felonies for purposes of the felony-murder rule. We reject this argument. As this Court noted in *Wall*:

> Defendant futher [sic] contends that the legislature did not intend that the discharging of a firearm into occupied property be included as an underlying felony for the purposes of the felony-murder rule. In 1977 G.S. 14-17 was revised by the General Assembly. The earlier statute had defined felony murder as a killing "committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, *or other felony*." (Emphasis added.) 1949 N.C. Sess. Laws Ch. 299 § 1. This vague language required judicial interpretation, which this Court provided by interpreting the "other felony" language in G.S. 14-17 to refer to any felony which "creates any substantial foreseeable human risk and actually results in the loss of life." *State v. Thompson*, 280 N.C. 202, 211, 185 S.E. 2d 666, 672 (1972). The revised statute expanded the listed felonies and limited the "other felonies" which would support a charge of felony murder to those "committed or attempted with the use of a deadly weapon." 1977 N.C. Sess. Laws Ch. 406 § 1.
>
> Where the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give the statute its plain meaning. *State v. McMillan*, 233 N.C. 630, 65 S.E. 2d 212 (1951). Contrary to defendant's contentions, the unambiguous language of the 1977 revision

> makes it clear that felonies "committed or attempted with the use of a deadly weapon" will support a conviction of first-degree murder under the felony-murder rule.
>
> Defendant notes in his brief that England, the birthplace of the felony-murder doctrine, abolished the rule by statute in 1957. We believe this approach represents the proper response to dissatisfaction with a statutory rule of law. Our General Assembly remains free to abolish felony murder or, as the Courts did in California, to limit its effect to those other felonies not "included in fact within" or "forming an integral part of" the underlying felony. As recently as 1977, however, our legislature chose to reaffirm and clarify the offense. We do not believe it is the proper role of this Court to abolish or judicially limit a constitutionally valid statutory offense clearly defined by the legislature.

304 N.C. at 614-15, 286 S.E. 2d at 72. If the legislature feels the need to restrict the list of felonies which may serve as the underlying felony for purposes of the felony-murder rule, it may do so. Until then, we must accord the felony-murder language contained in N.C.G.S. § 14-17 its plain meaning.

The defendant received a fair trial, free from prejudicial error.

No error.

Leonard v. Johns-Manville Sales Corp.

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

No. 478PA84

(Filed 18 February 1986)

Limitation of Actions § 4.2; Negligence § 20; Sales § 22— civil asbestos claim— statute of repose not applicable

Summary judgments entered for defendants in an asbestosis action were reversed where the sole ground for the summary judgments was that former N.C.G.S. 1-15(b) applied to disease claims.

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

Justice MEYER dissenting.

ON plaintiff's petition, pursuant to N.C.G.S. § 7A-31(b) for discretionary review before determination by the Court of Appeals of summary judgments in favor of defendants, The Celotex Corporation and Owens-Corning Fiberglas Corporation, entered on 27 December 1983 in Superior Court in DURHAM County, *Barnette, J.*, presiding.

Haywood, Denny, Miller, Johnson, Sessoms & Haywood by George W. Miller, Jr. and Michael W. Patrick for plaintiff appellant.

Poisson, Barnhill & Britt by Donald E. Britt, Jr. and Stuart L. Egerton for Owens-Corning Fiberglas Corporation, defendant appellee; Brown & Johnson by C. K. Brown, Jr., for The Celotex Corporation, defendant appellee.

EXUM, Justice.

This is a wrongful death claim in which it is alleged that Samuel Leonard's long exposure to asbestos-containing products manufactured by defendants caused him to contract the disease asbestosis which in turn caused death. The only defendants which are parties to this appeal are The Celotex Corporation (Celotex) and Owens-Corning Fiberglas (Owens-Corning). These defendants moved for and were granted summary judgment on the ground that the ten-year statute of repose contained in former N.C.G.S. § 1-15(b) (Interim Supp. 1976) (repealed 1979)[1] effectively bars plaintiff's claim.

The forecast of evidence on the motions for summary judgment, according to the parties' stipulation, tends to show that Samuel Leonard was exposed during his working life to asbestos-containing products manufactured and sold by Celotex and Owens-Corning.[2] Ultimately he contracted the disease asbestosis.

1. The statute provided:

"Except where otherwise provided by statute, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance or failure to perform professional services, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed ten years from the last act of the defendant giving rise to the claim for relief."

2. The parties have stipulated "[f]or purposes of this appeal only" that the forecast of evidence at the hearing on summary judgment tends to establish that plaintiff "was exposed to . . . asbestos-containing products manufactured or sold by both Defendant Appellees prior to the beginning of the ten year period preceding the filing of" the complaint on 1 August 1979.

The disease was first diagnosed in August 1977; Samuel Leonard died in June 1978; and on 1 August 1979 his personal representative filed this wrongful death claim.

Celotex and Owens-Corning argue that nowhere in the forecast of evidence does it appear that Samuel Leonard was exposed to their asbestos-containing products less than ten years before the filing of the complaint. Their argument before us as, according to the briefs, it was in the trial court is: Under the wrongful death statute, N.C.G.S. § 28A-18-2, a wrongful death claim is barred unless the decedent, had he lived, would have been "entitled . . . to an action for damages" for the same wrongful act which caused death. Had Samuel Leonard lived he would not have been "entitled . . . to an action for damages" for his asbestosis because of the bar of the ten-year statute of repose in N.C.G.S. § 1-15(b). Therefore, this wrongful death claim cannot be maintained. On the basis of this argument, according to the briefs, summary judgments for Celotex and Owens-Corning were granted in the trial court.

After these summary judgments were granted in the trial court and the instant case was briefed and argued before us, this Court decided *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E. 2d 66 (1985), *reh'g denied*, --- N.C. ---, --- S.E. 2d --- (7 Jan. 1986). In *Wilder* we held that former N.C.G.S. § 1-15(b) had no application to claims arising out of disease. The disease in question in *Wilder* was also asbestosis. We reversed summary judgment for defendants in *Wilder* because they were granted on the ground that former N.C.G.S. § 1-15(b) applied to disease claims and effectively barred the claim there asserted.

Because the summary judgments were granted below and are sought to be sustained on appeal on the sole ground that former N.C.G.S. § 1-15(b) would have applied to bar Samuel Leonard's claim for injuries arising out of the disease asbestosis had he lived, *Wilder* is dispositive of this case and dictates that the summary judgments here, as they were in *Wilder*, be reversed.

The summary judgments, therefore, entered below in favor of defendants Celotex and Owens-Corning are

Reversed.

Justice BILLINGS took no part in the consideration or decision of this case.

Justice MEYER dissenting.

I dissent for the reasons stated in my dissenting opinion in *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E. 2d 66 (1985).

STATE OF NORTH CAROLINA v. SAMUEL PERRY

No. 125A85

(Filed 5 March 1986)

1. **Criminal Law § 148— prayer for judgment continued—no appealable judgment**

Defendant's purported appeals from verdicts of guilty of conspiracy to manufacture heroin are dismissed since the trial judge, with defendant's express consent given in open court, entered prayer for judgment continued without imposing conditions in either case, and there was therefore no appeal before the Supreme Court.

2. **Narcotics § 4.3— trafficking in heroin by possessing more than 2 grams—constructive possession—sufficiency of evidence**

The trial court properly overruled defendant's motion to dismiss the charge of trafficking in heroin by possessing and transporting 28 grams or more of heroin, since the evidence of defendant's control of an apartment where heroin and implements of manufacturing of heroin were found when considered with the evidence of transportation of 82.9 grams of heroin mixture, was ample evidence of such actual and constructive possession as to support a reasonable inference that defendant had the power and intent to control the disposition and use of the contraband and that he did possess and transport heroin in violation of N.C.G.S. § 90-95(h)(4)(c).

3. **Narcotics § 4— trafficking in heroin by manufacturing heroin—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for trafficking in heroin by manufacturing heroin where it tended to show that defendant was in control of an apartment where heroin and implements of manufacturing heroin were found, and that he was in the apartment only minutes before being apprehended outside the apartment while transporting heroin.

4. **Narcotics § 4— contents of individual packets—heroin—testimony of expert sufficient**

There was no merit to defendant's contention that there was no evidence that there was heroin mixture in each of the 390 separate glassine packets con-

tained in the foil-wrapped package which defendant possessed so as to raise a reasonable inference that he was guilty of trafficking where the testimony of an expert witness in the field of forensic drug chemistry supported a reasonable inference that more than 28 grams of heroin were involved based upon his analysis of a portion of the white powdery substance found in the packets.

5. Narcotics § 5; Constitutional Law § 83— trafficking in drugs statute—punishment—statute not unconstitutional

The trial court did not err in failing to dismiss the charge of trafficking in drugs on the theory that N.C.G.S. § 90-95(h)(4) is unconstitutional, since the General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes, and a scheme which punishes more severely the possession of a small amount of heroin when mixed with a large amount of legal materials than possession of a smaller amount of pure heroin has a rational relation to a valid State objective, that is, the deterrence of large-scale distribution of drugs.

6. Narcotics § 1.3— trafficking by possessing, manufacturing and transporting heroin—three separate offenses

Possessing, manufacturing, and transporting heroin are separate and distinct offenses, and when a person commits any one of these offenses which involves four grams or more of heroin, he is guilty of trafficking; therefore, defendant may be convicted and punished separately for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of heroin, and trafficking in heroin by transporting 28 grams or more of heroin even when the contraband material in each separate offense is the same heroin.

7. Arrest and Bail § 3.4; Criminal Law § 75.1— warrantless arrest—probable cause—admissibility of defendant's admissions

Officers had probable cause to believe that defendant was committing a felony and his warrantless arrest was therefore legal so that the trial court was not required to suppress his statements of admissions made to police officers in the course of the arrest.

8. Arrest and Bail § 9.2— bond increased during trial—no error

The trial judge did not err by increasing defendant's bond during the course of the trial where the judge noted defendant's misconduct in the presence of jurors and the court; he was aware that defendant faced serious punishment if convicted and that defendant had just lost the aid of one of his prime witnesses; and the court expressed doubt as to the sufficiency of the bond to bring defendant to court until a final determination of his guilt or innocence. N.C.G.S. § 15A-534(e)(2).

9. Criminal Law § 98.3— handcuffed defendant seen by jurors—defendant not prejudiced

The trial court did not err in denying defendant's motion for a mistrial because a juror or jurors saw him in handcuffs or in custody of an officer after he was in custody because of his failure to post the bond ordered by the trial

judge, since defendant was not shackled during the course of the trial but was routinely handcuffed when carried to and from the jail; there was evidence that a juror had inadvertently seen defendant handcuffed and that others may have seen him in the custody of an officer; when defense counsel moved for a mistrial, the judge conducted an extensive hearing and found no misconduct or prejudice to defendant; the judge then denied the mistrial but advised defense counsel that he would be willing to inquire of all the jurors if they saw anything amiss; and defense counsel indicated that he desired no further inquiry.

10. **Criminal Law § 138.13; Narcotics § 5— severity of sentence**

Where a statute mandates that an offender be punished as a felon of one of the classifications of N.C.G.S. § 15A-1340.4(f) but sets a minimum sentence greater than the presumptive sentence established for the appropriate class of felony in subsection (4), the minimum sentence set out in the criminal statute becomes the presumptive sentence for purposes of sentencing under the Fair Sentencing Act; therefore, in order to impose a sentence in excess of the minimum prescribed by N.C.G.S. § 90-95(h)(4)(c) [45 years and $500,000], it is necessary that the trial judge make proper findings of factors in aggravation and mitigation and find that the aggravating factors outweigh any mitigating factors.

11. **Criminal Law § 138.29; Narcotics § 5— trafficking in heroin—severity of sentence—specific intent to sell—defendant's bad character and reputation—appropriate aggravating factors**

In a prosecution for trafficking in heroin by possessing, transporting, and manufacturing 28 grams or more of heroin, the trial court properly found as aggravating factors that defendant had the specific intent to sell the heroin which he possessed, since intent to sell is not an element of manufacturing, transporting or possessing 28 grams or more of heroin, and that defendant had a bad character and reputation for trafficking in drugs and handling stolen goods, since defendant's bad character related in part to his activities in the illegal drug trade and thus bore a reasonable relationship to the purposes of sentencing by demonstrating his increased culpability.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment of *Brannon, J.*, entered at the 17 October 1984 Criminal Session of WAKE County Superior Court, imposing a life sentence and a fine of $500,000 upon a jury verdict of guilty of trafficking in heroin by possessing 28 grams or more of heroin.

Defendant was also convicted of conspiracy to possess 28 grams or more of heroin, conspiracy to manufacture 28 grams or more of heroin, trafficking in heroin by transporting 28 grams or more of heroin, and trafficking in heroin by manufacturing 28 grams or more of heroin. Defendant received sentences of 45 years in prison on the verdict of manufacturing 28 grams or more of heroin, and 45 years in prison on the verdict of guilty of

transporting 28 grams or more of heroin. The court also imposed a $500,000 fine in each of the above trafficking cases. Prayer for judgment was continued, without condition, in both of the conspiracy cases. We allowed bypass of the Court of Appeals in these cases.

The State's evidence tended to show that at about 11:20 a.m. on 9 June 1982, Detectives J. H. Johnson and E. T. Bert, of the Raleigh Police Department, Drug and Vice Division, observed Edell Willis (hereinafter Willis) park a yellow Cadillac in the parking lot of the Woodland Apartment complex and enter Apartment 823-C carrying a small brown paper bag.

At about 1:30 p.m. on the same day Willis was seen by Detectives Johnson, Bert, and Weatherspoon leaving Apartment 823-C Suffolk Boulevard with nothing in his hands. He entered the Cadillac, drove out of the parking lot, and turned right onto Suffolk Boulevard. After traveling a short distance, Willis was stopped by Detectives O'Shields and O. T. Perry. About ten minutes after Willis left Apartment 823-C, defendant was seen leaving the same apartment wearing a dark hat and carrying a silver, shiny package which appeared to be six to eight inches long and three to four inches wide. Defendant left the parking lot in a gold and white pickup truck and turned right onto Suffolk Boulevard. His truck came to an abrupt halt between the apartment complex and where Willis's vehicle had been stopped by the police officers. He then backed down Suffolk Boulevard, stopped and abruptly turned left into a driveway between dwellings 810 and 812 on Suffolk Boulevard. Defendant was out of sight of the police officers for just a few seconds.

Sergeant Perry pursued defendant as he backed down Suffolk Boulevard and observed him behind 810 Suffolk Boulevard closing the driver's door of the truck with his elbow. Sergeant Perry then saw defendant back his truck straight across the driveway and into the back of the residence of 812 Suffolk Boulevard where the officer blocked defendant's vehicle with his police car. Defendant asked Sergeant Perry to retrieve his hat for him indicating that it was on the ground behind 810 Suffolk Boulevard. Defendant then told Sergeant Perry that he wanted to talk to "Shield." When Sergeant Perry responded that Detective

O'Shields was not at the scene, defendant indicated that Detective O'Shields was in fact approaching.

When he arrived, Detective O'Shields advised defendant of his rights and asked him if he wanted to talk. Defendant replied, "I don't want to take the fall for all of somebody else's s---." O'Shields then said, "Are you talking about Edell?" Defendant asked O'Shields, "What will I get out of this if I talk to you?" O'Shields then told defendant that he would give the district attorney any information that he released to him, but that he could not guarantee him anything. Defendant said that he understood, but added, "I just don't want to take the fall for everybody else's mess." Defendant was asked, "What did you do with the package you carried out of the apartment?" Defendant replied, "How will you help me if I tell you that?" Before O'Shields answered, a detective located the package some yards away from the truck in some bushes. O'Shields then told defendant that they had found it, and asked, "Do you have anything else you want to say?" Defendant said, "No, but are they going into the apartment?" O'Shields replied, "They are going to obtain a search warrant."

Defendant told Detective O'Shields that Apartment 823-C belonged to his girlfriend, that he had a key to it, and that Willis had left an ounce or so under the bed in the apartment. He asked the detective not to tear up the apartment. Defendant said that he had nothing to do with the drugs and that his girlfriend was not involved. He further stated that Willis wanted to use the place. Detective O'Shields asked defendant if, other than the package he brought out of the apartment and the package he stated was under the bed, that was all he (defendant) knew about being in the apartment. Defendant answered that it was.

Further evidence for the State tended to show that Detective Weatherspoon, while searching behind 810 Suffolk Boulevard, found a shiny, foil-wrapped package in the bushes, free of dirt, moisture and debris. Detectives Johnson, Bert, and Weatherspoon were of the opinion that the foil-wrapped package in the honeysuckle bushes was the same package they had observed in the left hand of defendant when he left Apartment 823-C.

When the package was opened, the detectives found 390 glassine envelopes, each envelope or bindle containing a small amount of white powder which was uniform in color, texture, and ap-

pearance. J. F. Casale, an expert in the area of forensic chemistry, analyzed a sample of the white powder and found it to be a mixture of heroin and mannitol. The aggregate mixture of all the bindles was 82.9 grams.

The detectives also found a Carolina Power and Light bill and a Southern Bell bill in defendant's name with the address 823 Suffolk Boulevard on each. A key was found on defendant's key chain that fit the lock on Apartment 823-C Suffolk Boulevard. They also found $7,440 in his sock.

On 9 June 1982 detectives obtained a warrant to search Apartment 823-C Suffolk Boulevard. In the bedroom under the bed they found two large green plastic bags containing numerous items which the officers recognized as items used in packaging and repackaging heroin. They found mannitol, a common agent used in cutting heroin, rubber gloves, boxes with empty bindles or envelopes, a strainer, album covers, aluminum foil, scotch tape, rubber bands, measuring spoons and other items. They also found a plastic bag containing a white powder which was properly secured and later analyzed by expert witness J. F. Casale who found the white powder to be 26.3 grams of virtually uncut heroin.

Defendant offered evidence tending to show that he sometimes stayed at his girlfriend's apartment on Suffolk Boulevard, that he had known Willis since childhood, and that he had often done work on Willis's car. On 9 June 1982 Willis was in the neighborhood of Suffolk Boulevard and saw defendant's truck parked in front of the apartment building. Willis entered the apartment and they visited for a period of time. Defendant and Willis did nothing in the apartment except drink coffee and talk about general things and in particular about defendant putting a new engine in Willis's El Camino. Willis left the apartment. When defendant later left the apartment, he was carrying some bills and an envelope in his hand. Defendant drove into a driveway across Suffolk Boulevard from the apartment complex to check out an old car he was thinking about buying. He backed his vehicle near the old car and was there blocked in by the police and arrested. He was questioned by an officer who identified himself as O'Shields. He did not know O'Shields prior to this questioning. O'Shields asked defendant about a package and he responded that

he did not know what he was talking about. He made no other statement to O'Shields, but stated that he saw an officer find a package, which appeared to be wrapped in smooth aluminum foil, in the woods.

After being taken to jail, he was at some time placed in the same area with Willis, and he asked Willis about the package that the police found in the woods. Willis then told defendant that he had hidden the package in the woods across Suffolk Boulevard from the apartments the night before and was in the neighborhood to get it on 9 June when he saw defendant's truck and decided to stop by the apartment. Willis said that when he left the apartment he intended to drive around the block once or twice to see if the coast was clear but that he was stopped by the police before he had gotten very far.

Defendant was in jail when the apartment was searched, and he testified that he knew nothing about any of the items that police had testified were seized in the apartment. Defendant and his girlfriend, Linda Fay Watson, each had keys to and access to the apartment. He further testified that he had never conspired with Willis or had anything to do with controlled substances.

Lacy H. Thornburg, Attorney General, by William F. Briley, Assistant Attorney General, for the State.

Currie, Pugh and Joyner, by Irving Joyner, Attorney for defendant-appellant.

BRANCH, Chief Justice.

Defendant assigns as error the trial judge's denial of his motion to dismiss all charges at the close of all the evidence.

[1] We first consider the conspiracy charges. The indictment in Case No. 82CRS36668 charges that defendant conspired with Edell Willis to possess 28 grams or more of heroin on 9 June 1982. The indictment in Case No. 82CRS36670 charges that defendant conspired to manufacture with Edell Willis 28 grams or more of heroin on 9 June 1982.

Defendant contends that the State failed to offer sufficient evidence of either of these charges to survive his motions to dismiss. We do not reach this argument since Cases Nos. 82CRS-

36668 and 82CRS36670 are not before us for decision. Upon the jury verdict of guilty in Case No. 82CRS36668 charging that defendant conspired with Edell Willis to possess 28 grams or more of heroin on 9 June 1982, the trial judge entered the following order:

ORDER—82CRS36668

Offense: Conspiring with Edell Willis to possess 28 grams or more of heroin on June 9, 1982

Attorney for State: Evelyn Hill
Attorney for Defendant: Thomas Loflin

PLEA: [X] Not Guilty
VERDICT: [X] Guilty

It is Ordered that Prayer for Judgment be continued, with the express consent of the defendant in open court, from term to term and session to session of the Wake County Superior Court for a maximum term of five (5) years from this date unless the Solicitor for the State in his/her unfettered and unbridled discretion prays judgment in the next five (5) years.

Date: October 24, 1984
Name of Presiding Judge: Hon. Anthony M. Brannon

Signature of Presiding Judge
s/ ANTHONY BRANNON

An identical order was entered in Case No. 82CRS36670 upon the jury verdict of guilty of conspiracy to manufacture with Edell Willis 28 grams or more of heroin on 9 June 1982.

In *State v. Pledger*, 257 N.C. 634, 127 S.E. 2d 337 (1962), we find the following:

> Where prayer for judgment is continued and no conditions are imposed, there is no judgment, no appeal will lie, and the case remains in the trial court for appropriate action upon motion of the solicitor.

Id. at 638, 127 S.E. 2d at 340.

In instant cases the trial judge, with defendant's express consent given in open court, entered prayer for judgment continued

without imposing conditions in either of the conspiracy charges. Therefore there is no appeal before us in cases 82CRS36670 and 82CRS36668. The purported appeals in each of these cases are dismissed.

[2] By his next assignment of error, defendant argues that the trial judge erred in failing to allow his motion to dismiss, made at the close of all the evidence, the charges of trafficking in heroin by possessing and transporting heroin. Defendant argues that there was insufficient evidence to support a reasonable inference that he possessed or transported 28 grams or more of heroin.

N.C.G.S. § 90-95(h)(4) in part provides:

> (4) Any person who sells, manufactures, delivers, transports, or possesses *four grams* or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as 'trafficking in opium or heroin' and if the quantity of such controlled substance or mixture involved:
>
> . . . .
>
> c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a term of at least 45 years in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(Emphasis added.)

We particularly note that this section penalizes possession of 4 grams or more of any mixture containing heroin without regard to the percentage of heroin in the mixture.

Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State as well as that introduced by defendant. N.C.G.S. § 15-173 (1983), N.C.G.S. § 15A-1227 (1983). Thus, the question presented is whether upon consideration of all the evidence, whether competent or incompetent, in the light most favorable to the State, there is substantial evidence that the crime charged in the bill of indictment was committed and that defendant was a perpetrator of that crime. *State v. Rid-*

dle, 300 N.C. 744, 268 S.E. 2d 80 (1980); *State v. Scott*, 289 N.C. 712, 224 S.E. 2d 185 (1976).

It is well settled in this jurisdiction that in a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of constructive possession is sufficient and that possession need not always be exclusive. *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983); *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680 (1971).

In *Allen* defendant was charged with possessing a quantity of heroin. The State offered evidence tending to show that the utilities for the house in which the heroin was found were listed in defendant's name, that an Army identification card and other papers bearing defendant's name were found in the bedroom of the house where the heroin was discovered, and that heroin was being sold by a sixteen-year-old boy at defendant's direction. Defendant testified that he did not reside at the residence where the heroin was found and that he had no dealings with the drug or the minor who allegedly was selling it. Holding that the trial court correctly denied defendant's motion for nonsuit, this Court quoted, with approval, from *People v. Galloway*, 28 Ill. 2d 355, 358, 192 N.E. 2d 370, 372 (1963), *cert. denied*, 376 U.S. 910, 11 L.Ed. 2d 608 (1964), the following:

> 'where narcotics are found on the premises under the control of defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts and circumstances which might leave in the mind of the jury * * * a reasonable doubt as to his guilt.'

State v. Allen, 279 N.C. at 410, 183 S.E. 2d at 683.

We again considered possession of contraband in *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706, and find there language pertinent to a decision of the question before us. We quote:

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power

> and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'

281 N.C. at 12-13, 187 S.E. 2d at 714 (citations omitted).

Defendant relies heavily on *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967). There defendant was convicted of felonious possession of marijuana. The State offered evidence tending to show that officers followed him and a companion along a street and through a vacant lot. They observed defendant and his companion in conversation about a minute and lost sight of him for just a few seconds. When defendant was first observed by the officers he was wearing a hat, but when he came back toward the officers, he was bareheaded. He was arrested and a search of his person did not reveal any contraband materials. In the vacant lot officers later found a hat, similar to the one worn by defendant, containing a quantity of marijuana. We held this evidence to be insufficient to overcome a motion for judgment as of nonsuit.

Instant case differs from *Chavis* in that defendant was alone from the time he was seen leaving the apartment carrying the silver-wrapped package until it was found in some bushes near his truck. In addition, there was evidence which would support an inference that defendant was either in joint or exclusive control of the apartment at 823-C Suffolk Boulevard from which defendant had departed carrying the silver-colored package and in which 26.3 grams of virtually uncut heroin, together with implements for the manufacturing of heroin, were found. There was also evidence of admissions by defendant that he knew some heroin was in the apartment and that his girlfriend knew nothing about it. In *Chavis* the only evidence connecting defendant to the marijuana was that it was found in a hat identical to one he had been seen wearing just a short time before his arrest.

We hold that the evidence of defendant's control of the apartment at 823-C Suffolk Boulevard, where heroin and implements of manufacturing of heroin were found, when considered with the evidence of transportation of 82.9 grams of heroin mixture is ample evidence of such actual and constructive possession as to support a reasonable inference that defendant had the power and intent to control the disposition and use of the contraband and that he did possess and transport heroin in violation of N.C.G.S. § 90-95(h)(4)(c).

The trial judge correctly overruled defendant's motion to dismiss the charge of trafficking in heroin by possessing and transporting 28 grams or more of heroin.

[3] Defendant next argues that there was not sufficient evidence to carry the charge of trafficking in heroin by manufacturing heroin to the jury and that his motion to dismiss should have been allowed.

N.C.G.S. § 90-95(a)(1) in part provides:

> (a) Except as authorized by this Article, it is unlawful for any person:
>
> (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance.

N.C.G.S. § 90-87(15) defines "manufacture" as

> the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and 'manufacture' further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use. . . .

Defendant was specifically charged in the bill of indictment with cutting and packaging heroin.

In addition to the previously cited authorities, we find *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984), to be instructive.

There the defendant was found in an apartment with two other persons. He was standing within a foot of a table containing two plastic packages of a substance later determined to be cocaine, plastic sandwich-type bags, plastic bags containing a green vegetable substance, wire ties, a chemical used to absorb water, aluminum foil, a single-edged razor blade, and a plastic straw which is commonly used to inhale cocaine through the nose. The apartment was leased to defendant's brother and was used as a "drink house" rather than a dwelling. Defendant had on his person a key to the apartment and $1700 in cash. During recent periods of police surveillance, defendant had been at the apartment where the contraband materials were found. Defendant was charged and convicted of packaging and repackaging cocaine. On appeal this Court held that there was ample evidence that defendant was engaged in manufacturing the controlled substance.

Brown and instant case are factually very similar, the most substantial variance being that in *Brown* defendant was actually within reach of the contraband materials and the implements used in the manufacturing process when the officers first observed him.

We therefore hold that there was ample evidence to give rise to a reasonable inference that defendant did manufacture heroin by packaging the controlled substance.

[4] Defendant next contends that the trial court erred by permitting the offenses of trafficking in heroin to be submitted to the jury. It is defendant's position that there was no evidence that there was heroin mixture in each of the 390 separate glassine packets contained in the foil-wrapped package so as to raise a reasonable inference that he was guilty of trafficking.

In order to prove the offense of trafficking, the State must prove that the accused sold, manufactured, delivered, transported, or possessed "four grams or more of . . . heroin, or any mixture containing such substance." N.C.G.S. § 90-95(h)(4) (1985). Upon conviction of trafficking, if it is found that the quantity of such controlled substance or mixture containing the controlled substance involved is 28 grams or more, a defendant shall be punished as a Class C felon. Said punishment shall be imprisonment for at least 45 years and imposition of a fine of not less than $500,000. N.C.G.S. § 90-95(h)(4)(c) (1985). The maximum punishment

for a Class C felony is imprisonment "up to fifty years, or by life imprisonment, or a fine, or both imprisonment and fine." N.C.G.S. § 14-1.1 (1981).

Having decided that there was enough evidence that defendant possessed, transported, and manufactured heroin, we will confine our consideration of the amount of heroin involved to the testimony of the expert witness, John Casale, who was admitted as an expert witness in the field of forensic drug chemistry. Mr. Casale identified State's Exhibit 55, a plastic bag containing 89.2 grams of white powder, by his initials and a case number. He stated that he tested the white powder by emptying the bag and noting that it was of a uniform mixture before beginning his analysis. He described his various methods of examination of different small portions from the whole. After performing various tests, he concluded that the white powdery substance contained a small amount of quinine, a large amount of mannitol, and approximately three percent heroin.

The witness Casale also identified State's Exhibit 57, another plastic bag containing a white powdery substance, by the marking of his initials and an assigned case number. The contents of the bag weighed 26.3 grams. He did tests similar to those which he performed on State's Exhibit 55 and concluded that the powdery substance was virtually uncut heroin. He detected no mannitol or quinine in the substance but did find a small amount of caffeine.

It is well established that an expert chemist may give his opinion as to the whole when only a part of the whole has been tested. *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). We note that the testimony of the expert witness was either admitted on direct examination without objection or was elicited on cross-examination.

The testimony of the expert witness when considered in conjunction with the State's evidence as to possession, manufacturing, and transporting is more than ample to support a reasonable inference of trafficking and that defendant engaged in trafficking more than 28 grams of heroin.

[5] Defendant assigns as error the failure of the trial judge to dismiss the charge of trafficking in drugs on the theory that N.C.G.S. § 90-95(h)(4) (hereinabove quoted in pertinent part) is un-

constitutional. He acknowledges that the Court of Appeals, in *State v. Willis*, 61 N.C. App. 23, 300 S.E. 2d 420, *affirmed and modified on other grounds*, 309 N.C. 451, 306 S.E. 2d 779 (1983), has held this section of the statute to be constitutional. However, without citation of case authority, he asks that *Willis* be overruled on grounds that the statute violates the law of the land provision of article I, § 19, of the North Carolina Constitution and the due process and equal protection clauses of the United States Constitution.

Defendant also argues that the imposition of the mandatory minimum sentence and fine as required by enactment of the General Assembly violates the separation of powers clause in the North Carolina Constitution as well as the due process and equal protection clauses of the United States Constitution. We disagree.

It is well settled that the General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes. The legislature alone can prescribe the punishment for those crimes. *State v. Jernigan*, 279 N.C. 556, 184 S.E. 2d 259 (1971); *State v. Roseboro*, 276 N.C. 185, 171 S.E. 2d 886 (1970), *death sentence vacated*, 403 U.S. 948, 29 L.Ed. 2d 860 (1971); *State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885 (1969), *death sentence vacated*, 403 U.S. 948, 29 L.Ed. 2d 860 (1971).

Defendant avers that the scheme of punishment provided for in this statute is irrational and violative of the equal protection and due process clauses of the United States Constitution because the scheme would punish more severely the possession of a small amount of heroin when mixed with a large amount of legal materials than for a smaller amount of pure heroin. He contends that this is irrational because it encourages the possession of pure heroin rather than a nonlethal diluted dosage. We find this argument to be without substance. The purpose of the statute is to prevent trafficking in controlled substances. The mixing and packaging into dosage containers of a controlled substance with other noncontrolled substances indicates an intent to distribute the controlled substance on a large scale. Large scale distribution naturally reaches more people who may be harmed by the drugs. Thus, the imposition of harsher penalties for the possession of a mixture of controlled substances with a larger mixture of lawful

materials has a rational relation to a valid State objective, that is, the deterrence of large scale distribution of drugs. *See State v. Tyndall*, 55 N.C. App. 57, 284 S.E. 2d 575 (1981); *State v. Willis*, 61 N.C. App. 23, 300 S.E. 2d 420.

We find no constitutional infirmity in the statute and therefore hold that the trial judge properly denied defendant's motion to dismiss the charge of trafficking in drugs as being unconstitutional.

Defendant next contends that the trial judge erred by refusing to direct the State to elect between prosecuting defendant for trafficking in heroin and the offenses of possessing, manufacturing and transporting heroin. Defendant asserts that the denial of his motion subjected him to double jeopardy. He seems to take the position that the offenses of trafficking in heroin by possessing, manufacturing, and transporting heroin are lesser included offenses of a single offense of trafficking in heroin. Defendant's contention is without merit.

In *State v. Anderson*, 57 N.C. App. 602, 292 S.E. 2d 163, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982), an opinion by Clark, J., we find an excellent discussion of the history and intent of the legislature in enacting Chapter 1251 of the 1979 Session Laws entitled "An Act to Control Trafficking in Certain Controlled Substances." We quote from that opinion:

> Prior to the enactment of Chapter 1251 of the 1979 Session Laws, the majority of the substantive offenses involving illegal drug activities were set forth in G.S. 90-88 before passage of a 1973 amendment, and thereafter in G.S. 90-95 (a)(1), (2) and (3), which made it unlawful for any person to manufacture, sell, or deliver, possess or possess with intent to manufacture, sell or deliver, a controlled substance. These same statutory sections are now a part of the new G.S. 90-95 with the 1979 amendments [subsections (h) and (i)] which provide for comprehensive graduations in the scale of mandatory sentences and fines for the sale, manufacture, delivery, transportation or possession of substantial amounts of certain illicit drugs.
>
> It is clear that the 1979 amendments to G.S. 90-95 by the addition of subsections (h) and (i) are responsive to a growing

concern regarding the gravity of illegal drug activity in North Carolina and the need for effective laws to deter the corrupting influence of drug dealers and traffickers. Prior to the enactment of the 1979 amendment, the provisions of G.S. 90-88 before 1973 and thereafter G.S. 90-95(a)(1), (2), and (3), have been interpreted by the courts of North Carolina. The distinct acts denounced by the statute (manufacture, sell, deliver, possess) have been held to constitute separate and distinct offenses. *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974); *State v. Thornton*, 283 N.C. 513, 196 S.E. 2d 701 (1973); *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973); *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); *State v. Brown*, 20 N.C. App. 71, 200 S.E. 2d 666 [1973], *cert. denied*, 284 N.C. 617, 202 S.E. 2d 274 (197[4]). The same statutory interpretation has been made in other jurisdictions. 28 C.J.S. *Drugs and Narcotics Supplement* § 171 (1974).

The cases cited and others not cited, which have established the rule of law that it was the intent of the legislature in enacting previous and current statutes similar to the statute in question to create separate and distinct crimes for the various acts denounced, must be given substantial weight in interpreting the similar statute [G.S. 90-95(h) and (i)] on which the indictments are based.

We find the words 'guilty of a felony . . . known as "trafficking in marijuana"' relates primarily to the preceding words '50 pounds (avoirdupois) of marijuana,' and the use of the word felony in singular form refers to the singular crime known as 'trafficking in marijuana,' a crime consisting of any one or more of the denounced acts, any one of which is a separate crime. We hold that under G.S. 90-95(h) if a person engages in conduct which constitutes possession of in excess of 50 pounds of marijuana as well as conduct which constitutes manufacture of in excess of 50 pounds of marijuana, then the person may be charged with and convicted of two separate felonies of trafficking in marijuana.

57 N.C. App. at 605-06, 292 S.E. 2d at 165-66.

[6] We therefore hold that possessing, manufacturing, and transporting heroin are separate and distinct offenses. Further,

when a person commits any one of these offenses which involves 4 grams or more of heroin, he is guilty of trafficking. Therefore, defendant may be convicted and punished separately for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of heroin, and trafficking in heroin by transporting 28 grams or more of heroin even when the contraband material in each separate offense is the same heroin.

We hold that the trial judge did not err in denying defendant's motion that he direct the State to elect between prosecuting defendant for trafficking in heroin and the offenses of possession, manufacturing and transporting heroin.

[7] Defendant next contends that Judge Bowen erred in denying his pretrial motion to suppress all evidence relating to statements made by him to police officers. Relying on *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416 (1975); *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441 (1963); and their progeny, defendant argues that his arrest was illegal and therefore any statements or admissions as a result of this arrest should be suppressed as "fruits of the poisonous tree." He contends that since there was no probable cause for arrest the warrantless arrest was illegal. Unquestionably defendant was arrested without a warrant, therefore the legality of his arrest is governed by N.C.G.S. § 15A-401(b) which provides:

> (b) Arrest by Officer Without a Warrant.—
>
> (1) Offense in Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.
>
> (2) Offense Out of Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe:
>
> a. Has committed a felony. . . .

Resolution of this assignment of error depends upon whether, at the time the officers arrested defendant without a warrant, they had probable cause to believe that he had committed a felony or that he had committed a criminal offense in their pres-

ence. In this connection, Judge Bowen made findings consistent with the facts hereinabove set out as well as the following additional findings:

> 2. E. T. Bert and J. H. Johnson, members of the Raleigh Police Department for over nine years and Detectives for over a year and a half, who had intensive training, education, and experience in drug identification and drug investigation, had participated in undercover drug campaigns, and had been investigating heroin trafficking in the Raleigh area for over a year, began to receive information in December of 1981 from a confidential informant regarding the involvement of Sam Perry and Edell Willis in heroin trafficking in Southeast Raleigh.
>
> 3. This informant was known to both Detectives and had given information in the past which had led to arrests, seizures of drugs, and convictions for drug violations. The informant had never given the detectives false information and all information given had proven reliable. The information had been given over a period of nine months by the informant. The informant was familiar with the customs and practices of drug dealers and knew what heroin looked like.
>
> 4. The informant told Detectives Bert and Johnson that he had personal knowledge that Edell Willis had a storage house used for purposes of cutting, packaging and storing heroin for distribution, that this storage house was located at 823-C Suffolk Boulevard, in Raleigh, and that Samuel Perry meets there with Edell Willis to cut, package, and distribute the heroin.
>
> . . . .
>
> 7. In the 24 hour period prior to the afternoon of June 9, 1982, the confidential informant told Detectives Bert and Johnson that Edell Willis and Sam Perry were in possession of a large amount of heroin, enough for a two-week supply of heroin sales, and that they would be going to 823-C Suffolk Boulevard to cut and package the heroin for distribution. The informant further stated that he had previously seen Edell Willis with a large quantity of heroin at 823-C Suffolk Boulevard, that Edell Willis usually carries the uncut heroin to

823-C Suffolk Boulevard in a brown paper bag, and that on this occasion Edell Willis would be carrying the heroin in a brown paper bag.

8. Based upon the informant's information, prior information and prior surveillance, Detectives Bert and Johnson set up surveillance of 823-C Suffolk Boulevard in the early morning hours of June 9, 1982.

Upon these findings, Judge Bowen concluded:

2. Detectives Bert and Johnson had probable cause to believe that Samuel Perry was committing a felony violation of the North Carolina Controlled Substances Act and had probable cause to arrest him for that felony offense.

3. Detective Perry, acting under the direction of Detectives Bert and Johnson, made a valid arrest of Samuel Perry for possession of heroin.

4. The search of the person of Samuel Perry and the search of the passenger area of the truck in which he was arrested were incident to a valid arrest upon probable cause and were therefore reasonable and lawful.

. . . .

6. Samuel Perry was properly advised of the appropriate Miranda Warnings and knowingly and intelligently waived those rights before making statements.

7. Samuel Perry knowingly, intelligently, freely and voluntarily, without threats, promises, or coercion, made statements to law enforcement officers subsequent to his valid arrest upon probable cause. After indicating at one point that he had nothing more to say about the heroin in the foil package, he freely and voluntarily initiated further conversation with law enforcement officers and engaged in a conversation during which he answered further questions knowingly, intelligently, freely and voluntarily.

He thereupon denied defendant's motion.

In *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973), we find the following statement:

> An arrest is constitutionally valid when the officers have probable cause to make it. Whether probable cause exists depends upon 'whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' *Beck v. Ohio*, 379 U.S. 89, 13 L.Ed. 2d 142, 85 S.Ct. 223 (1964).

Id. at 207, 195 S.E. 2d at 505.

It is well settled that a silent record supports a presumption that the proceedings below are free from error, and it is the duty of the appellant to see that the record is properly made up and transmitted to the appellate court. *State v. Fox*, 305 N.C. 280, 287 S.E. 2d 887 (1982). Further, when no exceptions are made to separate findings of fact they are presumed to be supported by competent evidence. N.C.R. App. P. 10(b)(2). *Dealers Specialties, Inc. v. Housing Services*, 305 N.C. 633, 291 S.E. 2d 137 (1982).

Here defendant failed to except separately to any finding of fact or conclusion of law made by Judge Bowen. Neither did he include in the record the substance of the testimony presented to and considered by Judge Bowen. We therefore conclude that the findings support Judge Bowen's conclusions of law which in turn support his ruling denying defendant's motion to suppress.

[8] Defendant next assigns as error the trial judge's action in raising defendant's bond from $140,000 to $500,000 after the State had rested and defendant had examined the witness Edell Willis.

The witness Edell Willis, upon the advice of counsel, exercised his fifth amendment rights and refused to answer any questions pertinent to this case on the ground that it might incriminate him. When the jury was released for the day, the prosecutor, noting that in previous hearings it became evident that a large part of defendant's defense would rest upon the testimony of Edell Willis, asked the court to reconsider bond. Whereupon, the trial judge noted that during the course of the trial he had had problems with defendant and that defendant had willfully violated the instructions of the court. Further, the trial judge expressed doubts that defendant would show up and as to whether there was a sufficient bond. He further explained his action for raising defendant's bond as follows:

> [D]uring the trial and in large measure because of defendant's misconduct in the presence of the 15 jurors in this case, the Court had him taken into custody last Friday and after repeated admonitions to him—and I'm satisfied after counsel's repeated admonitions to him—to behave himself and not, shall we say as you put it, Mr. Loflin, attempt to indirectly communicate with the jurors.

After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk, or district court judge, or any such order entered by him at any time before defendant's guilt has been established in superior court. N.C.G.S. § 15A-536 imposes additional restrictions upon the modification of pretrial release orders after a defendant has been convicted in superior court. N.C.G.S. § 15A-534(e)(2) (1983). Further, in addition to modification of a bail bond, a trial judge has discretionary power to order a defendant into custody during the progress of a trial. *See State v. Norman*, 8 N.C. App. 239, 174 S.E. 2d 41 (1970).

Here the trial judge noted defendant's misconduct in the presence of jurors and the court. He was aware that defendant faced serious punishment if convicted and that defendant had just lost the aid of one of his prime witnesses. In light of these circumstances, the court expressed doubt as to the sufficiency of the bond to bring defendant to court until a final determination of his guilt or innocence. Under these circumstances, we hold that the trial judge did not err by increasing defendant's bond during the course of the trial.

[9] Neither do we find error in the court's denial of defendant's motion for a mistrial because a juror or jurors saw defendant in handcuffs or in custody of an officer after he was in custody because of his failure to post the bond ordered by Judge Brannon. Admittedly the general rule is that a defendant is entitled to appear in court free from all bonds and shackles. However, this rule is subject to the exception that a trial judge, in the exercise of his sound discretion, may require an accused to be shackled when it is necessary to prevent escape, to protect others in the courtroom, or to maintain an orderly trial. *State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976).

In instant case defendant was not shackled during the course of the trial but was routinely handcuffed when carried to and from the jail. There was evidence that a juror had inadvertently seen defendant handcuffed and that others may have seen him in the custody of an officer. When defense counsel moved for a mistrial, the trial judge conducted an extensive hearing and found no misconduct or prejudice to defendant. He thereupon denied the motion for mistrial. The record discloses that the trial judge then advised defense counsel that he would be willing to inquire of all the jurors if they saw anything amiss. Defense counsel indicated that he desired no further inquiry.

We therefore conclude that the trial judge correctly denied defendant's motion for a mistrial.

In his final assignment of error defendant argues that the trial judge improperly found the following aggravating factors:

> a. The defendant had specific intent to sell the heroin that he possessed and manufactured in these cases; and
>
> b. The defendant has a bad character and reputation for trafficking in drugs and handling stolen goods.

Before reaching the merits of defendant's arguments we must deal with the State's contention that the subject matter of defendant's argument is not included in an assignment of error in the record. In assignment of error 15 defendant stated that "[t]he trial judge erred in his utilization of a 1946 conviction, opinion statements by police officers and other improper factors in determining aggrevating [sic] factors during the sentencing of the defendant." Though more detail would be helpful, we hold that this assignment of error is sufficient to state the "basis upon which error is assigned. . . ." N.C.R. App. P. 10(c).

The State next argues that the punishment for violations of N.C.G.S. § 90-95(h)(4)(c) is not covered by the Fair Sentencing Act. The State contends that the minimum punishment of a 45-year prison term and a fine of $500,000 so far exceeds the presumptive sentence of 15 years for a Class C felony that it has the effect of removing this offense from the Fair Sentencing Act.

[10] Subsection (f)(1) of N.C.G.S. § 15A-1340.4 provides that, unless otherwise specified by statute, the presumptive prison

term for a Class C felony is imprisonment for fifteen years. In cases such as this one in which a statute mandates that an offender *be punished as* a felon of one of the classifications of N.C.G.S. § 15A-1340.4(f) but sets a minimum sentence greater than the presumptive sentence established for the appropriate class of felony in subsection (f), we adopt the rule set out in *State v. Morris*, 59 N.C. App. 157, 296 S.E. 2d 309, *disc. rev. denied*, 307 N.C. 471, 299 S.E. 2d 227 (1983), that the minimum sentence set out in the criminal statute becomes the presumptive sentence for purposes of sentencing under the Fair Sentencing Act. Therefore, in order to impose a sentence in excess of the minimum prescribed by N.C.G.S. § 90-95(h)(4)(c) (45 years and $500,000), it is necessary that the trial judge make proper findings of factors in aggravation and mitigation and find that the aggravating factors outweigh any mitigating factors.

[11] We now consider defendant's argument that the aggravating factors found by the trial judge were improper.

In regard to the finding that he intended to sell the drugs defendant contends that pecuniary gain, *i.e.*, intent to sell, is inherent in the crime of possession of more than 28 grams of heroin. Where there is no evidence that a defendant was hired or paid to commit a crime it is improper for the trial court to find that he committed the offense for pecuniary gain. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). Therefore, defendant contends that the trial judge erred in finding that he intended to sell the heroin he possessed. We disagree.

Intent to sell is not an element of manufacturing, transporting, or possessing 28 grams or more of heroin. *See State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (intent to distribute cocaine is not an element of the offense of manufacturing). The reason a person possesses, manufactures, or transports the heroin is irrelevant. Therefore, the trial judge properly found the aggravating factor that defendant had the specific intent to sell the heroin that he possessed.

Lastly, we turn to defendant's argument that his bad reputation and character is not an appropriate factor in sentencing. We disagree. As the trial judge pointed out, good character and reputation is a statutory mitigating factor. We agree with him that a defendant's bad character and reputation can be a proper

nonstatutory aggravating factor. Since the evidence of defendant's bad character related in part to his activities in the illegal drug trade we hold that it does bear a reasonable relationship to the purposes of sentencing by demonstrating his increased culpability and is a proper aggravating factor. *See* N.C.G.S. § 15A-1340.3 (1983).

Defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. NATHANIEL LEE TORAIN

No. 284A85

(Filed 5 March 1986)

1. **Rape § 6— first degree rape—utility knife as dangerous or deadly weapon—instruction proper**

The trial court in a first degree rape case did not err in instructing the jury that "a utility knife is a dangerous or deadly weapon," and there could therefore be no "plain error" as contended by defendant, where the victim, who at the time of the assault was wearing only a one-piece bathing suit, testified that the blade of the knife was a typical razor blade about one inch long; she had seen her stepfather use such a knife to cut carpet or sheetrock and realized it was very sharp; and the knife had been used to cut through cardboard cartons, slice yarn off textile beams, and sever the victim's nylon bathing suit straps and was therefore capable of cutting into exposed flesh.

2. **Criminal Law § 67.1— rape victim's identification of defendant by voice—admissibility of evidence**

The trial court in a rape case did not err in allowing the State to recall the victim, following the close of defendant's evidence, to testify that, after hearing defendant's voice in court, she recognized it as being the voice of the man who attacked her eight months earlier, since defendant requested and was allowed a recess to research his objection but was unable to locate any authority for his position; defendant was allowed to conduct a *voir dire* examination of the victim; and the in-court voice identification was of independent origin and not unduly suggestive.

BEFORE *Bowen, J.*, at the 18 February 1985 Criminal Session of Superior Court, ORANGE County, defendant was convicted of first-degree rape and acquitted of second-degree kidnapping. Upon the imposition of a sentence of life imprisonment, defendant

appeals to this Court as a matter of right, pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 18 December 1985.

Lacy H. Thornburg, Attorney General, by Evelyn M. Coman, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Louis D. Bilionis, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

Defendant raises two issues for resolution by this Court. He first contends that he was deprived of his constitutional rights to due process and a fair trial by jury when the trial court, in its charge to the jury on the offense of first-degree rape, removed from the case an essential element of the crime—that the defendant employed or displayed a dangerous or deadly weapon. Second, defendant argues that it was error for the trial judge to allow the State to recall the victim, following the close of defendant's case, to testify that after hearing defendant's voice in court, she recognized it as being the voice of the man who attacked her eight months earlier.

I.

Defendant argues that, by instructing the jury that "a utility knife is a dangerous or deadly weapon," the trial judge erroneously created a mandatory presumption, removing a question of fact from the jury, and thereby relieving the State of its burden of proving an essential element of first-degree rape beyond a reasonable doubt.

Defendant admits that by his failure to object at trial to the contested instruction, he has waived his right to assign it as error on appeal. N.C.R. App. P. Rule 10(b)(2). However, defendant urges this Court to find that the trial judge committed "plain error" in charging that "a utility knife is a dangerous or deadly weapon." *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

The State's evidence tended to show that on 18 June 1984, after completing her shift at North Carolina Memorial Hospital, Kimberly Brock Ashworth drove to the Homestead Community Center in Orange County at approximately 1:00 p.m. to relax, read, and sunbathe. She set up a lounge chair by the swimming

pool and spent several hours reading, listening to music, and napping. She had stopped by her boyfriend's mother's home on the way to the Community Center and had been planning her wedding; "I was tired of that, and I just wanted to relax; and that's what I did that day most of the day." At approximately 3:30 p.m., Ms. Ashworth got out of her lounge chair to rinse off and had just sat back down in the chair when she heard a creaking noise she recognized as one of the doors to the pool house which was behind her. While still seated, she stretched around in the chair to see who was coming through the door into the fenced pool area and saw a man running toward her, crouched down, and wearing a stocking over his face. She thought someone was playing a joke on her until he grabbed her from behind; she tried to get up before he reached her but could not do so because the chair was so low. The man was wearing a green, short-sleeved shirt with an orange patch on the pocket, and darker colored pants. Ms. Ashworth was unable to describe his facial features because the stocking mask obscured his face, but she testified that her assailant smelled of oil or kerosene and had rough hands.

The man grabbed Ms. Ashworth's face with one hand and put his other arm around her, pulling her out of the chair. He kept repeating, "I've got a knife. I'm going to kill you. Get up. Get up." The man put a knife in front of Ms. Ashworth's face "enough so I could see it." She recognized the type of knife the man was showing her and described it at trial as follows:

> A. It was a, had a long gray handle on it. And it was a razor type edge. The knife was, it was something that you would use to cut carpet or sheetrock or something like that. My stepfather is a carpenter. So I've seen him use several things, several types of knives like that; and so I realized what it was; and I realized that it was very sharp.
>
> Q. Was this, this knife that this man had, was it a rather plain article or was there anything distinctive about it or unusual about it?
>
> A. It had a little switch where you could flick the blade in and out; and around that switch, it was worn pretty much where the thumb had been put there; and the blade was not a new blade. It had been used I could tell that. It had some

articles on it, some types of marks on it that I could tell that it was not a knew [sic] blade?

Q. Now, how was he holding this knife relative to you?

A. He had it like this; and it was this close to my throat; but at first he put it up where I could see it; and then it was down closer to my throat.

Q. Do you have an opinion as to about how long the blade was on that knife?

A. It was a typical type razor blade, triangular blade. It was no more than an inch long.

Q. Now, did he at any time press this knife so that it was against your person?

A. Only after he got me in the woods, the, the handle of the blade was touching my neck; but the blade itself was not on my neck. It, I didn't feel that, the thin tip. It was the thicker metal of the handle moreso [sic] than the thinner blade, the thinner part of the blade.

After her attacker showed Ms. Ashworth the knife, he began pushing her toward the pool house door. He held her with her back against his body and his arm around her neck, pinning her head to his chest and nudging her along with his knee. The man pushed Ms. Ashworth through the pool house and out another door toward the circular driveway and then into the woods. When she tripped several times, the man threatened again to kill her. Once they got into the woods, the man pushed Ms. Ashworth down to her knees and, with one hand still over her face, put the knife against her back and cut the straps off her bathing suit, causing it to fall down. The man pulled off the bathing suit and tied it around Ms. Ashworth's face. He asked her if she could see him and she said "no." He grabbed her arms and tied them behind her back with "a stocking type binder." The man then engaged in vaginal intercourse with Ms. Ashworth. When he was finished, he told Ms. Ashworth to stay there for fifteen minutes and she volunteered to "count out loud" so that he could hear her and be assured that she would not try to see him. After two or three minutes, Ms. Ashworth was able to free her hands and pull the bathing suit off her face and down around her neck. She got her

lab coat from her car and called her boyfriend's mother from the pool house phone.

When law enforcement officers arrived at the Community Center, Ms. Ashworth led them to the place where she'd been assaulted. She was then taken to the emergency room at North Carolina Memorial Hospital where medical personnel removed the bathing suit from around Ms. Ashworth's neck and the stocking from her right wrist. Dr. Arnold Barefoot collected evidence for the standard SBI rape evidence kit.

The State elicited the testimony of several SBI experts regarding results of their comparisons of hair, fiber, and body fluid samples collected from the crime scene and from the victim with known samples collected from the defendant and the utility knife identified by Ms. Ashworth as the weapon employed by her assailant.

The State offered the testimony of defendant's supervisor at D&S International and that of a co-worker to the effect that defendant had been at work on 18 June 1984 and had stayed until approximately 2:00 p.m. The supervisor, Mr. Boone, and co-worker, Bobby Loy, both testified that defendant's job at D&S was a dirty, oily, and greasy one and that D&S employees use a box cutter or carton cutter to open cardboard cartons and to cut yarn off textile beams being prepared for reshipment.

Mr. Loy testified that when he came to work on the morning of 19 June 1984, he found a carton cutter lying on a box outside the office. He returned the cutter to its usual place in Mr. Boone's desk drawer. Defendant had not yet reported to work when Mr. Loy arrived that morning.

Mr. Boone positively identified the carton cutter, previously identified by Ms. Ashworth as the one with which she had been assaulted, as the cutter he normally kept in his office drawer at D&S for use by his employees, including the defendant. The carton cutter was admitted into evidence.

Defendant offered evidence tending to show that he was not at or near the Homestead Community Center on the afternoon of 18 June 1984 and that he was not the perpetrator of the attack. Following defendant's testimony, the State was allowed to call

Ms. Ashworth in rebuttal. She testified that she recognized defendant's voice as being that of the man who assaulted her.

Defendant was convicted of first-degree rape and acquitted of second-degree kidnapping.

The record before us contains no indication that any written request for specific jury instructions was submitted to the trial judge. In instructing the jury on the elements of first-degree rape, the trial judge charged that the fourth element the State must prove beyond a reasonable doubt is "that the defendant used or displayed a dangerous or deadly weapon. A utility knife is a dangerous or deadly weapon." The case was not submitted to the jury until the following day. Before the jury retired to begin its deliberations, the trial judge inquired of counsel, "Are there any specific requests for corrections or additions to the charge from the State or the defendant?" Defense counsel responded, "No sir. Your Honor."

[1] In his brief and argument before this Court, defendant now contends that the instruction that "a utility knife is a dangerous or deadly weapon" amounted to a violation of defendant's constitutional rights to due process and a fair trial by jury in that, by charging, in effect, that a utility knife is a dangerous or deadly weapon *as a matter of law*, the trial judge impermissibly relieved the State of its burden of proving that element beyond a reasonable doubt. Defendant acknowledges his failure to object at trial and his noncompliance with Rule 10(b)(2), but contends that the instruction amounted to "plain error" under *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) (where defendant fails to preserve error in a jury instruction by not making a timely objection pursuant to N.C.R. App. P. Rule 10(b)(2), this Court must examine the whole record to determine whether the error amounted to "plain error"). A prerequisite to our engaging in a "plain error" analysis is the determination that the instruction complained of constitutes "error" at all. Then, "[b]efore 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. Walker*, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986). We conclude that the challenged instruction in this case did not constitute error at all, and therefore a "plain error" analysis is inappropriate.

Defendant's contention is that the challenged instruction amounted to a mandatory conclusive presumption which unconstitutionally relieved the State of its burden of proving each element of first-degree rape beyond a reasonable doubt. Defendant relies primarily upon the recent United States Supreme Court's opinion in *Francis v. Franklin*, --- U.S. ---, 85 L.Ed. 2d 344 (1985). In *Francis*, defendant's sole defense to a charge of "malice murder" was a lack of the requisite intent to kill; he offered substantial circumstantial evidence tending to support his defense. The trial judge instructed the jury, *inter alia*:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

Id. at ---, 85 L.Ed. 2d at 351.

After discussing the mandates of *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368 (1970); *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed. 2d 39 (1979); and *Ulster County Court v. Allen*, 442 U.S. 140, 60 L.Ed. 2d 777 (1979), the Court held in *Francis:*

> Because a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent, and because the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause.

Francis v. Franklin, --- U.S. at ---, 85 L.Ed. 2d at 360.

The United States Supreme Court explained in *Sandstrom*, 442 U.S. at 521, 61 L.Ed. 2d at 49, and in *Francis*, --- U.S. at ---, 85 L.Ed. 2d at 353, that in addressing the issue of " 'whether the challenged jury instruction had the effect of relieving the State of the burden of proof [beyond a reasonable doubt] on the critical question of state of mind' by creating a mandatory presumption of intent upon proof by the State of other elements of the offense," the "threshold inquiry" is a determination of the nature of the presumption described by the instruction. This mandate assumes,

of course, that the jury instruction amounts to some kind of presumption in the first place.[1]

This Court has had occasion to address the issue of the constitutionality of presumptions in criminal cases in *State v. Joyner*, 312 N.C. 779, 324 S.E. 2d 841 (1985), and *State v. White*, 300 N.C. 494, 268 S.E. 2d 481, *reh'g denied*, 301 N.C. 107, 273 S.E. 2d 443 (1980), in light of *Ulster County Court v. Allen*, 442 U.S. 140, 60 L.Ed. 2d 777 (1979). These cases explain that presumptions of *elemental* facts, under proper circumstances, arise from the State's proof, beyond a reasonable doubt, of certain *basic* facts.[2]

1. The United States Supreme Court provided the following definitions in *Francis v. Franklin*, --- U.S. ---, 85 L.Ed. 2d 344:

> "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. [A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the State has proven the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. (Citation omitted.)] A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion."

Id. at ---, 85 L.Ed. 2d at 353 (material within brackets appears at 353, n. 2). *See also State v. White*, 300 N.C. 494, 503, 268 S.E. 2d 481, 487, *reh'g denied*, 301 N.C. 107, 273 S.E. 2d 443 (1980).

2. In *Joyner*, the "basic" fact was that the robbery was accomplished with what appeared to the victim to be a firearm; the "elemental" fact arising by presumption therefrom was that a life was endangered or threatened. *State v. Joyner*, 312 N.C. at 783, 324 S.E. 2d at 844. In *White*, the "basic" fact was the birth of a child to the mother during her marriage to her husband; the "elemental" fact arising by presumption therefrom was that the mother's husband was the child's father. *State v. White*, 300 N.C. 494, 268 S.E. 2d 481.

Other examples of presumptions which have been thought to arise from proof of "basic" facts in criminal cases are: *Francis v. Franklin*, --- U.S. ---, 85 L.Ed. 2d 344 (1985) ("basic" fact: natural and probable consequences of a voluntary act; "elemental" fact: intent); *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed. 2d 39 (1979) (same); *United States v. Ben M. Hogan Co., Inc.*, 769 F. 2d 1293 (8th Cir. 1985) ("basic" fact: bid rigging; "elemental" fact: effect on interstate commerce); *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd*, 432 U.S. 233, 53 L.Ed. 2d 306 (1977) ("basic" fact: use of a deadly weapon; "elemental" fact: malice/unlawfulness).

The constitutionality of jury instructions on these presumptions, however denominated, depends upon the clarity of the instructions which must not be capable of interpretation by a reasonable juror to mean that the burden of persuasion has shifted to defendant upon the State's proof of the "basic" fact. *See Francis v. Franklin*, --- U.S. at ---, 85 L.Ed. 2d at 360.

"Elemental" facts are, of course, *facts* which are essential elements of a criminal offense, e.g., intent, paternity, life endangered or threatened, malice (where it becomes an element by reason of defendant's asserting a lack thereof, as in a "heat of passion" defense). Elements of criminal offenses present questions of *fact* which must be resolved by the *jury* upon the State's proof of their existence beyond a reasonable doubt.

Defendant here assumes that the character of the instrumentality, the carton cutter, is an element of the offense of first-degree rape and that whether or not the instrumentality was a "dangerous or deadly weapon" is therefore always a question of fact for the jury. This assumption is incorrect.

It has long been the law of this state that "[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . *is one of law, and the Court must take the responsibility of so declaring.*" *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (emphasis added); *State v. West*, 51 N.C. 505 (6 Jones) (1859); *State v. Roper*, 39 N.C. App. 256, 249 S.E. 2d 870 (1978). In fact, where the trial judge has left to the jury the question of the dangerous or deadly character of a weapon of "such character as to admit of but one conclusion," our appellate courts have often found harmless error (allowing jury to decide nature of instrumentality is error in some cases, but the higher burden of proof (beyond a reasonable doubt) is advantageous to defendant and is therefore harmless error). For example, in *State v. Collins*, 30 N.C. 407 (8 Ired.) (1848), the trial judge left it to the jury to decide whether a knife with a two and one-half inch blade was a deadly weapon. This Court stated that, although the trial judge correctly defined "deadly weapon,"

> the error of his Honor consisted in leaving that to the jury as a question of fact which is strictly one of law. . . . Whether the instrument used was such as is described by the witnesses, where it is not produced, or, if produced, whether it was the one used, are questions of fact; but, these ascertained, its character is pronounced by law.

"[P]resumptions generally are confined to facts characterized as elements of the offense." Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1338 (1979).

Id. at 412. *See also State v. Perry*, 226 N.C. 530, 39 S.E. 2d 460 (1946) (trial court could properly have found brick was deadly weapon as a matter of law; defendant cannot complain that trial judge left question to jury); *State v. McLaurin*, 12 N.C. App. 23, 182 S.E. 2d 280 (1971) (same; board); *State v. Cox*, 11 N.C. App. 377, 181 S.E. 2d 205 (1971) (same; knife with three-inch blade is deadly weapon per se). *Cf. State v. McKinnon*, 54 N.C. App. 475, 283 S.E. 2d 555 (1981) (where evidence uncontradicted that defendant's blow with a small pocketknife caused victim's lung to collapse, trial court should have instructed that pocketknife was a deadly weapon as a matter of law; no error in failing to instruct on misdemeanor assault); *accord State v. Daniels*, 38 N.C. App. 382, 247 S.E. 2d 770 (1978) (blackjack).

A dangerous or deadly weapon "is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E. 2d 719, 725 (1981). Only "where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury." *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E. 2d 367, 373 (1978) (Pepsi-Cola bottle). *See also State v. Strickland*, 290 N.C. 169, 225 S.E. 2d 531 (1976) (plastic bag); *State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931) (metal handcuffs); *State v. Beal*, 170 N.C. 764, 87 S.E. 416 (1915) (rock); *State v. Archbell*, 139 N.C. 537, 51 S.E. 801 (1905) (buggy trace); *State v. Sinclair*, 120 N.C. 603, 27 S.E. 77 (1897) (pine weather boarding); *State v. McGee*, 47 N.C. App. 280, 267 S.E. 2d 67, *disc. rev. denied*, 301 N.C. 101, 273 S.E. 2d 306 (1980) (tire tool); *State v. Whitaker*, 29 N.C. App. 602, 225 S.E. 2d 129 (1976) (broom handle, knife, nail clippers).

A variety of instrumentalities have been recognized in this state to be deadly (or dangerous) as a matter of law. *E.g., State v. Hefner*, 199 N.C. 778, 155 S.E. 879 (1930) (blackjack); *State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924) (baseball bat); *State v. Beal*, 170 N.C. 764, 87 S.E. 416 (1915) ("gun, pistol, large knife, bar of iron, a club or bludgeon"); *State v. Phillips*, 104 N.C. 786, 10 S.E. 463 (1889) (club); *State v. Collins*, 30 N.C. 407 (8 Ired.) (1848) (pocketknife); *State v. Craton*, 28 N.C. 165 (6 Ired.) (1845) (pine stub); *State v. Wiggins*, 78 N.C. App. 405, 337 S.E. 2d 198 (1985) (box cutter); *State v. Lednum*, 51 N.C. App. 387, 276 S.E. 2d 920,

disc. rev. denied, 303 N.C. 317, 281 S.E. 2d 656 (1981) (kitchen knife); *State v. Roper*, 39 N.C. App. 256, 249 S.E. 2d 870 (1978) ("keen bladed pocketknife"); *State v. Parker*, 7 N.C. App. 191, 171 S.E. 2d 665 (1970) (steak knife).

The distinction between a weapon which is deadly or dangerous per se and one which may or may not be deadly or dangerous depending upon the circumstances is not one that lends itself to mechanical definition.

> Nevertheless, the evidence in each case determines whether a certain kind of [weapon] is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death. *See State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931); *State v. West*, 51 N.C. 505 (1859).

State v. Sturdivant, 304 N.C. at 301, 283 S.E. 2d at 726 (knife).

The evidence presented in the instant case convinces us that the trial judge did not err in instructing the jury that "a utility knife is a dangerous or deadly weapon." The victim, who at the time of the assault was wearing only a one-piece bathing suit, testified that the blade of the knife was "a typical type razor blade" about one inch long. She recognized the weapon as the type of knife she had seen her stepfather use to cut carpet or sheetrock, and she "realized that it was very sharp." She described unusual physical characteristics of the knife she observed on the day of the assault and identified that knife at trial. The knife was received into evidence and was observed by the trial judge and the jury. Ms. Ashworth explained that her attacker held the knife to her throat and later used it to cut the straps off her bathing suit. Defendant's supervisor, Mr. Boone, positively identified the same knife as being the one he kept in his desk at D&S International for use by his employees, including defendant. He stated that the box cutter was used by his employees to open boxes, to uncrate machine parts, and to cut yarn away from textile beams.

We hold that this evidence amply supports the trial judge's instruction to the effect that a utility knife is a dangerous or deadly weapon per se. In the circumstances of its use by defendant here, it was "likely to produce death or great bodily harm."

State v. Sturdivant, 304 N.C. at 301, 283 S.E. 2d at 725. We note that the Court of Appeals reached the same conclusion in *State v. Wiggins*, 78 N.C. App. 405, 337 S.E. 2d 198 (1985), on facts even less compelling than these. Judge Whichard wrote:

> The victim testified that defendant held the cutter a couple of inches from her side as he instructed her to open the cash register. From that position a slight movement of defendant's hand in the direction of the victim's side clearly could have resulted in death or great bodily harm.

Id. at 407, 337 S.E. 2d at 199.

In the instant case, the defendant held the box cutter against Ms. Ashworth's unprotected neck and repeatedly threatened to kill her. A mere flick of his wrist would have allowed defendant to use the razor blade's sharp edge to cut the victim's throat. With only slightly more effort, the razor blade could have been used to slash the victim's face, bare arms, back, and legs. The dangerousness of a utility knife wielded by a man intent on raping a woman wearing only a thin bathing suit is manifest beyond question. A knife with a razor blade cutting surface which can cut through cardboard cartons, slice yarn off textile beams, and sever nylon bathing suit straps is certainly capable of cutting into exposed flesh. The trial judge did not err in instructing the jury that, as a matter of law, "a utility knife is a dangerous or deadly weapon."

In this case, therefore, the *nature* of the weapon used or displayed by defendant in the commission of his sexual assault upon the victim was not an "element"—question of fact—of the offense for which he was tried and convicted. The fourth element of first-degree rape is that the defendant "employ[ed] or display[ed] a dangerous or deadly weapon." N.C.G.S. § 14-27.2(a)(2)(a) (1981); N.C.P.I.—Crim. 207.10, at 2 (1983). The question of *fact* within this element is whether defendant *employed or displayed* the weapon found to be dangerous or deadly, here, as a matter of law. The trial judge properly instructed the jury that its duty would be to return a verdict of guilty of first-degree rape if the jury found, *inter alia*, that the State had proved, beyond a reasonable doubt, that "N.L. Torain used or displayed the utility knife."

Defendant's reliance on *Francis v. Franklin*, --- U.S. ---, 85 L.Ed. 2d 344, and other criminal "presumption" cases, although ingenious, is misplaced. No "presumption" is created when a trial judge fulfills his duty, where appropriate, as here, of declaring a weapon to be dangerous or deadly as a matter of law. Presumptions may potentially arise only as to certain "elemental" questions of fact and have no applicability to the trial court's resolution of questions of law.

Because we hold that there was no error in the challenged instruction, there can be no "plain error" as contended by the defendant.

II.

[2] Following the close of defendant's evidence which included the testimony of defendant himself, the prosecutor moved to recall the victim, Ms. Ashworth, to testify that she recognized defendant's voice as being that of the man who attacked her on 18 June 1984. Defendant objected on grounds of surprise and requested a brief recess to research his objection. The trial judge granted a short recess, then gave the jury a two-hour extended lunch recess during which time defendant was allowed to conduct a *voir dire* examination of Ms. Ashworth. Following the *voir dire*, the trial judge indicated his inclination to allow the victim to testify after lunch but advised defense counsel, "In the meantime during the lunch if you can find some law that says it would not be appropriate, I will certainly go over it." When defendant stated after lunch that he had nothing further to bring to the court's attention, the trial judge entered findings of fact and allowed Ms. Ashworth to identify defendant's voice as the voice she heard on 18 June 1984. Defendant's timely objection was duly noted and overruled.

Ms. Ashworth had not heard defendant's voice between the date of the offense and the time he took the stand in his own behalf, although she testified that she had requested an opportunity to hear a tape recording of his voice before trial. Defendant pointed out some discrepancies in her descriptions of her attacker's voice and physical characteristics, and noted that it had been eight months since the victim had allegedly last heard defendant's voice. Ms. Ashworth remained steadfast, however, in her assertion that she recognized defendant's voice as being that

of her attacker. In his *pro se* supplemental brief, defendant first contends that the trial judge erred in permitting the State to recall Ms. Ashworth because her testimony surprised, and therefore prejudiced, him.

N.C.G.S. § 15A-1226 (1983) provides:

§ 15A-1226. *Rebuttal evidence; additional evidence.*

(a) Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal.

(b) The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict.

This Court has stated that if a defendant is surprised by such additional evidence, he should move for a continuance or a recess to prepare to meet the evidence. *State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978); *State v. Coffey*, 255 N.C. 293, 121 S.E. 2d 736 (1961). Here, defendant requested and was allowed a recess to research his objection but was unable to locate any authority for his position, and so advised the judge.

> It is within the trial judge's discretion to admit evidence on rebuttal which would have been otherwise admissible, and the appellate courts will not interfere absent a showing of gross abuse of discretion. . . .
>
> . . . .
>
> A trial judge has discretionary power to permit the introduction of additional evidence after a party has rested. *State v. Coffey*, 255 N.C. 293, 121 S.E. 2d 736 (1961); *State v. Perry*, 231 N.C. 467, 57 S.E. 2d 774 (1950).

State v. Carson, 296 N.C. at 44-45, 249 S.E. 2d at 425. *See also* N.C.G.S. § 15A-1226 (1983).

Defendant has shown no abuse of discretion. The State requested a bench conference less than fifteen minutes after the prosecutor learned that the victim wished to testify after having

heard defendant's voice as he testified on the stand. The trial judge allowed defendant's request for a recess and tendered the victim for *voir dire* examination whereupon he entered into the record extensive findings of fact. The trial judge did not err in allowing the State to recall the victim after the close of defendant's evidence.

Defendant also contends that the victim's in-court voice identification was unduly suggestive and resulted in a "very substantial likelihood of irreparable misidentification." This Court held that an in-court voice identification was not unduly suggestive in *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973). The facts of *Jackson* are strikingly similar to those in this case. In *Jackson*, a preliminary hearing was held at which time the rape victim inadvertently overheard defendant whispering the words, "No, no" to his attorney. The victim's assailant had said to her following the rape, "No, no, don't call the police." During defendant's trial in superior court, the prosecutor inquired of the victim whether she recognized defendant's voice. The jury was excused and a *voir dire* examination was conducted wherein the victim described her assailant's voice and then testified:

> "After I heard this defendant make the statement, 'No, no,' in the District Court I jumped out of my seat just about. I mean it shocked me and I recognized it right then and I told my attorneys about it. I told the people with me that it sounded exactly like the man I had heard that night. I was talking with Detective Page about it. I told him that was it—that was him—that was him."

State v. Jackson, 284 N.C. at 328, 200 S.E. 2d at 630. In *Jackson*, as here, the rape victim admitted that she could not identify her assailant by sight, but immediately recognized his voice upon hearing it again for the first time in court. Unlike the instant case, however, the victim admitted in *Jackson* that, prior to her appearance in district court, she had been shown a photograph of defendant, had been told his fingerprint matched one found in her apartment, and had been informed that defendant had been arrested. Pursuant to *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967), this Court examined the "totality of the circumstances" surrounding the confrontation and found no due process violation.

The facts of the instant case are even more compelling. Here, the victim testified that she not only had not been given an opportunity to hear defendant's voice before trial, she also had not been requested to view a photographic display or live lineup. In addition, the *voir dire* and in-court voice identification in this case were conducted during the same proceeding in which the victim first heard and recognized her attacker's voice. The evidence in the instant case fully supports the trial judge's findings that the victim had ample opportunity to become familiar with her attacker's voice during the assault and that, although eight months had elapsed, her opportunity "to hear the voice under the unforgettable circumstances of June 18, 1984, and the freeflowing testimony of the defendant in his rambling alibi defense" rendered the time lapse of "little difference." The trial judge also found:

> The defendant was not required to talk and repeat words allegedly uttered by the assailant at the time of the crime. He voluntarily made statements he selected without suggestion from law enforcement personnel, the District Attorney, or anyone else, except his privately retained attorney.

The judge concluded that the victim's in-court voice identification was of independent origin and was "not so tainted by any State-imposed identification procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to constitute a denial of due process of law."

We hold that the trial judge's findings are amply supported by the evidence and they are, therefore, conclusive upon this Court. *See State v. Jackson*, 284 N.C. at 327, 200 S.E. 2d at 630; *State v. Taylor*, 280 N.C. 273, 279, 185 S.E. 2d 677, 681 (1972). An examination of the "totality of the circumstances" convinces us that this unplanned, completely coincidental courtroom confrontation was not violative of defendant's right to due process of law. *United States v. Davis*, 407 F. 2d 846 (4th Cir. 1969); *State v. Jackson*, 284 N.C. at 329, 200 S.E. 2d at 631; *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). Any discrepancies or inconsistencies in the victim's identification of defendant went to the weight and not the admissibility of her testimony, and the voice identification was properly submitted to the jury. *State v. Satterfield*, 300 N.C. 621, 630, 268 S.E. 2d 510, 517 (1980). *See generally State*

v. Brooks, 49 N.C. App. 14, 270 S.E. 2d 592, *appeal dismissed*, 301 N.C. 723, 275 S.E. 2d 285 (1980); Annot., Identification of accused by his voice, 70 A.L.R. 2d 995 (1960).

No error.

STATE OF NORTH CAROLINA v. JEFFERY R. RIDDICK

No. 284A84

(Filed 5 March 1986)

1. Criminal Law § 34.5— defendant's guilt of other offenses—admissibility to show identity

The trial court in a first degree burglary case did not err in admitting evidence concerning burglaries committed by defendant in 1977 in Connecticut, concluding that the *modus operandi* in the Connecticut crimes was so similar to that in the North Carolina crimes that evidence of the earlier crimes, to which defendant had pled guilty, was admissible on the issue of defendant's identity in the North Carolina crimes, where the victims in all the crimes were middle aged to elderly Caucasian women alone in their homes late in the evening when the crimes were committed; the Connecticut victims lived in the same neighborhood, as did the North Carolina victims; in both states, electric power to the burglarized homes was turned off at the fuse box and telephones were disabled; the perpetrator in both states wore a dark toboggan similar to the one worn by defendant when arrested; in both states the perpetrator either used or attempted to use handcuffs to disable his victim and had difficulty operating the handcuffs; and the perpetrator in both states stole fresh fruit from the kitchens. Moreover, remoteness in time and location and dissimilarity--in the Connecticut crimes defendant committed sexual assaults on his victims which he did not do in the North Carolina offenses—did not prevent admission of the evidence.

2. Criminal Law § 34.5— defendant's guilt of other offenses—identity of defendant—admission not unfairly prejudicial

There was no merit to defendant's contention that, even if evidence of Connecticut crimes was probative on the issue of identity of the perpetrator of the North Carolina crimes, the probative force was outweighed by its tendency unfairly to prejudice the jury so as to lead them to convict defendant for an improper reason, since the evidence, because of the remarkable similarities in the Connecticut and North Carolina crimes, was highly probative on the issue of identity of the North Carolina perpetrator; identity of the perpetrator of the North Carolina burglaries was the only real issue at trial, and evidence connecting defendant to the crimes was totally circumstantial so that use by the State of any additional circumstance which legitimately tended to identify defendant as the perpetrator was fully warranted; and the trial judge in the

case at bar excluded any reference to the sexual assaults committed by defendant in the Connecticut crimes in order to avoid whatever additional prejudice would accrue to defendant from this fact.

3. Burglary and Unlawful Breakings § 4.1— wallet in Connecticut mailbox—admissibility on issue of identity

The trial court in a first degree burglary case did not err in admitting into evidence a wallet and its contents found in a Connecticut mailbox six weeks before the burglaries in question, since the evidence was relevant on the issue of defendant's identity as the perpetrator of the crimes charged.

4. Assault and Battery § 14— attempted malicious throwing of acid—insufficiency of evidence

In a prosecution of defendant for first degree burglary, assault, attempted malicious throwing of acid, and various larcenies, evidence, though circumstantial, was sufficient to identify defendant as the perpetrator of all the crimes except the attempted malicious throwing of acid, since there was evidence that muriatic acid was found on the windowsill and front door of one victim's residence, but assuming that defendant was responsible for its being there, there was no evidence that defendant intended by its use to murder, maim or disfigure anyone, that he actually threw or attempted to throw the acid, or that he threw it or attempted to throw it at some person.

Justice BILLINGS took no part in the consideration or decision of this case.

BEFORE *Lewis (John B.), J.*, at the 7 May 1984 Criminal Session of MARTIN County Superior Court, defendant was convicted of first degree burglary, assault with a deadly weapon inflicting serious injury, attempted first degree burglary, attempted malicious throwing of acid, felonious larceny of a motor vehicle, nonfelonious larceny of a motor vehicle, larceny of firearms, and larceny from the person. Defendant received a sentence of life imprisonment for the first degree burglary conviction and a total of seventy-two years for the other convictions, with all sentences to run consecutively. Defendant appeals the life sentence as of right to this Court. N.C.G.S. § 7A-27(a). Defendant's motion to bypass the Court of Appeals as to the lesser sentences allowed. N.C.G.S. § 7A-31(b).

Lacy H. Thornburg, Attorney General, by Sarah C. Young, Assistant Attorney General, for the state.

J. Melvin Bowen and James R. Batchelor, Jr. for defendant appellant.

EXUM, Justice.

The questions presented in this appeal are whether the trial court erred in (1) admitting evidence that defendant had committed two burglaries in Connecticut in 1977, six years before the burglaries for which he was being tried; (2) admitting defendant's wallet and contents found in Connecticut six weeks before the crimes for which he was being tried; and (3) denying defendant's motions to dismiss for insufficiency of the evidence. We find no error in Judge Lewis's rulings on the evidence.[1] We conclude defendant's conviction for attempted malicious throwing of acid (No. 83CRS3077) should be reversed for insufficiency of the evidence. We find no error in and leave undisturbed defendant's remaining convictions and the sentences imposed thereon.

I.

The state's evidence tended to show the following: On 4 September 1983, Ann Modlin, aged sixty-two, a Caucasian woman alone in her home, was awakened after midnight by noises from the front porch of her house located in Everetts in Martin County near Williamston. Mrs. Modlin saw a man tamper with her fuse box until her electricity went off. She went to the front door and screamed. The man ran. Mrs. Modlin noticed unfamiliar moisture on the windowsill and front door which was later determined to be muriatic acid. She went to a back bedroom and yelled through an open window to alert her neighbors. The intruder then was attempting to enter through her back door. Through another open window he fired a small caliber gun three or four times, striking Mrs. Modlin once in her arm. Witnesses compared the gun's report to firecrackers. X-rays taken later at the hospital showed Mrs. Modlin had been shot with many small pellets which left her arm swollen and bruised. Investigators also found small pellet holes in the window area through which the shots were fired, and one small lead pellet inside that bedroom. Neighbors arrived and called the sheriff's department.

1. We have not relied on the new North Carolina Rules of Evidence, N.C.G.S. § 8C-1, in resolving the evidentiary question because this case was tried before these rules became effective on 1 July 1984. By this observation we do not mean to imply that a different result would have been reached had the new rules been applied.

Shortly thereafter Christine Bailey, an eighty-four-year-old Caucasian woman who lived alone, was awakened by a noise at her house, located only several blocks from the Modlin home. When Mrs. Bailey entered her kitchen she saw a man climbing through a window carrying a flashlight and wearing a dark toboggan and gloves. The toboggan was similar to the one being worn by defendant when he was later arrested. Her assailant told her to return to her bed and pulled the telephone cord out of the wall. The intruder grabbed Mrs. Bailey by the arms, injuring her and causing extensive bruising and bleeding. He took her diamond ring and wedding band from her fingers, her .32 caliber Smith and Wesson pistol from the drawer of the nightstand, pulled metal handcuffs from his pocket, and struggled unsuccessfully to put the handcuffs on her. He returned to the kitchen and took several cans of food (including sardines and vienna sausages) and some bananas. A few minutes later Mrs. Bailey found the back door open and noticed her Chrysler automobile was gone. She walked to her neighbor's house one-fourth mile away; the neighbors notified the sheriff's department.

An officer investigating both crimes, Ronnie Wynne, left his house several miles south of Williamston at about 3:20 a.m. As he left he saw a car matching the description of Mrs. Bailey's stolen Chrysler. He chased the car for about one mile until it went into a ditch on the side of the road. The driver was gone when Officer Wynne approached the car, which was later identified as Mrs. Bailey's. In the rear seat of the car were several cans of food of the same varieties and brands as those taken from Mrs. Bailey's kitchen, and a banana peel. A handgun and a blue duffel bag were found on the front seat. The handgun on the front seat, a .32 caliber Smith and Wesson, contained five unfired cartridges identical in type and brand to others found under Mrs. Bailey's bed after the burglary, and one fired shell casing. The gun fit the description of the pistol stolen from her nightstand. Police found another handgun, a Ruger .22 caliber revolver, protruding from the duffel bag. Loaded in the Ruger were five unfired regular .22 caliber cartridges and one unfired .22 caliber super X "rat shot" cartridge. Rat shot rifle or pistol cartridges contain small pellets suitable for killing rats. They are rare and outdated and will damage bored weapons if used in them frequently. One more rat shot cartridge was loose in the duffel bag. The bag also contained

two regular .22 caliber cartridges, two "Wanted-to-Buy" ads, three unmatched gloves, one pair of khaki colored shorts with size 32 waist, and a nonfunctional orange Eveready flashlight. Tennis shoe tracks led away from the car into the woods.

The next day shortly after 7 a.m., defendant was stopped as he attempted to enter the Chesapeake Bay Bridge-Tunnel in a pickup truck belonging to William Tadlock without paying the toll. When confronted by Virginia authorities, defendant, who was wearing a dark toboggan and tennis shoes, stated that the truck was stolen. Defendant was then about 100 miles north of Williamston, where, between 8:30 and 9:30 the night before, Tadlock's truck had been stolen from his driveway. Tadlock's home is located about three-fourths of a mile north of where Mrs. Bailey's car was abandoned and seven miles north of Everetts.

Virginia police found many items in the truck which did not belong to Tadlock and were not in his truck before it was stolen, including: a pair of shiny metal handcuffs, two pairs of driving gloves, one of which bore human bloodstains, a flashlight, and a rat shot cartridge similar to the one found in the blue duffel bag in Mrs. Bailey's car. Tadlock's 12-gauge pump shotgun, which had been in its rack inside the truck's passenger compartment, was recovered with the stolen truck, but a new Smith and Wesson 9mm. Luger pistol was never recovered. On instruction from North Carolina investigators, Virginia police immediately confiscated the tennis shoes defendant was wearing when arrested. The soles matched in size and tread the prints left near Mrs. Bailey's abandoned car.

About six weeks before the events described above, postal workers found a wallet in a mailbox in Darien, Connecticut, which contained a "Wanted-to-Buy" advertisement clipped from a newspaper soliciting sellers of, among other items, diamonds and jewelry, two identification cards bearing defendant's photograph, a North Carolina driver's license bearing defendant's photograph, and an address book. Names and addresses in the address book included two Connecticut women who had been victims of burglaries and sexual assaults in Connecticut in 1977, for which defendant was convicted and served an active prison sentence. One of the Connecticut burglary victims and a Connecticut police officer who had investigated both burglaries described the crimes defendant committed there.

Defendant presented no evidence at trial.

II.

[1] Defendant's first assignment of error challenges the trial court's admission of evidence concerning the two burglaries defendant committed in 1977 in Connecticut. This evidence tended to show as follows: On 13 May 1977 at approximately 11 p.m. Mrs. Lila Murphy, who lived in Greenwich, Connecticut, was awakened in her bedroom by the defendant, who handcuffed her. Defendant had difficulty putting the handcuffs on her. Her electricity had been turned off and defendant was using a flashlight. He was dressed in a jogging suit and had "something on his head." Later investigation revealed that defendant had taken strawberries from Mrs. Murphy's refrigerator and had turned off the current to the house at the fuse box. Defendant also had taken money from the home. Further testimony revealed that on 18 May 1977 at approximately 11 p.m. defendant broke into and entered the home of Mrs. Rita Noonan who lived less than one-half mile from Mrs. Murphy. At the Noonan residence defendant disabled the telephone, handcuffed Mrs. Noonan, who arrived home after defendant had entered, and took bananas and orange juice from the refrigerator. He wore a toboggan. Both Mrs. Murphy and Mrs. Noonan were Caucasian, lived alone and were at the time of the crimes aged, respectively, fifty-three and sixty-one years.

The state contended evidence of the Connecticut burglaries was admissible on the issue of defendant's identity in the North Carolina burglaries committed against Mrs. Modlin and Mrs. Bailey. After a carefully conducted voir dire on the issue of admissibility, Judge Lewis concluded that the *modus operandi* in the Connecticut crimes was so similar to the *modus operandi* in the North Carolina crimes that evidence of the Connecticut crimes to which defendant had pled guilty, was admissible under the theory urged by the state. We agree with this ruling.

The general rule is "in a prosecution for a particular crime, the state cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *State v. McClain*, 240 N.C. 171, 172, 81 S.E. 2d 364, 365 (1954). "This is true even though the other offense is of the same nature as the crime charged." *Id.* "However, if such evidence tends to prove any other relevant fact it will not be excluded

merely because it shows guilt of another crime." *State v. Irwin*, 304 N.C. 93, 99, 282 S.E. 2d 439, 444 (1981).

This Court set forth the rationale for the general rule in *McClain* as follows: (1) Logically, the commission of an independent offense alone does not prove the commission of another crime; (2) admitting such evidence violates the rule forbidding the state initially to attack defendant's character, and to prove bad character by evidence of specific acts inadmissible for that purpose; (3) proof of defendant's guilt of another equally grave offense prompts a ready acceptance of his guilt of the crime charged, stripping him of the presumption of innocence; and (4) evidence of other crimes compels defendant to meet charges not included in the indictment, confuses him in his defense, and distracts the jury. *McClain*, 240 N.C. at 173-74, 81 S.E. 2d at 365-66.

There are, however, exceptions to the general rule of exclusion. They are listed in *McClain*. One is applicable to the case at bar:

> 4. Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged.

McClain, 240 at 175-76, 81 S.E. 2d at 367.

The application of this exception requires "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." *State v. Moore*, 309 N.C. 102, 106, 305 S.E. 2d 542, 545 (1983). Here we think there are both unusual facts and strikingly similar circumstances in the Connecticut and North Carolina burglaries so as to permit a reasonable inference that the person who committed the Connecticut burglaries, *i.e.*, the defendant here, also committed the North Carolina burglaries. The victims in all these crimes were middle-aged to elderly Caucasian women alone in their homes late in the evening when the crimes were committed. Both the Connecticut victims on one hand and the North Carolina victims on the other lived in the same neighborhoods in their respective locales. In both the Connecticut crime against Mrs.

Murphy and the North Carolina crime against Mrs. Modlin, electric power to the homes was turned off at the fuse box. In both the Connecticut crime against Mrs. Noonan and the North Carolina crime against Mrs. Bailey, the telephones were disabled; and the perpetrator in both these crimes wore a dark toboggan similar to the one worn by defendant when arrested. In both the Connecticut crimes and the North Carolina crime against Mrs. Bailey, the perpetrator either used or attempted to use handcuffs to disable his victim and had difficulty operating the handcuffs. A relatively unusual circumstance and perhaps the most telling of all is that in both Connecticut crimes and in the North Carolina crime against Mrs. Bailey, defendant stole fresh fruit from the respective kitchens. Needless to say, the theft of fresh fruit is rarely a circumstance occurring in an ordinary burglary.

Defendant argues that the remoteness in time and location militates against admission of the Connecticut burglaries. Defendant was, however, incarcerated in Connecticut as punishment for those burglaries. He was not released there until approximately six months before the North Carolina crimes were committed. This incarceration effectively explains the remoteness in time. For cases sustaining the admission of other crimes committed at similar intervals from the crimes being tried, see *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. Smoak*, 213 N.C. 79, 195 S.E. 72 (1937). Remoteness in time is more significant when evidence of another crime is admitted to show that it and the crime being tried both arose out of a common scheme or plan. *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982). It would be unlikely, though not inconceivable, that crimes committed several years apart were planned at the same time. Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes. It is reasonable to think that a criminal who has adopted a particular *modus operandi* will continue to use it notwithstanding a long lapse of time between crimes. It is this latter theory which sustains the evidence's admission in this case.

Remoteness in location provides no reason in this age of rapid transportation to exclude evidence of the Connecticut

crimes. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (prior robberies in Ohio admissible in North Carolina robbery trial).

Defendant next contends that because in both Connecticut cases defendant committed sexual assaults on his victims, a factor not present in either of the North Carolina offenses, the Connecticut crimes are too dissimilar to be relevant on the issue of identity. This difference is explained in part by noting that in the North Carolina burglary against Mrs. Modlin, defendant was thwarted in his attempt to complete the burglary by Mrs. Modlin's actions in discovering him early and screaming for help. Although defendant apparently had an opportunity to, but did not, sexually assault Mrs. Bailey in North Carolina, this dissimilarity alone, we conclude, does not render evidence of the Connecticut burglaries inadmissible in light of other substantial and unusual similarities between the Connecticut and North Carolina crimes. *Compare*, for example, *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982); *State v. Perry*, 293 N.C. 97, 235 S.E. 2d 52 (1977); *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974), in which other crimes evidence was ruled admissible on the question of identity, *with State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542, in which evidence of other crimes was ruled inadmissible on the issue of identity.

[2] Finally defendant argues that even if evidence of the Connecticut crimes was probative on the issue of the identity of the perpetrator of the North Carolina crimes, the probative force of this evidence was outweighed by its tendency unfairly to prejudice the jury so as to lead them to convict defendant in the instant cases for an improper reason. We are cognizant of the propensity for unfair prejudice to a defendant of the introduction against him of evidence that he has committed crimes separate and distinct from the crime or crimes for which he is being tried. "Nevertheless, the facts of each case ultimately decide whether a defendant's previous commission of [a former crime] is peculiarly pertinent in his prosecution for another independent . . . crime." *State v. Shane*, 304 N.C. at 654, 285 S.E. 2d at 820. While the determination of whether the probative value of evidence is outweighed by its prejudicial effect lies within the trial judge's discretion, *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986), "it must affirmatively appear that the probative force of such evi-

dence outweighs the specter of undue prejudice to the defendant, and, in close cases, fundamental fairness requires giving defendant the benefit of the doubt and excluding the evidence." *State v. Shane*, 304 N.C. at 654, 285 S.E. 2d at 820.

In the instant case we are satisfied for three reasons that the probative force of the Connecticut crimes evidence was not outweighed by the potential this evidence had for unfairly prejudicing defendant. First, this evidence, because of the remarkable similarities in the Connecticut and North Carolina crimes, was highly probative on the issue of identity of the North Carolina perpetrator. Second, we note that the identity of the perpetrator of the North Carolina burglaries was the only real issue at trial. That the burglaries occurred was not really in dispute. Evidence connecting defendant to these crimes was totally circumstantial. Use, therefore, by the state of any additional circumstance which legitimately tended to identify defendant as the perpetrator of these crimes was fully warranted. As we said in *State v. Leggett*, 305 N.C. at 213, 287 S.E. 2d at 832:

> [T]he principal issue was the identity of the defendant as the perpetrator of the crimes charged. . . . [T]he issue of whether he was, in fact, the perpetrator [was] 'the very heart of the case.'

305 N.C. at 223, 287 S.E. 2d at 838, *quoting State v. Freeman*, 303 N.C. 299, 302, 278 S.E. 2d 207, 208-09 (1981). In *Freeman* we also sustained admissibility of evidence that defendant had committed a prior crime on the issue of his identity in part for the reason that identity was "the principal issue" in the case. Third, Judge Lewis in the case at bar carefully and properly excluded any reference to the sexual assaults committed by defendant in the Connecticut crimes in order to avoid whatever additional prejudice would accrue to defendant from this fact. In short, the highly probative nature of this evidence, the real need for its use, and Judge Lewis's careful removal of needlessly prejudicial aspects justifies its admission into evidence against defendant.

III.

[3] Defendant next contends evidence of the wallet and its contents, found in a Connecticut mailbox six weeks before the North

Carolina burglaries, was irrelevant and should not have been admitted.

> Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, . . . and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Arnold, 284 N.C. 41, 47, 199 S.E. 2d 423, 426 (1973) (citations omitted). The wallet contained a Martin County, North Carolina, birth certificate for one "Jeffery Rondale Riddick"; a North Carolina driver's license for one "Jeffery R. Riddick" with the same date of birth (16 December 1951) as appeared on the birth certificate, two laminated identification cards bearing the same photograph as appeared on the driver's license but bearing the name of one "Ron Brown" with an address of 4982 Main Street, Bridgeport, Connecticut, and with a birth date of 10 March 1955. The wallet also contained an address book and a "Wanted-to-Buy" advertisement. The address book contained the names and addresses of the Connecticut burglary victims and several names and addresses of persons in the Williamston area, one of which was an elderly Caucasian woman. The want ad indicated that a "Bremson Diamond Company, 198 Wilmington Street" wanted to buy various items including "diamonds, jewelry bought for immediate cash, highest prices paid upon inspection, all transactions confidential." Although the advertisement listed a number of other items which the advertiser wished to buy, the reference in the advertisement to diamonds and jewelry was underlined and boxed in with blue ink.

This evidence was relevant on the issue of defendant's identity as the perpetrator of at least the North Carolina burglary of Mrs. Bailey. Obviously the jury could reasonably find that the wallet and its contents belonged to defendant. The birth certificate tended to tie defendant to the county in North Carolina where the crimes were committed. The want ad was similar to the advertisement found in a duffel bag in the automobile stolen

from Mrs. Bailey. The perpetrator of the Bailey burglary took a diamond ring and wedding band. The advertisement found in the wallet indicated that defendant was interested in a place where jewelry could be sold "confidentially."

There was, therefore, no error in the admission of this evidence.

IV.

[4] Finally, defendant contends the trial court erred in denying his motion to dismiss all charges except the larceny of the Tadlock truck and the Tadlock firearm for insufficiency of the evidence. His argument is that the evidence is insufficient to identify him as the perpetrator of any of the other North Carolina crimes.

The question for decision is whether there is evidence from which a jury could reasonably infer that defendant committed the North Carolina crimes.

> It is elementary that, upon a motion for judgment as of nonsuit in a criminal case, the evidence must be considered by the court in the light most favorable to the State. Where there are contradictions and discrepancies in the evidence, these must be resolved in the State's favor and the State must be given the benefit of every reasonable inference arising on the evidence. . . .
>
> . . . The test of the sufficiency of the evidence to withstand a nonsuit motion is the same whether the evidence is circumstantial, direct or both. . . .
>
> > 'When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.'

State v. White, 293 N.C. 91, 95, 235 S.E. 2d 55, 58 (1977) (*quoting State v. Rowland*, 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965)) (citations omitted). Stated another way, the question is whether the state has offered substantial evidence that defendant perpetrated these crimes. "Substantial evidence is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). *Accord, State v. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980).

The evidence on the issue of identity was: The perpetrator of the Bailey burglary stole diamond jewelry. The driver of Mrs. Bailey's stolen Chrysler, who escaped into the woods leaving tennis shoe prints, also left a blue duffel bag in the car containing clothes in defendant's size, a rat shot, pellet-type cartridge, a .22 caliber Ruger pistol with one such cartridge in it, several gloves, banana peels, cans of food taken from Mrs. Bailey's residence, and the pistol stolen from Mrs. Bailey. Defendant was arrested in Virginia in a truck stolen from Tadlock. At that time he was wearing a toboggan like the one worn by Mrs. Bailey's assailant and tennis shoes similar in size and tread to those which left footprints near Mrs. Bailey's stolen car. Items found in the truck which did not belong to its owner were: a .22 caliber rat shot, pellet-type cartridge identical to those found in Mrs. Bailey's car, gloves bearing human blood, handcuffs and a pocket flashlight. Mrs. Modlin was wounded by pellet-type ammunition from a weapon which sounded like a firecracker.

Taking this evidence in the light most favorable to the state, the jury could reasonably infer from it: The person who was arrested driving Tadlock's stolen truck not only stole the truck but also Mrs. Bailey's car. The person who stole Mrs. Bailey's car possessed a .22 caliber revolver and relatively unusual .22 caliber rat shot, or pellet-type, cartridges, with which he wounded Mrs. Modlin while attempting to burglarize her home. The person who stole Mrs. Bailey's car also burglarized Mrs. Bailey's home and thereafter stole from her a pistol and her diamond ring and wedding band. Since defendant was arrested in Tadlock's truck, then defendant was the perpetrator of all the other crimes. Defendant's earlier commission of burglaries in Connecticut remarkably similar in *modus operandi* to the burglaries of Mrs. Bailey and Mrs. Modlin and the contents of the defendant's wallet indicating he was interested in a place where diamond jewelry could be sold confidentially are additional pieces of circumstantial evidence which bolster the reasonableness of an inference that defendant perpetrated all the crimes except the attempted malicious throwing of acid.

As to this last crime, we conclude the evidence is insufficient for conviction. Necessary elements of the crime of malicious throwing of corrosive acid or alkaline are that the perpetrator (1) throw or cause the substance to be thrown (2) upon another person (3) with intent "to murder, maim or disfigure." N.C.G.S. § 14-30.1 (1981). If we assume, arguendo, the evidence is sufficient to permit a jury to find that defendant was responsible for the muriatic acid found on the windowsill and front door of Mrs. Modlin's residence, there is no evidence that defendant intended by its use to murder, maim or disfigure anyone or that he actually threw or attempted to throw the acid, or that he threw it or attempted to throw it at some person. We therefore reverse defendant's conviction in the acid throwing case (No. 83CRS3077). In all remaining convictions we find no error. The result is:

Case No. 83CRS3077 (acid throwing)—reversed.

Case No. 83CRS3075 (felonious assault)—no error.

Case No. 83CRS3076 (attempted burglary)—no error.

Case No. 83CRS3078 (felonious larceny of motor vehicle)—no error.

Case No. 83CRS3079 (larceny of firearm)—no error.

Case No. 83CRS3080 (burglary)—no error.

Case No. 83CRS3081 (larceny of firearm)—no error.

Case No. 83CRS3082 (nonfelonious larceny of motor vehicle)—no error.

Justice BILLINGS took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. CHARLES HARRIS WRENN

No. 383A84

(Filed 5 March 1986)

1. **Rape and Allied Offenses § 4.3— evidence concerning prior sexual offense against same victim—exclusion proper**

In a prosecution of defendant for first degree sexual offense and first degree burglary, the trial court did not err in prohibiting defendant's attempt to elicit testimony from the victim that she had received psychiatric treatment subsequent to a prior unrelated sexual assault in which she was the prosecuting witness, though defendant claimed that the excluded evidence was relevant to the issue of the victim's credibility because her testimony was the only evidence that a sexual crime had been committed, since the evidence was inadmissible under the Rape Shield Statute; the evidence was irrelevant to the case being tried; and the relevance of the evidence, if any, was outweighed by its prejudicial effect.

2. **Searches and Seizures § 8— warrantless arrest—probable cause—warrantless search of vehicle proper**

In a prosecution for first degree sexual offense and burglary, the trial court did not err in denying defendant's motion to suppress physical evidence seized from his automobile and the victim's subsequent identification of him as her attacker as being the fruits of an illegal arrest since defendant was actually placed under arrest when an officer ordered him out of his car at gunpoint and told him to keep his hands visible; the proximity of defendant to the location where the offenses were committed and the similarity of defendant's appearance to the description which had been reported to the police provided the arresting officer with the element of probable cause necessary to effectuate the arrest; once the officer made a lawful arrest, he was authorized to search the passenger compartment of defendant's vehicle and items found therein were properly seized; and the existence of probable cause for defendant's arrest validated the victim's subsequent identification of defendant as her assailant.

3. **Criminal Law § 154.1— jury instructions—transcript unavailable—right to appellate review not denied**

There was no merit to defendant's contention that his right to meaningful appellate review was denied because the court reporter's tape recording of the judge's charge to the jury was lost since nothing in the record disclosed what, if any, efforts were made by defense counsel to reconstruct the judge's charge to the jury so as to present a complete and accurate record on appeal; neither counsel at trial noted any objection or exception to the charge; and there were no improper comments by the prosecutor in his closing argument with regard to defendant's post-arrest silence or failure to testify which would require curative instructions by the trial court.

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

State v. Wrenn

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment plus fifteen years entered by *Freeman, J.*, at the 22 March 1984 Criminal Session of Superior Court, GUILFORD County, upon jury verdicts of guilty of first-degree sexual offense and first-degree burglary in violation of N.C.G.S. §§ 14-27.4(a)(2) and 14-51 respectively. Defendant's motion to bypass the Court of Appeals on the burglary conviction was allowed by this Court on 4 October 1984.

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Assistant Attorney General, for the State.

S. Mark Rabil for defendant-appellant.

FRYE, Justice.

Defendant was charged in separate bills of indictment with first-degree sexual offense in violation of N.C.G.S. § 14-27.4(a)(2) and first-degree burglary in violation of N.C.G.S. § 14-51. Evidence for the State tended to show that in the early morning hours of 5 January 1984, victim[1] was awakened when she felt someone lying on her back. She also felt the barrel of a revolver placed at her right temple. The man, defendant in this case, told the victim to roll over and then proceeded to insert one of his fingers into victim's vagina several times. Defendant also forced victim to perform fellatio on him. After this act transpired, defendant left victim's apartment carrying with him her copper-colored nightgown which she was wearing at the time the sexual offenses were committed. Victim remained on her bed for a few minutes, checked the locks on the doors in her apartment, and then reported the incident to the police.

Officer Appel of the High Point Police Department promptly responded to a call which reported a burglary at the victim's apartment. The suspect was described as a white male, dressed in a dark sweatsuit and possibly wearing a knit hat. The police were also alerted that the suspect was possibly armed. As the officer approached the apartment complex, he observed a vehicle leaving the complex which was being operated by a man fitting the description of the suspect in the burglary. Officer Appel stopped the

1. We find it unnecessary to expose the victim to further embarrassment by using her name in this opinion.

vehicle, ordered defendant to step down onto the ground, and "patted down" defendant to determine whether he was carrying a weapon. The officer then searched the vehicle and discovered a loaded revolver in a holster in an unlocked console in the front seat of the vehicle. Upon finding the revolver, the officer arrested defendant on the charge of carrying a concealed weapon. After defendant was arrested, the arresting officers were asked by someone at the police headquarters to determine if there was a copper-colored nightgown in the vehicle. An officer searched the vehicle and discovered a bag in the passenger compartment which contained several articles of clothing, including a copper-colored nightgown. Subsequent to defendant's arrest, victim identified the copper-colored nightgown as the one which defendant took from her apartment and identified defendant as her attacker.

Defendant did not testify at trial. The jury returned verdicts of guilty on the charges of first-degree sexual offense and first-degree burglary.

I.

[1] Defendant contends that the trial court erred in prohibiting his attempted cross-examination of the victim concerning psychiatric treatment that she had received and unrelated charges that she had made against another person in a previous judicial proceeding.

During his cross-examination of the victim, defense counsel attempted to elicit testimony that the victim had received psychiatric treatment subsequent to a prior unrelated sexual assault in which she was the prosecuting witness. Upon objection by the State, the court held an *in camera* hearing to determine the admissibility of the evidence. The evidence at the *in camera* hearing showed that the victim in this case had previously accused another man of sexually assaulting her. The defendant in that case pleaded guilty to crime against nature and was placed on probation. Subsequent to the defendant being placed on probation, victim claimed that he called and threatened her. As a result of the victim's allegation, a probation revocation hearing was held at which both the victim and the defendant testified under oath. The presiding judge at the probation revocation hearing declined to revoke the defendant's probation.

At the conclusion of the *in camera* hearing, the trial court prohibited defense counsel from introducing this evidence on the grounds that: (1) the proffered evidence was inadmissible under the Rape Shield Statute, N.C.G.S. § 8-58.6 (1981); (2) the evidence was irrelevant to the case being tried; and (3) even if the evidence was relevant, it was outweighed by its prejudicial effect. Defendant contends that the trial court abused its discretion and committed prejudicial error by preventing inquiry into the challenged evidence because such evidence was relevant to the issue of credibility of victim since her testimony was the only evidence that a sexual crime had been committed.

"It is well settled that in a criminal case an accused is assured his right to cross-examine adverse witnesses by the constitutional guarantee of the right of confrontation." *State v. Newman*, 308 N.C. 231, 254, 302 S.E. 2d 174, 187 (1983). However, it is also a well-established principle that "the scope of cross-examination rests largely within the discretion of the trial court and its ruling thereon will not be disturbed absent a clear showing of abuse of discretion." *State v. Hinson*, 310 N.C. 245, 254, 311 S.E. 2d 256, 263, *cert. denied*, --- U.S. ---, 83 L.Ed. 2d 78 (1984); *see also State v. Burgin*, 313 N.C. 404, 329 S.E. 2d 653 (1985). We have carefully reviewed defendant's contentions under the circumstances presented and find no clear showing of abuse of discretion by the trial court.

Defendant contends, relying on *Alford v. United States*, 282 U.S. 687 (1931), that the trial court

> abused its discretion and committed prejudicial error by cutting off all inquiry into evidence that the prosecuting witness had made false accusations against another defendant in a prior sexual offense case, and by cutting off all inquiry into evidence that she had received psychiatric treatment in connection with that incident.

However, defendant fails to show that the accusations were false. The defendant in that case pleaded guilty to a sexual offense, thus admitting his guilt. The fact that the defendant's probation was not revoked based on subsequent allegation that the defendant had called and threatened the victim is not sufficient, standing alone, to prove that the victim's accusation was false. There could be, and often are, other reasons why a judge does not

revoke one's probation in a given case. Here, the trial judge correctly held an *in camera* hearing to determine whether the cross-examination should be allowed to go forward in the presence of the jury, and decided on several grounds not to permit it. In his decision we find no abuse of discretion. *See State v. Hinson*, 310 N.C. 245, 311 S.E. 2d 256, *cert. denied*, --- U.S. ---, 83 L.Ed. 2d 78.

II.

[2] Defendant next assigns as error the denial of his motion to suppress physical evidence seized from his automobile and the victim's subsequent identification of him as her attacker as being the fruits of an illegal arrest.

Prior to the commencement of his trial, defendant made a motion to suppress the physical evidence retrieved from his vehicle on the night that the victim was sexually assaulted. A suppression hearing was held on 23 February 1984 to consider the merits of defendant's motion. The motion was denied on the grounds that the arresting officers had probable cause to arrest defendant and that the evidence in issue was lawfully seized pursuant to that arrest.

The trial court's finding that the officer had probable cause to arrest defendant was based on the following evidence: At 3:24 a.m., the police in the High Point area were alerted that a burglary had been committed at an apartment complex on Chester Ridge Drive. The suspect was described as a white male, dressed in dark clothing, possibly wearing a knit hat and armed with a handgun. Officer Appel was in the vicinity of the victim's apartment and arrived at the apartment complex approximately two minutes after receiving the call. As the officer approached the apartment complex, he observed a vehicle traveling on the only exit from the complex. The officer noted that the vehicle was operated by a white male wearing dark clothing. Officer Appel stopped the vehicle, ordered the operator, defendant in this case, out of the vehicle, and "frisked" him. A search of the passenger compartment of the automobile yielded a loaded revolver and a nightgown which the victim identified as the one her assailant had taken from her.

Defendant contends that the evidence seized from his vehicle and the victim's subsequent identification of him as her attacker

should have been excluded at trial because they were obtained in violation of his rights under the Fourth Amendment of the United States Constitution. We disagree.

In resolving this argument, we must first determine when defendant was actually placed under arrest. Officer Appel testified that he told defendant he was under arrest only after he discovered a revolver in a console in the passenger compartment of defendant's vehicle. However, defendant argues in his brief, and the State apparently agrees, that defendant was placed under arrest when Officer Appel ordered defendant out of his car at gunpoint and told defendant to keep his hands visible. *See State v. Ausborn*, 26 N.C. App. 481, 216 S.E. 2d 396 (1975).

"A formal declaration of arrest by an officer is not a prerequisite to the making of an arrest." *State v. Zuniga*, 312 N.C. 251, 260, 322 S.E. 2d 140, 145 (1984); *see also State v. Tippett*, 270 N.C. 588, 596, 155 S.E. 2d 269, 275 (1967). Also, "an officer's statement that a defendant was or was not under arrest is not conclusive." *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E. 2d 140, 145; *State v. Sanders*, 295 N.C. 361, 376, 245 S.E. 2d 674, 684, *cert. denied*, 454 U.S. 973, 70 L.Ed. 2d 392 (1981).

This Court has held that "[w]hen a law enforcement officer, by words or actions indicates that an individual must remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty." *State v. Sanders*, 295 N.C. at 376, 245 S.E. 2d at 684, *cert. denied*, 454 U.S. 973, 70 L.Ed. 2d 392.

In the instant case, the arresting officer testified that he stopped defendant's vehicle, opened the door, ordered defendant out of the car at gunpoint, and advised defendant "to keep his hands where I could see them." Since the officers thought defendant to be the suspect in the burglary which they were investigating, it is unlikely that they were going to willingly allow defendant to leave their presence. Applying the rules stated above, we find that defendant was under arrest at the point the officers held him at gunpoint as a suspect in the reported crime.

Since this case involves a warrantless arrest, we must now consider whether the police officers had probable cause to believe

that defendant had committed the reported crime. "To be lawful, a warrantless arrest must be supported by probable cause." *State v. Zuniga*, 312 N.C. at 259, 322 S.E. 2d at 145. This Court defined probable cause in *State v. Joyner*, 301 N.C. 18, 21-22, 269 S.E. 2d 125, 128 (1980) as follows:

> Probable cause exists when there is 'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' (Citations omitted.) The existence of probable cause depends upon 'whether at that moment the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' (Citation omitted.)

Applying the rule cited above to the instant case, we find that the officers had probable cause to arrest defendant. Defendant was apprehended almost immediately after the reported felony had been committed as he exited victim's apartment complex at an early morning hour when there was no other vehicular or pedestrian traffic in the area. Defendant's appearance at the time of the arrest fit victim's general description of her assailant, *i.e.*, white male wearing dark clothing. Under these circumstances, we find that the proximity of defendant to the location where the offenses were committed and the similarity of defendant's appearance to the description which had been reported to the police provided the arresting officer with the element of probable cause necessary to effectuate the arrest. *See State v. Joyner*, 301 N.C. 18, 22, 269 S.E. 2d 125, 129.

Once the officer made a lawful arrest in this case, he was authorized to search the passenger compartment of the vehicle. *See generally, New York v. Belton*, 453 U.S. 454, 69 L.Ed. 2d 768 (1981). "When a police officer has effected a lawful custodial arrest of an occupant of a vehicle, the officer may, as a contemporaneous incident of that arrest, conduct a search of the passenger compartment of the vehicle extending to the contents of containers found within the passenger compartment." *State v. Cooper*, 304 N.C. 701, 703, 286 S.E. 2d 102, 103-04 (1981); *see also New York v. Belton*, 453 U.S. 454, 69 L.Ed. 2d 768. Therefore, the evidence was properly seized.

The victim's subsequent identification of defendant was also lawfully obtained. The existence of probable cause for defendant's arrest validates the victim's subsequent identification of defendant as her assailant. *See generally State v. Mathis*, 295 N.C. 623, 247 S.E. 2d 919 (1978). We note, however, that even had defendant's arrest been unlawful, the victim's identification of defendant as her assailant would not have necessarily been inadmissible. In *State v. Finch*, 293 N.C. 132, 139, 235 S.E. 2d 819, 823 (1979), this Court held that an illegal arrest will lead to suppression of identification testimony only if it [the arrest] "created a likelihood that the pretrial confrontation was so 'conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and injustice.'" *See also State v. Mathis*, 295 N.C. 623, 247 S.E. 2d 919. We find no evidence in this case which would support the suppression of the victim's identification of defendant, even if defendant's arrest had been unlawful. This assignment of error is without merit.

III.

[3] Defendant contends that his right to meaningful appellate review under N.C.G.S. § 7A-27(a) was denied, since the court reporter's tape recording of the judge's charge to the jury was lost, and therefore he is entitled to a new trial.

On 10 August 1984, approximately five months after defendant's trial ended, the court reporter informed defendant's counsel that the tape recording containing the judge's charge to the jury had been lost. The parties did not include the judge's charge to the jury in the record.

In the record (*Statement of Transcript of Judge's Charge*), it is stated that neither counsel at trial noted any objection nor exception to the charge. Therefore, defendant may not now on appeal raise objections to the judge's charge to the jury. *See* Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. Defendant, nevertheless, contends that he is prejudiced by the absence of the judge's charge, since he is entitled to have this Court review the charge to determine whether it contained "plain error" which would warrant a reversal of his conviction, notwithstanding his failure to object to the charge at trial. Specifically, defendant contends that he is prejudiced by the absence of the charge to the jury because his attorney on appeal is precluded

from effectively arguing two of his assignments of error regarding comments made by the prosecuting attorney during his closing argument regarding defendant's post-arrest silence. Defendant contends that without the judge's charge to the jury, this Court cannot determine whether adequate, fair, and sufficient curative instructions were given to the jury to attempt to overcome the prejudicial effects of the prosecutor's comments. Defendant also claims that there is a possibility in the instant case that the trial court may have committed "plain error" by failing to instruct on an essential element of the crimes charged by improperly commenting or expressing an opinion as to the defendant's guilt or by incorrectly instructing the jury "where it can fairly be said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

We note first that nothing in the record or briefs of the defendant or the State disclosed what, if any, efforts were made by defense counsel to reconstruct the judge's charge to the jury so as to present a complete and accurate record on appeal.[2] *See State v. Fields*, 279 N.C. 460, 183 S.E. 2d 666 (1971).

We will first address defendant's argument that the prosecutor made improper comments on defendant's failure to testify at his trial and the exercise of his right to remain silent after he was arrested. In his closing argument the prosecutor said:

> But what did Officer Appel tell you? Sometime later on he asked Mr. Wrenn again when he was doing his reports and was in a position—
>
> MR. MICHAEL: Objection.
>
> THE COURT: I will sustain that objection.
>
> MR. CARROLL: Officer Appel testified to you that he made some further effort to get a name from the Defendant and was unsuccessful.
>
> MR. MICHAEL: Objection, Your Honor.
>
> MR. CARROLL: That is the testimony, Judge.

2. In his brief, counsel for defendant states that "appellate rule 11(c), allowing for judicial settlement of the record, would have been of no avail," but no reason is given as to why this is so.

THE COURT: Overruled. Go ahead.

MR. CARROLL: So I argue and contend to you, ladies and gentlemen, Mr. Wrenn was there at three o'clock in the morning. There is no question about that. There is no good explanation as to why he was there. He says that he was there seeing some girl. We don't have her name at this point. He couldn't give the apartment number. He was there two hundred yards from [the victim's] apartment. And look at the officer's response time.

. . . .

What did Officer Appel tell you about the Defendant's reaction. You heard how long that [sic] he has been involved in law enforcement. All of his experience. Five years or so with the High Point Police Department. Three and a half years with the UNC-G Police, involved in the Military Police before that. Based on his training experience, he told you that he thought it was unusual that the Defendant reacted the way he did. Why am I being arrested? What can I do for you officers? He didn't say a thing.

One of defendant's two objections to the prosecutor's comments was overruled. Defendant did not at that time request that curative instructions be given nor did he make such a request in the jury instruction conference. As previously noted, defendant did not object to the judge's charge to the jury.

As part of this assignment of error, defendant contends that the prosecutor made some improper comments on defendant's failure to testify at trial. We have carefully read the prosecutor's comments and we fail to find any comments, unfavorable or otherwise, on defendant's failure to testify at trial. We also note that in the jury instruction conference the judge stated that he would give an instruction in his charge to the jury regarding defendant's constitutional right not to testify in a proceeding against him. Even in the absence of the charge to the jury, we have no reason to assume that such an instruction was not given by the judge. This argument is meritless.

Relying, *inter alia*, on *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974), defendant also contends that the prosecutor made some improper comments on his post-arrest silence, thus violating

the constitutional principle that a defendant who does not testify may not have his post-arrest silence used against him at trial. The prosecutor's comments related to defendant's failure to give the arresting officer the name of the woman that defendant claimed to have visited at victim's complex. We note that the prosecutor's argument was a restatement of the evidence which defendant elicited from the arresting officer on cross-examination at which time defendant made no objection or motion to strike. Assuming, *arguendo*, that even under these circumstances, the prosecutor's argument was improper as a comment on defendant's post-arrest silence, since defendant objected to this portion of the argument, we must determine whether it was prejudicial. Since the alleged error is of constitutional magnitude, the test is provided by N.C.G.S. § 15A-1443(b) as follows:

> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

In the instant case there was direct testimony that defendant broke into victim's apartment, awakened her, placed a revolver at her head, forced her to have oral sex with him and then left the apartment, taking with him victim's copper-colored nightgown. Shortly after the crimes were committed, the police were given a description of the suspect. Because of defendant's similarity to the dispatched description, and his close proximity to the apartment complex, defendant was stopped by the police. A search of his vehicle produced a revolver and victim's nightgown. Victim identified defendant as the perpetrator subsequent to his arrest. In light of this evidence, we do not believe that the prosecutor's comments had any impact on the defendant's conviction. Thus, we find any error harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1983); *State v. Taylor*, 304 N.C. 249, 277-78, 283 S.E. 2d 761, 779 (1981).

Defendant also contends that it is possible that this Court would find other instances of "plain error," if we could examine the judge's charge to the jury in the instant case. However, in order for this Court to grant a new trial under the "plain error" exception to Rule 10(b)(2), a judge's charge must be so fundamen-

tally flawed that it can be fairly said that the mistake probably had an impact on the defendant's conviction. *State v. Moore*, 311 N.C. 442, 319 S.E. 2d 150 (1984); *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). As indicated earlier herein, the evidence for the State was straightforward and direct and virtually uncontradicted. A brief instruction conference was held in which the trial judge indicated that he would give several routine instructions on collateral matters and then read the pattern jury instructions defining the two crimes at issue. The judge did not propose to instruct on any lesser included offenses. There was only one defendant. Given the simplicity of the case and the fact that defense counsel failed to make any objections at the conclusion of the judge's charge, it is highly improbable that any error that may have been made in the instructions was so fundamental or grave as to have impacted on the jury verdict. Thus, no prejudicial error has been shown.

No error.

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

STATE OF NORTH CAROLINA v. DALE THOMAS RIDDLE

No. 710A84

(Filed 5 March 1986)

1. Criminal Law § 89.2— rape victim—corroborative evidence admissible

In a prosecution for first degree rape and incest, the trial court did not err in allowing a protective services worker who interviewed the victim to testify as to the victim's statement that her sister had asked her to say that she had made up the accusation against defendant, since defendant objected to the question posed to the witness but did not move to strike her answer; the testimony was admissible on the ground that it tended to corroborate the victim's earlier testimony; the testimony was not inadmissible hearsay in that it was not offered to prove the truth of the matter asserted (that the sister had asked the victim to say that she fabricated the incident), but was offered merely to prove that the victim had made a statement to this effect to the witness; the fact that the testimony might also tend to impugn the credibility of a prospective defense witness, the victim's sister, did not render it inadmissible; and the trial court properly instructed that the testimony could only be considered for the purpose of corroborating the victim's testimony.

2. Criminal Law § 85.3— misconduct of defendant—cross-examination proper

Where defendant testified that he had tried to prevent his daughter from seeing two of her friends on the ground that they were not "decent" people, the prosecutor's question addressed to defendant on cross-examination that ". . . you beat your wife, and you tried to cheat on your wife, and you are calling these people not decent?" did not constitute plain error, since defendant testified that he had beaten his wife during the early years of their marriage and admitted that he had asked a neighbor for a date while married, and the record did not indicate that the jury would have reached a different result had the exchange in question not taken place.

BEFORE *Collier, J.*, at the 5 November 1984 Mixed Session of Superior Court, DAVIE County, defendant was convicted of first-degree rape and incest. The convictions were consolidated for the purpose of judgment, and the defendant was sentenced to a term of life imprisonment. The defendant appeals 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 Steven Mansfield Shaber, Assistant Attorney General, and Catherine McLamb, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

The State's evidence tended to show that the defendant is the father of Pamela Riddle. On 3 August 1984, fourteen-year-old Pamela was living in a mobile home with the defendant, her mother, her brother, and her brother's fiancee. Pamela testified that early in the morning on 3 August 1984, while she was watching television, the defendant approached her and asked her to go to bed with him. She refused and ran out of the living room. The defendant chased after her. Pamela attempted to get out of the mobile home; however, both doors were locked. She then ran into the bathroom which was adjacent to her bedroom and locked the door.

Pamela further testified that the defendant managed to unlock the bathroom door and then forced her into his bedroom. When she refused his order to get on the bed, the defendant pulled out a pocketknife, opened it, and held it to her throat. Pam-

ela stated that she then got on the bed. While continuing to hold the knife to her throat, the defendant proceeded to engage in vaginal intercourse with Pamela. Pamela testified that the defendant threatened to kill her if she reported the incident to anyone. Pamela also testified that the defendant wore a prophylactic during intercourse.

On cross-examination, Pamela testified that her father was strict with her and would at times forbid her from visiting certain friends. Pamela also admitted that occasionally she forged her parents' signatures to notes purporting to excuse school absences.

Elsie James, a neighbor of the Riddles, testified for the State. She testified that Pamela came to her house on 6 August 1984 and stated that the defendant had engaged in sex with her.

The State also presented the testimony of Amy Collins, a protective services worker with the Davie County Department of Social Services. Collins testified that she interviewed Pamela on 8 August 1984. During the interview, Pamela told Collins that her father had forced her to engage in sexual intercourse with him on 3 August 1984. Collins further testified that Pamela said her father used a pocketknife to carry out the act.

Detective P. C. Williams of the Davie County Sheriff's Department testified that he met with Pamela on 8 August 1984. At that time, Pamela gave a statement regarding the defendant's actions on the morning of 3 August 1984. This statement, which was substantially in accord with Pamela's testimony at trial, was read to the jury. Williams also testified that on 9 August 1984, the defendant's wife gave him permission to conduct a search of the mobile home. As a result of the search, Williams found two empty prophylactic packages; one in a kitchen trash can, the other in a pocket of a coat located in defendant's bedroom.

Betty Riddle, Pamela's mother, was called as a witness by the State. She testified that the defendant had a bad temper and had on previous occasions spanked Pamela. Mrs. Riddle also said that the defendant had beaten her (Mrs. Riddle) during the early years of their marriage. Mrs. Riddle further testified that she had undergone a partial hysterectomy six years earlier, and as a consequence there was no need for defendant to use prophylactics when they engaged in intercourse. She also stated that she and

her husband had been having sexual problems near the time of the alleged incident. Mrs. Riddle testified that, on several occasions, Pamela had told her that she was telling the truth about the incident.

Mark Riddle, Pamela's sixteen-year-old brother, was called as a witness by the State. He testified that he was living with his parents in August 1984 and was in the mobile home on the morning of 3 August 1984. Mark testified that his bedroom was directly adjacent to his parents' bedroom. He stated that he heard nothing unusual that morning prior to being awakened by his father at approximately 8:00 a.m. Mark denied having any prophylactics in the mobile home at that time.

Lisa Riddle, Pamela's eighteen-year-old sister, testified for the defendant. She stated that Pamela had expressed a desire to live away from home due in part to the fact that she was required to adhere to strict rules of behavior which were imposed by her parents. Lisa testified that she had spoken with Pamela on several occasions after charges were brought against their father. Lisa said that, during one of these conversations, Pamela asked, "Could they do anything to me if they found out I was lying?" Lisa testified that on another occasion Pamela told her to "[t]ell daddy I am going to tell everybody that I have been lying." Lisa also said that Pamela had a history of telling lies. On cross-examination, Lisa denied that she had ever told Pamela that she did not want her to testify against the defendant.

Teresa Riddle, Pamela's sister-in-law, testified that, a few days prior to 3 August, Pamela told her that she was planning to go to the Department of Social Services to see if she could be placed in a foster home. Teresa stated that Pamela expressed a great deal of dissatisfaction with the restrictions that her parents placed on her.

Evalina Campbell, Betty Riddle's aunt, testified that sometime after 3 August, she and her husband were helping Mrs. Riddle clean up the Riddle's mobile home. She stated that, at that time, she found a package of prophylactics under Mark Riddle's bed and put it in a trash can.

The defendant took the stand in his own behalf. He denied having ever engaged in any type of sexual activity with Pamela or having displayed a knife in her presence.

Based on this and other evidence, the jury found the defendant guilty of first-degree rape and incest.

[1] The defendant's first assignment of error concerns certain testimony given by Amy Collins, the protective services worker who interviewed Pamela Riddle. Collins testified after Pamela had testified. During direct examination, Collins was asked if Pamela had told her about any conversations that she had had with her sister, Lisa. Collins stated that Pamela had told her "[t]hat she [Lisa] wanted her [Pamela] to say that she [Pamela] had made it [the accusation against defendant] up." The defendant argues that the admission of this testimony constitutes reversible error.

We note initially that defense counsel objected to the question posed to Ms. Collins but did not move to strike her answer. The defendant suggests that the question asked of Ms. Collins anticipated or suggested that the answer would be inadmissible, and therefore his objection was sufficient and alone preserved the issue for appellate review. We disagree. Where inadmissibility of the answer is not indicated or suggested by the question, but becomes apparent by some feature of the answer, the objection should be made as soon as the inadmissibility becomes known and should be in the form of a motion to strike out the answer or the objectionable part of it. 1 Brandis on North Carolina Evidence § 27 (2d rev. ed. 1982). Thus, even assuming, *arguendo*, that the answer was not corroborative, the defendant's failure to move to strike it waived his objection. We conclude, however, that the question anticipated an answer that would have been fully corroborative of Pamela's prior testimony, i.e., that Pamela told Ms. Collins that her sister, Lisa, had asked her to say that what she had accused her father of doing was not true or to say that she "made up" the story.

The prosecution contended at trial that this testimony was admissible on the ground that it tended to corroborate Pamela's earlier testimony. The trial court allowed the testimony to be introduced for purposes of corroborating Pamela's testimony and specifically instructed the jury that the evidence was only to be considered for that purpose.

Corroboration 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). We have defined "corroborate" as "to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." *State v. Higginbottom*, 312 N.C. 760, 769, 324 S.E. 2d 834, 840 (1985). Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983); *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979); *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972). However, the prior statement must in fact corroborate the witness' testimony. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277; *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976). Slight variations between the corroborating statement and the witness' testimony will not render the statement inadmissible. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984); *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982); *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977).

The defendant contends that Collins' testimony did not in fact corroborate Pamela's trial testimony. He claims that the portion of Pamela's testimony which Collins' testimony purportedly corroborated was contained in the following exchange between Pamela and the prosecutor on redirect examination:

> Q: Have you spoken to her [Lisa], or had she spoken to you about this matter before?
>
> A: What do you mean?
>
> Q: I mean after the charges were taken out, have you spoken to Lisa either on the phone or in person or anything of that nature?
>
> A: Yes, I talked to her.
>
> Q: Has she indicated to you about what your testimony should be or should not be?
>
> A: She just—all she said was that, "You are going to send daddy to prison". I said, "I didn't do it, he did".

Defendant argues that since this testimony contained no statement by Pamela that Lisa had asked her to say that she had fabricated the allegations, Collins' testimony could not have been corroborative and should have been excluded. We conclude, however, that the defendant has misapprehended the portion of

Pamela's testimony which Collins' testimony was meant to corroborate. During defense counsel's cross-examination of Pamela, the following exchange occurred:

> Q: Okay, and tell us on one occasion did you not tell your sister that, "I already know what I am going to say, that I am going to get up and say that I was lying the first time this case was heard"?
>
> A: No, we was talking, me and her [Lisa], and mama was talking about the case and everything; and she started saying some stuff. I can't remember now what it was, but I said, "All I ought to do now is just get up and say I was lying, right?"
>
> Q: You didn't say it this way, that you indicated, "That I already know what I am going to say; that I am going to get up and say I was lying"?
>
> A: (Nodded negatively.)
>
> Q: Did you make another statment [sic], "I have already made up my mind that I am going to get on the stand and say that I have been lying about this", in front of your mother and sister?
>
> A: No, that is when we was still talking about the case.
>
> Q: Okay, and did you then say it that way?
>
> A: I didn't say it that way.

By this cross-examination, the defense attempted to impeach Pamela's credibility by suggesting that she had made statements to Lisa which were inconsistent with her trial testimony, specifically that she had stated that she intended to testify that her accusations against defendant were false. Pamela denied this allegation, and her testimony carried the unmistakable impression that Lisa had asked her to say that she had fabricated the incident. This was the portion of Pamela's testimony which Collins' testimony was offered to corroborate. In neither Pamela's testimony nor in Ms. Collins' testimony is there a specific assertion that Lisa knew the truth and that she was asking Pamela to lie, although this assertion is implicit in both statements. We have previously recognized the importance that may attach to asser-

tions which are implicit in a witness' testimony in a criminal case. *E.g., State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981) (where witness' testimony clearly implied that evidence had undergone no material change since recovery, the failure of the witness to expressly so state does not render his identification testimony of the items inadmissible); *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971) (where defendant's testimony implied that he had met his codefendants by accident and that no plan or design to commit robbery could have existed, the prosecution could properly cross-examine the defendant to establish that he had met his codefendants in the Virginia State Penitentiary). We hold that Collins' testimony was properly admitted in corroboration of Pamela's trial testimony.

The defendant also contends that Collins' testimony was inadmissible hearsay. This argument is without merit. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (Cum. Supp. 1985). Collins' testimony was not offered to prove the truth of the matter asserted (that Lisa had asked Pamela to say that she had fabricated the incident), but was offered merely to prove that Pamela had made a statement to this effect to Collins. The testimony was therefore not objectionable on hearsay grounds.

The defendant also argues that Collins' testimony constituted an impermissible attempt to impeach the credibility of defense witness Lisa Riddle by accusing her of subornation of perjury. Defendant contends that this was improper due to the fact that the attempted impeachment occurred before Lisa testified. Assuming, *arguendo*, that this testimony did tend to impeach Lisa, defendant is entitled to no relief. Corroborative evidence is admissible as such notwithstanding the fact that it would otherwise be incompetent. *State v. Culbertson*, 6 N.C. App. 327, 170 S.E. 2d 125 (1969); *see also Woodard v. Mordecai*, 234 N.C. 463, 67 S.E. 2d 639 (1951). Since the testimony was properly admissible as corroborative evidence, the fact that it might also tend to impugn the credibility of a prospective defense witness will not render it inadmissible. Furthermore, we note that the trial judge explicitly instructed the jury that Collins' testimony could only be considered for the purpose of corroborating Pamela's testimony. In

light of this instruction, we feel that the impeaching effect of this testimony would have been minimal at best.

For the reasons stated above, we hold that the trial court did not err in permitting the State to introduce Collins' testimony regarding Pamela's statement. This assignment of error is overruled.

[2] The defendant next argues that the trial court erred by failing to intervene *ex mero motu* in the face of grossly improper cross-examination of the defendant by the prosecution. We do not agree.

On direct examination, the defendant testified that he had tried to prevent Pamela from seeing two of her friends on the grounds that "they are not a decent-type person." The defendant also testified that he had beaten his wife during the early years of their marriage. On cross-examination, the defendant admitted having asked a neighbor for a date while married. The following exchange between the prosecutor and the defendant then took place:

> Q: You indicated you didn't want your daughter messing around with the Dobbins girls because they were not decent people, is that correct?
>
> A: That's right.
>
> Q: And you beat your wife, and you tried to cheat on your wife, and you are calling these people not decent?

The defendant argues that this last question was irrelevant and was designed merely to appeal to the passions and prejudices of the jury.

The defendant failed to object to this question, and the objection is deemed waived pursuant to Rule 10(b)(1) of the North Carolina 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 evidentiary matters. Assuming, *arguendo*, that this question was objectionable, it is clear that it did not constitute "plain error." With regard to the question of "plain error," we recently stated:

> 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.

State v. Walker, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986).

Our review of the whole record fails to convince us that this exchange caused the jury to reach a different verdict than would have been reached had the exchange not have occurred. This assignment of error is overruled.

The defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. WILLIAM JUNIOR AMERSON AND CONRAD KEITH AMERSON

No. 41A85

(Filed 5 March 1986)

Rape and Allied Offenses § 6.1 — defendants aiding and abetting each other — first degree rape — instruction on second degree rape not required

Defendants in a first degree rape case were not entitled to a jury instruction on second degree rape where the State's evidence tended to prove a first degree rape in that defendants aided and abetted each other in the commission of the crime; defendants' evidence did not conflict with the State's evidence as to whether each defendant aided and abetted the other; and defendants' evidence itself was sufficient to support the jury in finding the element of aiding and abetting by acts of encouragement and protection where it tended to show that defendants were bound together by friendship and by blood and that each defendant was either inside the car or leaning against the outside of it while the other defendant was perpetrating the rape in the back seat of the car.

State v. Amerson

APPEAL by the defendants from judgments entered on 8 November 1984, by *Smith, J.*, in Superior Court, LEE County. Heard in the Supreme Court on 18 December 1985.

Lacy H. Thornburg, Attorney General, by Angeline M. Maletto, Associate Attorney, for the State.

W. W. Seymour, Sr. for the defendant appellant Conrad Keith Amerson.

K. R. Hoyle for the defendant appellant William Junior Amerson.

MITCHELL, Justice.

The defendants were each convicted upon proper indictments of first degree rape. Each defendant appealed his conviction and mandatory sentence of life imprisonment to this Court as a matter of right.

By their assignments, the defendants contend that their convictions must be reversed and a new trial ordered because the trial court refused to comply with their timely request that the jury be instructed on the lesser included offense of second degree rape. Although the defendants' counsel have argued this point most ably, we do not agree.

The evidence for the State tended to show that between 7:00 p.m. and 8:00 p.m. on 10 November 1983, the victim was walking along Horner Boulevard in Sanford, North Carolina headed to a friend's house. A car containing the defendants blocked her path. She testified that the defendant William Amerson got out, grabbed her arm and waist and pulled her into the back seat of the car. The defendant Conrad Amerson was in the front seat. The victim began screaming and hitting the driver. She started crying and repeatedly asked to be let out but was told to "shut up."

The victim was driven to a wooded area where the car was stopped. William got into the back seat with her. She testified that "[h]e was trying to kiss me and put his hands on me and I kept screaming for him to stop and leave me alone." William pushed her down and Conrad "leaned over the back of the seat and he put his hands on my mouth and my nose and he was tell-

ing me to shut up and to quit crying, and then he put his knees over my hands." William pulled the victim's pants down and had forceable vaginal intercourse with her against her will. Conrad then removed his knees and hands from the victim. She tried to hit both of the defendants and told them to stop. Each defendant told her that if she did not stop crying they would hurt her.

The victim testified that William got off of her and "switched places" with Conrad. Conrad then had forceable vaginal intercourse with the victim against her will while William licked her leg. Both defendants got out of the car and had an argument. William then got back into the car and had forceable vaginal intercourse with her again. When this act of intercourse began Conrad was outside of the car, but he got back in before it was completed. When William finished he told the victim to put her clothes back on, and she did so. She was driven back into town, told "not to say nothing," and was let out.

The defendant Conrad Keith Amerson testified that on the night of 10 November 1983 he was riding around with his cousin William. They saw the victim walking and asked her if she needed a ride. She said yes and got into the back seat of the car voluntarily. They then drove to a wooded area where Conrad got into the back seat and had consensual vaginal intercourse with the victim. Conrad testified that he then got into the front seat and William got into the back seat with the victim. It was hot inside, so Conrad got out and leaned against the outside of the car. He denied ever holding the victim while William was in the back seat with her or assisting William in any way.

The defendant William Junior Amerson testified that the victim entered his car voluntarily on 10 November 1983 in order to get a ride to the bowling alley. He testified that his cousin Conrad was the first to have sexual intercourse with the victim. William was in the front seat and did not even look into the back seat while Conrad was with the victim. When Conrad left the victim, William got in the back seat and had consensual vaginal intercourse with the victim. William testified that he then drove the victim to a car wash and let her out.

The defendants contend that the trial court committed prejudicial error by refusing to instruct the jury as to second degree

rape, a lesser included offense of first degree rape. We do not agree.

N.C.G.S. § 14-27.2 (1981 and Cum. Supp. 1985) provides in pertinent part that:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and;
>
> . . . .
>
> c. The person commits the offense aided and abetted by one or more other persons.

The victim testified in this case that the defendants engaged in vaginal intercourse with her by force and against her will. The defendants testified that the victim consented. In returning its verdicts finding the defendants guilty under the instructions given by the trial court, the jury necessarily found that the acts of vaginal intercourse in question were by force and against the victim's will. Therefore, the jury accepted the victim's testimony and rejected the defendants' testimony in this regard.

The defendants contend that, even so, evidence was introduced at trial tending to show that neither defendant aided or abetted the other. The defendants argue that the trial court was required to submit a possible verdict of second degree rape, because such evidence would support a jury finding that the defendants did not aid or abet each other and therefore were guilty only of the lesser included offense of second degree rape.

In support of their contention, the defendants rely on the following testimony:

> Q. [to Conrad Amerson] After you had sex, what happened then?
>
> A. After I had sex with her, I got up and I got in the front seat and then my cousin, he went back there, and along this time it got real hot in the car. So I had stepped outside of the car and I was leaning up against the car and my cousin was back there with her.

Q. While your cousin was having sex, did you hold her or anything like that?

A. No, sir. Why would I have to hold her.

Q. No, just answer the question.

A. No sir, I didn't hold her.

Q. And at any time did you assist your cousin in having sex with her?

A. What you mean 'assist'?

Q. By holding her or anything like that?

A. No, sir.

. . . .

Q. [to William Amerson] After you parked the car what, if anything, happened in your car?

A. Well, I continued to set in my driver's seat and my cousin, Conrad, you know, we sat there about fifteen minutes, I would say about fifteen minutes, and Conrad, he got out of the car and got in the back seat with [the victim].

Q. At that time did she make any complaints or cries for help.

A. No, sir, she did not, she didn't.

Q. Were you still sitting in the front seat?

A. Yes, I did, I continued to sit there and I was listening to my music.

Q. Were you able to tell what was going on in the back seat?

A. I could tell they was, you know, ready to have sexual intercourse with each other. That's about all I could tell you, because see, it was dark, it was really dark, you know, because my car haven't got no interior light in there and it was back in the woods.

Q. Did you look around at any time while your cousin was in the back seat with [the victim]?

A. No, sir, I did not.

This Court speaking through Justice Frye recently stated:

> The law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense. However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. The determining factor is the presence of evidence to support a conviction of the lesser included offense.

State v. Boykin, 310 N.C. 118, 121, 310 S.E. 2d 315, 317 (1984) (citations omitted).

Based upon their foregoing quoted testimony, the defendants argue that the jury could have believed that the defendants each had intercourse with the victim against her will but that each acted independently and did not aid or abet the other. The defendants contend that such evidence tended to negate the aiding and abetting element of first degree rape and thereby tended to prove second degree rape. Therefore, they contend that the trial court erred by refusing to instruct the jury with regard to the lesser included offense of second degree rape.

We reject the defendants' contention because their testimony did not tend to negate the evidence that each aided and abetted the other during the commission of the crimes charged. Justice Lake writing for this Court in *State v. Rankin*, 284 N.C. 219, 223, 200 S.E. 2d 182, 185 (1973) best summarized the law in this area when he stated:

> The mere presence of the defendant at the scene of a crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. To sustain a conviction of the defendant, as [a] principal . . ., the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrator in the commission of the offense should his as-

> sistance become necessary and that such intent was communicated to the actual perpetrator. Such communication of intent to aid, if needed, does not, however, have to be shown by express words of the defendant, but may be inferred from his actions and from his relation to the actual perpetrator. 'When the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.'

(Citations omitted); *State v. Haywood*, 295 N.C. 709, 718-19, 249 S.E. 2d 429, 435 (1978). *See State v. Walden*, 306 N.C. 466, 476, 293 S.E. 2d 780, 786-87 (1982) (mother present when child beaten but took no steps to prevent attack).

In this case the testimony of each defendant tended to show that he was close by when the other was having intercourse with the victim. Conrad testified that he was sitting in the front seat of the car part of the time and leaning against the outside of the car the remainder of the time while William was having intercourse with the victim. William testified that he was sitting in the front seat listening to music when Conrad was having intercourse with the victim. The defendants in this case were bound together both by friendship and by blood. The defendants' testimony and the relationship of each defendant to the other were consistent with a jury determination that each defendant knew and intended that the other would regard his presence as an encouragement and protection. Therefore, the defendants' evidence *did not tend to negate the element of aiding and abetting. Id.*

The victim's testimony also tended to show that the defendants aided and abetted one another. She testified that while William drove the car, Conrad tried to hold her down in the back seat. She stated that Conrad held her down while William had intercourse with her and that William then "switched places" with Conrad.

Neither the defendants' testimony nor the victim's testimony tends to show that either of the defendants did not aid and abet the other. If the jury had believed the defendants' assertion that the victim consented to sexual intercourse, it would never have reached the question of aiding and abetting. The jury having determined as it did in the present case, however, that the inter-

course was by force and against the victim's will, the defendants' evidence as well as the State's could only be construed as tending to show that each defendant aided and abetted the other. *See, e.g., State v. Walden,* 306 N.C. 466, 293 S.E. 2d 780; *State v. Haywood,* 295 N.C. 709, 249 S.E. 2d 429.

We hold that the defendants were not entitled to a jury instruction on second degree rape because there was no evidence introduced to support such a lesser offense. The State's evidence tended to prove a first degree rape. The defendants' evidence did not conflict with the State's evidence *as to whether each defendant aided and abetted the other.* Instead, the defendants' evidence itself was sufficient to support the jury in finding *the element of aiding and abetting* by acts of encouragement and protection. Their evidence conflicted with the State's evidence only on the issue of consent. The jury could have found the defendants guilty of first degree rape or not guilty. There was simply no evidence tending to show an absence of aiding and abetting which would have required a jury instruction as to second degree rape. Therefore, the trial court did not err in refusing the defendants' request to instruct the jury on second degree rape.

No error.

STATE OF NORTH CAROLINA v. JAMES EDWARD CAMPBELL

No. 420A85

(Filed 5 March 1986)

Parent and Child § 2.2— child's hands burned—defendant as sole care giver—intentionally inflicting injury on child—sufficiency of evidence

In a prosecution of defendant for felonious child abuse the State produced ample evidence from which the jury could reasonably infer that defendant intentionally inflicted injury upon a child which proved to be serious, and the Court of Appeals erred in reversing defendant's conviction on the basis that the State had failed to produce sufficient evidence that defendant intentionally inflicted serious injury on the child, where the evidence tended to show that the uninjured two-year-old was left in defendant's sole custody; the child was unable to put her hands more than approximately two inches below the top of the tub in which defendant contended she accidentally received burns; the child suffered extensive first, second and third degree burns on her hands up

to the wrists; the burns had clear lines of demarcation separating the burned tissue from healthy skin; there was no evidence of splash burns on any part of the child's body; there was evidence that her hands would have had to be in the water ten to fifteen seconds to cause the extensive burns she suffered; and there were circular bruises under the child's neck and on her right arm which would support a reasonable inference that they resulted from defendant's grasping her so that he could hold her hands under the hot water in the bathtub.

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of the Court of Appeals reported at 75 N.C. App. 266, 330 S.E. 2d 502 (1985) (*Parker, J.*, and *Becton, J.*, concurring, *Webb, J.*, dissenting), reversing the judgment entered by *Lane, J.*, at the 30 April 1984 term of BURKE County Superior Court. Judgment entered 3 May 1984.

Defendant was convicted of felonious child abuse, a violation of N.C.G.S. § 14-318.4. He received the presumptive sentence of two years. The Court of Appeals reversed defendant's conviction on the basis that the State had failed to produce sufficient evidence that defendant intentionally inflicted serious injury on the child victim. The Court of Appeals therefore vacated the judgment of conviction and ordered that a judgment of acquittal be entered.

The State produced evidence tending to show the following:

On 5 January 1983 Amanda Renee Harris, a child aged two years and four months, was seriously burned. Amanda lived with her mother, Mrs. Janice Benfield, and defendant. No one else lived in Mrs. Benfield's mobile home. Defendant was unemployed and Amanda was usually left in his care while Mrs. Benfield was at work. On the morning of 5 January 1985 Mrs. Benfield left home for work at about six o'clock, leaving Amanda in the care of defendant. Amanda was not injured at that time.

Mrs. Benfield testified for the State as to what defendant told her about the incident. After she had left to go to work defendant began to run hot water into the bathtub to wash out a mop. Amanda was playing in the bedroom adjoining the bathroom. While the hot water was running, defendant went into the kitchen area to get a mop and heard Amanda scream. Defendant returned to the bathroom and saw Amanda come up from the

bathtub and fall on her bottom. He then took her to the kitchen where he immersed her hands in ice filled water.

After holding Amanda's hands under the water for a few mintues defendant took her to a neighbor's house where the same thing was done. Defendant then took Amanda to the emergency room at Grace Hospital where she was treated and released. After Amanda was released defendant went to Mrs. Benfield's place of employment and told her of the child's injuries. Mrs. Benfield left her job early to return home and care for Amanda. The next day, defendant took Amanda to a doctor for additional treatment.

On 6 January 1983 Ms. Lesley Edwards, an employee of the Burke County Department of Social Services, visited the home of Mrs. Benfield to investigate the nature of Amanda's injuries. After defendant related his version of what had occurred on the previous day, Ms. Edwards measured Amanda. She was thirty-two inches tall. Ms. Edwards then had defendant assist her in measuring Amanda against the height of the bathtub. Amanda began to cry hysterically and continued crying while the measurement was made. The top of the tub came between Amanda's neck and breastline. When Amanda reached her hands over the tub, they came about two inches below the top. Ms. Edwards testified that the tub would have to be one-half to three-quarters full for Amanda's hands to reach the water. Mrs. Benfield testified that the edge of the tub was seventeen inches above the floor. Ms. Edwards also noticed that Amanda had bruises on the left side of her head as well as circular bruises under her neck and on her right arm.

Amanda suffered first, second, and third degree burns over both hands to just above the wrist. Dr. Keith Forgy testified that the burns were marked by clear lines of demarcation between injured and normal tissue. Such lines of demarcation are characteristic of burns caused by immersion in a hot liquid, and Dr. Forgy testified that Amanda's burns had the characteristics of immersion burns. In Dr. Forgy's opinion, if it is assumed that the liquid Amanda's hands were in was not boiling hot, it would take approximately ten to fifteen seconds of immersion to cause burns of the type suffered by her. On cross-examination Dr. Forgy testified that without knowing the temperature of the liquid, he could

only guess at the length of time needed to produce burns such as those suffered by Amanda.

Amanda had to be hospitalized so that surgery could be performed on her hands. She has suffered some permanent scarring.

Defendant presented no evidence.

Lacy H. Thornburg, Attorney General, by Victor H. E. Morgan, Jr., Associate Attorney, for the State.

Joe K. Byrd, Jr., Attorney for defendant-appellee.

BRANCH, Chief Justice.

N.C.G.S. § 14-318.4 as written at the time of the offense in pertinent part provided that:

> (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:
>
> (1) Permanent disfigurement, or
>
> (2) Bone fracture, or
>
> (3) Substantial impairment of physical health, or
>
> (4) Substantial impairment of the function of any organ, limb, or appendage of such child,
>
> is guilty of a Class I felony.

The transcript of the trial and the Court of Appeals' opinion make it clear that the State produced plenary evidence that Amanda is less than sixteen years of age, that defendant was providing care and supervision of her at the time she suffered her injuries, that she suffered permanent disfigurement, substantial impairment of physical health, and substantial impairment of the function of her hands. The only question is whether the State produced sufficient evidence that defendant intentionally inflicted any serious injury on Amanda.

In deciding that the State had produced insufficient evidence to take the case to the jury the Court of Appeals stated that the State must prove that defendant intended to cause Amanda serious injury. This is a misinterpretation of the statute.

We believe that the Court of Appeals correctly interpreted N.C.G.S. § 14-318.4(a) in the case of *State v. Riggsbee*, 72 N.C. App. 167, 323 S.E. 2d 502 (1984). In *Riggsbee* the defendant was charged with violating N.C.G.S. § 14-318.4(a)(2) by breaking the left arm of Andrew Huang. Judge Johnson, writing for the court, set out the essential elements of the crime as follows:

(1) That defendant was providing care of Andrew Huang.

(2) That Andrew Huang was less than 16 years of age.

(3) That defendant intentionally twisted Andrew's arm.

(4) That the twisting of Andrew's arm by defendant proximately caused a serious injury to Andrew.

(5) That the injury resulted in the fracture of a bone in Andrew's arm.

State v. Riggsbee, 72 N.C. App. 167, 170, 323 S.E. 2d 502, 504.

Riggsbee makes clear that the element in question is sufficiently established if a defendant intentionally inflicts injury that proves to be serious on a child of less than sixteen years of age in his care. He need not specifically intend that the injury be serious.

The remaining issue in this appeal is whether the State produced sufficient evidence that defendant intentionally inflicted injury on Amanda that proved to be serious. We agree with Judge Webb that the State did produce sufficient evidence on this point to withstand defendant's motion to dismiss.

"[U]pon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom." *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). Contradictions and discrepancies in the evidence are to be resolved by the jury. *Id.* This rule extends to contradictions and discrepancies within the testimony of a witness. *State v. Burell*, 252 N.C. 115, 117, 113 S.E. 2d 16, 18 (1960). *See State v. Bryant*, 250 N.C. 113, 108 S.E. 2d 128 (1959) (discrepancies and contradictions in the testimony of a witness go to the credibility of the witness); *State v. Wood*, 235 N.C. 636, 70

S.E. 2d 665 (1952) (whether a witness's credibility has been impeached by evidence of prior inconsistent statements made out of court is a matter for the jury). In passing upon the motion the trial judge must determine whether there is substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

The evidence, when viewed in the light most favorable to the State, was sufficient to establish each element of the offense and to allow a rational trier of fact to conclude that defendant was guilty.

When Mrs. Benfield left Amanda in defendant's custody the child was uninjured. Defendant had sole custody and control of Amanda at the time of the accident. Amanda was unable to put her hands more than approximately two inches below the top of the tub. She suffered extensive first, second, and third degree burns on her hands up to the wrist. The burns had clear lines of demarcation separating the burned tissue from healthy skin. There was no evidence of splash burns on any part of Amanda's body, and there was evidence that her hands would have had to be in the water ten to fifteen seconds to cause the extensive burns she suffered. There were also circular bruises under Amanda's neck and on her right arm which would support a reasonable inference that they resulted from defendant grasping her so that he could hold her hands under the hot water in the bathtub.

This evidence, if believed, is sufficient to allow a rational trier of fact to conclude that Amanda's injuries were not accidental and that they were intentionally inflicted on her by defendant. Aside from the evidence that Amanda would have had great difficulty in reaching the water in the tub, it is nearly inconceivable that a two-year-old child such as Amanda could accidentally or intentionally hold her hands under hot water for ten to fifteen seconds without struggling and thereby causing splash burns and an uneven line of demarcation. Rather, the evidence tended to show that some other person had to put her hands in the water and hold them relatively motionless for a sufficient period of time to cause the burns that she suffered. Since defendant was the only person with Amanda at the time, it was reasonable for the

jury to conclude that he had intentionally injured Amanda by holding her hands under the water.

Our holding is bolstered by the similar case of *State v. Riggsbee*, 72 N.C. App. 167, 323 S.E. 2d 502. In that case the Court of Appeals held that evidence that the child victim's arm had been twisted and fractured in a nonaccidental manner and that the victim was in the defendant's sole care raised an inference that the defendant intentionally twisted the victim's arm, thereby causing the fracture. *Id.* at 171, 323 S.E. 2d at 505. We agree with the Court of Appeals' decision in *Riggsbee* and hold that its rationale is applicable to this case.

After examining the cases relied on by the Court of Appeals we find that they are distinguishable from the instant case.

State v. Byrd, 309 N.C. 132, 305 S.E. 2d 724 (1983), concerned an attempt by the State to use evidence that the victim's sister, YaVonka, had previously suffered injuries similar to those of the victim and was a victim of battered child syndrome as evidence that the victim's injuries were inflicted by other than accidental means. Though we noted that the evidence that YaVonka was a victim of battered child syndrome raised an inference that her injuries were not accidentally inflicted, we held that a further inference that the *victim's* injuries were not accidental could not be relied on because it was an inference based on an inference. *Id.* at 138-39, 305 S.E. 2d at 729.

In the instant case battered child syndrome is not at issue and each inference indicating defendant's guilt is independently supported by the evidence. The nature and extent of Amanda's burns raises an inference that someone other than Amanda intentionally held her hands under hot water for a period of ten to fifteen seconds. The fact that defendant alone was with Amanda at the time she was injured raises an inference that he held her hands under the water. Neither inference is based on the other and *Byrd* does not apply.

We also find the case of *State v. Reber*, 71 N.C. App. 256, 321 S.E. 2d 484 (1984), *disc. rev. denied*, 313 N.C. 335, 327 S.E. 2d 897 (1985), to be distinguishable from this case. In *Reber* the victim was alone with the defendant for only a short period of time, and the evidence did not disclose how or when the injury occurred. *Id.*

at 260, 321 S.E. 2d at 486. Therefore, the Court of Appeals' decision in that case that the verdict of guilty was based on speculation and conjecture is inapplicable to this case.

We hold that the State produced ample evidence from which the jury could reasonably infer that defendant intentionally inflicted injury on Amanda, which proved to be serious, resulting in permanent disfigurement, substantial impairment of the function of her hands, and substantial impairment of her physical health in violation of N.C.G.S. § 14-318.4. The decision of the Court of Appeals that defendant's conviction be reversed and that judgment of acquittal be entered is reversed.

Reversed.

STATE OF NORTH CAROLINA v. ALEXANDER McLAUGHLIN

No. 240A85

(Filed 5 March 1986)

Criminal Law § 73.2— accomplice's confession—admission error

An accomplice's confession did not contain "equivalent circumstantial guarantees of trustworthiness" pursuant to N.C.G.S. § 8C-1, Rule 804(b)(5) and the trial court erred in admitting the statement where the statement was not made under oath or a threat of perjury; defendant did not have the opportunity to cross-examine the accomplice as to the veracity of the statement; the accomplice made the statement to gain favor with the police and in hopes of a favorable plea bargain; and the accomplice later recanted, claiming that the police drafted the statement and that he signed it under coercion by his attorney.

APPEAL by the defendant from the order of *Johnson, J.*, entered 14 December 1984, in the Superior Court, CUMBERLAND County.

The defendant was convicted of first degree burglary, felonious larceny, two counts of first degree rape, two counts of first degree rape by aiding and abetting, first degree kidnapping, felonious breaking or entering a motor vehicle, felonious larceny, and common law robbery. He received three life sentences and additional sentences totaling sixty years to run consecutively. The defendant appealed the rape and burglary convictions and result-

ing life sentences to the Supreme Court as a matter of right under N.C.G.S. § 7A-27(a). On 29 April 1985, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal in the breaking or entering, kidnapping, and robbery cases. Heard in the Supreme Court on 20 November 1985.

Lacy H. Thornburg, Attorney General, by David R. Minges, Assistant Attorney General, for the State.

Ferguson, Watt, Wallas & Adkins, P.A., by James E. Ferguson II, for the defendant appellant.

MITCHELL, Justice.

The defendant brings forward assignments of error in which he contends that the trial court erred in admitting an accomplice's confession under the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, Rule 804(b)(5) (Cum. Supp. 1985), and that the trial court erred in refusing to give the defendant's requested special instruction regarding the accomplice's confession. We conclude that the trial court erred in admitting the accomplice's confession under Rule 804(b)(5), thereby entitling the defendant to a new trial.

The State presented evidence which tended to show that on 21 December 1983, the victim, a sixty-nine-year-old widow, was asleep in her home and was awakened from her sleep by two unidentified masked men. The masked assailants tied her to her bed and each raped her twice. Two televisions, two raincoats, some jewelry and some other items were taken.

The victim was unable to identify either of her assailants because both were wearing ski masks over their faces. The only characteristics she remembered were that one man had a high pitched voice with a Mexican accent and wore tight fitting athletic clothes, while the other wore a loose jacket and was a little shorter and stockier by comparison.

On 30 March 1984, Larry McLaughlin, the defendant's cousin, went to the police claiming to have information about the crime. Under a grant of immunity, Larry McLaughlin stated that Quincy Corbett and Alexander McLaughlin, the defendant-appellant in the present case, had appeared at his home on 22 December 1983 and had asked him to get rid of some stolen goods. Larry Mc-

Laughlin stated that certain goods he sold to Robert McCrae, a purchaser of stolen goods, were the same goods as those stolen from the victim's home. He also stated that the defendant, Alexander McLaughlin, recounted the crimes that occurred on the previous night.

Larry McLaughlin made two different statements to the police about the sale of the stolen goods. In the first statement, he said that the defendant, Alexander McLaughlin, had accompanied him on two separate visits to McCrae's house. However, in a second statement made only four days before trial, he changed his story and said that the defendant had *not* accompanied him on the second visit to McCrae's house. He gave this second version of the story in his trial testimony. Larry McLaughlin's statements to the police led to the arrests of the defendant and Quincy Corbett.

On 11 April 1984, Quincy Corbett made a statement to the police implicating himself and the defendant. In August 1984, Corbett entered into a plea arrangement with the State, whereby he agreed to plead guilty to the charges and testify against the defendant in exchange for a lighter sentence recommendation.

During the course of the trial, Quincy Corbett stated that he would not testify for the State. The State filed written notice with the court and the defendant of its intention to introduce Corbett's statement under Rule 804(b)(5) of the North Carolina Rules of Evidence. During the *voir dire* hearing, Corbett stated that the police had drafted the statement, that he signed it only under the coercion of his attorney, and that he did not adopt the contents of the statement. The trial court found pursuant to Rule 804 that Corbett was unavailable as a witness due to his refusal to testify concerning the subject matter of his statement and due to a lack of memory of the subject matter of the statement.

The defendant presented evidence tending to show that he had been out with friends on the night of the crime. After leaving his friends, he returned home and remained there.

The defendant first assigns as error the trial court's action in admitting Quincy Corbett's confession under Rule 804(b)(5) of the North Carolina Rules of Evidence. The defendant contends that the statement was not admissible under any of the specific hearsay exceptions of Rule 804(b) and did not have "equivalent cir-

cumstantial guarantees of trustworthiness" and the interests of justice and the general purposes of the hearsay rules would not be served by its admission. The defendant further contends that even if the accomplice's confession was properly admissible under Rule 804(b)(5), its admission violated the right to confrontation guaranteed by the Sixth Amendment to the Constitution of the United States.

We conclude that the accomplice's confession to the police lacked "equivalent circumstantial guarantees of trustworthiness," and we restrict our consideration to this issue. Rule 804(b)(5) provides in pertinent part:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) 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.

N.C.G.S. § 8C-1, Rule 804(b)(5) (Cum. Supp. 1985). Rule 804(b)(5) of the Federal Rules of Evidence is identical to its North Carolina counterpart except the Federal Rule does not require written notice. *State v. Triplett*, 316 N.C. 1, 340 S.E. 2d 736 (1986). Therefore, the federal cases are helpful as guidelines in determining whether an accomplice's confession possessed "equivalent circumstantial guarantees of trustworthiness."

To be admissible under the residual exception to the hearsay rule, the hearsay statement must possess "guarantees of trustworthiness" that are equivalent to the other exceptions contained in Rule 804(b). *United States v. Bailey*, 581 F. 2d 341 (3d Cir. 1978). The hearsay exceptions of Rule 804(b) include former testimony, dying declarations, statements made against interest, and personal or family history statements.

> Each of these kinds of statements is admissible, through hearsay, because the circumstances in which the statements are made are indicative of a strong propensity for truthfulness (dying declarations), because there has been a previous opportunity for cross-examination (former testimony), or because the contents of the statements themselves are of such a nature that one reasonably would conclude that the speaker was telling the truth (statements against interest, statements of family history).

United States v. Bailey, 581 F. 2d 341, 348-49 (3d Cir. 1978).

In determining whether a hearsay statement possesses "equivalent circumstantial guarantees of trustworthiness," the trial court should consider *inter alia*: (1) the declarant's relationship with both the defendant and the government; (2) the declarant's motivation; (3) the extent of the declarant's personal knowledge; (4) whether the declarant ever recanted the statement, and (5) the practical availability of the declarant at trial for cross-examination. *State v. Triplett*, 316 N.C. 1, 340 S.E. 2d 736 (1986). This list is not all inclusive and other factors may be considered when appropriate. *Cf. United States v. Barlow*, 683 F. 2d 954, 962 (6th Cir. 1982) (existence of corroborating evidence); *United States v. Bailey*, 581 F. 2d 341, 349 (3d Cir. 1978) (circumstances surrounding statement, contents of statement, and defendant's propensity for truthfulness); *United States v. West*, 574 F. 2d 1131 (4th Cir. 1978) (declarant under police surveillance and police records corroborated statement); *United States v. Carlson*, 547 F. 2d 1346, 1354 (9th Cir. 1976) (statement made under oath and with a threat of perjury).

The record before us shows that the statement made by Quincy Corbett, the defendant's accomplice, was not made under oath or under a threat of perjury. The defendant did not have the opportunity to cross-examine Corbett as to the veracity of the

statement. Corbett made the statement to gain favor with the police and in hopes of a favorable plea bargain. The trustworthiness of the statement is further questioned by the fact that Corbett later recanted, claiming that the police drafted the statement and that he signed it under coercion by his attorney.

Although the testimony of the defendant's cousin, Larry McLaughlin, and the victim tended to corroborate Corbett's confession, the analysis required under Rule 804(b)(5) may not focus solely on the existence of corroboration. The totality of the circumstances surrounding Corbett's confession justifies our conclusion that it lacked the required "equivalent circumstantial guarantees of trustworthiness" and was improperly admitted under the residual exception of Rule 804(b)(5).

The defendant's remaining contentions dealing with the alleged violation of the Sixth Amendment and the trial court's failure to give a requested instruction regarding Corbett's statement need not be addressed as they will not arise at the defendant's new trial.

New trial.

STATE OF NORTH CAROLINA v. MICHAEL BULLOCK, SR.

No. 418A85

(Filed 5 March 1986)

Constitutional Law § 49— waiver of counsel—voluntariness—failure to make statutory inquiry

Where defendant employed counsel who were ready to proceed to trial and in fact demanded trial when the State requested a second continuance, defendant consented to withdrawal of his retained counsel because of irreconcilable differences but stated he would employ other counsel and stated on the day of the trial that he had been unable to get any attorney to take his case because of the inadequate preparation time, and the trial court reminded defendant that he had been warned that the case would be tried as scheduled, defendant acquiesced to trial without counsel because he had no other choice, and the trial court erred in failing to make the inquiry required by N.C.G.S. § 15A-1242 as to voluntary waiver of counsel, notwithstanding the trial court's knowledge that defendant was a Durham County Magistrate.

State v. Bullock

ON appeal by the defendant from a judgment entered by *Bailey, J.*, at the 10 September 1984 Criminal Session of Superior Court, DURHAM County. Heard in the Supreme Court 19 December 1985.

On 4 June 1984 the defendant was charged in an indictment, proper in form, by the Durham County Grand Jury with first degree sexual offense, taking indecent liberties, felonious child abuse, and crime against nature in connection with acts alleged to have occurred on or about 17 May 1983. On 6 August 1984 the defendant was charged in an indictment, proper in form, by the Durham County Grand Jury with first degree sexual offense and indecent liberties in connection with an incident alleged to have occurred on or about 1 May 1983. At a jury trial in which he appeared *pro se*, the defendant was convicted of two counts of first degree sexual offense. The trial court had dismissed all other charges at the close of all the evidence. The two cases of first degree sexual offense were consolidated for judgment, and the trial court sentenced the defendant to life imprisonment. The defendant appeals as a matter of right pursuant to N.C.G.S. § 7A-27(a).

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Nathaniel L. Belcher for defendant-appellant.

BILLINGS, Justice.

The defendant brings forward four assignments of error. We agree with the defendant that he is entitled to a new trial because the trial judge did not comply with N.C.G.S. § 15A-1242 before allowing the defendant to be tried without counsel. Since the other issues, relating to evidentiary questions and remarks by the trial judge, are not likely to arise upon the new trial, we have chosen not to address those assignments of error.

The State's evidence tended to show that the defendant engaged in fellatio with his two sons. The situation central to this appeal arose before trial; consequently, we do not find a detailed discussion of the evidence necessary to an understanding of the case.

The defendant initially had retained two attorneys to represent him. When the State moved to continue the trial from 23 July 1984 to 27 August 1984 because of the unavailability of an essential witness, one of the defendant's attorneys consented to the continuance, and the motion was granted. The State requested a second continuance, from 27 August 1984 to 10 September 1984, for the same reason. Over defense counsel's strong objection, the motion was granted on 27 August 1984. On 30 August 1984 the defendant's attorneys filed motions to allow counsel to withdraw, stating that "the differences that have developed between defendant and his present counsel have become irreconcilable." Judge Bailey signed orders, dated 31 August 1984, permitting the attorneys to withdraw. The orders are also signed by the defendant, indicating his consent. Although one of the orders is somewhat confusing in that it says that one attorney has asked to withdraw but gives permission for the other one to withdraw, the parties agree that both attorneys were in fact allowed to withdraw.

The record shows the following exchange between Judge Bailey and the defendant on 4 September 1984:

> COURT: Mr. Bullock, I understand from Mr. Brown you wish to agree that Mr. C. C. Malone and Mr. Artis Plummer will no longer be your lawyers, is that correct?
>
> DEFENDANT BULLOCK: That is so.
>
> COURT: Now, they are employed by you, is that correct?
>
> DEFENDANT BULLOCK: Yes, sir.
>
> COURT: You understand that the Court is not going to appoint a lawyer for you?
>
> DEFENDANT BULLOCK: Yes, sir.
>
> COURT: Mr. Mason, when do you expect this case to be on the calendar?
>
> MS. SCOUTEN: It is already set next Monday.
>
> COURT: I am not going to continue the case.
>
> DEFENDANT BULLOCK: Yes, sir.

COURT: It will be for trial next Monday morning. You have a lawyer in here to go or be here yourself ready to go without a lawyer. Is that the way you understand it?

DEFENDANT BULLOCK: Yes, sir.

COURT: Going to be no continuance.

DEFENDANT BULLOCK: Yes, sir.

COURT: If you get a lawyer it is not time for the lawyer to prepare or anything else, you understand?

DEFENDANT BULLOCK: Yes, sir.

MS. SCOUTEN: We would like to have it entered of record the reason he doesn't qualify for Court-appointed counsel is that he is still getting his pay.

COURT: Are you still employed?

DEFENDANT BULLOCK: I am getting my pay check.

MS. SCOUTEN: Would it be possible for Your Honor to inquire if he does have other counsel who it might be?

COURT: Mr. Bullock, let us know who your lawyer is. Just call up the District Attorney's office.

DEFENDANT BULLOCK: I will be happy to agree.

On 10 September 1984, the date of the trial, the following conversation transpired:

COURT: We had some proceedings in this matter last week.

MS. SCOUTEN: That's correct, Your Honor. On last—Tuesday of last week, Mr. Bullock appeared and Mr. George Brown appeared and filed a motion for Mr. Malone to be allowed to withdraw as counsel, and Your Honor inquired of Mr. Bullock at that time if that's what he wished to do, and Mr. Bullock stated in open court that that is what he wished; and, further, he signed and consented to the order allowing attorney to withdraw based on irreconcilable differences between Mr. Malone and Mr. Bullock, and his signature does appear of record here that he consented to that withdrawing of

Mr. Malone as counsel. And at that time Your Honor told Mr. Bullock that—well, you asked me when was it set for trial, and I told Your Honor it was set for this Monday, the 10th of September, and you advised Mr. Bullock of that and Mr. Bullock said he would be ready. So, he was ready, that's the way he wanted it, wanted to go forward on the 10th of September.

So, here we are and ready to go forward.

COURT: Are you ready to proceed, Mr. Bullock?

MR. BULLOCK: I haven't been—I haven't been able to find counsel to represent me, Your Honor.

COURT: Well, you had a lawyer.

MR. BULLOCK: After—after—on September the 4th to September the 10th, the counsels that I went to, they said they wouldn't have time enough for preparation.

COURT: Well, you had a lawyer, and it was your wish to get rid of him. And I let you get rid of him, but I told you at the time, if I'm not badly mistaken, that we would be trying your case on this date. Do you remember that?

MR. BULLOCK: Yes, sir.

COURT: You were fully aware of that when you consider—consented to the withdrawal of your former lawyer.

MR. BULLOCK: (Nods affirmatively.)

COURT: All right. The case will be for trial.

The State contends that the defendant was not entitled to court-appointed counsel; that he willingly waived his right to counsel; and that there was no need for the trial court to make the inquiry required by N.C.G.S. § 15A-1242 because the judge was aware that the defendant was a Durham County Magistrate.

The record establishes that until the time of his trial the defendant was continuing to draw his salary of $17,000.00 per year as a Durham County Magistrate. Therefore, we will assume for the purpose of this discussion that at the time of trial he was not indigent and was not entitled to appointed counsel.

The State argues that the defendant voluntarily and willingly waived his right to counsel. The right of a defendant to be represented by counsel is well-established. *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530 (1972). A defendant also has the right to proceed without counsel if he so desires, but a waiver of counsel must be knowing and voluntary, and the record must show that the defendant is literate and competent. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562 (1975); *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980). When a defendant indicates his desire to proceed to trial without counsel, the trial judge must conduct an inquiry to ascertain that the defendant's waiver is given with full understanding of his rights. N.C.G.S. § 15A-1242 (1983).

In *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775 (1984), the defendant discharged his court-appointed counsel in order to hire a private attorney. At that time he signed a "Waiver of Right to Assigned Counsel." At the trial, the defendant had not been able to secure the services of a private attorney. He said that although he was ready for trial, there were some things he could not handle, and he requested assistance. The trial judge insisted that the defendant had waived his right to counsel and proceeded with the trial. This Court held that the defendant was entitled to a new trial because the record did not show that the defendant intended to go to trial without the assistance of counsel and because the inquiry required by N.C.G.S. § 15A-1242 was not conducted.

The present case is quite similar. The defendant consented to the withdrawal of his retained counsel because of irreconcilable differences but stated that he would employ other counsel. On the day of the trial, he said that he had been unable to get any attorney to take his case because of the inadequate preparation time. The trial court reminded the defendant that he had warned him he would try the case as scheduled. The defendant acquiesced to trial without counsel because he had no other choice. Events here do not show a voluntary exercise of the defendant's free will to proceed *pro se*. *See Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562.

Had the defendant voluntarily waived his right to counsel, the trial judge was required to make inquiry as required by N.C.G.S. § 15A-1242 (1983) as to whether the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

The State argues that because the trial judge knew the defendant was a Durham County Magistrate the judge could assume that the defendant knew of his rights and that the inquiry was therefore unnecessary.

Nothing in the statute makes it inapplicable to defendants who are magistrates, or even attorneys or judges. This inquiry is necessary whenever a defendant either implicitly or explicitly indicates a desire to waive the right to counsel.

We are not here dealing with a situation where the record shows that a criminal defendant, capable of employing counsel, has attempted to prevent his trial by refusing to employ counsel and also refusing to waive counsel and respond to the inquiry required by N.C.G.S. § 15A-1242. This defendant employed counsel who were ready to proceed to trial and in fact demanded trial when the State requested a second continuance. Thereafter, when differences between the defendant and his counsel necessitated counsel's withdrawal, the defendant attempted to employ other counsel but understandably could not find anyone who would attempt to defend him, with only a few days' preparation time, on charges as serious as the ones he faced.

It was prejudicial error for the trial court to proceed to trial without conducting the statutory inquiry in order to clearly establish whether the defendant voluntarily, knowingly and intelligently waived his right to counsel.

New trial.

STATE OF NORTH CAROLINA v. TERRIS LEE EDMONDSON

No. 601PA84

(Filed 5 March 1986)

Constitutional Law § 34; Burglary and Unlawful Breakings § 1; Larceny § 1— one incident—convictions for breaking or entering and larceny—no double jeopardy

Prohibitions in the U. S. and N. C. Constitutions against placing a person twice in jeopardy did not prohibit defendant's convictions and punishment, in a single trial, for both felony breaking or entering and felonious larceny based upon the same breaking or entering.

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

Justice EXUM dissenting.

Justice FRYE joins in the dissenting opinion.

ON discretionary review of the decision of the Court of Appeals, 70 N.C. App. 426, 320 S.E. 2d 315 (1984) finding no error in the judgment entered by *Preston, J.*, on 14 April 1983 in Superior Court, LENOIR County. Heard in the Supreme Court on 11 March 1985.

The defendant was tried upon proper indictments and convicted by a jury on 14 April 1983 of felonious breaking or entering, felonious larceny, unauthorized use of a conveyance, willful and wanton injury to real property, and two counts of willful and wanton injury to personal property causing more than $200 in damages. The charges were consolidated for judgment, and the trial court sentenced the defendant to a maximum and minimum term of imprisonment of ten years. The defendant appealed to the Court of Appeals which rendered its decision on 18 September 1984 finding no error in the defendant's trial. The Supreme Court allowed the defendant's petition for discretionary review.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender, and Louis D. Bilionis, Special Assistant to the Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant's sole contention is that prohibitions in the Constitution of the United States and the Constitution of North Carolina against placing a person twice in jeopardy prohibited his convictions and punishment, in a single trial, for both felony breaking or entering, N.C.G.S. § 14-54(a), and felonious larceny based upon the same breaking or entering, N.C.G.S. § 14-72(b)(2). When faced with the identical question in the recent case of *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986), we specifically held that conviction and punishment for both such offenses in a single trial is not prohibited by the provisions of either the Constitution of the United States or the Constitution of North Carolina. For reasons fully discussed in *Gardner*, we conclude that the defendant in the present case received a fair trial free of prejudicial error. The decision of the Court of Appeals is affirmed.

Affirmed.

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

Justice EXUM dissenting.

For the reasons stated in my dissenting opinion in *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986), I dissent here from the majority's resolution of the double jeopardy question.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. DONALD W. HERRING AND JOSEPH MEYER

No. 287A85

(Filed 5 March 1986)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported

in 74 N.C. App. 269, 328 S.E. 2d 23 (1985), which found no error in the trial and conviction of defendants before *Watts, J.*, at the 9 April 1984 session of Superior Court, BRUNSWICK County. Heard in the Supreme Court 12 February 1986.

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Assistant Attorney General, for the state.

Alexander M. Hall for defendant Donald W. Herring and Stephen B. Yount for defendant Joseph Meyer.

PER CURIAM.

Affirmed.

JAMES K. CARSON AND WIFE, BELINDA McCALL CARSON v. LEE REID

No. 564A85

(Filed 5 March 1986)

APPEAL of right by respondent Lee Reid from a decision of a divided panel of the Court of Appeals, 76 N.C. App. 321, 332 S.E. 2d 497 (1985), which found error in the judgment entered by *Snepp, J.*, on 19 April 1984, in Superior Court, TRANSYLVANIA County, and awarded a new trial.

Ramsey, Cilley & Perkins, by Robert S. Cilley, for petitioner appellees.

Jack H. Potts and Paul B. Welch, III, for respondent appellant.

PER CURIAM.

Affirmed.

SAMUEL COLON AND RUSSELL L. SCHELB, JR., PLAINTIFFS v. F. D. BAILEY AND WIFE, SUE BAILEY, AND ROBERT C. PRESSLEY, DEFENDANTS. GREAT AMERICAN INSURANCE COMPANY, PROPOSED INTERVENOR

No. 590A85

(Filed 5 March 1986)

PLAINTIFFS and proposed intervenor appeal 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, 76 N.C. App. 491, 333 S.E. 2d 505 (1985), affirming judgment entered by *Lewis, J.*, on 13 September 1984 in Superior Court, BUNCOMBE County, granting summary judgment for defendants and denying the proposed intervenor's motion to intervene. Heard in the Supreme Court 11 February 1986.

Morris, Golding, Phillips & Cloninger, by Thomas R. Bell, Jr., for plaintiff-appellants.

Michael T. Moore & Ronald C. True, for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

Reversed.

A. FLOYD HARRELL v. FIRST UNION NATIONAL BANK

No. 635A85

(Filed 5 March 1986)

PLAINTIFF 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, 76 N.C. App. 666, 334 S.E. 2d 109 (1985), affirming the judgment entered by *Brown, J.*, on 2 March 1984 in Superior Court, WILSON County. Heard in the Supreme Court 11 February 1986.

Carr, Gibbons, Cozart and Jones, by L. H. Gibbons, for plaintiff-appellant.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

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

APPERSON v. R. W. WILKINS

No. 763P85.

Case below: 77 N.C. App. 844.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 March 1986.

BEAM v. MORROW, SEC. OF HUMAN RESOURCES

No. 781P85.

Case below: 77 N.C. App. 800.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 5 March 1986.

BIGGERS BROTHERS v. BROOKS, COMM. LAB.

No. 754P85.

Case below: 77 N.C. App. 459.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

BLACKMAN v. STEVENS

No. 48P86.

Case below: 76 N.C. App. 542.

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 5 March 1986.

BRANCH BANKING AND TRUST CO. v.
KENYON INVESTMENT CORP.

No. 500PA85.

Case below: 76 N.C. App. 1.

Motion by several defendants to withdraw appeal allowed 20 March 1986.

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

CATAWBA CHIROPRACTIC CORP. v. BARE

No. 798P85.

Case below: 77 N.C. App. 844.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

FIRST UNION NATIONAL BANK v. STATE OF N.C. BD. OF ALCOHOLIC CONTROL

No. 799P85.

Case below: 78 N.C. App. 221.

Petition by intervenor plaintiffs for discretionary review under G.S. 7A-31 denied 5 March 1986.

FOWLER v. FOWLER

No. 9A85.

Case below: 71 N.C. App. 638.

Motion by defendant to withdraw appeal allowed 20 March 1986.

HOLDER v. N.C. DEPT. OF TRANS.

No. 621P85.

Case below: 77 N.C. App. 238.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 March 1986.

HORNBY v. PENN. NAT'L MUT. CASUALTY INS. CO.

No. 736P85.

Case below: 77 N.C. App. 475.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986.

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

IN RE DAVIS

No. 15P86.

Case below: 78 N.C. App. 221.

Petition by respondent for discretionary review under G.S. 7A-31 denied 5 March 1986.

IN RE ROGERS

No. 12P86.

Case below: 78 N.C. App. 202.

Petition by respondent for discretionary review under G.S. 7A-31 denied 5 March 1986.

IN RE WILLIAMSON

No. 667P85.

Case below: 77 N.C. App. 53.

Petition by Charles Britt and wife, Fredrickia W. Britt, for discretionary review under G.S. 7A-31 denied 5 March 1986.

KAPP v. KAPP

No. 73P86.

Case below: 78 N.C. App. 442.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 March 1986.

LAWRENCE v. WAYNE COUNTY MEM. HOS.

No. 28P86.

Case below: 78 N.C. App. 221.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 March 1986.

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

LEE v. PARAGON GROUP CONTRACTORS

No. 49P86.

Case below: 78 N.C. App. 334.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 March 1986.

MICHAEL v. MICHAEL

No. 785P85.

Case below: 77 N.C. App. 841.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 March 1986.

PATTON v. PATTON

No. 50A86.

Case below: 78 N.C. App. 247.

Petition by defendant for discretionary review under G.S. 7A-31 denied as to additional issues 12 March 1986.

ROCKWELL v. ROCKWELL

No. 730P85.

Case below: 77 N.C. App. 381.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 5 March 1986.

SCHAFFNER v. CUMBERLAND COUNTY HOSP. SYSTEM

No. 804P85.

Case below: 77 N.C. App. 689.

Petition by defendant (Hospital) for discretionary review under G.S. 7A-31 denied 5 March 1986. Petition by defendant (Dr. C. G. Pantelakos) for discretionary review under G.S. 7A-31 denied 5 March 1986.

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

SOUTHEAST AIRMOTIVE CORP. v. U. S. FIRE INS. CO.

No. 51P86.

Case below: 78 N.C. App. 418.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

STATE v. ALLEN

No. 679P85.

Case below: 77 N.C. App. 142.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

STATE v. ALLEN

No. 140A86.

Case below: 79 N.C. App. 280.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 21 March 1986.

STATE v. BARFIELD

No. 658P85.

Case below: 77 N.C. App. 459.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

STATE v. CARLOS

No. 611P85.

Case below: 76 N.C. App. 543.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

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

STATE v. DIAZ

No. 30PA86.

Case below: 78 N.C. App. 488.

Petition by Attorney General for writ of supersedeas and writ of certiorari to the North Carolina Court of Appeals allowed 5 March 1986.

STATE v. EVANS

No. 21P86.

Case below: 78 N.C. App. 222.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

STATE v. FLANNIGAN

No. 77P86.

Case below: 78 N.C. App. 629.

Petition by Attorney General for discretionary review under G.S. 7A-31 and writ of supersedeas denied 18 February 1986. Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 February 1986.

STATE v. GARY

No. 155P86.

Case below: 78 N.C. App. 29.

Petition by Attorney General for discretionary review under G.S. 7A-31 and writ of supersedeas and temporary stay denied 17 March 1986.

STATE v. GEORGE

No. 700P85.

Case below: 77 N.C. App. 470.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 5 March 1986.

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

STATE v. GLIDDEN

No. 692PA85.

Case below: 76 N.C. App. 653.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 5 March 1986.

STATE v. GRAINGER

No. 765P85.

Case below: 78 N.C. App. 123.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. HARVEY

No. 787P85.

Case below: 77 N.C. App. 845.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

STATE v. HOOPER

No. 103A86.

Case below: 79 N.C. App. 93.

Petition by Attorney General for writ of supersedeas denied 25 February 1986.

STATE v. HOWARD

No. 69P86.

Case below: 78 N.C. App. 262.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 March 1986. Motion by State to dismiss appeal for lack of significant public interest allowed 5 March 1986.

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

STATE v. JACKSON

No. 762P85.

Case below: 77 N.C. App. 832.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 18 February 1986.

STATE v. KIRKPATRICK

No. 126P86.

Case below: 79 N.C. App. 370.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 March 1986. Petition by defendant for writ of supersedeas and temporary stay denied 11 March 1986.

STATE v. LILLEY

No. 22A86.

Case below: 78 N.C. App. 100.

Petition by defendant for discretionary review under G.S. 7A-31 denied as to additional issues 5 March 1986.

STATE v. LOGAN

No. 127P86.

Case below: 79 N.C. App. 420.

Petition by defendant for writ of supersedeas and temporary stay denied 7 March 1986.

STATE v. McLEAN

No. 270A85.

Case below: 74 N.C. App. 224.

Motion by defendant to dismiss notice of appeal by Attorney General under G.S. 7A-30 allowed 18 February 1986.

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

STATE v. MARRERO-ALDAMA

No. 157P86.

Case below: 79 N.C. App. 571.

Petition by defendant for writ of supersedeas and temporary stay allowed 20 March 1986.

STATE v. MARTIN

No. 29P86.

Case below: 78 N.C. App. 223.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

STATE v. MOORE

No. 25A86.

Case below: 78 N.C. App. 77.

Motion by the State to dismiss appeal for lack of substantial constitutional question allowed as to issues not included in the dissenting opinion in the Court of Appeals 12 March 1986. Petition by defendant for discretionary review of additional issues pursuant to G.S. 7A-31 and Appellate Rule 16(b) allowed as to the issue of whether defendant's youth should have been found to be a mitigating factor 12 March 1986.

STATE v. RATHBONE

No. 27P86.

Case below: 78 N.C. App. 58.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

STATE v. SMITH

No. 16P86.

Case below: 78 N.C. App. 223.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 5 March 1986.

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

STATE v. STEVENS

No. 46P86.

Case below: 78 N.C. App. 444.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

STATE v. TORBIT

No. 788P85.

Case below: 77 N.C. App. 816.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 18 February 1986.

STATE v. WEAVER

No. 110A86.

Case below: 79 N.C. App. 244.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 4 March 1986.

STATE v. WHEELER

No. 725P85.

Case below: 70 N.C. App. 191.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 March 1986.

TAYLOR v. CREATIVE FOODS

No. 691P85.

Case below: 77 N.C. App. 461.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 February 1986. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 18 February 1986.

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

THOMASON v. FIBER INDUSTRIES

No. 758P85.

Case below: 78 N.C. App. 159.

Petition by defendants for discretionary review under G.S. 7A-31 denied 18 February 1986.

UNDERWOOD v. CONE MILLS CORP.

No. 14P86.

Case below: 78 N.C. App. 155.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1986.

WHITLEY v. COLUMBIA LUMBER MFG. CO.

No. 805PA85.

Case below: 78 N.C. App. 217.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 March 1986.

YOUNG'S SHEET METAL AND ROOFING, INC. v. WILKINS, COMR. OF MOTOR VEHICLES

No. 662P85.

Case below: 77 N.C. App. 180.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 February 1986. Notice of appeal by defendant under G.S. 7A-30 dismissed 18 February 1986.

STATE OF NORTH CAROLINA v. CHARLES GENE ROGERS, AKA "DADDY RICH" AKA CHARLES GENE PAIGE AND BELINDA JOYCE CARRAWAY

No. 165A84

(Filed 2 April 1986)

1. **Criminal Law § 89.4— witness allegedly improperly influenced by officer—motion for pretrial investigation denied—no error**

The trial court did not err in a prosecution for murder and assault by refusing defendant Carraway's pretrial motion requesting an internal investigation of whether a detective had caused the only eyewitness to the shooting to fabricate his account of the murder. Although the witness admitted telling defendant Carraway and her attorney that he had not seen the killing, defendant Carraway did not bring forth any evidence that tended to show that the detective had improperly influenced the witness and the detective was subjected to cross-examination concerning his alleged inappropriate behavior.

2. **Criminal Law § 75.4— waiver of rights—defendant sleepy and tired—statement admissible**

The trial court did not err by denying defendant Carraway's motion to suppress statements made to FBI agents after her arrest in Maryland where the trial court found that defendant was advised of her rights when taken into custody; she did not request an attorney and voluntarily answered the agent's biographical questions; defendant closed her eyes during the ten-minute ride to the FBI office but appeared to be at all times in full command of her physical and mental faculties; defendant told agents upon her arrival at their office that she had been traveling with defendant Rogers for the past few months, that she owned a .44 caliber weapon, and that she did not know the victim; and defendant then exercised her right to an attorney and the interview stopped.

3. **Constitutional Law § 63; Jury § 7.11— death qualified jury—no error**

The trial court did not err in a first degree murder prosecution by denying defendants' motions to prohibit the prosecution from death qualifying the jury.

4. **Jury § 7.14— peremptory challenge of black jurors allowed—no error**

The trial court did not err in a first degree murder prosecution by denying defendants' motions to prohibit the State from peremptorily challenging black jurors. N.C.G.S. § 15A-1217.

5. **Criminal Law § 101.1; Jury § 7.14— exercise of peremptory challenge—no error**

The trial court did not err in permitting the State to peremptorily challenge a black juror who had already been passed by the State and defendant where the State asked a black potential juror whether he or any member of his family had ever been charged with a serious offense; none of the jurors being questioned responded; the State tendered the juror to the defendants;

defendants' motions to excuse the juror for cause were denied; defendants' peremptory challenges were unsuccessful because both defendants had exhausted all their peremptory challenges; the State obtained information before the jury was empaneled that the juror's two sons had been convicted of shoplifting and felonious breaking and entering; the information was verified at a hearing; and the State exercised one of its peremptory challenges to remove the juror. The trial court did not abuse its discretion in reopening the voir dire examination of the juror and the State was entitled to exercise one of its remaining peremptory challenges. N.C.G.S. 15A-1214(g).

6. Jury § 7.14— motion for additional peremptory challenges denied—no error

There was no error in a murder and assault prosecution where the court denied defendant Carraway's motion for an additional peremptory challenge after the State exercised a peremptory challenge to remove a juror and defendant argued that she was therefore prevented from having the removal reviewed on appeal. The use of a peremptory challenge by one party does not unfairly prejudice the opposing party's position in the jury selection process. N.C.G.S. 15A-1217(a).

7. Jury § 6— individual voir dire denied—no error

The trial court did not abuse its discretion in a murder and assault prosecution by denying defendants' motion for an individual *voir dire* and separation of potential jurors. The argument that prospective jurors in a capital case are improperly influenced by repetitious questions concerning capital punishment is speculative.

8. Jury § 6.4— capital punishment—court's questions to potential juror—no error

The trial court did not improperly question a potential juror during *voir dire* for a first degree murder prosecution where the court's questions were an attempt to clarify the juror's position on the issue of capital punishment.

9. Jury § 6— voir dire—order of examination—no error

Defendant Carraway was not denied her right to examine a full panel of prospective jurors where her *voir dire* examination followed the State's and the codefendant's examinations. Defendant still had the right to exercise her fourteen peremptory challenges and to exercise her right to challenge for cause. N.C.G.S. 15A-1214.

10. Jury § 7.11— nondeath qualifying questions--not allowed—no error

The trial court did not abuse its discretion in a first degree murder prosecution by refusing to ask prospective jurors during *voir dire* nondeath qualifying questions to counter the State's death qualifying questions.

11. Jury § 6.2— voir dire examination—use of fully satisfied and entirely convinced—no error

The trial court in a murder and assault prosecution properly overruled defendant's objection to the State using "fully satisfied and entirely convinced" instead of "reasonable doubt" in its questions to prospective jurors because the N. C. Pattern Jury Instructions for criminal cases define reasonable doubt in those terms. N.C.P.I.-Crim. 101.10.

12. Jury § 6.3— voir dire examination—question as to effect of number of witnesses—not allowed—no error

The trial court did not err by sustaining objections to defendant's questions asking prospective jurors whether the fact that she called fewer witnesses than the State would make a difference in their decision. Hypothetical questions which attempt to stake out a juror's future course of action are improper.

13. Criminal Law § 103— murder and assault—conflicts in evidence—jury question

The trial court did not err in a murder and assault prosecution by allowing a police captain to testify that the eyewitness's car was parked at the murder scene between 11:15 p.m. and 3:30 a.m. on the night of the shooting even though the State's other witnesses did not remember seeing the car. Contradictions in the evidence are matters for the jury to resolve.

14. Criminal Law § 99.2— voir dire on admissibility of identification—questions by court—no error

The trial court did not err during a voir dire to determine the admissibility of identification by directing a series of questions to the witness. N.C.G.S. 15A-1222 does not apply when the jury is not present during questioning and it is evident from the record that the witness had difficulty understanding some of the prosecution's questions and answering clearly.

15. Criminal Law § 66— in-court identification—contrary statement prior to trial—identification admissible

The trial court did not err in a murder and assault prosecution by allowing an in-court identification even though the witness had made a contrary statement prior to trial because the in-court testimony was consistent and in accordance with the first statement to police.

16. Criminal Law § 89— eyewitness testimony—admissible

The trial court did not err in a murder and assault prosecution by not striking *ex mero motu* the entire testimony of the only eyewitness on the grounds that it lacked credibility where the witness related the murder as he saw it and his testimony was corroborated in several respects. Moreover, a prior inconsistent statement and seemingly questionable portions of his testimony were matters bearing on the weight of the testimony, not its admissibility.

17. Criminal Law §§ 66.20, 73.2— identification of defendant as man pointed out as murderer—admissible

The trial court did not err in a prosecution for murder and assault by admitting the identification testimony of a witness who saw one defendant several times the night of the murder and who was told that defendant was the man who was supposed to have shot the victim. The court's findings were supported by competent evidence and are thus binding on appeal, and the statement that defendant was supposed to have shot the victim, though improperly admitted to corroborate the testimony of the person making the statement, was admissible to explain the witness's subsequent conduct.

18. Criminal Law § 43.2— photographs of scene—properly admitted

The trial court did not err in an assault and murder prosecution by admitting photographs offered by the State where a witness testified that the photographs fairly and accurately represented the crime scene on the night of the murder even though defendant claimed the photographs were taken at a different time and under different weather conditions from the night of the murder; the absence of a car which another witness claimed had been parked at the murder scene was not a basis for holding as error the admission of the photographs; a photograph of the alleged intended victim introduced to illustrate testimony was relevant; and the court did not err by instructing the jury on differences in photographs of the crime scene taken five months later and the crime scene on the night of the murder.

19. Criminal Law § 33.3— murder and assault—evidence about intended victim—relevant

The trial court did not err in a first degree murder prosecution by allowing an officer to testify that he had unsuccessfully searched for the alleged intended victim to serve a subpoena, or by allowing another witness to testify that the alleged intended victim had not returned to his barbershop for work and had been seen only one time thereafter. It was both relevant and proper to explain why a prominent character in the State's theory of the case was not present at trial.

20. Criminal Law § 99.7— court's failure to admonish witness about joke—no error

The trial court in a first degree murder trial did not err by not instructing an officer not to make jokes on the witness stand where the court felt that the officer's answer had been responsive to the State's questions and that the resulting laughter was accidental, and stated that he would admonish the witness if he made a joke.

21. Criminal Law § 113.6— charge that evidence should be considered against one defendant—immediate correction—no error

The trial court did not improperly express an opinion in a murder prosecution and defendant's motion for a mistrial was properly denied where the court instructed the jury that some of the evidence should be considered against one defendant and not the other, then corrected the instruction to say that the evidence should only be considered in one defendant's case. Any possible error in the phrasing of the first instruction was cured by the immediate explanatory instruction. N.C.G.S. 15A-1222.

22. Criminal Law § 42.4— testimony that defendant seen with pistol—same kind used in shooting—admissible

The trial court did not err in an assault and murder prosecution by allowing the witness to testify that he had seen one defendant with the kind of pistol used in the shooting several times in the months before the shooting. It was clearly relevant to the State's theory of the case that defendant Carraway possessed a .44 caliber pistol and that defendant Rogers had been seen with her pistol.

23. Criminal Law § 42.4— assault and murder—whether alleged intended victim had ever been seen with gun—not admissible

The trial court did not err in an assault and murder prosecution by sustaining the State's objections to one defendant's question asking whether the witness had ever seen the alleged intended victim with the gun. Defendant's questions included no time reference to show relevancy to the case, and defendant was allowed to pose a rephrased question seeking the same information.

24. Criminal Law § 102.4— counsel's comment on evidentiary ruling—no instruction—no error

The trial court did not err in an assault and murder prosecution by failing to instruct the jury about the prosecutor's comment that the court was free to sustain defendant's objection because he had already made his point by asking the question where the comment was made during a bench conference out of the hearing of the jury.

25. Homicide § 21.1; Assault and Battery § 14.2— assault and murder—evidence sufficient

The trial court did not err by failing to dismiss charges of murder and assault for insufficient evidence where the eyewitness testimony, when taken with other corroborative evidence offered by the State, was sufficient substantial evidence from which the jury could reasonably infer that defendant Rogers as principal and defendant Carraway as an aider or abettor committed the first degree murder of Charles Hall and the assault with a deadly weapon with intent to kill of George Edwards.

26. Criminal Law § 113.1— assault and murder—State's closing argument—no error

The trial court did not err in a prosecution for assault and murder by not instructing the jury to disregard portions of the State's closing argument where all of the contested statements had a basis in evidence presented at trial and the court twice within the State's argument reminded the jury that they should be guided by their own recollection of the evidence and not counsel's rendition.

27. Criminal Law § 102.6— assault and murder—defendant's closing argument—State's objection properly sustained

The trial court did not err in an assault and murder prosecution by sustaining the State's objection to defense counsel asking the jury during closing argument if they would like to be convicted on the eyewitness's testimony after defense counsel had highlighted contradictions and inconsistencies in the eyewitness's testimony. The trial judge properly exercised his discretion by preventing defense counsel from suggesting that the jurors reach their verdict by placing themselves in defendant Rogers' position rather than by deciding the case from the facts and inferences which could be drawn from the evidence.

28. Criminal Law § 138.29— finding in aggravation—perjury—error

The trial court erred when sentencing defendant Carraway for assault with a deadly weapon with intent to kill by finding in aggravation that defend-

ant Carraway had committed perjury and that defendant had entered into a conspiracy where the court's finding of perjury was not supported by a preponderance of the evidence and where there was no evidence that defendants had conspired to carry out the crimes for which they were convicted.

29. Criminal Law § 135— capital sentencing—jury argument—no error

The trial court did not abuse its discretion by not correcting the State's argument in the capital sentencing portion of a murder trial where the State argued that the intended victim was someone other than the actual victim, and referred to biblical passages that encouraged Christians to obey the law.

30. Criminal Law § 135.8— murder—course of conduct aggravating circumstance—evidence sufficient

The trial court in a murder prosecution properly submitted the course of conduct aggravating factor to the jury and properly denied defendant Rogers' later motion to set aside the jury's finding of this aggravating circumstance where the State presented substantial evidence that defendant Rogers fired his weapon at George Edwards after killing Charles Hall and the jury, by returning guilty verdicts, had found beyond a reasonable doubt that defendant Rogers had committed Hall's murder and the assault against Edwards. N.C.G.S. 15A-2000(e)(11).

31. Criminal Law § 135.10— murder—death sentence disproportionate

The death sentence imposed in a first degree murder prosecution was excessive and disproportionate where defendant's crime did not rise to the level of those murders in which the death sentence was approved upon proportionality review and the slaying in this case did not contain the viciousness and cruelty present in other cases in which the only aggravating circumstance was course of conduct. N.C.G.S. 15A-2000(d)(2).

32. Criminal Law § 135.10— murder—death sentence—judgment signed and entered—no error

The trial court did not err in a prosecution for assault and murder by signing and entering judgments against defendant Rogers or by denying defendant Carraway's motion to set aside the verdict where the evidence was sufficient to support the verdict against defendant Carraway, there was no prejudicial error in the guilt phase of either charge against Rogers, defendant Rogers did not assign error to the sentence imposed against him for assault, and even though the death sentence was vacated, the trial judge was bound to follow the jury's recommendation and did not err by entering judgment. N.C.G.S. 15A-2000.

APPEAL as of right by each defendant pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Small, J.*, at the 5 March 1984 Criminal Session of WAYNE County Superior Court. Defendants' motions to bypass the North Carolina Court of Appeals on the non-Class A felonies were allowed on 22 June 1984 as to defendant Rogers and on 16 August 1984 as to defendant Carraway.

Defendants were charged in indictments, proper in form, with first degree murder and assault with a deadly weapon with intent to kill.

The State's evidence during the guilt-innocence phase of this bifurcated trial tended to show that Charles Thurman Hall was fatally shot shortly after midnight on 21 September 1983 in an apartment building parking lot at 611 East Elm Street in Goldsboro.

State's witness Captain Floyd Hobbs of the Goldsboro Police Department responded to the call concerning the East Elm Street shooting at 12:07 a.m. He proceeded to 611 East Elm Street and found the victim, Charles Hall, lying in the parking lot behind a pickup truck parked in front of Apartment 611-A. Captain Hobbs stated that the 611 East Elm Street apartment building is a two-story brick building containing four separate apartments. These apartments are fronted by a large parking area which adjoins Elm Street. Apartment 611-A is the westernmost apartment. The western boundary of the apartment parking lot is marked off by a chain link fence. Apartment 611-D is located on the eastern side of the apartment building. Washington's Shoe Shop is located in the extreme eastern portion of the parking lot. Across Elm Street immediately behind a small gas station, there is a larger building which houses, among other tenants, the Pink Panther Lounge. Captain Hobbs noted that to the left of the pickup truck, beside the fence, there was an automobile and to the right of the truck, in front of Apartment 611-B, a yellow Lincoln Continental was parked. Hobbs observed a bullet hole in the trunk lid of the Lincoln and a bullet fragment lying near its flat left front tire. Goldsboro Police Identification Officer Andrew Pinto testified that he removed the Continental's left front tire and found what appeared to be a bullet fragment inside.

Jeffrey Dekeyser, testifying for the State, related that on 20 September 1983 between 11:00 and 11:15 p.m. he drove his car to Blondie Coley's apartment to attend a party. Ms. Coley resided in Apartment 611-A East Elm Street. Dekeyser stated that he parked his car in front of Apartment 611-A between the fence and the pickup truck. When he arrived, several people were standing outside the front door of Ms. Coley's apartment. Dekeyser testified that after parking his car he walked behind the apart-

ment building to Ms. Coley's back door. He found more people socializing outside that door. Dekeyser managed to walk just inside the back door but decided to go back outside after seeing the crowd within. While standing in the doorway, Dekeyser saw George Edwards and Charles Hall near the front door making their way outside.

Dekeyser testified that he then walked to the front of the apartment and stood at the southwest corner of the building. He noticed Edwards and Hall talking to each other while standing in the parking lot a few feet behind the pickup truck parked in front of 611-A. Shortly thereafter, Dekeyser observed a 1983 white Cougar turn off Elm Street and pull into the parking lot. When the car stopped and the passenger door opened, the interior light came on enabling Dekeyser to recognize defendant Carraway as the driver of the car and defendant Rogers as the passenger who was leaving the vehicle. Rogers stood up, pulled his coat back, and walked around the rear of the car towards Hall and Edwards. Rogers walked to within three or four feet of the two men and spoke to them. Dekeyser testified that Hall, by his hand movements, looked as if he were trying to explain something to Rogers. Dekeyser stated that "then, just like out of nowhere," he saw Rogers pull out a large caliber pistol and begin to shoot.

When the first shot was fired Hall fell to the ground, and as Edwards ran between the pickup truck and the Continental a second shot was fired. At this point the witness Dekeyser ran behind the apartment building through a broken place in the fence to a carwash located on the west side of the apartment building. He there observed the Cougar going west on Elm Street. Dekeyser also testified that he heard a total of three shots fired.

SBI firearms expert James H. Evans testified that he performed tests on the bullet removed from the back seat of the Continental and the bullet found at the scene by an investigating officer. Agent Evans found both bullets to be .44 caliber jacketed hollow-point bullets and concluded that both bullets were fired from the same firearm. Sergeant C. E. Boltinhouse of the Goldsboro Police Department testified that after defendant Carraway had been arrested and released on bond she reported a .44 caliber magnum pistol missing from her house.

The State produced other evidence tending to show that Rogers and Edwards had argued on several previous occasions and that Rogers had physically threatened Edwards on one of those occasions at Edwards' Barber Shop. The State also offered evidence which revealed that Rogers had been looking for Edwards at the Pink Panther Lounge prior to the shooting and had continued to look for Edwards after the shooting. The State's case went to the jury on the theory that Rogers, with Carraway's knowing assistance, mistakenly shot Hall while attempting to murder Edwards.

Both defendants testified in their own defense. Defendant Carraway stated that on 20 September 1983 she and defendant Rogers returned to Goldsboro from Wilmington. That evening, they left her 201 North George Street residence to buy some items for a sick friend. They drove first to the Jazz-Mo Club to talk with Carraway's mother who worked there. Outside the Club, Carraway bought a .357 magnum pistol from Buster King because he was selling it for a good price. Without going inside to speak to her mother, Carraway then left and rode with Rogers to a grocery store where she bought some honey and lemon for her friend.

They thereafter proceeded to the service station located next to the Pink Panther Lounge to put some air in one of the Cougar's tires. Upon finding the station closed, Rogers drove the Cougar to the 611 East Elm Street parking lot and parked near Apartment 611-C beside the Continental. Rogers got out of the car which he had backed into a parking space and walked around the car, opening Carraway's door. Rogers and Carraway had started back towards the Pink Panther Lounge when Edwards approached Rogers and asked for a loan of money. When Rogers refused, Hall appeared and stated: "Man if you've got any sense you'll give him all your money." When Rogers refused again, Hall pulled out a gun and began shooting. Carraway testified that the first shot hit the Continental and that she and Rogers ducked in between the Continental and the Cougar. Carraway stated that she heard a second shot fired and at that point reached into her pocketbook and pulled out her recently purchased .357 magnum. Carraway testified that she fired the weapon, then ran out of the parking lot towards Elm Street. At that time, she did not know whether she had hit Hall. Rogers then slipped into the Cougar

and picked Carraway up on Elm Street. The couple returned to her residence and left for Myrtle Beach where they intended to be married.

By his testimony defendant Rogers substantially corroborated Carraway's story. He explained that he parked the car at 611-C because he did not want it to get scratched while they briefly went into the Pink Panther Lounge for a beer. Rogers also denied arguing with George Edwards at his barbershop or looking for Edwards on the night before and the morning after the shooting.

Defendants also offered the testimony of Jeffrey Fennell who stated that at approximately 8:30 or 9:30 p.m. on 20 September 1983 he was at Ed Lewis's house with George Edwards and Charles Hall. He testified that Charles Hall was "acting wild" and had a weapon in his belt.

Both the State and defendants presented evidence on rebuttal. At the conclusion of all the testimony, and after counsel's closing arguments and the trial court's instructions to the jury, the case was submitted to the jury. The jury returned verdicts finding both defendants guilty of the first degree murder of Charles Hall and guilty of assault with a deadly weapon with intent to kill George Edwards.

At the sentencing phase of the trial, the court submitted the following aggravating circumstance against each defendant for the jury's consideration: the murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11) (1983). The court also submitted to the jury two mitigating factors for defendant Rogers and eight mitigating factors for defendant Carraway. The jury retired and after due deliberation, returned a recommendation of death as to defendant Rogers and life imprisonment for defendant Carraway for the murder of Charles Hall. The court imposed judgments accordingly and further imposed a ten year sentence for defendants' assault convictions to run consecutively with the sentences imposed for the murder.

On appeal, each defendant has brought forward numerous assignments of error. When possible, similar assignments will be discussed together.

Lacy H. Thornburg, Attorney General, by J. Michael Carpenter, Special Deputy Attorney General, for the State.

Herbert B. Hulse, Attorney for defendant-appellant Rogers.

Louis Jordan and Michael A. Ellis, Attorneys for defendant-appellant Carraway.

BRANCH, Chief Justice.

I. GUILT-INNOCENCE PHASE

A. *Pretrial Concerns*

[1] Defendant Carraway filed a pretrial *pro se* motion requesting an internal investigation into the conduct of Sergeant C. E. Boltinhouse, a detective with the Goldsboro Police Department. Her motion alleges that Sergeant Boltinhouse caused Jeffrey Dekeyser to fabricate his account of the 21 September Elm Street murder. Defendant Carraway's first assignment of error contends that the trial court erred in failing to order the requested investigation.

This assignment of error, and others raised by both defendants, are based on the conflicting statements given to the police and defendants by Jeffrey Dekeyser, the only eyewitness to the murder. According to the State, Dekeyser informed the police only hours after the 21 September shooting that defendants were involved in the murder of Charles Hall at 611 Elm Street. However, on 13 November 1983, Dekeyser, who was taken by Carraway to her attorney's office, said that he did not know defendant Rogers and did not see the 611 Elm Street shooting. At trial, Dekeyser admitted he had lied to Carraway and her attorney.

We hold the trial court correctly refrained from authorizing an investigation of Sergeant Boltinhouse's conduct. Besides the allegations contained in the motion, defendant Carraway failed to bring forward any evidence that tended to show that Sergeant Boltinhouse had improperly influenced Dekeyser's recollection of the events on the night of the shooting. Furthermore, we note that Sergeant Boltinhouse testified at trial and was subjected to

fruitless cross-examination concerning his alleged inappropriate behavior. This assignment of error is overruled.

[2] Defendant Carraway next assigns as error the denial of her motion to suppress the statements she made to FBI agents when apprehended in Maryland. The defendant contends that she did not waive her rights and that her statements were involuntarily made because she was sleepy and tired when arrested. After a *voir dire* hearing, the trial court found that defendant Carraway was advised of her *Miranda* rights when taken into custody. At that time, she did not request an attorney and voluntarily answered the agent's biographical questions. During the ten-minute ride to their FBI office, defendant Carraway closed her eyes, but appeared to the agents to be at all times in full command of her physical and mental faculties. Upon their arrival, Carraway told the agents that she had been traveling with defendant Rogers for the past few months, that she owned a .44 caliber weapon, and that she did not know Charles Hall. At that point, she exercised her right to an attorney and the interview stopped.

Initially, we note that defendant failed to except to any of the findings of fact. When no such exceptions are taken, the findings are presumed to be supported by competent evidence. *State v. Perry*, 316 N.C. 87, 340 S.E. 2d 450 (1986). Further, our examination of the evidence on *voir dire* discloses plenary competent evidence to support the findings. These findings in turn support the trial court's conclusions of law and ruling denying the motion to suppress. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death penalty vacated*, 428 U.S. 908, 49 L.Ed. 2d 1213 (1976).

Finally, we have previously held unpersuasive Carraway's remaining contention that a defendant's refusal to sign the *Miranda* rights waiver form is a bar to finding that an oral waiver has occurred. *See State v. Connley*, 297 N.C. 584, 256 S.E. 2d 234, *cert. denied*, 444 U.S. 954, 62 L.Ed. 2d 327 (1979).

B. *Jury Selection*

[3] Both defendants argue that the trial court committed prejudicial error by denying their motions to prohibit the prosecution from "death qualifying" the jury before the guilt-innocence phase of the trial. They contend that death qualified juries are un-

constitutional because they are prosecution prone and more likely to convict a defendant. This Court has repeatedly held that the North Carolina jury process in first degree murder cases is constitutional. *See State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985); *State v. Vereen*, 312 N.C. 449, 314 S.E. 2d 250, *cert. denied*, --- U.S. ---, 85 L.Ed. 2d 526 (1985); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, --- U.S. ---, 84 L.Ed. 2d 369 (1985). We decline to reconsider our position.

[4] Defendants also contest the denial of their motions to prohibit the State from peremptorily challenging black jurors. Defendants alleged that the district attorney has shown "a pattern of discrimination against black jurors by peremptorily challenging them" in criminal cases and moved that the State be prohibited from challenging black jurors. Neither defendant offered any evidence in support of the motion.

A peremptory challenge may be exercised without a stated reason and without being subject to the control of the court. *State v. Jenkins*, 311 N.C. 194, 204, 317 S.E. 2d 345, 351 (1984). The right to challenge veniremen peremptorily is equally bestowed on the State and defendants by N.C.G.S. § 15A-1217. This contention is without merit.

[5] Defendant Carraway assigns as error the State's use of a peremptory challenge of a black juror who had already been passed by the State and defendants. During *voir dire*, the State asked Thelbert Harvey whether he or any member of his family had ever been charged with a serious offense. Neither Mr. Harvey nor any of the other jurors being questioned at that time responded. The State tendered Mr. Harvey to the defendants who first challenged him for cause, then peremptorily. Their motions to excuse Mr. Harvey as a juror for cause were denied. Their peremptory challenges were likewise unsuccessful in removing Mr. Harvey because both defendants had exhausted all their peremptory challenges.

During a short recess and before the jury had been impaneled, the State obtained information that Mr. Harvey's two sons had been convicted of shoplifting and felonious breaking and entering. An evidentiary hearing was conducted and the State produced a witness who verified the State's information. The trial court recalled Mr. Harvey and questioned him concerning his

sons' criminal records. Mr. Harvey admitted that his sons had been convicted of these crimes. At that time, the State exercised one of its remaining peremptory challenges and Mr. Harvey was excused.

We find that this procedure fully comported with the controlling statute, N.C.G.S. § 15A-1214(g). This statute provides that after a juror has been accepted by a party, and before the jury has been impaneled, a judge may examine a juror if it is discovered that this juror has made an incorrect statement during *voir dire*. The decision to reopen the examination of a juror previously accepted by the parties is within the sound discretion of the trial court. *State v. Freeman*, 314 N.C. 432, 333 S.E. 2d 743 (1985). However, once the examination of a juror has been reopened, "the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror." *Id.* at 438, 333 S.E. 2d at 747. In the present case as in *Freeman*, the question concerning the juror's truthfulness on *voir dire* arose before a full jury had been impaneled. We hold that the trial court did not abuse its discretion in reopening the *voir dire* examination of Mr. Harvey based on the evidence produced by the State. Consequently, the State was entitled to exercise one of its remaining peremptory challenges to remove Mr. Harvey.

[6] Defendant Carraway further contends that the trial court improperly denied her motion for an additional peremptory challenge. She argues that because Mr. Harvey was peremptorily challenged, rather than excused for cause, she has been prevented from having his removal reviewed on appeal. She maintains, therefore, that she should have been entitled to an additional peremptory challenge. This novel argument is unpersuasive. Pursuant to N.C.G.S. § 15A-1217(a), the State and the defendant in a capital case are each allowed fourteen peremptory challenges. Contrary to defendant Carraway's contention, the use of a peremptory challenge by one party does not unfairly prejudice the opposing party's position in the jury selection process. This contention is without merit.

[7] Defendants next assign as error the trial court's denial of their motions for an individual *voir dire* and sequestration of the jurors during the jury selection proceedings. It is well settled that these motions are addressed to the sound discretion of the

court and will not be disturbed absent an abuse of discretion. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137 (1980). Defendants argue that prospective jurors in a capital case are improperly influenced during a collective *voir dire* by the repetitious questions concerning capital punishment and the positive responses given by other veniremen. Defendants assert that jurors are left with the impression that the accused is guilty and that the penalty phase of the trial will undoubtedly be reached. We reject this argument as speculative as we have rejected previous arguments dealing with the alleged contamination of jurors who are chosen pursuant to a collective *voir dire*. *E.g., State v. Ysaguire*, 309 N.C. 780, 309 S.E. 2d 436 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982). Our review of the *voir dire* proceedings fails to reveal any abuse of discretion by the trial court in denying defendants' motions.

[8] Defendant Carraway also claims that the trial court improperly expressed an opinion by its questioning of a prospective juror who intimated that he could not vote for a verdict which would result in the imposition of the death penalty. The court's questions to this juror were made in an attempt to clarify his actual position on the issue of capital punishment. Here, since the State was entitled to "death-qualify" the jury, we fail to see how the trial judge's inquiry or his ruling excusing the juror for cause could be construed as an improper expression of an opinion which might have unfairly influenced the views of the other jurors. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974).

[9] Defendant Carraway next contends that because her *voir dire* examination of the jurors followed the State's and Rogers' examinations, she was denied her right to examine a full panel from which to select jurors and exercise her challenges. We disagree. The procedure followed in this case was in full accord with the provisions of N.C.G.S. § 15A-1214. Her statutory rights were not infringed because others had removed jurors before she began her examination. She still had the right to exercise her fourteen peremptory challenges and to exert her right to challenge for cause. Except for her bald assertion of error, defendant has failed to furnish authority or plausible argument to show that the statutory scheme or the judge's discretionary ruling on the

order of examination violated her constitutional or statutory rights. This assignment of error is without merit.

[10] Defendant Carraway cites as error the trial court's alleged refusal to allow her to ask prospective jurors during *voir dire* "nondeath qualifying" questions to counter the State's "death qualifying" questions. In the two instances highlighted in her brief, the juror was asked whether she could conceive of a circumstance where she would impose a life sentence rather than the death penalty and whether she would automatically vote for the death penalty upon the return of a guilty verdict.

This Court has previously recognized that "both the State and defendant have a right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial verdict." *State v. Adcock*, 310 N.C. 1, 10, 310 S.E. 2d 587, 593 (1984). However, the trial court is vested with broad discretion in controlling the extent and manner of the inquiry into prospective jurors' qualifications in a capital case. Absent an abuse of discretion, the trial judge's rulings in this regard will not be disturbed. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). Our review of the *voir dire* proceedings reveals that defendant Carraway was clearly afforded an opportunity to question each juror on his or her death penalty views. Because this defendant has failed to show any abuse of discretion, this assignment of error is overruled.

[11] The final assignments of error dealing with jury selection are brought forward by defendant Carraway. In one assignment, she objects to the State's use of "fully satisfied and entirely convinced" instead of "reasonable doubt" in its questions to prospective jurors concerning their ability to return a guilty verdict. Defendant Carraway contends that the phrase used by the State is an inadequate statement of the law. We disagree. The North Carolina Pattern Jury Instructions for Criminal Cases, adopting the definition developed in our case law, define reasonable doubt as "proof that fully satisfies or entirely convinces you of the defendant's guilt." N.C.P.I.—Crim. 101.10. *See also State v. Hammonds*, 241 N.C. 226, 232, 85 S.E. 2d 133, 138 (1954). We hold that the trial court properly overruled defendant Carraway's objection to the State's question.

[12] She also contends that the trial court improperly sustained the State's objections to their questions asking prospective jurors whether the fact that she called fewer witnesses than the State would make a difference in their decision as to her guilt. We hold that the trial court properly sustained the objections. Hypothetical questions which attempt to "stake out" a juror's future course of action are improper. *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death penalty vacated*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976).

C. *Evidentiary Questions*

[13] Defendant Rogers contends that the trial court improperly allowed the State in bad faith to repeatedly elicit testimony which was without any basis in fact. Specifically, this assignment of error deals with a dispute in the evidence as to whether or not Jeffrey Dekeyser's car was parked at 611-A East Elm Street between 11:15 p.m. and 3:00 a.m. on the night of the shooting. Rogers argues that because the State's other witnesses did not see Dekeyser's car or do not remember seeing his car that night, the trial court should not have allowed Captain Floyd Hobbs of the Goldsboro Police Department to testify that he saw Dekeyser's car at the place and during the time Dekeyser had indicated it was there.

This contention has no merit. Admittedly, the presence of the car at the scene of the crime is an important fact because it tends to substantiate Dekeyser's claim that he witnessed Charles Hall's murder. Yet, contradictions in the evidence are matters for the jury to resolve. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984). The resolution of this dispute largely turned on the credibility the jury chose to give Dekeyser's and Hobbs' testimony. The credibility of witnesses is also a determination for the jury. 12 Strong's N.C. Index 3d *Trial* § 18.2 (1978). Consequently, we hold the trial court properly allowed Captain Hobbs to relate his recollection of the crime scene on the night in question.

[14] Defendant Rogers next asserts that the trial judge committed reversible error when he directed a series of questions to Dekeyser during the *voir dire* hearing held to determine the admissibility of Dekeyser's identification of the defendants. Rogers argues that the court's conduct was unfair and indicated its bias in favor of the State. He maintains that he was prejudiced by the

court's examination of Dekeyser because his answers constituted the findings of fact in the order admitting his in-court identification of the defendants.

The hearing where the challenged examination occurred was conducted out of the presence of the jury. N.C.G.S. § 15A-1222, which forbids the expression of an opinion by the trial court, is inapplicable when the jury is not present during the questioning. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Furthermore, it is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts. *State v. Efird*, 309 N.C. 802, 309 S.E. 2d 228 (1983).

Here, the trial court's inquiry was necessary and proper. It is evident from the record that Dekeyser, the State's only eyewitness, had difficulty in understanding some of the prosecution's questions and in responding clearly. In order to determine the admissibility of his in-court identification, the trial court wisely decided to examine the witness to clarify his testimony. We hold that the trial court's conduct was entirely proper.

[15] Defendant Rogers also attacks the trial court's order allowing Dekeyser's in-court identification on the basis that Dekeyser's testimony was incredible and conflicting.

> When a motion to suppress identification testimony is made, the trial judge must conduct a voir dire hearing and make findings of fact to support his conclusion of law and ruling as to the admissibility of the evidence. When the facts found are supported by competent evidence, they are binding on the appellate courts.

State v. Freeman, 313 N.C. 539, 544, 330 S.E. 2d 465, 470 (1985). Although Dekeyser did make a contrary statement prior to trial, his in-court testimony was consistent and in accordance with his first statement to police. The evidence elicited on *voir dire* fully supports the trial court's findings of fact and conclusions of law. We hold that the trial court properly admitted Dekeyser's in-court identification of the defendants.

[16] Both defendants further contend that the trial court erred when it failed to strike *ex mero motu* Dekeyser's entire testimony because it lacked credibility. Again, defendants have confused the

roles of judge and jury. We agree that Dekeyser was a troublesome witness. He was often unclear and an easy target for impeachment in view of his prior inconsistent statement to defendant Carraway's attorney that he had no knowledge of the Elm Street slaying. Yet, in spite of Dekeyser's overall shortcomings, he did manage to relate to the jury Charles Hall's murder as he saw it on 21 September 1983. Moreover, his testimony was corroborated in several crucial respects (Captain Hobbs' confirmation of the presence of Dekeyser's car at the scene; Blondie Coley's verification that after the shots were fired a figure got into the passenger side of a light-colored car which then drove away; and Robert Holmes' affirmation that defendant Rogers was looking for George Edwards after the murder at the corner of James and Pine).

In any event, Dekeyser's prior inconsistent statement did not cancel his testimony at trial. This statement as well as the seemingly questionable portions of his testimony were matters bearing on the weight the jury would give Dekeyser's testimony, not on its admissibility. *See State v. Wagoner*, 249 N.C. 637, 107 S.E. 2d 83 (1959).

[17] Defendant Rogers next asserts that the trial court improperly admitted the testimony of Robert Holmes. Rogers assails Holmes' testimony on two grounds. First, he argues that Holmes should not have been allowed to identify him in court as the man he talked with on 21 September 1983 on the corner of James and Pine. Holmes testified on *voir dire* that he saw Rogers three times on the night of the murder. He stated that he and Jeffrey Dekeyser saw Rogers sitting in his car at the corner of James and Pine after the murder of Charles Hall. According to Holmes, Dekeyser informed him that Rogers "was supposed to have shot" Hall. Holmes, out of curiosity created by this statement, then walked over to Rogers' car and spoke with him for several minutes. Later that night, he passed Rogers in the same car driving on other Goldsboro streets. Holmes further testified that based on his recollection of the events of that night he could identify Rogers as the same man with whom he talked on 21 September 1983. Clearly, the trial court's findings of fact which incorporated this portion of Holmes' testimony were supported by competent evidence and thus binding upon this Court. *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982). We hold that the trial

judge's conclusions are supported by these findings and therefore he properly admitted Holmes' in-court identification of defendant Rogers.

Secondly, defendant Rogers asserts that Holmes was improperly allowed to relate Dekeyser's statement to him that Rogers had shot Hall. The statement was admitted for the purpose of corroborating Dekeyser's earlier testimony as to what he had told Holmes on the corner of James and Pine on the night of the murder. We agree that this testimony was improperly admitted for this purpose. The record reveals that although Dekeyser testified in this manner on *voir dire*, he did not repeat this statement while testifying before the jury. Therefore, this portion of Holmes' testimony did not corroborate Dekeyser's testimony.

Although this statement was improperly admitted on this basis, we hold its admission was harmless in light of the fact that it was admissible for another purpose. Statements which are offered for any purpose other than for proving the truth of the matter stated are not objectionable as hearsay. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). "The statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. White*, 298 N.C. 430, 437, 259 S.E. 2d 281, 286 (1979). Holmes clearly testified that Dekeyser's statement about Rogers made him curious and motivated him to cross the street to talk with Rogers. In order to start a conversation with him, Holmes lied and asked if Rogers wanted to buy some drugs. Later, through this conversation, Holmes learned that Rogers was still looking for Edwards. We hold Dekeyser's statement to Holmes was admissible to explain Holmes' subsequent conduct. It was not offered to prove Rogers did, in fact, murder Hall, but to reveal why Holmes went over to talk with Rogers after the shooting.

[18] The next several assignments of error posing evidentiary questions deal with the admission into evidence of certain photographs offered by the State. Defendant Carraway first objects to the admission into evidence of Exhibits 2 and 3. These exhibits were photographs of the 611 East Elm Street apartment building from different angles and were admitted for purposes of illustrating the witness's testimony. Carraway contends that these photographs, taken during the day and under rainy conditions,

could not be used to illustrate the witness's testimony because the murder occurred at night and under a clear sky.

We reject this contention. "A photograph of the scene of a crime may be admitted into evidence if it is identified as portraying the locale with sufficient accuracy." *State v. Smith*, 300 N.C. 71, 75, 265 S.E. 2d 164, 167 (1980). As long as the witness is able to testify that the photograph is a fair and accurate representation of the scene, it is irrelevant that he did not take the photograph or that it was not made at the time of the event to which it relates. *Id.* at 75, 265 S.E. 2d at 168. *See also State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1976) (daytime photograph admitted to illustrate testimony of witness who had viewed the scene at night). In the present case, Captain Hobbs, the witness through whom the exhibits were admitted, testified that the photographs fairly and accurately represented the area on the night of the murder. We hold that State's exhibits 2 and 3 were properly admitted for illustrative purposes.

Although defendant Carraway has also excepted to the court's admission into evidence of State's exhibit 4, she has presented no argument to this effect in her brief. Rather, Carraway argues that Dekeyser's testimony that he parked his car in front of Apartment 611-A and west of the Ford pickup truck should not have been allowed because exhibit 4, a photograph of the front of 611-A and 611-B taken on the night of the murder, reveals that his car was not there during the specified time period.

Clearly, this argument is no basis for holding as error the admission of a properly authenticated photograph. This exhibit was not admitted in connection with Dekeyser's testimony, but was admitted through Police Officer Pinto, the photographer, for use during his testimony. This assignment of error is overruled.

Exhibit 18, another photograph taken and authenticated by Officer Pinto, is the subject of defendant Carraway's next assignment of error. Although she does not object to the admission of the exhibit, Carraway contends that the trial court erred in its instruction to the jury upon receiving it into evidence. This photograph of the intersection of Elm and Slocumb Streets was taken during the day five months after the murder and included extraneous vehicles. The trial court, as it admitted the photograph for illustrative purposes, highlighted these differences to the jury

and asked it to bear them in mind when considering the exhibit. We hold this instruction was entirely proper.

Defendant Carraway further assigns as error the trial court's ruling admitting the photograph of George Edwards into evidence. The State at trial contended that Edwards was the intended murder victim. He was also the alleged victim of the assaults with a deadly weapon with intent to kill. Captain Hobbs testified that he had known Edwards for twenty years and that he recognized State's exhibit 1 as a photograph of Edwards. The photograph was offered to illustrate Hobbs' testimony with regard to the people present at the murder scene when he arrived. Contrary to Carraway's argument, there was substantial evidence that Edwards was at 611-A Elm Street with Hall at the time of his murder and that Edwards was also assaulted at that time. There was further evidence that Rogers had searched for Edwards before and after Hall's slaying. Because Edwards was an essential part of the State's trial theory, his picture was surely relevant. Based on the foundation laid through Hobbs' testimony, we hold the photograph was properly admitted.

[19] In a related assignment of error, defendant Carraway argues that the trial court improperly allowed the testimony of Police Officer Perry Sharp that he had searched for Edwards, without success, in order to serve him with a subpoena for trial. Carraway asserts that this evidence was elicited in order to excite the passion and the prejudice of the jurors who essentially were led to believe that Edwards, out of fear, had disappeared after the shooting. We disagree. Since Edwards was a prominent character in the State's theory of the case, it was both relevant and proper for the prosecution to explain why this witness was not present at trial.

Furthermore, State's witness, William Artis, similarly testified, without objection, that after the shooting Edwards did not return to his barbershop for work and was only seen one time thereafter. Therefore, Carraway's objection to Sharp's testimony had been waived due to the fact that Artis's evidence of the same import had been previously admitted without objection. *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). This assignment is overruled.

Defendant Carraway also contends that the trial court improperly overruled her objections and allowed Captain Hobbs to testify that he found a bullet fragment near the flat tire of the Continental. The State, on the other hand, correctly points out that precisely the same evidence was introduced earlier in Captain Hobbs' testimony without objection. Therefore, we hold that defendant Carraway waived her right to object to this evidence. *Id.*

[20] The next assignment of error presented by defendant Carraway is likewise without merit. She argues that the trial court erred by failing to instruct Officer Pinto as well as other witnesses that they should refrain from making jokes while on the witness stand. The following exchange occurred during defendant Rogers' cross-examination of Pinto:

> Q. And what is the date that's written on the envelope in your handwriting?
>
> A. 9-26-83.
>
> Q. Who typed up the envelope, the other information that is on the outside of that envelope?
>
> A. I did.
>
> Q. And who typed 9-6-83 on there?
>
> A. 9-6, that was me.
>
> Q. Was that an old envelope back from September 6th?
>
> A. No, I'm just a good typist.

We do not find that this testimony reflects that Officer Pinto was attempting to be humorous or was making light of the defendant's plight. Further, upon defendant Carraway's objection, the trial judge stated that if the witness made a joke, he would admonish him. However, the court felt Pinto's answer was responsive to the State's questions and that the resulting laughter was accidental. Obviously, the trial court was well aware of its duty to control the conduct of the trial and acted accordingly.

[21] In four related assignments of error, defendant Carraway asserts that the trial judge improperly expressed an opinion in violation of N.C.G.S. § 15A-1222 when he instructed the jury that

some of the evidence should be considered only against defendant Carraway and not against defendant Rogers. At the time this alleged error occurred, the following exchange took place:

> THE COURT: Members of the jury, the evidence or testimony that is about to be elicited from this witness concerning what occurred at the apartment, 201 North George Street, is admissible into evidence solely against the defendant, Belinda Carraway. You shall not consider it in arriving at your verdict as to the defendant, Charles Gene Rogers. All right, you may continue with your examination.
>
> MR. JORDAN: If your Honor please, may we approach the Bench?
>
> THE COURT: Yes, sir.
>
> MR. JORDAN: If my recollection serves me properly, His Honor said it is admissible as evidence solely against Belinda Carraway and we except to that instruction.
>
> THE COURT: All right. Members of the jury, in my instruction to you I said the evidence that is about to be elicited from this witness is to be considered by you solely against the defendant, Belinda Carraway. I should have said it should be considered by you solely in the case of Belinda Carraway because evidence may be for or against someone depending upon the circumstances in which you view it and the weight and credibility you should give it, and sometime evidence is favorable to one side and sometimes it is against that side. At any rate, my instruction is that you consider it in the trial of her case but do not consider it in the trial of the case of Charles Gene Rogers. You may continue your examination.

Initially, we fail to see how the first version of this instruction amounted to a prejudicial expression of opinion by the trial court. In any event, we hold that any possible error which might have occurred due to the phrasing of the first instruction was surely cured by the court's immediate explanatory instruction. We further note that when instructing the jury in a similar manner later in the trial, the court carefully avoided the use of the word "against" to ensure no prejudice resulted and simply stated that

the evidence "is received in the trial of the case of Belinda Carraway" and not in the case against Rogers.

Despite the clarifying second instruction, Carraway nevertheless made a motion for a mistrial on this basis. On appeal, she argues that the trial court erred by denying her motion. A motion for a mistrial is usually addressed to the sound discretion of the trial judge. *State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980). In a capital case, however, the trial court may not order a mistrial without the consent of the defendant except in cases of necessity to attain the ends of justice. *State v. Moore*, 276 N.C. 142, 171 S.E. 2d 453 (1970). N.C.G.S. § 15A-1061 requires a trial court to declare a mistrial upon the defendant's motion if during the trial an error occurs "resulting in substantial or irreparable prejudice to the defendant's case." In view of the court's immediate correction and clarification of its first instruction, we conclude that defendant Carraway suffered no substantial or irreparable prejudice to her case. We therefore hold that the trial court properly denied her motion for a mistrial.

[22] By her next assignment of error, defendant Carraway argues that the trial judge improperly allowed Billy King to testify that he saw her with a .44 magnum pistol in May or June of 1983 and again in July of 1983. King further testified that he saw Rogers with the same .44 magnum also in July of 1983. Carraway contends that evidence to the effect that she possessed a gun sometime before the homicide "lacked probative value" because there was "no evidence as to what caliber gun was used to inflict the fatal wound." This statement is incorrect and therefore her reliance on *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973), is misplaced. In *Gaines*, this Court held that the trial court properly excluded irrelevant evidence that a person other than the defendant had been seen walking with a shotgun near the victim's residence three or four days before her attack. This evidence was excluded because it neither tended to inculpate this person or exculpate defendant. *Id.* at 41, 194 S.E. 2d at 845.

In the present case, King's testimony tended to inculpate both defendants. There was testimony from the State's medical expert that the entrance wound in Hall's chest had a one-half inch diameter. Dekeyser testified that Rogers had a "large caliber pistol" in his hand at the time of the shooting. SBI Firearms Ex-

aminer Jim Evans stated that one .44 caliber bullet was recovered from the back seat of the Continental and another one, fired from the same .44 caliber weapon, was found near the Continental's flat left front tire. Thus, it was clearly relevant to the State's theory of the case that Carraway possessed a .44 caliber pistol and that Rogers had been seen with her .44 caliber pistol. Thus, King's testimony was properly admitted into evidence.

[23] Conversely, defendant Carraway asserts that the trial court improperly sustained the State's objections to her questions asking William Artis whether he had ever seen Edwards with a weapon. In the first place, Carraway's questions included no time reference as to when the witness might have seen Edwards with a gun in order to show their relevancy to defendant's case. Secondly, even though these objections were sustained, defendant Carraway, after some rephrasing, was allowed to pose a question seeking the same information. The witness responded: "No, he didn't own a gun. I haven't ever seen him with a gun." Having obtained an answer to her question, defendant Carraway can show no prejudice in the trial court's rulings.

[24] In the final assignment of error under this grouping, defendant Carraway maintains that the trial court erred in failing to instruct the jury about a comment by the prosecutor that the court was free to sustain defendant's objection because he had already made his point by asking the question. We hold that this assignment of error is feckless because the comment was made during a bench conference out of the hearing of the jury.

D. *Sufficiency of the Evidence*

[25] In six assignments of error, defendants Rogers and Carraway contend that the trial court erred in failing to dismiss the charges against them for insufficient evidence. Initially, we note that defendant Carraway's motion to dismiss at the close of the State's evidence was waived when she elected to present evidence. *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631, *cert. denied*, 449 U.S. 960, 66 L.Ed. 2d 227 (1980). Therefore, the trial court's ruling on that motion is not part of our review.

Upon a motion to dismiss in a criminal case, the trial judge must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that

might be drawn therefrom, and leaving all contradictions or discrepancies in the evidence for the jury's resolution. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585. The function of the trial court on the motion is to determine whether there is substantial evidence of each element of the offense charged and that defendant is the perpetrator. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164.

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). *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984). To be held liable as an aider and abettor, one must be actually or constructively present at the scene, share the criminal intent with the principal, and render assistance or encouragement to him in the commission of the crime. *State v. Williams*, 299 N.C. 652, 263 S.E. 2d 774 (1980); *State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952).

We hold that the eyewitness testimony of the witnesses Dekeyser and Coley, when taken with the other corroborative evidence offered by the State, was sufficient substantial evidence from which the jury could have reasonably inferred that defendant Rogers as the principal and defendant Carraway as an aider and abettor committed the first degree murder of Charles Hall. Further, this evidence was sufficient to repel defendants' motions to dismiss the charges of assault with a deadly weapon with intent to kill George Edwards.

E. *Jury Arguments*

[26] Both defendants assert that the trial court erred in failing to instruct the jury to disregard a portion of the State's closing argument which they allege is unsupported by the evidence. The portion of the State's argument in question is as follows: "When the shot was fired Mr. Edwards took off between the pickup truck and the Continental, and by that time Mr. Rogers fired towards Mr. Edwards, causing the weapon to fire, [and] hit the tire." Immediately after the objection, the trial court instructed the jury to be guided by their own recollection of the evidence.

It is well established that counsel should be allowed wide latitude in his argument to the jury. Counsel may argue "the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case." *State v. Covington*, 290 N.C. 313, 327-28, 226 S.E. 2d 629, 640 (1976). *See State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984), *cert. denied*, --- U.S. ---, 85 L.Ed. 2d 169 (1985). Clearly, the questioned argument was based on reasonable inferences which could be drawn from the evidence. With Dekeyser's eyewitness account of the shooting and the physical evidence taken from the Continental, it was surely reasonable to infer that after shooting Hall, Rogers turned and fired at Edwards. Because the State's argument was proper, the trial court correctly refrained from instructing the jury to disregard it.

Defendants also objected to the assistant district attorney's comments that: Dekeyser may have felt coerced into giving Carraway's attorneys his conflicting statement; Carraway told the FBI that she did not know Charles Hall; Dekeyser's statement that he drove 75 m.p.h. from Kinston to Goldsboro on the night of the murder was a declaration against interest; and defendant's theory of the case was that the murder occurred after an attempted robbery.

It is well settled that the arguments of counsel must be left largely to the discretion of the trial court. The trial court has a duty, upon objection, to censure the remarks not warranted by the law or the evidence. *State v. Covington*, 290 N.C. at 328, 226 S.E. 2d at 640. The court's ruling thereon will not be disturbed in the absence of a gross abuse of discretion. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

A review of the record indicates that all of these contested statements have a basis in the evidence presented at trial. Further, the trial court twice within the State's argument reminded the jury that they should be guided by their own recollection of the evidence and not by counsel's rendition. We therefore hold that the trial judge did not abuse his discretion in overruling defendants' objection to the prosecutor's argument.

[27] Defendant Rogers next contends that the trial court erred in sustaining the State's objection to a rhetorical question he posed to the jury in his closing argument. After highlighting the

contradictions and inconsistencies in Dekeyser's testimony, Rogers' counsel asked: "Would you like to be convicted on his testimony?" As previously set forth, counsel should be allowed wide latitude in arguing his case to the jury. Yet, "[w]hether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge." *Id.* We hold that the trial judge did not abuse his discretion in sustaining the objection. The trial judge properly exercised his discretion by preventing defense counsel from suggesting that the jurors reach their verdict by placing themselves in defendant Rogers' position, rather than on deciding the case from the facts and inferences which could be reasonably drawn from the evidence.

F. *Jury Instructions*

Together defendants have presented nine assignments of error dealing with the trial court's instructions to the jury in the guilt-innocence phase of their trial. They failed, however, to voice at trial any objection to the court's final jury instructions. Under N.C. R. App. P. 10(b)(2), defendants have therefore waived their right to assign error in the instructions. Consequently, they are entitled to relief only if one of their alleged errors amounted to "plain error" as that term has been defined in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), and subsequent cases. *See State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837. Our careful review of the record reveals that no such error was committed in this case.

II. FAIR SENTENCING ISSUES

[28] Each defendant was convicted of first degree murder and assault with a deadly weapon with intent to kill. Defendant Carraway raises three assignments of error with regard to the sentence she received for her assault conviction. Carraway argues that the court erred in finding the following factors in aggravation:

> 27. . . . The defendant although not charged with the crime of conspiracy, entered in a conspiracy to aid and abet another person in the commission of a felony.
>
> 28. Although, the defendant has not been charged with perjury or convicted of it, the jury by its verdict found her testimony of self-defense was unbelievable and thereby, de-

termined that she committed perjury. The Court likewise finds she committed perjury.

In *State v. Thompson*, 310 N.C. 209, 227, 311 S.E. 2d 866, 876 (1984), this Court held that

> nothing in our Fair Sentencing Act specifically precludes a finding of perjury as an aggravating factor to be weighed in considering the sentence to be imposed upon a defendant, provided, of course, the finding meets the requirements of the statute; however, in view of some of the potential dangers inherent in this particular factor and also of its peculiar nature, a trial judge should exercise extreme caution in this area and should refrain from finding perjury as an aggravating factor except in the most extreme case.

It is true that Carraway's testimony conflicts with the State's version of the facts as revealed through its witnesses and the physical evidence produced at trial. However, her testimony is not intrinsically inconsistent, a usual characteristic of obviously perjured testimony. Moreover, the most damaging evidence against her was offered by Jeffrey Dekeyser, a witness whose own testimony reeked of inconsistencies, contradictions, and recantations. We cannot speculate as to why the jury chose to believe this witness over the defendant but its refusal to accept her version of the facts in light of Dekeyser's testimony does not compel the conclusion that Carraway's testimony was perjured. We believe that under *Thompson* the witness's testimony must be undeniably perjured to constitute an "extreme case" and to warrant a finding of this aggravating factor. Otherwise, every convicted defendant who has testified in his own defense may be treated as a perjurer, a result previously found unacceptable by this Court. *Id.* at 226, 311 S.E. 2d at 876. *See also United States v. Moore*, 484 F. 2d 1284, 1287 (4th Cir. 1973). We hold that the court's finding of perjury in this case is not supported by a preponderance of the evidence and repeat our admonishment that judges exercise extreme caution in this area.

We further hold that the "conspiracy to aid and abet" aggravating factor was not supported by a preponderance of the evidence. A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an

unlawful way. *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975).

In the present case, there is simply no evidence that the defendants conspired to carry out the crimes for which they were convicted. Basically, the presence of a conspiracy between defendants is only an inference which can be drawn from the commission of the crimes themselves. This inference does not support this factor by a preponderance of the evidence.

As a result of the trial court's error in finding these aggravating factors, we award defendant Carraway a new sentencing hearing for her assault with a deadly weapon with intent to kill conviction.

III. CAPITAL SENTENCING ISSUES

Defendant Rogers brings forward several assignments of error which deal with alleged errors committed during the sentencing phase of his first degree murder conviction. Defendant Carraway was given the mandatory life sentence and therefore has no similar assignments of error.

A. *Jury Argument*

[29] Defendant Rogers first contends that the trial court committed prejudicial error in failing to control the State's argument to the jury during the capital sentencing portion of the trial. However, Rogers failed to object in court to the argument. As stated in *State v. Johnson*, 298 N.C. 355, 369, 259 S.E. 2d 752, 761 (1979):

> In capital cases, . . . an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

In the present case, defendant's exceptions in general deal with the State's continued argument that Edwards, not Hall, was the intended murder victim. This idea was again stressed at this time because the "course of conduct" aggravating circumstance would be submitted to the jury. Rogers further objects to the

prosecutor's references to biblical passages that encourage Christians to obey the law. We note that defendant Rogers also used the Bible and its teachings to argue against the imposition of the death penalty.

We have reviewed the State's argument and even assuming arguendo that the statements singled out by defendant were improper, the impropriety was clearly not so gross as to require us to hold that the trial court abused its discretion in not recognizing the error and correcting it on its own motion. These assignments are overruled.

B. *Aggravating Circumstance*

[30] Defendant Rogers also claims that the trial court improperly submitted the "course of conduct" aggravating circumstance to the jury. N.C.G.S. § 15A-2000(e)(11) contains the following aggravating circumstance: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." Defendant Rogers argues that there was no evidence to support the submission of this circumstance. N.C.G.S. § 15A-2000 (d)(2) also requires this Court in a capital case to review the record and determine whether the record supports the jury's finding of any aggravating circumstance.

As previously set forth, the State presented substantial evidence that after killing Charles Hall, defendant Rogers fired his weapon at George Edwards, intending to kill him. The jury, by returning guilty verdicts, found beyond a reasonable doubt that Rogers had committed Hall's murder and this assault against Edwards. We therefore hold that the trial court properly submitted this aggravating circumstance to the jury for its consideration and properly denied Rogers' later motion to set aside the jury's finding of this aggravating circumstance.

C. *Statutory Review Required by N.C.G.S. § 15A-2000(d)(2)*

[31] Having found no prejudicial error by the trial court in the guilt-innocence or sentencing phases in the first degree murder case, we now undertake the review imposed upon this Court by N.C.G.S. § 15A-2000(d)(2). This statute directs us to review the record in a capital case and to determine: (1) whether the record

supports the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its death sentence; (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. We have previously concluded that the evidence supports the aggravating circumstance found by the jury. Furthermore, we have searched the record and have failed to find any evidence indicating that the sentence was the product of passion, prejudice or any other arbitrary factor.

To determine whether the sentence of death is excessive or disproportionate when considering the crime and the defendant, we review all of the cases in the "pool" of similar cases for comparison. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983). The purpose of our review is to eliminate " 'the possibility that a person will be sentenced to die by the action of an aberrant jury.' *Greg v. Georgia*, 428 U.S. 153, 206 (1976)." *Id.* at 82, 301 S.E. 2d at 356. We reiterate our feeling that "the responsibility placed upon us by N.C.G.S. § 15A-2000(d)(2) to be as serious as any responsibility placed upon an appellate court." *State v. Jackson*, 309 N.C. 26, 46, 305 S.E. 2d 703, 717 (1983).

The proportionality review pool currently contains approximately twenty-three death sentence cases and seventy-six life sentence cases. Our review of these cases compels the finding that although the crime committed by this defendant was a senseless, unprovoked killing, "it does not rise to the level of those murders in which we have approved the death sentence upon proportionality review." *Id. E.g., State v. Craig & Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983) (defendants took turns stabbing heavily intoxicated, utterly defenseless, woman inflicting thirty-seven wounds as she begged for her life); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983) (defendant kidnapped and attacked victim and her roommate, ultimately stabbing victim twenty-two times with a butcher knife); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (defendant with no apparent motive fatally stabbed a young mother and her child, extensively mutilating their bodies); and *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert.*

denied, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982) (at motorcycle clubhouse defendant shot to death two men, one of whom he had never seen before, because he "didn't have any use for people like that").

Furthermore, it is particularly instructive to compare this case with those cases where the death sentence was upheld and N.C.G.S. § 15A-2000(e)(11) was the only aggravating circumstance found by the jury. This "course of conduct" circumstance was the sole factor upon which the jury recommended the death penalty in *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), and *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642. In *Williams*, defendant deliberately stalked two lone employees of business establishments in isolated areas during the early morning hours, robbed them at gunpoint, and shot them at very close range with a shotgun before fleeing with the money. *Id.* at 690, 292 S.E. 2d at 263. In *Noland*, defendant warned his estranged wife that if she did not come back to him he would kill her sister first and then her father and mother. Thereafter when his wife did not return to him, defendant entered his wife's sister's home and shot her in the back of the head as she huddled helplessly behind the laundry room door. Defendant then walked across the street into his wife's parents' home, fatally shot her father in the left eye while he slept, and wounded her mother. *Id.* at 4-6, 320 S.E. 2d at 645-46.

Although any murder is a horrendous and reprehensible act, the slaying in this case does not contain the viciousness and the cruelty present in these cases. Rogers' crime on the other hand is more in line with those cases in which the jury has recommended a sentence of life imprisonment. *Cf. State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (defendant follows estranged wife from work and shoots her at the bottom of an exit ramp—same aggravating circumstance); and *State v. Bare*, 309 N.C. 122, 305 S.E. 2d 513 (1983) (defendant orders death of allegedly double-crossing drug dealer—different aggravating circumstances). *See also State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (defendant shoots fellow drug dealer in Club Ebony after prior drug-related argument—vacated by this Court due to insufficient evidence to support the sole aggravating factor submitted to the jury; life sentence imposed).

We therefore hold as a matter of law that the death sentence imposed in this case is excessive and disproportionate. Defendant Rogers' death sentence is hereby vacated and defendant is sentenced to imprisonment for the remainder of his natural life. Defendant is entitled to credit for days spent in confinement prior to the date of this judgment.

IV. POST TRIAL MOTIONS

[32] In their final assignments of error, defendant Rogers excepts to the signing and entry of the judgments against him, and defendant Carraway excepts to the trial court's refusal to set aside the verdict as being contrary to the weight of the evidence. A motion to set aside the jury's verdict lies within the discretion of the trial judge and is not reviewable absent a showing of abuse of that discretion. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). Since the evidence was sufficient to support the jury's verdict, we hold that the trial court did not abuse its discretion in denying Carraway's motion. Furthermore, defendant Rogers' exception to the entry of judgment based on the same errors heretofore discussed is also without merit. We have found no prejudicial error in the guilt phase of either charge against him and he has failed to assign error to the sentence imposed against him for his assault conviction. Even though we have vacated his death sentence for proportionality reasons, the trial judge did not err by entering that judgment because he was bound to follow the jury's recommendation. N.C.G.S. § 15A-2000 (1983).

No. 83CRS15013—Rogers—first degree murder—no error in guilt phase; death sentence vacated and sentence of life imprisonment imposed.

No. 83CRS15013—Rogers—assault with deadly weapon with intent to kill—no error.

No. 83CRS15014—Carraway—first degree murder—no error.

No. 83CRS15014—Carraway—assault with a deadly weapon with intent to kill—new sentencing hearing.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR; CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., INTERVENOR; DEPARTMENT OF DEFENSE OF THE UNITED STATES, INTERVENOR; CONSERVATION COUNCIL OF NORTH CAROLINA, INTERVENOR; CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES—FEDERAL PAPER BOARD COMPANY, INC.; HURON CHEMICALS OF AMERICA, INC.; LCP CHEMICALS AND PLASTICS, INC.; MONSANTO COMPANY; UNION CARBIDE CORPORATION; CLARK EQUIPMENT COMPANY; CORNING GLASS WORKS; DIAMOND SHAMROCK CHEMICAL COMPANY; MASONITE CORPORATION; NORTH CAROLINA PHOSPHATE CORPORATION; OUTBOARD MARINE CORPORATION; FIRESTONE TIRE AND RUBBER COMPANY; WEYERHAUSER COMPANY, INTERVENORS; KUDZU ALLIANCE, INTERVENOR; AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY, INTERVENOR, APPELLEES v. LACY H. THORNBURG, ATTORNEY GENERAL, INTERVENOR, APPELLANT; AND CAROLINA POWER & LIGHT COMPANY, APPLICANT, CROSS-APPELLANT

No. 278A85

(Filed 2 April 1986)

1. **Utilities Commission § 56— utility rates—burden of proving impropriety**

Rates fixed by the Utilities Commission are deemed *prima facie* just and reasonable, and the party attacking the rates established by the Commission bears the burden of proving that they are improper. N.C.G.S. § 62-94(e).

2. **Utilities Commission § 56— review of utility rate case—whole record test**

The order of the Utilities Commission in a utility rate case will not be disturbed if, upon consideration of the entire record, the appellate court finds the decision is not affected by error of law and the facts found by the Commission are supported by competent, material, and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn.

3. **Utilities Commission § 56— rate case—minimal consideration of competent evidence**

A summary disposition which indicates that the Utilities Commission accorded only minimal consideration to competent evidence in a rate case constitutes error at law and is correctable on appeal.

4. **Utilities Commission § 56— rate case—presumption of consideration of competent evidence**

It will be presumed that the Utilities Commission gave proper consideration to all competent evidence presented in a rate case absent an express statement by the Commission to the contrary, some record evidence to the contrary, or a summary disposition which indicates to the contrary. Therefore, the Commission's finding that the inclusion of additional construction work in

progress in the rate base of a power company was in the public interest was proper where no such statement, record evidence or summary disposition appears in the case and there was competent, material and substantial evidence supporting the finding.

5. Electricity § 3; Utilities Commission § 34— power company—inclusion of CWIP in rate base—financial stability standard

The inclusion of construction work in progress in the rate base of a public utility is "necessary to the financial stability of the utility" within the meaning of N.C.G.S. § 62-133(b)(1) if it is determined that the financial strength of the company will be significantly damaged if construction work in progress is not included in the rate base.

6. Electricity § 3; Utilities Commission § 34— power company—inclusion of CWIP in rate base—financial stability standard

The "financial stability" requirement of N.C.G.S. § 62-133(b)(1) means that construction work in progress may be included in a utility's rate base to the extent the Commission determines that the inclusion is necessary to allow the utility to maintain a generally good overall financial status. The "financial stability" standard does not require a finding that the inclusion is necessary to the financial survival of the company.

7. Electricity § 3; Utilities Commission § 34— inclusion of CWIP in rate base—effect on bond rating—financial stability standard

Evidence that a power company's bond rating was in jeopardy of falling from an A rating to a BAA rating and that the inclusion of additional construction work in progress in the company's rate base was necessary to stabilize the company at its A rating level supported a finding by the Utilities Commission that the inclusion of the additional construction work in progress was necessary to the company's financial stability.

8. Electricity § 3; Utilities Commission § 38— power company rates—normalization of nuclear capacity factor

The Utilities Commission did not err in "normalizing" the nuclear capacity factor component of a power company's test-period generation mix in ascertaining the company's cost of fuel by utilizing the national average capacity factor for each type of nuclear plant computed by the North American Electric Reliability Council for the period 1972-81 and adjusting these national averages downward to take into account planned outages at two of the power company's nuclear plants.

9. Electricity § 3; Utilities Commission § 56— refund of deferred fuel account

The Utilities Commission did not err in ordering a power company to refund to its customers the funds in the deferred fuel account which the Commission ordered the company to establish in a prior general rate case. However, the Commission did err by ordering a deduction from the company's annual rate increase in the amount of the refund rather than ordering a lump-sum refund (*i.e.*, one-time rate reduction) or a rate reduction over a period of time.

APPEAL under N.C.G.S. § 7A-29(b) by the Attorney General and cross-appeal pursuant to N.C.G.S. § 62-90(a) by Carolina Power & Light Company from an order of the North Carolina Utilities Commission entered in Docket No. E-2, Sub 481. Heard in the Supreme Court 20 November 1985.

Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, for intervenor-appellee Public Staff-North Carolina Utilities Commission.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, and Karen E. Long, Assistant Attorney General, for intervenor-appellant Attorney General.

Richard E. Jones, Vice President and Senior Counsel, for applicant-cross-appellant Carolina Power & Light Company.

MEYER, Justice.

On 21 February 1984, Carolina Power & Light Company (hereinafter "CP&L") filed an application with the North Carolina Utilities Commission (hereinafter "Commission") for an increase in its rates for electric service to its retail customers in North Carolina so as to increase annual revenue by approximately $151.6 million, or 12.6%. In the application, CP&L proposed to make the rate increase effective 22 March 1984. In an order issued 21 March 1984, the Commission determined that the application constituted a general rate case and suspended the proposed rate increase for a period of up to 270 days. On 29 March 1984, the Commission issued an order scheduling public hearings on the proposed rate increase and establishing the test period as the twelve-month period ending 30 September 1983. The Public Staff-North Carolina Utilities Commission (hereinafter "the Public Staff") filed a notice of intervention, and the Commission permitted various parties to intervene in the proceeding. Public hearings were held by the Commission in various areas of the state in June, July, and August 1984.

On 21 September 1984, the three-member Commission panel which heard the evidence issued an order which granted CP&L an increase in gross annual revenues of $64,339,000 from its North Carolina retail operations. However, due to the fact that two of the members of the panel dissented from different portions

of the order, the decision constituted only a recommended order pursuant to N.C.G.S. § 62-60.1(c). Subsequently, various parties requested a review by the full Commission.

Additional hearings were held before the full Commission in November 1984. On 20 November 1984, the Commission issued its final order which affirmed the $64,339,000 rate increase that had been recommended by the panel. The Attorney General appealed, and CP&L cross-appealed.

I.

Intervenor Attorney General argues that the Commission erred in calculating the amount of construction work in progress (hereinafter "CWIP") which was to be included in CP&L's rate base. CP&L requested the inclusion of $695,275,923 of CWIP in its rate base. This entire amount is attributable to Unit One of CP&L's Shearon Harris Nuclear Power Plant and constituted an increase of approximately $155,500,000 above the CWIP which the Commission included in the company's rate base in its 1983 general rate case, Docket No. E-2, Sub 461.

The Public Staff, however, contended that the amount of CWIP which had been included in CP&L's rate base was $496,597,912.[1] The Public Staff recommended that the Commission continue to allow CP&L to include this amount of CWIP in its rate base.

In its recommended order, the hearing panel found that $692,604,000 of CWIP should be included in CP&L's rate base. Subsequent to the issuance of the panel's recommended order, this Court issued its opinion in *Utilities Comm. v. Conservation Council*, 312 N.C. 59, 320 S.E. 2d 679 (1984), which held that it was

1. According to CP&L, the disagreement between it and the Public Staff regarding the amount of CWIP included in the rate base results from the utilization of different methods for allocating expenses between North Carolina and other jurisdictions. According to CP&L, in the 1983 general rate case, the portion of generation attributable to the North Carolina Eastern Municipal Power Agency was not separately allocated. Costs and offsetting revenues were spread across CP&L's other classes of customers. However, in a 1984 general rate case, the Power Agency's share was treated as a separate class of customers. This caused the allocation factor for North Carolina retail customers to be reduced. As a result, a part of CWIP was allocated to the separate Power Agency class, leaving $496,597,912 of CWIP in the North Carolina retail rate base.

error to include CWIP in the rate base to the extent that it was comprised of allowance for funds used during construction accrued subsequent to 1 July 1979 on construction work which occurred prior to 1 July 1979. Therefore, at the November hearings before the full Commission, CP&L adjusted the amount of CWIP which it was requesting to be included in the rate base so as to exclude the expenses held to be ineligible for rate base inclusion in the *Conservation Council* case. The adjusted request was $675,306,000. The Public Staff continued to adhere to its position that $496,597,912 was the proper amount of CWIP which should be included in CP&L's rate base.

In its final order, the Commission found that $663,167,000 of CWIP should be included in CP&L's rate base. The Commission stated that the inclusion of this amount of CWIP was in the public interest and was necessary to the financial stability of CP&L.

[1-3] Before examining the Attorney General's contentions, we deem it wise to take note of certain fundamental principles. The Commission, not the courts, has been given the authority to regulate the rates of public utilities. N.C.G.S. § 62-2 (1982 and Cum. Supp. 1985). The rates established by the Commission must, however, be fair to both the utility and the customer. N.C.G.S. § 62-133(a) (1982 and Cum. Supp. 1985). Rates fixed by the Commission are deemed prima facie just and reasonable. N.C.G.S. § 62-94(e) (1982 and Cum. Supp. 1985). The party attacking the rates established by the Commission bears the burden of proving that they are improper. *Utilities Comm. v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786 (1982). The order of the Commission will not be disturbed if, upon consideration of the entire record, we find the decision is not affected by error of law and the facts found by the Commission are supported by competent, material, and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. *Id.* Naturally, an appellant may show on appeal that the order is not supported by competent, material, and substantial evidence. *Id.; Utilities Comm. v. Edmisten*, 291 N.C. 424, 230 S.E. 2d 647 (1976). The credibility of testimony and the weight to be accorded it are matters to be determined by the Commission. *Utilities Comm. v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972). However, a summary disposition which indicates that the

Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. *Utilities Comm. v. Edmisten*, 299 N.C. 432, 263 S.E. 2d 583 (1980).

N.C.G.S. § 62-133(b)(1) provides that, in fixing the rates for any public utility, the Commission must:

> Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within the State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection may be included, to the extent the Commission considers such inclusion in the public interest and necessary to the financial stability of the utility in question, subject to the provisions of subparagraph (b)(4a) of this section.

This provision clearly commits to the discretion of the Commission the determination of what amount of CWIP, if any, to include in the utility's rate base. This discretion is tempered, however, by the statute's requirement that the expenditures be reasonable and prudent and that the Commission find that the inclusion is "in the public interest and necessary to the financial stability of the utility in question." The Attorney General contends that the Commission erred in finding that inclusion of the additional CWIP in CP&L's rate base was in the public interest and was necessary to the financial stability of the company, and therefore the Commission exceeded its statutory authority in setting CP&L's rates. We do not agree.

With regard to the finding that the inclusion of the additional CWIP was in the public interest, the final order recited several factors which the Commission had considered. These were: (1) that the inclusion in the rate base would result in lower revenue requirements on a net present value basis through the year 2000; (2) that the inclusion would result in a gradual increase in rates

over the period of construction rather than all at once when the plant goes into service; (3) that the inclusion is a lower cost method of improving CP&L's cash flow, interest coverage, and other key financial indicators than are available alternative policies; (4) that the inclusion would give ratepayers accurate pricing signals regarding the cost of electricity necessary to make decisions regarding home insulation, appliances, and other energy-sensitive investments; (5) that migration studies have shown that most of CP&L's present ratepayers will also be future ratepayers; and (6) that assurance of adequate service in the future attracts industry and jobs and bolsters the economy in the service area. A review of the record reveals that CP&L presented competent, material, and substantial evidence in support of these factors which the Commission found established the "public interest requirement" for CWIP inclusion.

The Attorney General, however, argues that the Commission failed to consider evidence that was presented which tended to show that the CWIP inclusion was not in the public interest. In particular, the Attorney General contends that the Commission completely ignored or at best gave only minimal consideration to the testimony of a Public Staff financial analyst to the effect that the inclusion of additional CWIP would reduce CP&L's incentive to complete the Shearon Harris facility as soon as possible.

[4] It is clear that if the Commission gave only minimal consideration to competent evidence, that would constitute error at law and would be correctable on appeal. *Utilities Comm. v. Edmisten*, 299 N.C. 432, 263 S.E. 2d 583 (where record evidence so indicates); *Utilities Comm. v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469 (1961) (where order of Commission so indicated); *see also Utilities Comm. v. Thornburg*, 314 N.C. 509, 334 S.E. 2d 772 (1985). Although the order of the Commission in the case at bar does not set out that portion of the analyst's testimony discussing the effect of inclusion of CWIP on CP&L's incentive to complete the plant as soon as possible, this cannot be said to be an indication that the Commission failed to accord the evidence the proper amount of consideration. The evidence in this case consisted of thirty-one volumes of testimony, three volumes of exhibits, and four volumes of CP&L financial information. Obviously, it would be impossible for the final order to include a recitation of all of the evidence which factored into the Commission's decision. In

the absence of an express statement by the Commission to the contrary, some record evidence to the contrary, or a summary disposition which indicates to the contrary, we must presume that the Commission gave proper consideration to all competent evidence presented. Since no such statement, record evidence, or summary disposition appears in this case and there was competent, material, and substantial evidence supporting the finding that the inclusion of the additional CWIP was in the public interest, we conclude that this finding was properly made.

With regard to the Attorney General's contention that the inclusion of the additional CWIP was not necessary to CP&L's financial stability, our first task is to ascertain the meaning of the phrase "necessary to the financial stability of the utility." We begin our analysis by noting that the term "financial stability" is not defined in the Public Utilities Act, N.C.G.S. § 62-1, *et seq.* We must therefore rely on established principles of statutory construction to interpret the phrase.

The cardinal principle of statutory construction is that the intent of the legislature is controlling. In determining this intent, the courts should consider the statute's language, spirit, and goals. *Utilities Comm. v. Public Staff*, 309 N.C. 195, 306 S.E. 2d 435 (1983). When the language of a statute is clear and unambiguous, it must be accorded its clear meaning and may not be evaded by a court under the pretext of construction. *Utilities Comm. v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977). Furthermore, while the interpretation by an agency responsible for the administration of a legislative act may and should be considered by a court called upon to construe statutory language, the agency interpretation is not controlling. *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303 (1961).

[5] The Commission has stated that the financial stability test can be met only if it is determined that "the financial strength of the company will be significantly damaged if CWIP is not included in the rate base." *Re Continental Telephone Co. of North Carolina*, 56 P.U.R. 4th 687, 695 (1983). We believe that this is an entirely proper interpretation to place upon the statutory language. However, we must still ascertain what constitutes significant damage to the utility's financial strength.

Regulatory agencies in several other states have said that CWIP is to be included in the rate base to the extent necessary to provide and maintain the utility's "financial integrity." *E.g., Re Tampa Electric Co.*, 49 P.U.R. 4th 547 (1982); *Re New York State Electric & Gas Corp.*, 44 P.U.R. 4th 449 (1981); *Re City of Burlington Electric Light Dept.*, 43 P.U.R. 4th 117 (1981). This "financial integrity" standard can be traced to *Power Comm. v. Hope Gas Co.*, 320 U.S. 591, 88 L.Ed. 333 (1944). In that case, the United States Supreme Court was required to construe the ratemaking process under the Natural Gas Act of 1938. The Court stated that the return to the equity owners "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Id.* at 603, 88 L.Ed. at 345. Although the case did not involve the issue of CWIP, the Court's statement regarding the proper rate of return is relevant since CWIP can constitute a significant portion of the rate base. We feel that the "financial integrity" standard utilized by several other state regulatory agencies is comparable or equivalent to the "financial stability" standard contained in N.C.G.S. § 62-133(b)(1), and we will examine some of those agency decisions in determining the construction to place on our statutory language.

In construing the "financial integrity" standard, the regulatory agencies have relied on an analysis of various economic and financial indicators. Among those indicators are the amount of the utility's cash flow, its bond coverage ratios, and the percentage of earnings comprised of allowance for funds used during construction (AFUDC). *See, e.g., Re Tampa Electric Co.*, 49 P.U.R. 4th 547. The bond coverage ratio is the ratio of net earnings available for interest payments to the amount of bond interest payable. *See Re El Paso Electric Co.*, 38 P.U.R. 4th 289 (1980). This ratio, along with other factors such as CWIP as a percentage of net plant, AFUDC as a percentage of net income, and the company's common equity ratio, determines the company's bond rating. Bond ratings are important for several reasons. The ratings are used by investors in determining the quality of the investment. They are also utilized in ascertaining the breadth of the market, since some large institutional investors are prohibited from investing in low grade bonds. The ratings also partially determine the cost of new debt and have an indirect impact on the status of the utility's common stock. C. Phillips, *The Regulation of Public Utilities—*

Theory and Practice 218 n. 80 (1984). Investment quality securities are those having ratings of AAA, AA, A, or BAA (also known as BBB). 1 A. Priest, *Principles of Public Utility Regulation—Theory and Application* 463 (1969).

Several regulatory agencies employing the "financial integrity" standard have said that CWIP is to be included to the extent necessary to maintain a utility's investment grade bond rating. *E.g., Re Tampa Electric Co.*, 49 P.U.R. 4th 547 (allowed CWIP to the extent necessary to permit company to maintain AA rating); *Re Central Hudson Gas & Electric Corp.*, 58 P.U.R. 4th 509 (1984) (allowed CWIP to the extent necessary to permit company to maintain A rating). Other regulatory agencies, while not expressly articulating the "financial integrity" standard, have appeared to allow the inclusion of CWIP where necessary to assist the utility in maintaining its then-existing investment grade bond rating. *See, e.g., Re El Paso Electric Co.*, 38 P.U.R. 4th 289 (allowed CWIP to extent necessary to maintain split AA/A rating); *Re Utah Power & Light Co.*, 30 P.U.R. 4th 197 (1979) (allowed CWIP to extent necessary to maintain AA rating).

[6] This focus on the "maintenance" of a utility's investment grade bond rating seems well fitted to our statutory command that the inclusion be necessary to the "financial stability" of the company. It would also seem to include those situations where the inclusion was necessary to permit a utility to upgrade its investment bond rating from noninvestment grade to investment grade or to shore-up a rating where a reduction is a substantial threat. Nevertheless, the Attorney General appears to implicitly argue that the financial stability requirement be construed as requiring a finding that the inclusion is necessary to the financial *survival* of the company. We decline to place such a Draconian construction on the statute. We do not believe that the General Assembly intended to require a utility to travel to the brink of financial ruin before being entitled to include CWIP in its rate base. Our conclusion is supported in part by N.C.G.S. § 62-2(3), which states the public policy of the State to promote adequate, reliable, and economical utility service to the residents of North Carolina, and N.C.G.S. § 62-2(4a), which states the public policy of the State to assure that facilities necessary to meet future growth can be financed by the utilities on terms that are reasonable and fair to

both the customers and existing investors of the utilities. Utilities faced with economic collapse would be hard pressed to provide adequate, reliable, and economical services to the public and to plan for and meet the increased demands occasioned by future growth. Furthermore, we note that the word "stability" is defined as "the strength to stand or endure without alteration of position or without material change." *Webster's Third New International Dictionary* 2217 (1976). We interpret the "financial stability requirement as meaning that CWIP may be included in the utility's rate base to the extent the Commission determines that the inclusion is necessary to allow the utility to maintain a generally good overall financial status.

In the present case, the Commission found that the inclusion of additional CWIP was necessary to the financial stability of CP&L based in part on a finding that its inclusion was necessary to improve the company's financial indicators. CP&L had an A bond rating at the time of the hearings. CP&L witness Spann testified concerning the five common indicators used for determining a utility's bond rating. He stated that CP&L's bond coverage ratio was 2.4. This compared with 2.71 for the average A-rated utility and 2.04 for the average BAA-rated utility. The company's CWIP as a percentage of net plant was 38.3%, compared with 24.6% for the average A-rated utility and 34.68% for the average BAA-rated utility. Spann also testified that CP&L's AFUDC as a percentage of net income was 59.5%, compared with 39% for the average A-rated utility and 61.33% for the average BAA-rated utility. He also testified that CP&L's internal generation of construction expenses was 38%, compared with 57% for the average A-rated utility and 52% for the average BAA-rated utility. CP&L's common equity ratio was 40.4%, which was better than the average A-rated utility's 39%.

Therefore, of the five major indicators, two of CP&L's indicators were below those of the average BAA-rated utility, one was closer to the average BAA than the average A, one was approximately equidistant between the average BAA and the average A, and one was better than the average A-rated utility. This and other evidence clearly tended to show that CP&L's financial indicators were closer to those of a BAA-rated utility than an A-rated utility. CP&L witnesses further testified that the company was in danger of having its bonds downgraded to a BAA

rating and that this risk would be greatly increased if additional CWIP was not included in the rate base. There was testimony to the effect that if CP&L's bonds were downgraded to BAA, the cost of the Shearon Harris plant would be increased due to the increased financing costs. There was also opinion testimony offered by CP&L witnesses that a BAA-rated utility is not "financially stable."

[7] We conclude that this and other evidence amply supports the Commission's finding that the inclusion of the additional CWIP was necessary to CP&L's financial stability. There was substantial, competent, and material evidence that CP&L's bond rating was in jeopardy of falling from an A rating to a BAA rating and that the inclusion of the additional CWIP was necessary to "stabilize" the company at its A rating level.

The Attorney General notes that a Public Staff financial analyst testified that CP&L was financially stable and that the inclusion of additional CWIP was not necessary to the financial stability of the company. Furthermore, at the November hearing before the full Commission, the witness testified that CP&L's financial indicators had improved since the initial hearings were closed. This testimony was set out in the order and there is no indication that the Commission failed to accord this evidence proper consideration. Also, CP&L presented testimony to the effect that the improvement in its financial indicators since the initial hearings were closed was due to a temporary increase in sales and could not be expected to continue. As noted above, CP&L presented substantial evidence that the company was not financially stable and that the inclusion of additional CWIP was necessary to enable it to achieve financial stability.

We acknowledge that the evidence concerning the necessity of the inclusion of the additional CWIP in CP&L's rate base was conflicting. However, it is the Commission and not this Court that determines the weight and credibility to be accorded the evidence. The Commission weighed the evidence and concluded that the inclusion of additional CWIP was necessary to the company's financial stability. This finding was supported by competent, substantial, and material evidence. Furthermore, there is no indication that the Commission ignored or gave minimal consideration to any evidence tending to show that the inclusion was not

necessary to CP&L's financial stability. We conclude that the Commission did not err in finding that the inclusion of the additional CWIP was necessary to CP&L's financial stability.

We hold that the Commission did not exceed its statutory authority in including the additional CWIP in CP&L's rate base, as the evidence clearly supports the Commission's finding that the inclusion was in the public interest and was necessary to the financial stability of the company.

II.

[8] On its cross-appeal, CP&L initially contends that the Commission erred in ascertaining the company's fuel costs. Specifically, CP&L argues that the Commission erred in "normalizing" the nuclear capacity factor component of CP&L's test-period generation mix. We conclude that the Commission did not err in calculating CP&L's fuel costs.

In order to address this issue, it is necessary to first examine the process by which the Commission calculated CP&L's cost of fuel. As the Commission noted in its order, this process basically involves three steps. Initially, the reasonable annual level of power generation in terms of kilowatt-hours (hereinafter "kWh") is determined. Second, the generation mix necessary to produce the power output calculated in the first step is determined. Basically, this involves a determination of the level of annual generation that would be produced by the four types of energy sources available to the company—coal, nuclear, oil, and hydroelectric. Additionally, the average level of energy purchases from and sales to other electric producers are included as a part of the generation mix calculation. Finally, a determination is made as to the reasonable cost per kWh to be attributed to each component of the generation mix. The costs are then multiplied by the number of kWh produced by each component of the generation mix in order to derive a total annual fuel cost.

The specific generation mix that is utilized in deriving the cost of fuel is very important. There is a wide variation in the cost associated with the various components of the generation mix. For example, there was testimony that the fuel cost involved in generating one kWh using oil was ten to fourteen cents, using coal was two cents, and using nuclear generation was one-half

cent. Therefore, the more oil generation which is included in the generation mix, the higher CP&L's cost of fuel. Conversely, the more nuclear generation included in the generation mix, the lower the company's cost of fuel.

CP&L witness Nevil testified that the company's fuel cost was 1.701 cents per kWh. This was based in part on his determination that CP&L's actual test-year system nuclear capacity factor was 45.17%.[2] This figure was a composite of the actual test-year capacity factors of CP&L's three nuclear generating units, Brunswick No. 1, Brunswick No. 2, and Robinson No. 2, appropriately weighed by the generating capacity of each unit.

Public Staff witness Lam testified regarding fuel cost. He recommended that CP&L's fuel cost be set at 1.582 cents per kWh. This calculation was based in part on a 53.4% system nuclear capacity factor. Lam testified that he felt CP&L's test-year nuclear performance (i.e., capacity factor) was lower than that which should reasonably be expected. He therefore "normalized" CP&L's system nuclear capacity factor for each type of nuclear plant,[3] as reported in the latest North American Electric Reliability Council report. These figures were further adjusted to take into account outages at Robinson No. 2 and Brunswick No. 2 which were certain to occur during the period the rates might be in effect.

The Commission concluded that CP&L's test-year 45% system nuclear capacity was abnormally low and not reasonably representative of the system capacity factor which the company could reasonably expect to experience in the future. The Commission went on to conclude that the "normalized generation mix" should reflect a 53.4% system nuclear capacity factor. Based on this and other evidence, the Commission held that CP&L's appropriate fuel factor was 1.582 cents per kWh.

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2. $\text{capacity factor} = \dfrac{\text{net generation}}{\text{plant capacity x hours in a year}}$

3. Robinson No. 2 is a "pressurized water reactor." Brunswick No. 1 and No. 2 are "boiling water reactors." According to the North American Electric Reliability Council data, the average capacity factor for a "pressurized water reactor" is 62.7%, and the average capacity factor for a "boiling water reactor" is 60%.

CP&L argues that the Commission erred in calculating its fuel costs because the Commission's "normalization" of its system nuclear capacity factor was improper. Before addressing the Company's various arguments concerning this question, we deem it necessary to discuss the issue of normalization.

N.C.G.S. § 62-133 sets out the method by which rates are to be set. One factor which must be taken into consideration by the Commission in setting rates is the utility's reasonable operating expenses. N.C.G.S. § 62-133(b)(3) (1982 and 1985 Cum. Supp.). N.C.G.S. § 62-133(c) provides:

> The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

We have previously held that N.C.G.S. § 62-133 requires the Commission "to adjust test period data to reflect abnormalities which had a probable impact on the utility's revenues and *expenses* during the test period." *Utilities Comm. v. Carolina Utilities Customers Association*, 314 N.C. 171, 189, 333 S.E. 2d 259, 270 (1985) (emphasis added). This allows for a reasonably accurate estimate of what may be anticipated in the future. However, no *pro forma* adjustment is to be made unless the Commission finds that an abnormality having a probable impact on the utility's revenues and expenses existed during the test period. Whether such an abnormality existed is a question of fact to be determined by the Commission, and its finding is conclusive on appeal if supported by competent, material, and substantial

evidence. *Utilities Comm. v. Carolina Utilities Customers Association*, 314 N.C. 171, 333 S.E. 2d 259. Since fuel costs comprise a large portion of a utility's expenses, the statutory mandate to normalize test period data includes a requirement that the Commission adjust the test period fuel costs for any abnormalities established by competent, material, and substantial evidence. Since the system nuclear capacity factor directly impacts upon the generation mix, which in turn affects fuel costs, any abnormality in the system nuclear capacity which is shown to have existed during the test year must be adjusted.

CP&L initially contends that the Commission erred in concluding that the company's test-year system nuclear capacity factor was abnormally low. The company argues that this finding was arbitrary and capricious and is not supported by the record. We do not agree.

CP&L witness Howe testified that Brunswick No. 1 had a historical lifetime capacity factor of 46%. However, during the test year (the twelve-month period ending 30 September 1983), the capacity factor of Brunswick No. 1 was 15%. This was due to a major outage which occurred during the test year. However, improvements and modifications were made to the unit during the outage which would increase its performance. Howe testified that from late-August 1983 until mid-July 1984, Brunswick No. 1 operated at a 73% capacity factor. He further testified that the company expected the unit to operate at a capacity factor of approximately 70% when it was not in an extended outage. However, he stated that the company expected the unit to operate at a 29% capacity factor from October 1984 until September 1985 (the period during which the rates set would likely be in effect) due to planned outages.

Howe also testified with regard to the performance of Brunswick No. 2. He stated that the actual test-year capacity factor for that unit was 57%. He further testified that improvements and modifications had been made to the unit which were expected to improve its performance. He testified that the company expected the unit to operate at a 65% capacity factor during the period the rates would likely be in effect. This estimate took into account a scheduled outage for the period 1 October 1984 through 17 November 1984.

CP&L witness McDuffie testified with regard to the performance of Robinson No. 2. He stated that the unit had a historical lifetime capacity factor of 66% and an actual test-year capacity factor of 67%. He testified that the unit would come back on line in December 1984 and that the company expected the unit to operate at an 85% capacity factor from that time through October 1985.

Evidence was also presented that showed the company's test-year system nuclear capacity factor was below the national averages for 1982 and 1983.[4] Furthermore, although the test-year capacity factor for Robinson No. 2 was approximately three percentage points higher than the national ten-year average capacity factor for pressurized water reactors, the test-year capacity factor for Brunswick No. 1 was forty-five percentage points below the national ten-year average for boiling water reactors, and the figure for Brunswick No. 2 was three percentage points below the national ten-year average for boiling water reactors.

We feel that this evidence supports the Commission's conclusion that CP&L's test-year system nuclear capacity factor was abnormally low. The test-year system nuclear capacity factor of 45% was below the historical lifetime capacity factors of Brunswick No. 1 and Robinson No. 2. The test-year capacity factor for Brunswick No. 1 was fourteen percentage points lower than the unit's projected capacity factor for the period during which the rates set would likely be in effect. The test-year capacity factor of Brunswick No. 2 was eight percentage points lower than that expected during the period the rates would likely be in effect. The test-year capacity factor of Robinson No. 2 was eighteen percentage points lower than that expected during the period the rates would likely be in effect. These figures included outages scheduled for the various units during the period the rates were expected to be in effect. The test-year system nuclear capacity factor was below the national average for the two calendar years encompassed by the test year.

4. The national average capacity factor for 1982 was 56%. The average for 1983 was 55%.

The evidence tending to show that CP&L's test-year system nuclear capacity factor was abnormally low was competent, material, and substantial. The Commission's finding that the abnormality existed is therefore conclusive on this Court. *See Utilities Comm. v. Carolina Utilities Customers Association*, 314 N.C. 171, 333 S.E. 2d 259.

CP&L next contends that assuming its test period nuclear capacity factor was abnormal, the Commission failed to explain how it arrived at its conclusion that 53.4% was the normal capacity factor. Although the Commission failed to explicitly set out the manner by which it arrived at this conclusion, it is clear that the figure adopted by the Commission was based on the testimony and calculations of Public Staff witness Lam. Lam testified that his fuel cost calculation was based on a normalized system capacity factor of 53.4%. The Commission recited Lam's testimony in the order, as well as testimony from other witnesses concerning their proposed normalized capacity factor. In its order, the Commission stated: "Based upon all of the evidence, the Commission concludes that a normalized generation mix which reflects a system nuclear capacity factor of approximately 53.4% and a level of nuclear generation which is properly associated with that capacity factor are appropriate for use in this proceeding." This, along with the fact that the Commission adopted Lam's proposed fuel cost calculation (which was based in part on a 53.4% capacity factor), leads to the inescapable conclusion that the Commission's conclusion was based on its acceptance of Lam's methodology for calculating the normalized capacity factor. We take this opportunity, however, to urge the Commission to endeavor to be as specific as possible in explaining the basis of its findings.

CP&L next argues that if the Commission did base its normalization adjustment on Lam's calculations, the adjustment was improper, as Lam's calculations are erroneous. Before addressing this contention, we deem it appropriate to briefly examine the normalization methodology employed by Lam.

As noted previously, Lam utilized the national average capacity factors computed by the North American Electric Reliability Council for the period 1972-81 in normalizing CP&L's system capacity factor. He replaced Robinson No. 2's actual test-year capacity factor with the North American Electric Reliability

Council's national average of 62.7% for pressurized water reactors. He replaced the actual test-year capacity factors of Brunswick No. 1 and No. 2 with the North American Electric Reliability Council's national average of 60% for boiling water reactors. Lam then adjusted these national averages downward to take into account the fact that Robinson No. 2 was scheduled to be out of service until two and one-half months after the rates would go into effect, and Brunswick No. 2 would not come back on line until two months after the rates would go into effect.

CP&L initially argues that Lam's calculations were flawed because it is inappropriate to use national averages as a basis for calculating a "normal" capacity factor. In support of this contention, the company cites *Utilities Comm. v. Gas Company*, 254 N.C. 536, 119 S.E. 2d 469. There, we stated our disapproval of the Commission's action disallowing all promotional expenditures by the utility which exceeded the national average. However, in that case, the Commission made no adjustment to the national average to take into consideration special circumstances unique to the utility. Indeed, we noted that the utility was faced with its own unique marketing environment, which differed from that faced by other utilities. Here, the Commission did not set total fuel cost on the basis of unadjusted national average capacity factors, but instead used the averages as a *starting point* for the normalization process. The national averages were adjusted to take into consideration unique, inherent factors which would impact upon the capacity factors (i.e., the scheduled outages at Robinson No. 2 and Brunswick No. 2). We find nothing improper in the use of national averages as long as proper adjustments are made to reflect unique characteristics of the utility. Such adjustments were made in the present case.

CP&L next claims that Lam's calculations were erroneous because, while he adjusted for scheduled outages at Robinson No. 2 and Brunswick No. 2, he failed to take into consideration a planned outage at Brunswick No. 1. Company witness Howe testified that an outage was scheduled for Brunswick No. 1 which would occupy approximately six months of the period the rates would be in effect. Lam's calculations did not include this outage. He testified that he did not include this outage because in contrast to the outages at Robinson No. 2 and Brunswick No. 2, the outage at Brunswick No. 1 was not a known and measurable

change at the time of the hearing. Furthermore, Howe intimated that the company was negotiating with the Nuclear Regulatory Commission to change the timing of the projected outage at the unit. In light of the testimony tending to show the uncertainty of the timing of any outage at Brunswick No. 1, we conclude that the Commission did not err in accepting Lam's calculations which failed to include the company's projected outage at that unit.

CP&L next argues that Lam's calculation is flawed by the fact that the national average capacity factors which were utilized in the calculation were out of date. We do not agree. The national averages used by Lam were for the period 1972-81. Although the company did present some evidence as to the national average of all reactors of 400 megawatts or more for the years 1982 and 1983, Lam testified that the trend for the years 1979-83 was basically flat. Furthermore, the company's evidence as to the national averages for the years 1982 and 1983 only included reactors of 400 megawatts or more and did not set out separate averages for pressurized water reactors and boiling water reactors. We conclude that Lam's calculation is not rendered invalid by the fact that the national averages which were utilized did not encompass any period beyond 1981.

Finally, the company argues that Lam's calculation is flawed because he failed to use national averages for all elements of the fuel cost calculation. CP&L argues that if national averages are to be used, they should be used for all elements of the computation. We do not agree.

It would be clearly improper to use national averages for certain elements. For example, it would not be appropriate to use the national average for the cost of coal due to the price differential to various utilities resulting from their close proximity to or long distance from the mines. For obvious reasons, it would also be inappropriate to use national climatic averages for weather normalization. However, a utility's nuclear plant capacity factor is a component of the fuel cost calculation that naturally lends itself to a comparison with those of other companies. Furthermore, we note once again that the Commission did not set total fuel cost on the basis of the unadjusted national average, but instead adjusted the average to take into consideration circumstances unique to CP&L which would impact upon the capacity factors.

We hold that the Commission did not err in finding that the test-year fuel costs were abnormal and that the company's normalized system nuclear capacity factor was 53.4%. There was competent, material, and substantial evidence that CP&L's test-year system nuclear capacity factor was abnormally low, and we find that the Commission did not err in the methodology employed to arrive at the company's normalized system capacity factor.

III.

[9] CP&L's final argument centers on the Commission's directive that it refund to its customers the funds in the deferred fuel account which the Commission ordered the company to establish in its 1983 general rate case, Docket No. E-2, Sub 461. In that case, the utility was ordered to place any fuel cost over-collections in the special account. In other words, the account would include the amount by which allowable fuel costs exceeded actual fuel costs. The Commission was to review the company's actual fuel costs in the next general rate case or in a proceeding pursuant to N.C.G.S. § 62-133.2 and require the company to refund any over-collection to the customers. However, if CP&L under-recovered its fuel costs, it would not be permitted to recover the under-collection.

At the time of the hearing, the deferred fuel account reflected over-collections of approximately $2,566,418. Approximately $173,000 of the account had been effectively refunded to the ratepayers through certain adjustments to operating and maintenance expenses, leaving a net account of $2,387,000. In order to effectuate a refund of the funds in this account, the Commission reduced the company's annual rate increase by $2,387,000.

CP&L initially contends that the "one-way true-up" established in the 1983 rate case is arbitrary and capricious and openly discriminates against the company, as it requires the company to refund any over-collections while requiring it to absorb any under-collections. CP&L contends that basic fairness and the mandate in N.C.G.S. § 62-133(a) that rates shall be fair to both the utility and the customer require that either the rates be fixed or that any "true-up" run both ways.

We find it unnecessary to decide this question. By its order in this rate case, the Commission closed out the deferred fuel ac-

count established in the 1983 general rate case. The account had a positive balance—in other words, the company had over-collected its fuel costs. This amount was ordered refunded. There was no actual under-collection, and since the account was closed, there can be no future under-collections. The question of whether a two-way true-up should have been established is therefore moot.

The company is correct, however, when it argues that the Commission erred by refunding the over-collections by deducting the amount of the deferred fuel account from CP&L's annual rate increase. This would, in effect, require the company to pay the refund annually for as long as the rates fixed in this case remain in effect. The Commission should have provided for a lump-sum refund (i.e., one-time rate reduction) or a rate reduction over a period of time. We therefore remand the case to the Commission with instructions that it take appropriate measures to correct this situation.

To summarize, we hold: (1) the Commission did not err by including $663,167,000 of CWIP in CP&L's rate base; (2) the Commission did not err in calculating CP&L's fuel costs; (3) the Commission did not err in ordering a refund of the deferred fuel account, but it did err by ordering a deduction from the company's annual rate increase in the amount of the refund. For the reasons stated herein, the order of the Commission is affirmed in part, reversed in part, and remanded to the Commission for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

LINDA JACKSON, ADMINISTRATRIX OF THE ESTATE OF MARY MAGDALENE JACKSON v. THE HOUSING AUTHORITY OF THE CITY OF HIGH POINT

No. 201A85

(Filed 2 April 1986)

Landlord and Tenant § 8.3; Negligence § 50.1— punitive damages against municipality—recoverable

The North Carolina Wrongful Death Act contains a statutory provision providing for the recovery of punitive damages from bodies politic, which includes municipal corporations, in that N.C.G.S. 28A-18-2 provides punitive

damages against a person who caused the death of the decedent through maliciousness, willful or wanton injury, or gross negligence, and N.C.G.S. 12-3 provides that the word "person" shall extend and be applied to bodies politic and corporate.

Justice MEYER dissenting.

Chief Justice BRANCH joins in the dissenting opinion.

APPEAL by the defendant as a matter of right pursuant to N.C.G.S. § 7A-30(2) from a decision of the Court of Appeals, 73 N.C. App. 363, 326 S.E. 2d 295 (1985), *Webb, J.*, dissenting, reversing dismissal of the plaintiff's claims for punitive damages in a wrongful death action.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellee.

Henson, Henson & Bayliss, by Jack B. Bayliss, Jr. and Perry C. Henson, for defendant-appellant.

BILLINGS, Justice.

The plaintiff filed an action seeking recovery against the Housing Authority of the City of High Point for the death of Mary Magdalene Jackson. On 19 February 1978 Mrs. Jackson was found dead in her apartment in the Clara Cox Apartments, a low-income housing project owned and operated by the defendant. An autopsy report indicated that the cause of death was carbon monoxide poisoning. The plaintiff alleged that carbon monoxide backed up into the apartment because the chimney pipe from the natural gas heater was blocked by a bird's nest, a bird carcass and other debris. She based her right to recover on theories of negligence, strict liability for violation of N.C.G.S. § 42-42, breach of express and implied warranties, and breach of contract. Included in the negligence and breach of warranty claims were demands for punitive damages based upon allegations of wilful, wanton and gross negligence and intentional, malicious, wilful or wanton breach of warranty.

In its answer, the defendant raised, *inter alia*, the defense, pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), that the complaint failed to state a claim upon which relief can be granted, and on 10 November 1982 it moved to dismiss the punitive damages claims. The matter came on for trial before Judge Washington at the 15

November 1982 Civil Jury Session of the Superior Court of Guilford County, High Point Division, at which time the trial judge allowed the Rule 12(b)(6) motion to dismiss the claims for punitive damages. At the close of the plaintiff's evidence, the trial court allowed the defendant's motions for directed verdict "on the plaintiff's claims for gross [sic] willful and wanton negligence, implied warranty, and express warranty." At the close of all the evidence, the trial court directed a verdict for the defendant on all claims.

On appeal to the Court of Appeals, that court reversed dismissal of plaintiff's claims based on negligence and implied warranty and of the claims for punitive damages. Judge Webb dissented from "that part of the majority opinion which holds it was error to dismiss plaintiff's claim for punitive damages." *Id.* at 374, 326 S.E. 2d at 301. He further said that, since in his opinion the evidence would not support a verdict of maliciousness, wilfulness, wantonness or gross negligence, the court did not have to decide whether punitive damages may be had in a wrongful death claim against a municipal corporation. The defendant filed notice of appeal and a petition for discretionary review of issues not raised by the dissent. The petition for discretionary review was denied.

In her brief and at oral argument, the plaintiff contended that, pursuant to Appellate Rule 16(b), only the question of sufficiency of the evidence to support an award of punitive damages is before this Court, and we should not consider whether under the law a claim for punitive damages may be maintained against a municipal corporation in a wrongful death action. The defendant contends that the question of sufficiency of the evidence was never before the Court of Appeals since the punitive damage claims had been dismissed pursuant to a Rule 12(b)(6) motion prior to trial, and that the trial judge's subsequent directed verdict on that portion of the case was surplusage. Thus, it contends, the Court of Appeals could only determine the legal sufficiency of the claim alleged in the complaint, and the dissent from "that part of the majority opinion which holds it was error to dismiss plaintiff's claim for punitive damages" necessarily was a dissent from reversal of the Rule 12(b)(6) dismissal.

While we concede that there has been some procedural confusion in this matter, it also is apparent that both parties appeared in this Court prepared to argue the question of the legal availability of a punitive damages claim against a municipal corporation in a wrongful death action. Thus, to the extent that there is technical merit to the plaintiff's contention, we have chosen to exercise our authority under Appellate Rule 2 to consider the question, since it was fully argued by both parties.

In *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982) this Court held that "in the absence of statutory provisions to the contrary, municipal corporations are immune from punitive damages" (*id.* at 208, 293 S.E. 2d at 115) regardless of whether the function of the municipality is governmental or proprietary.* In *Cox v. Kinston*, 217 N.C. 391, 8 S.E. 2d 252 (1940) and *Wells v. Housing Authority*, 213 N.C. 744, 197 S.E. 693 (1938) we held that a public housing authority is a municipal corporation. Thus, there is no question but that the defendant is immune from a claim for punitive damages in a common law negligence action.

The plaintiff contends that by specifically including punitive damages as an item of damages recoverable in a wrongful death action under N.C.G.S. § 28A-18-2, the General Assembly has provided a statutory exception to the common law prohibition on punitive damages against municipal corporations. We agree and affirm the decision of the Court of Appeals.

The plaintiff contends that "[a]lthough punitive damages are generally not recoverable against a municipal corporation, they are recoverable where expressly authorized by statute," and that since punitive damages are expressly authorized in N.C.G.S. § 28A-18-2, they may be recovered from a municipal corporation in an action under the statute. Thus, the plaintiff would have us construe the *Long* decision to mean that the exception to the common law prohibition exists whenever a statute authorizes punitive damages, not only when the statute expressly authorizes the recovery of punitive damages against a municipal corporation. We do not so read the *Long* decision.

* No question has been raised on this appeal about the general immunity of a municipal corporation from any liability in tort resulting from negligence in performing a governmental function, in the absence of waiver of immunity by the purchase of liability insurance. *See* N.C.G.S. § 160A-485.

The phrasing of the rule prohibiting punitive damages employed by the plaintiff is not the phrasing of this Court's holding in *Long*. Even if there is some ambiguity in the statement employed by the plaintiff, which is taken from an early portion of the Court's discussion in *Long* of the rule of law, the actual *holding* of the Court is not subject to a similar ambiguity. That holding is that "in the absence of statutory provisions to the contrary, municipal corporations are immune from punitive damages." *Long v. City of Charlotte*, 306 N.C. at 208, 293 S.E. 2d at 115. This clearly states that the statutory provision must remove the *immunity of municipal corporations*, not merely provide for punitive damages, before the immunity of the common law is abrogated.

The plaintiff further contends that the immunity is statutorily abrogated when N.C.G.S. § 28A-18-2 is read in conjunction with N.C.G.S. § 12-3(6).

N.C.G.S. § 12-3 (1981), Rules for construction of statutes, provides *inter alia* that, "unless such construction would be inconsistent with the manifest intent of the General Assembly, . . . (6) . . . The word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary."

Pertinent parts of N.C.G.S. § 28A-18-2 (1984) provide as follows:

> (a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, *the person* or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages . . . .
>
> (b) Damages recoverable for death by wrongful act include:
>
> . . .
>
> (5) Such punitive damages as the decedent could have recovered had he survived, *and punitive damages for wrongfully causing the death of the decedent through*

maliciousness, wilful or wanton injury, or gross negligence;

. . .

[Emphasis added.]

We must assume that at the time the General Assembly enacted N.C.G.S. § 28A-18-2, it was aware of the rules of statutory construction contained in N.C.G.S. § 12-3(6), and that if it had intended a limitation on the word "person" at any place in N.C.G.S. § 28A-18-2, it would have so provided. In fact, no limitation is made, and there is no contention by the defendant that N.C.G.S. § 28A-18-2(a) does not apply to governmental entities such as municipal corporations. Therefore, a wrongful death action may be maintained against a municipal corporation.

Subdivision (b)(5) of N.C.G.S. § 28A-18-2 contains two provisions for punitive damages in a wrongful death action. The first of these is "[s]uch punitive damages as the decedent could have recovered had he survived." Because the deceased could not have recovered punitive damages in a common law tort action for personal injuries against the municipality if she had survived, this portion of the statute does not authorize the recovery of punitive damages against a municipal corporation in a statutory action for wrongful death. However, the statute goes further and provides additionally for "punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence."

By reading portions of N.C.G.S. § 12-3(6) into N.C.G.S. § 28A-18-2, we must construe that statute as follows:

> (a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the [body politic] or corporation that would have been so liable . . . shall be liable to an action for damages . . . .
>
> (b) Damages recoverable for death by wrongful act include:
>
> . . .

> (5) . . . punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence.

Read in this fashion, the North Carolina Wrongful Death Act *does* contain a statutory provision providing for the recovery of punitive damages from bodies politic, which includes municipal corporations.

We recognize that the policy reasons set forth in the *Long* case for exempting municipal corporations from punitive damages claims may apply as well to actions for wrongful death as to actions for personal injury. However, the General Assembly has chosen to remove the immunity in case of wrongful death.

Because the claims for punitive damages were dismissed before trial, we do not consider whether the evidence offered at trial was sufficient to justify submission to the jury of the punitive damages claims. Although the plaintiff has not identified evidence which she would have introduced had the claims not been dismissed, we cannot assume that the dismissal which removed those issues from the trial did not have an effect upon the plaintiff's presentation of evidence.

The decision of the Court of Appeals reversing the dismissal of the plaintiff's claim for punitive damages is affirmed.

Affirmed.

Justice MEYER dissenting.

I respectfully dissent. Two grievous faults are apparent in the majority opinion. First, it does violence to the Wrongful Death Act by allowing recovery for a species of damages in a situation where they could not have been recovered by the deceased had she lived. Second, our cases, including our recent decision in *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982), prohibit recovery of punitive damages against a municipality "unless *expressly* authorized by statute," and the majority has allowed such a recovery by what is, at best, a mere statutory *implication.*

The basic premise of N.C.G.S. Chapter 28A is that there can be a recovery for wrongful death *only* where the injured person, had he lived, could have brought an action for such damages.

> (a) When the death of a person is caused by a wrongful act, neglect or default of another, *such as would, if the injured person had lived, have entitled him to an action for damages therefor*, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages . . . .

N.C.G.S. § 28A-18-2 (1984 & Cum. Supp. 1985) (emphasis added).

It is abundantly clear from *Long* that, had the deceased here lived, she could not have recovered punitive damages from the defendant Housing Authority in a common law negligence action for personal injuries. Under the majority's holding in this case, punitive damages are allowed *even though they could not have been recovered by the deceased had she lived.* I find very strange indeed the majority's reasoning that, under the facts of this case, the Wrongful Death Act provides one species of punitive damages for which a municipality is not liable because the deceased could not have recovered them had she lived and another for which the municipality *is* liable because the act "provides additionally for" such damages, even if the decedent could not have recovered them had she lived, where the claim is based on maliciousness, willful or wanton injury, or gross negligence. Having conceded that the personal representative cannot recover the first species of punitive damages (those which the decedent might have recovered had she lived) from the municipality because of its immunity, the majority now reasons that the personal representative *may* recover the second species of punitive damages (those arising from the fact of death by means specified in the statute) from the municipality because the decedent died rather than lived. In other words, the majority reasons that the municipality is immune from one species of punitive damages, but not the other. The majority finds "express" statutory authority for this result by reading the definitions section of N.C.G.S. Chapter 12 into the punitive damages section of the Wrongful Death Act, N.C.G.S. § 28A-18-2(b)(5).

The rule in this state, as well as in an overwhelming majority of jurisdictions (and, indeed, the rule may now be universal), is "that no punitive damages are allowed against a municipal cor-

poration unless *expressly* authorized by statute." *Long v. City of Charlotte*, 306 N.C. at 207, 293 S.E. 2d at 114 (emphasis added). *See also Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 260 n. 21, 69 L.Ed. 2d 616, 628 n. 21 (1981); *Rieser v. District of Columbia*, 563 F. 2d 462, 481 (D.C. Cir. 1977), *modif. on other grounds*, 580 F. 2d 647 (D.C. Cir. 1978); *Smith v. District of Columbia*, 336 A. 2d 831, 832 (D.C. App. 1975); *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965); *Foss v. Maine Turnpike Authority*, 309 A. 2d 339, 345-46 (Me. 1973); *Desforge v. City of West Saint Paul*, 231 Minn. 205, 208, 42 N.W. 2d 633, 634 (1950); *Chappell v. City of Springfield*, 423 S.W. 2d 810, 812-15 (Mo. 1968); *Brown v. Village of Deming*, 56 N.M. 302, 316, 243 P. 2d 609, 618 (1952); *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 6-8, 321 N.E. 2d 885, 888-89 (1975); *Township of Bensalem v. Press*, --- Pa. Commw. ---, ---, 501 A. 2d 331, 337 (1985); 18 E. McQuillin, The Law of Municipal Corporations § 53.18a (3d ed. 1984); 4 C. D. Sands & M. Libonati, Local Government Law § 27.19 (1985); Hines, *Municipal Liability for Exemplary Damages*, 15 Clev-Mar L. Rev. 304, 304 (1966); Annot., *Recovery of Exemplary or Punitive Damages From Municipal Corporation*, 1 A.L.R. 4th 448 (1980); 57 Am. Jur. 2d, Municipal, Etc., Tort Liability §§ 318-322 (1971 & Cum. Supp. 1985).

My research has disclosed only two states that have, at some time in the past, allowed the recovery of punitive damages against a municipality in the face of a defense of immunity—Iowa and New York. Those holdings in both states have now been abrogated by later case law or statute. In *Young v. City of Des Moines*, 262 N.W. 2d 612 (Iowa 1978), the Iowa Supreme Court rejected the various policy arguments militating against the assessment of punitive damages against a municipality and opined that permitting such a recovery would result in greater care being taken in the selection and training of municipal employees. In 1982, however, the Iowa Code was amended to expressly exempt municipalities from liability for punitive damages. Iowa Code Ann. § 613A-4(5) (Cum. Supp. 1985).

The New York position had long been uncertain as a result of inconsistent lower court decisions, *Sharapata v. Town of Islip*, 82 A.D. 2d 350, 441 N.Y.S. 2d 275, *aff'd*, 456 N.Y. 2d 332, 452 N.Y.S. 2d 347, 437 N.E. 2d 1104 (1982), but punitive damages have been allowed in that state. *E.g., Hayes v. State*, 80 Misc. 2d 498, 363 N.Y.S. 2d 986 (1975), *rev'd on other grounds and punitive damages*

issue not reached, 50 A.D. 2d 693, 376 N.Y.S. 2d 647, *aff'd per curiam and punitive damages issue not reached*, 40 N.Y. 2d 1044, 392 N.Y.S. 2d 282, 360 N.E. 2d 959 (1976). However, the New York Court of Appeals definitively held in 1982 that "the waiver of sovereign immunity effected by section 8 of the Court of Claims Act does not permit punitive damages to be assessed against the State or its political subdivisions." *Sharapata v. Town of Islip*, 56 N.Y. 2d at 334, 452 N.Y.S. 2d at 348, 437 N.E. 2d at 1105.

Additionally, the federal district court, applying Pennsylvania law in *Hennigan v. Atlantic Refining Co.*, 282 F. Supp. 667 (E.D. Pa. 1967), *aff'd*, 400 F. 2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904, 23 L.Ed. 2d 216 (1969), held that the city could be liable for punitive damages in a wrongful death action in light of a city ordinance waiving immunity from tort liability even for governmental functions and in light of recent Pennsylvania Supreme Court decisions abrogating immunity for charitable institutions. However, when squarely faced with the issue, the Pennsylvania Commonwealth Court rejected the "legal argument that waiver of sovereign immunity implicitly permit[s] assessment of punitive damages against a municipality" and clearly aligned itself with the "better reasoned" majority view which requires specific statutory authorization. *Township of Bensalem v. Press*, --- Pa. Commw. ---, ---, 501 A. 2d 331, 338.

The rule reiterated in *Long* is founded upon strong public policy considerations which were stressed in our opinion in that case:

> In *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 69 L.Ed. 2d 616 (1981), the United States Supreme Court held that a municipality is immune from punitive damages under 42 U.S.C. § 1983. In that case the Court examined at length the historical and public policy considerations of allowing punitive damages against municipalities and other governmental agencies and concluded that neither consideration supports exposing a municipality to punitive damages for the bad faith actions of its officials.
>
> > Punitive damages by definition are not intended to compensate the injured party, but rather to *punish* the tortfeasor whose wrongful action was intentional or malicious, and to *deter* him and others from similar ex-

> treme conduct. (Citations omitted.) Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort . . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers (emphasis added).

453 U.S. at 266-67; 69 L.Ed. 2d at 632.

Ordinarily it is the wrongdoer himself who is made to suffer for his conduct by the imposition of punitive damages—here it is the governmental entity itself. The retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages.

With regard to the deterrent aspect, the Court noted that it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the threat of large punitive awards against the wealth of their municipality and its taxpayers. This is particularly true in the absence of a law making indemnification available to the municipality. Likewise, there is no reason to suppose that corrective action such as discharge of the offending officials who were appointed or the removal of those who were elected will occur simply because punitive damages are awarded against the municipality. 453 U.S. at 268-69; 69 L.Ed. 2d at 632-33.

We believe that public policy considerations[10] mitigating against allowing assessment of punitive damages are compelling and are applicable to the actions of municipal corporations without regard to whether the function is governmental or proprietary. We hold that in the absence of statutory provisions to the contrary, municipal corporations are immune from punitive damages. The trial court did not err in striking those allegations of the complaint alleging punitive damages.

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10. With regard to public policy considerations, the United States Supreme Court in *Newport* sounded an alarm in view of the anticipated effect of one of its recent opinions broadening the liability of municipalities:

> Finally, although the benefits associated with awarding punitive damages against municipalities under § 1983 are of doubtful character, the costs may be very real. In light of the Court's decision last Term in *Main [sic] v. Thiboutot*, 448 U.S. 1, 65 L.Ed. 2d 555, 100 S.Ct. 2502 (1980), the § 1983 damages remedy may now be available for violations of federal statutory as well as constitutional law. But cf. *Middlesex Cty. Sewerage Authority v. National Sea Clammers Assn.*, [453] U.S. [1], 69 L.Ed. 2d 435, 101 S.Ct. [2615] (1981). Under this expanded liability, municipalities and other units of state and local government face the possibility of having to assure compensation for persons harmed by abuses of governmental authority covering a large range of activity in everyday life. To add the burden of exposure for the malicious conduct of individual government employees may create [a] serious risk to the financial integrity of these governmental entities.
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> 453 U.S. at 270, 69 L.Ed. 2d at 634.

Long v. City of Charlotte, 306 N.C. at 207-08 & n. 10, 293 S.E. 2d at 114 & n. 10 (emphasis in original; citations omitted in original).

Requiring the taxpayers to respond with punitive damages in this case will serve no retributive or deterrent purpose. In an analogous situation, the Court of Appeals, in *Thorpe v. Wilson*, 58 N.C. App. 292, 293 S.E. 2d 675 (1982) (Chief Judge Morris writing), said this:

> The general rule in this and other jurisdictions is that there can be no recovery for punitive damages against the personal representative of the deceased wrongdoer, however aggravated the circumstances may be. *McAdams v. Blue*, 3 N.C. App. 169, 164 S.E. 2d 490 (1968). The sole purpose of the allowance of punitive damages is to punish the wrongdoer. The death of the wrongdoer precludes his being punished by the assessment of punitive damages. By statute, G.S. 28A-18-2(b)(5), plaintiff could recover "Such punitive damages as the *decedent* could have recovered had he survived . . ." but we find no statutory provision allowing the recovery of punitive damages in a case where the wrongdoer does not survive. The punitive damage claim was properly dismissed . . . .

58 N.C. App. at 299, 293 S.E. 2d at 680 (emphasis in original).

The compelling public policy considerations underlying immunity from punitive damages by municipal corporations may not and should not be summarily abrogated under the guise of the kind of statutory construction employed by the majority here. *Cf.*

Newport v. Facts Concerts, Inc., 453 U.S. 247, 69 L.Ed. 2d 616. The majority has correctly stated that the holding in *Long* contemplates that, in order for a municipality to be liable for punitive damages, there must exist a "statutory provision [which] remove[s] the *immunity of municipal corporations*, not [one which] merely provide[s] for punitive damages." Yet, despite this clear recognition of the rule, the majority has reached its conclusion by the simple tactic of reading the words "body politic" into a statutory provision which "merely provides for punitive damages." Nowhere in N.C.G.S. § 28A-18-2 does the legislature "remove the immunity of municipal corporations" for punitive damages.

It is manifestly unreasonable to suppose that *Long* stands for the proposition that substituting the words "body politic" for the word "person" in a statutory provision *merely providing for punitive damages* amounts to a statutory provision *expressly* removing the immunity of municipal corporations for such damages. Such a tortured construction cannot have been intended by the General Assembly and was not contemplated by our opinion in *Long*. *Long* requires *express* statutory authority before punitive damages may be recovered against a municipal corporation. Our General Assembly knows how to expressly remove immunity from municipal corporations, as evidenced by N.C.G.S. § 160A-485 (". . . no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance"). Had our legislature intended to authorize the recovery of punitive damages in this situation, it could have done so by including "municipal corporations" when it provided "the person or corporation" language in the wrongful death statute. The reasoning of the majority in its analysis that the definition of person in the remote N.C.G.S. § 12-3(6) should be read into the wrongful death provision of N.C.G.S. Chapter 28A is strained and untenable. It is inescapable that the Wrongful Death Act contains no "express statutory authority" for recovery of punitive damages against municipalities as required by *Long*. It is only by reading the statutory definitions in N.C.G.S. Chapter 12 into N.C.G.S. Chapter 28A that there is even a statutory *implication* that recovery of punitive damages may be had against a body politic. This is not the kind of "express" statutory authority contemplated by this Court in *Long*. I consider it not only

unnecessary, but improper, for this Court to judicially impose liability where none is imposed by the body responsible for abolition or modification of such immunity. *See Steelman v. City of New Bern*, 279 N.C. 589, 595, 184 S.E. 2d 239, 243 (1971) ("any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court").

Our state and municipal officials must presume that the majority's decision will allow recovery of punitive damages for wrongful *death* (second species only) to all proprietary functions and, to the extent covered by insurance, to governmental functions unless statutory law otherwise prohibits it. The consequences which flow from the majority opinion may be extremely serious for the taxpayers because of the exposure it creates for all units of state and local government. A very large jury verdict awarding punitive damages for a wrongful death against a small municipality may indeed prove to be devastating. I reiterate what the United States Supreme Court said, in a somewhat different context, in *Newport*:

> Under this expanded liability, municipalities and other units of state and local government face the possibility of having to assure compensation for persons harmed by abuses of governmental authority covering a large range of activity in everyday life. To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities.
>
> The Court has remarked elsewhere on the broad discretion traditionally accorded to juries in assessing the amount of punitive damages. . . . Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large.

Newport, 453 U.S. at 270-71, 69 L.Ed. 2d at 634 (citations omitted).

I vote to reverse the decision of the Court of Appeals and hold that the clear mandate of *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101, disallows a claim for punitive damages against the municipal corporation in this case.

Chief Justice BRANCH joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. GARY HANSFORD MILLER AND ALAN RAY HATTAWAY

No. 317A85

(Filed 2 April 1986)

1. **Criminal Law § 138.21 — second degree murder — heinous, atrocious or cruel aggravating circumstance**

The evidence was sufficient to show that the victims endured psychological and physical suffering beyond that normally present in a second degree murder so as to support the trial court's finding as an aggravating factor that the killings were especially heinous, atrocious or cruel where it tended to show: (1) defendants forced their way into the first victim's motel room, hit him on the head with a gun, strip searched him, and forced him to go with them to a drive-in; en route to this destination, one defendant pointed a gun at the victim and others in the vehicle, and the victim told his girl friend that he was a "dead man"; at the drive-in, defendants transferred the victim and his girl friend to a car and tied them up with a rope; they were then driven for about two hours to a garage in another county where the victim was blindfolded and gagged; the victim was then driven approximately five miles on a "bumpy" road, taken from the vehicle, walked through the woods to a mine shaft, and pushed into the 250-foot mine shaft after a struggle with his captors; and the victim lived briefly after receiving massive injuries from the fall in the shaft; and (2) defendants kidnapped the second victim, taped his hands and arms together, put him in the trunk of one defendant's car, and then drove for approximately two hours to another county; defendants handcuffed the victim to a tree in the woods in mid-winter for approximately four hours; the victim was later released from the tree and taken to a garage where he was forced to transfer marijuana to the second defendant; the victim was then blindfolded, driven to a mine, walked up a path, and pushed into the mine shaft; after getting caught on a tree root approximately ten feet down in the shaft, the victim was pulled out of the shaft and pushed in again; and the victim took one and one-half to two breaths after falling to the bottom of the shaft.

2. **Criminal Law § 138.14 — cases consolidated for judgment — aggravating and mitigating factors — findings as to all offenses not necessary**

When cases are consolidated for judgment and the trial judge finds aggravating and mitigating factors for the most serious offense for which defendant

is being sentenced, defendant is not prejudiced by the judge's failure to make findings as to the lesser offenses consolidated so long as the sentence given does not exceed the maximum sentence permissible for the most serious offense. N.C.G.S. § 15A-1340.4(b).

APPEAL by the State of North Carolina pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 74 N.C. App. 760, 330 S.E. 2d 71 (1985), vacating and remanding for resentencing judgments entered 10 February 1984 in Superior Court, BUNCOMBE County, by *Sitton, J.* Heard in the Supreme Court 21 November 1985.

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

J. Robert Hufstader, Public Defender for the Twenty-Eighth Judicial District, for defendant-appellee Gary Hansford Miller.

J. Stephen Gray, for defendant-appellee Alan Ray Hattaway.

FRYE, Justice.

By this appeal, the State seeks reversal of the decision of the Court of Appeals granting defendants a new sentencing hearing. First, the State contends that the Court of Appeals erred in holding that the trial court incorrectly found as an aggravating factor that the killings were especially heinous, atrocious, or cruel. Secondly, the State argues that the Court of Appeals erred in holding that a trial judge must find separate aggravating and mitigating factors for each offense when cases are consolidated for judgment. Having carefully reviewed the Court of Appeals' opinion, the parties' arguments, and the relevant law, we reverse the Court of Appeals' ruling that defendants are entitled to a new sentencing hearing.

Defendants Miller and Hattaway were indicted for first degree kidnapping of Thomas Forrester, first degree kidnapping of Betty Darlene Callahan, first degree murder of Forrester, first degree kidnapping of Lonnie Marshall Gamboa, and first degree murder of Gamboa. Pursuant to a plea bargain agreement, each defendant entered pleas of guilty to two counts of second degree murder and three counts of first degree kidnapping. At the hearing to establish a factual basis for the pleas, the State presented the testimony of Ross Robert Robinson and William R. Buckner,

together with some fifty-three exhibits. The testimony established that on 12 December 1981 defendants believed that Thomas "Tommy" Forrester had stolen defendant Hattaway's motorcycle. Defendants borrowed a van from Danny Roberts and went to the residence of Jay Fagel seeking information as to Forrester's whereabouts. Defendants, Fagel, and Fagel's nine-year-old son went to the In Town Motel where Forrester was staying with his girlfriend, Betty Darlene Callahan. Defendants forced their way into Forrester's motel room and questioned Forrester about the motorcycle and some money that Forrester owed Hattaway relating to a drug deal. Miller hit Forrester on the side of his head with a pistol. Defendants ransacked the motel room and strip searched Forrester and Callahan. The motorcycle was loaded into the van, and defendants, Forrester, Callahan, Fagel and his son left the motel.

Defendant Miller drove the van to the Park Drive-In in Asheville, while Hattaway sat in the front passenger seat pointing a gun at Forrester, Callahan, and the Fagels. When they parked the van at the drive-in, Miller got out and was gone briefly. During this time, Forrester told Callahan that he was a "dead man." Shortly thereafter, a car drove up beside the van and Callahan and Forrester were transferred to this vehicle and tied up with a rope.

Miller began to drive toward Newport, Tennessee. While at a rest area, Hattaway stated to Miller, "I've changed my mind. I want to take him to the other place." Callahan and Forrester were then driven to a garage area on Paul Bare's property in Ashe County. The ride from the drive-in to Newport, Tennessee, then to Bare's property took about two hours. Both Forrester and Callahan were gagged and blindfolded after they arrived at Bare's garage. They were put in a pickup truck and driven approximately five miles on a "bumpy type road up into an area." Upon their arrival at the planned destination, Forrester was taken from the truck by Hattaway and an unidentified man while Miller remained in the truck with Callahan. After some time had elapsed, two people returned to the truck. The truck was driven back to Bare's residence and Callahan's blindfold was removed. She was subsequently taken to Chicago, Illinois, where she was forced to work as a prostitute for a motorcycle gang.

In November 1981, there was a shoot-out at defendant Miller's house due to a dispute concerning drugs. Lonnie Marshall Gamboa was involved in this incident. There were arrests made and a preliminary hearing was held. On 23 December 1981, Gamboa met with Larry Smith, an attorney, at which time Gamboa obtained a copy of the transcript from the hearing and asked Smith to draft a deed conveying some of Gamboa's land to defendant Hattaway's father. Gamboa told Smith that he was obtaining the deed because Alan Hattaway was putting pressure on him.

Later that day, Jo Jo Vines, at the request of defendant Hattaway, picked up Gamboa and took him to a bar on Swannanoa River Road where they met Hattaway. Hattaway took the transcript that Gamboa had brought for him and said that he wanted to read it but not in the bar. Therefore, Gamboa, Vines and Hattaway got into Hattaway's car and drove to Sarge's Lounge where they met Miller. Miller got into the car and pointed a pistol at Gamboa. The other men in the car disarmed Gamboa, taped his hands and arms together, and put him in the trunk of the car. The men then drove to Paul Bare's residence in Ashe County, which is about a two-hour drive from Sarge's Lounge. Vines and Miller removed Gamboa from the trunk and handcuffed him to a tree in the woods. Gamboa remained in this position for approximately four hours. This incident occurred during mid-winter and Gamboa was lightly dressed.

When Bare and Miller finally released Gamboa from the tree, they took him to Bare's garage. Bare and Miller talked to Gamboa about paying a drug debt that he owed Miller and forced Gamboa to instruct his wife to transfer some marijuana to some of Miller's friends to help pay off the debt. After the call had been made, Miller and Bare told Gamboa that they were going to take him to see someone with whom he could make arrangements to pay the balance of the debt. Bare blindfolded Gamboa, and then Bare, Vines, Miller and Gamboa got into a truck and drove to Ore Knob Mine. Hattaway followed them in a car but stopped at the road leading to the mine to serve as a lookout. Vines took Gamboa inside the fenced-in area surrounding the mine shaft and, after receiving instructions from Bare and Miller, pushed Gamboa into the shaft. Because Gamboa got hung up on a tree root during the fall, Vines pulled him out and pushed him in again. The men

threw rocks in after Gamboa to make sure that he was not lodged anywhere in the mine shaft.

On 25 January 1982, the bodies of Thomas Forrester and Lonnie Marshall Gamboa were found at the bottom of the Ore Knob Mine. The autopsies revealed that both men died of massive blunt trauma but were alive at the time of impact on the floor of the shaft and had lived long enough to take one and a half or two breaths.

At the conclusion of the hearing, the court found that there was a factual basis for the entry of each plea, made other appropriate findings, and ordered the pleas recorded. Under the terms of the plea bargain, the two first degree kidnapping cases which led to the Forrester murder (kidnapping of Forrester and Callahan) were consolidated for judgment with the Forrester murder case, and the first degree kidnapping of Lonnie Marshall Gamboa was consolidated for judgment with the Gamboa murder case.

At the sentencing hearing, the State presented evidence of other crimes committed by defendant Miller and that defendant Miller was on pretrial release on a charge of possession with intent to sell and deliver a controlled substance at the time of the commission of these offenses. The State relied on the evidence presented at the previous hearing for whatever aggravating factors that evidence might prove as to defendant Hattaway. Defendant Miller presented ten character witnesses and defendant Hattaway twenty-six.

Following the sentencing hearing, the trial judge made specific findings of fact in aggravation and mitigation in each of the two murder cases. The court did not make separate findings in aggravation and mitigation as to the kidnapping cases which were consolidated for judgment with the murder cases. Among other factors found in aggravation, the court found that each killing was especially heinous, atrocious, or cruel. Both defendants excepted to this finding. The judge sentenced each of the defendants to two terms of forty-five years imprisonment to be served consecutively.

The Court of Appeals, in a divided opinion, held that the trial court erred by finding that the killings were especially heinous,

atrocious, or cruel and that the trial court erred by failing to make separate findings in aggravation and mitigation for each of the consolidated offenses. The judgments were thus vacated and the cases remanded for resentencing. 74 N.C. App. 760, 330 S.E. 2d 71. One judge dissented, believing that the evidence was sufficient to support the finding in each murder case that the offense was especially heinous, atrocious, or cruel, *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), and that "the findings in aggravation and mitigation were sufficiently tailored to the murder pleas pursuant to *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983) . . . ." *Id.* at 766-67, 330 S.E. 2d at 74, Webb, J., dissenting. For the reasons indicated hereinafter, we agree with the dissenting opinion.

I.

[1] The State argues that the Court of Appeals erred in holding that the trial judge incorrectly found as an aggravating factor that the killings were especially heinous, atrocious, or cruel. Defendants, on the other hand, contend that the facts in this case do not show excessive brutality, physical pain, psychological suffering, dehumanizing aspects or torture not normally present in second degree murder, and therefore the Court of Appeals was correct in reversing the decision of the trial court.

In *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689, this Court first considered how to interpret the Fair Sentencing Act's aggravating factor, especially heinous, atrocious, or cruel. We looked for guidance in interpreting this factor to the comparable aggravating factor in the Death Penalty Statute, N.C.G.S. § 15A-2000(e)(9). In *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783, this Court clarified its holding in *Ahearn* as follows:

> While it is instructive to turn to our capital cases for a *definition* of an especially heinous, atrocious, or cruel offense, we decline to measure the facts of those capital cases against the facts of the cases decided under G.S. § 15A-1340.4(a)(1)f. Rather, the focus should be on whether the facts disclose *excessive* brutality, or physical pain, psychological suffering or dehumanizing aspects *not normally present in that offense.*

309 N.C. at 413-14, 306 S.E. 2d at 786. (Emphasis in original.)

In *Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783, defendant was convicted of second degree murder. We held that the trial court did not err in finding that the murder was especially heinous, atrocious, or cruel where the record supported a conclusion that the victim was shot twice, that death was not immediate and that the victim suffered unnecessary physical pain prior to death. In discussing the facts shown by the report of the examining pathologist, this Court said that it was not "inappropriate in any case to measure the brutality of the crime by the extent of the physical mutilation of the body of the deceased or surviving victim." *Id.* at 415, 306 S.E. 2d at 787.

In *State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983), defendant entered a plea of guilty of second degree murder. The evidence disclosed that the victim was beaten with a stick, fracturing his skull in several places and driving the orb of one eye into the brain. We held that the evidence supported the trial court's finding that the beating was especially heinous, atrocious, or cruel.

In *State v. Payne*, 311 N.C. 291, 316 S.E. 2d 64 (1984), defendant's plea of guilty to second degree murder and sentence of life imprisonment were upheld notwithstanding defendant's contention that there was no mutilation of the victim's body and that the defendant did not intend to inflict blows sufficient to cause the victim's death. This Court noted that the victim was brutally beaten, kicked and "body slammed" into the floor, his injuries were extensive and he suffered continuous and extreme pain as a result. The trial court's finding that the murder was especially heinous, atrocious, or cruel was upheld.

In *State v. Brown*, 314 N.C. 588, 336 S.E. 2d 388 (1985), defendants also entered a plea of guilty to second degree murder. The evidence disclosed that the defendant led his unsuspecting victim into a room in which he was surprised by a codefendant brandishing a gun. The two defendants bound the victim's arms and legs together, tied him to a bedpost, forced a towel down his throat, robbed him and carried him to the basement and dumped him there. Defendants contended that the trial court erred in finding that the offense was especially heinous, atrocious, or cruel. This Court found sufficient evidence from which the sentencing judge could find that the victim suffered psychologically

and physically in a manner not normally present in second degree murders. Thus we held that the trial judge did not err in finding that the offenses were especially heinous, atrocious, or cruel.

We believe there is sufficient evidence in this case from which the trial judge could find that the victims suffered psychologically and physically in a manner not normally present in second degree murders. In the case of Thomas Forrester, defendants forced their way into his motel room, hit him on the side of his head with a gun and then strip searched him. Defendants forced Forrester to go with them to a drive-in in Asheville. En route to this destination, defendant Hattaway sat in the front seat of the van and pointed a gun at Forrester and others in the vehicle. Forrester, at one point during the journey, told his girlfriend that he was a "dead man."

At the drive-in, defendants transferred Forrester and Callahan to a car and tied them up with a rope. They were driven for about two hours to a garage in Ashe County. Forrester was blindfolded and gagged, and driven approximately five miles on a "bumpy" road. Forrester was taken from the vehicle, walked through the woods to the Ore Knob mine shaft, and pushed into the 250-foot mine shaft after a struggle with his captors. The autopsy report showed that Forrester lived briefly after receiving massive injuries from the fall. Those injuries included multiple abrasions on his body, multiple fractured ribs, severance of his right ear and tears to the left lung, left kidney and spleen.

In the case of Lonnie Marshall Gamboa, defendants kidnapped him, taped his hands and arms together, put him in the trunk of defendant Hattaway's car and then drove for approximately two hours to Ashe County. Gamboa was handcuffed to a tree in the woods in mid-winter for approximately four hours. The victim was later released from the tree and taken to a garage where he was forced to transfer some marijuana to defendant Miller. Then Gamboa was blindfolded, driven to Ore Knob Mine, walked up a path, and pushed into the mine shaft. After getting caught on a tree root approximately ten feet down in the shaft, he was pulled out of the shaft and pushed in again. The autopsy report showed that Gamboa, as did Forrester, took one and one-half to two breaths after falling to the bottom of the shaft.

The foregoing constitutes sufficient evidence for the trial judge to find that the victims in this case endured psychological and physical suffering beyond that normally present in a second degree murder. Therefore, the Court of Appeals erred in holding that the trial judge improperly found as an aggravating factor that the murders were especially heinous, atrocious, or cruel.

II.

[2] The State next contends that the Court of Appeals erred in holding that the trial court's failure to make separate findings of aggravating and mitigating factors as to the kidnapping convictions which were consolidated for judgment with the murder convictions was error. Defendants contend that the rule set forth in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689, requires the trial judge to make findings of aggravating and mitigating factors for each of the offenses for which defendant was convicted, whether consolidated for hearing or judgment purposes. We disagree.

The applicable statute in this case is N.C.G.S. § 15A-1340.4(b) which provides that:

> (b) If the judge imposes a prison term for a felony that differs from the presumptive term provided in subsection (f) . . . the judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence. If he imposes a prison term that exceeds the presumptive term, he must find that the factors in aggravation outweigh the factors in mitigation, and if he imposes a prison term that is less than the presumptive term, he must find that the factors in mitigation outweigh the factors in aggravation. However, a judge need not make any findings regarding aggravating and mitigating factors . . . if when two or more convictions are consolidated for judgment he imposes a prison term (i) that does not exceed the total of the presumptive terms for each felony so consolidated, (ii) that does not exceed the maximum term for the most serious felony so consolidated, and (iii) that is not shorter than the presumptive term for the most serious felony so consolidated.

Kidnapping in the first degree is a class D felony, punishable by a maximum prison term of forty years with a presumptive

term of twelve years. N.C.G.S. § 14-1.1(a)(4) (1981); N.C.G.S. § 15A-1340.4(f)(2) (1983). Murder in the second degree is a class C felony, punishable by a maximum prison term of fifty years or life with a presumptive term of fifteen years. N.C.G.S. § 14-1.1(a)(3) (1981); N.C.G.S. § 15A-1340.4(f)(1) (1983). Thus, the sentence of forty-five years imprisonment in the consolidated Forrester judgment exceeded by six years the total of the presumptive terms for the kidnapping of Callahan and Forrester (twelve years each) and the Forrester murder (fifteen years). Likewise, the sentence of forty-five years imprisonment in the consolidated Gamboa judgment exceeded by eighteen years the total of the presumptive terms (kidnapping—twelve years and second degree murder—fifteen years) for the two felonies so consolidated. Therefore, in order for the trial judge to sentence defendants to the forty-five year terms of imprisonment, it was necessary for him to "list in the record each matter in aggravation or mitigation that he finds proved .by a preponderance of the evidence" and find that "the factors in aggravation outweigh the factors in mitigation . . . ." N.C.G.S. § 15A-1340.4(b) (1983). This the trial judge did in the second degree murder cases, clearly "the most serious felony so consolidated." Having done so, he could have sentenced defendants to a maximum prison term of fifty years or life. N.C.G.S. § 15A-1340.4(b); N.C.G.S. § 14-1.1(a)(3). Instead, he gave sentences of forty-five years imprisonment, well within the maximum terms permissible for class C felonies. Nevertheless, defendants contend that it was also necessary for the trial judge to make separate findings of aggravating and mitigating factors as to the kidnapping convictions which were consolidated for sentencing with the more serious murder convictions. They contend that the rule of *Ahearn* so requires.

This Court in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689, discussed the necessity of appropriate findings as follows:

> [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.

307 N.C. at 598, 300 S.E. 2d at 698 (emphasis added). *Ahearn* speaks to the necessity of separate findings where cases are consolidated for trial or hearing. It does not speak to the question of whether separate findings must be made where cases are consolidated for *judgment*, that is, two or more convictions but only one sentence. However, this Court has addressed this issue in at least two cases since *State v. Ahearn* was decided: *State v. Higson*, 310 N.C. 418, 312 S.E. 2d 437 (1984), and *State v. Parker*, 315 N.C. 249, 337 S.E. 2d 497 (1985).

In *State v. Higson*, 310 N.C. 418, 312 S.E. 2d 437, the defendant entered guilty pleas to charges of second degree murder of his brother and assault with a deadly weapon with intent to kill inflicting serious injury upon his sister-in-law. The cases were consolidated for judgment and defendant was sentenced to a term of life imprisonment, the maximum sentence for second degree murder. The trial judge made a single set of findings in aggravation and mitigation. This Court found errors in some of the findings. Defendant contended that the trial court also erred in failing to make separate findings in aggravation and mitigation as to each offense. This Court, in an opinion by Justice Meyer (Justices Mitchell and Martin dissenting as to the holding that the trial court erred in finding that the offenses were especially heinous, atrocious, or cruel), agreed with the defendant. After quoting from *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689, the Court said that in the present case "the error is harmless inasmuch as the errors found in the aggravating factors apply equally to both offenses." *Higson*, 310 N.C. at 426, 312 S.E. 2d at 442. Nevertheless, the Court said "we once again caution trial judges that fairness and judicial economy dictate that when sentencing a defendant for multiple offenses, separate findings are necessary for each offense." *Id.* We note that the quote from *Ahearn* in *Higson* referred to cases consolidated for hearing and makes no reference to cases consolidated for judgment.

In a more recent sentencing case, we stated in *State v. Parker*, 315 N.C. 249, 257, 337 S.E. 2d 497, 501, that "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." (Emphasis added.) This decision would require a judge to make findings of aggravating

and mitigating factors for each offense in cases consolidated for trial or *hearing*, but not in cases consolidated for *judgment*. We believe this to be the better rule. When cases are consolidated for judgment and the trial judge finds aggravating and mitigating factors as to the most serious offense, but fails to make such findings as to the lesser offenses consolidated, the defendant is not prejudiced so long as the sentence given does not exceed the maximum sentence permissible for the most serious offense.

While the statute permits a sentence equal to the combined presumptive sentences for the offenses consolidated, N.C.G.S. § 15A-1340.4(b), it does not permit a sentence equal to the combined maximum sentences for the consolidated offenses. Rather, the total sentence is limited by the maximum sentence for the most serious offense in the consolidated judgment. This is the very purpose of consolidation for sentencing purposes and works to the benefit of the defendant by limiting the maximum sentence that he can receive for all of the convictions so consolidated. Here, pursuant to the plea bargain, the kidnapping and second degree murder convictions were consolidated for judgment, thus insuring the defendants only one sentence for two convictions with a maximum prison sentence of fifty years or life. Without the consolidation, defendants could have been sentenced to the maximum prison sentences of fifty years or life for the second degree murders in addition to at least the presumptive terms of twelve years for the first degree kidnapping convictions. Having received the benefits of their plea bargains by having their convictions consolidated for sentencing, they are not entitled to an additional benefit of separate findings as to the lesser offenses so consolidated.

For the reasons stated hereinabove, we hold that when cases are consolidated for *judgment*, and the judge makes findings of aggravating and mitigating factors for the most serious offense for which defendant is being sentenced, the judge's failure to make findings of such factors for the lesser offenses consolidated will not constitute reversible error. The decision of the Court of Appeals is reversed.

Reversed.

ROBERT R. GARDNER, AND NATIONWIDE MUTUAL INSURANCE CO. v. THE NORTH CAROLINA STATE BAR

No. 706PA84

(Filed 2 April 1986)

1. **Attorneys at Law § 1.1— whether insurance company attorneys can represent insureds—jurisdiction to decide**

The superior court's inherent power to deal with its attorneys provided jurisdiction to decide whether a licensed attorney who was a full-time employee of an insurance company could ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. N.C.G.S. 150A-1 *et seq.*, N.C.G.S. 84-36.

2. **Attorneys at Law § 1.1; Insurance § 100— insurance company attorneys representing insured—prohibited as corporation practicing law**

Insurance company attorneys appearing in court for an insured would fall within the ban of N.C.G.S. 84-5 because the attorneys would be acting in the course of their employment; their actions would thereby be those of the company itself; and the company would not in essence be appearing for itself because the company is not a party to the action, the judgment is against the insured, the insured is responsible for excess damages and collateral penalties, the insured may be called upon to pay the judgment if the company fails, and the insured's property becomes subject to attachment to pay the judgment. The insurance company does not purport to defend or represent its insureds itself when it furnishes a defense by providing an attorney as an independent contractor.

3. **Constitutional Law § 23.4; Attorneys § 1.1— insurance company attorney prohibited from representing insured—not unconstitutional**

An attorney who was employed full-time by an insurance company was not unconstitutionally prevented from practicing law when he was not allowed to appear before a court representing an insured. Art. I of the N. C. Constitution, Fourteenth Amendment of the U. S. Constitution.

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

APPEAL by respondent from judgment entered out of session by consent of the parties on 21 August 1984 by *Barnette, J.*, following a hearing at the 2 July 1984 Civil Session of Superior Court, WAKE County. Respondent's motion to bypass the Court of Appeals was granted on 30 January 1985. Heard in the Supreme Court 14 May 1985.

Bryant, Drew, Crill & Patterson, P.A., by Victor S. Bryant, Jr., for petitioner-appellees.

L. Thomas Lunsford, II, and James E. Tucker, for respondent-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, for Amicus Curiae, The National Association of Independent Insurers, The Alliance of American Insurers and the American Insurance Association.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., for Amicus Curiae, The North Carolina Bar Association.

FRYE, Justice.

The parties to this action have brought a single question before this Court: May a licensed attorney who is a full-time employee of an insurance company ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage? We hold that under North Carolina law, the answer is no.

Petitioners[1] presented this question to respondent Bar on 13 January 1982 with a request that the Bar reconsider two of its ethics opinions, Opinion 682 and CPR 19. Opinion 682, issued in 1969, held that it would be unethical for "house counsel" of an insurance company to defend that company's insureds against claims arising out of automobile accidents. CPR 19, issued in 1974, held that prosecution of subrogation claims in the name of the insured by "house counsel" would also be unethical. The Bar responded to petitioners' request by reconsidering these earlier opinions and then affirming them in CPR 326, adopted 14 January 1983.

Considering CPR 326 to be a declaratory ruling as defined by N.C.G.S. § 150A-17, petitioners filed a petition for judicial review with the Superior Court, Wake County, on 11 February 1983.

1. The individual petitioner, Gardner, is an attorney licensed to practice law in North Carolina who is employed by corporate petitioner Nationwide on a full-time basis.

Both parties submitted memoranda and presented oral arguments to the trial judge. On 21 August 1984, the trial judge entered judgment, out of session by consent of the parties, in favor of petitioners. The trial judge held that the distinction made by the Bar between "house" and "outside independent" counsel was an arbitrary distinction and therefore unlawful.

Respondent Bar accordingly filed a timely notice of appeal, and petitioned this Court for leave to bypass the Court of Appeals. This Court granted the Bar's petition on 30 January 1985.

[1] We note initially that petitioners' reliance on the Administrative Procedure Act (N.C.G.S. § 150A-1 *et seq.*)[2] for authority to bring their petition before the superior court raises a jurisdictional problem. The Administrative Procedure Act allows a party aggrieved by an agency's declaratory ruling (N.C.G.S. § 150A-17), or final decision in a contested case (N.C.G.S. § 150A-43), to bring the matter before the Superior Court, Wake County, for judicial review. N.C.G.S. § 150A-45 (1983). Without deciding the general applicability of the Act to the State Bar and the decisions of its Council, this Court, in *N.C. State Bar v. DuMont*, 304 N.C. 627, 286 S.E. 2d 89 (1982), held that Article 4 of the Act would provide the standard of review applicable to decisions of the Disciplinary Hearing Commission.

Nevertheless, in this particular case we need not rely upon the Administrative Procedure Act to find jurisdiction. Instead, we conclude that jurisdiction to decide the question now before us arises out of the court's inherent power to deal with its attorneys. As this Court explained in *In re Burton*, 257 N.C. 534, 542-43, 126 S.E. 2d 581, 587-88 (1962), " '[This] power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice.' " (Citation omitted.) While we agree with the statement in *McMichael v. Proctor*, 243 N.C. 479, 485, 91 S.E. 2d 231, 235 (1956), that "questions of propriety and ethics are ordinarily for the consideration of the . . . Bar" because that organization was expressly created

2. Chapter 150A has been amended and recodified as Chapter 150B, effective 1 January 1986.

by the legislature to deal with such questions, nevertheless the power to regulate the conduct of attorneys is held concurrently by the Bar and the court. The legislation creating and empowering the State Bar expressly states that it does not abridge or disable the court's inherent powers to deal with its attorneys. N.C.G.S. § 84-36 (1985). Therefore, in a proper case, the court may rule on questions concerning the conduct of attorneys. The question presented by the petitioners in this case is of sufficient importance to warrant the superior court's consideration.

[2] CPR 326 as recommended by the Ethics Committee and adopted by the Council of the North Carolina State Bar provides in part as follows:

> It would be unethical for a full time salaried employee of an insurance company, who is an attorney licensed to practice in the State of North Carolina, to appear as counsel of record in an action brought against an insured by a third party for a claim covered by the terms of the insurance policy or to appear in the prosecution of subrogation claims for the property damage unless such actions are defended or prosecuted only in the name of the insurance company and the insurance company assumes or is subrogated to the complete legal liability and pecuniary interest of the claim. Independent counsel must be retained for the insured when he is the named defendant or plaintiff and thereby the real party in interest. See G.S. 1-57.
>
> This reconsideration affirms Opinion 682 and CPR 19 and those decisions' premise that it is unethical to engage in the unauthorized practice of law as proscribed by G.S. 84-5 . . . .
>
> Protecting and preserving the relationship of the attorney to his client and the court and avoiding professionally reprehensible conflicts of interest also prohibit this manner of legal representation.
>
> The attorney's paramount responsibility is to the court and client which he serves before the court. This responsibility should not be influenced by any other entity. When an attorney, who is employed by a corporation, is directed by his employer in the representation of other individual litigants, he is subject to the direct control of his employer, which is

> not itself the litigant and which is not itself subject to strict professional discipline as an officer of the court. This diluted responsibility to the court and the client must be avoided.

The Bar gave two reasons for its decision. First, it concluded that allowing attorney-employees to represent insureds would violate the ban on the practice of law by corporations. Second, it reasoned that the proposed practice would result in an increased risk of conflicts of interest that the Bar considered unacceptable.

In considering the Bar's first reason, the trial judge found as follows:

> Ethics Opinion 682 and CPR 19 each prohibited appearance by . . . full time salaried employee[s] of an insurance company . . . on the basis that such appearance . . . would constitute an unauthorized practice of law by an insurance company.
>
> . . . .
>
> There is no case decided by the Appellate Courts of North Carolina directly on point with the issues raised in this case. Because of the substantial financial interest of the insurer in such actions the insurer is in effect representing itself when its House Counsel represents its insured. This does not appear to be in conflict with established law in this State . . . .

We agree with respondent Bar that the trial judge erred in his conclusion.

The practice of law is defined in North Carolina as "performing any legal service for any other person, firm or corporation, with or without compensation . . . ." N.C.G.S. § 84-2.1 (1985). A corporation may not perform legal services for others; N.C.G.S. § 84-5 forbids it to do so. "It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State . . . ." N.C.G.S. § 84-5 (1985). *See also State ex rel. Seawell v. Carolina Motor Club, Inc.*, 209 N.C. 624, 184 S.E. 540 (1936). The question at hand is whether an appearance by one of petitioner corporation's employees on behalf of an insured would constitute a prohibited appearance by the corporation.

The first point of inquiry is whether the corporation would be making an appearance at all. We believe that it would. When a corporation's employees perform legal services for the corpora-

tion in the course of their employment, their acts have been held to be the acts of the corporation so that in law, the corporation itself is performing the acts. *State v. Pledger*, 257 N.C. 634, 127 S.E. 2d 337. Pledger, a layman, was convicted of violating the statute against the unauthorized practice of law when he prepared legal documents for his corporate employer. This Court decided that Pledger was not guilty, concluding that, "[A] person who, in the course of his employment by a corporation, prepares a legal document in connection with a business transaction in which the corporation has a primary interest, the corporation being authorized by law and its charter to transact such business, does not violate the statute, for his act in so doing is the act of the corporation in the furtherance of its business." *Id.* at 637, 127 S.E. 2d at 339-40. Here, petitioner Nationwide is proposing to send its employees into court in connection with a matter in which it alleges it has a primary interest. Such employees, acting in the course of their employment by the corporation, would be charged with representing its insureds as part of their job for Nationwide. Their acts would thereby be the acts of Nationwide itself. *Cf. Rucker v. Hospital*, 285 N.C. 519, 206 S.E. 2d 196 (1974) (hospital liable for staff physician's malpractice based on employer-employee relationships).

The second point of inquiry is whether the corporation's appearance would be a prohibited one.

Both petitioners and amicus Insurance Trade Associations argue that the appearance is not prohibited because the corporation would in essence be appearing for itself. We recognize that insurance companies have an interest in the outcome of litigation when the damages sought are covered by their policies. Companies providing automobile insurance are required by statute to pay such damages directly. N.C.G.S. § 20-279.21(f) (1984). Amicus Insurance Trade Associations argues that *State v. Pledger*, cited above, supports its contention that an insurance company's appearance on behalf of an insured is not prohibited. It reads *Pledger* as drawing "a bright line between those matters in which a corporation has a significant interest and those matters in which it does not."

The decision in *Pledger* does speak in terms of allowing employees to prepare legal documents for a corporation when the

corporation has a "primary" interest in the transaction. *Pledger*, 257 N.C. at 637, 127 S.E. 2d at 339. However, what the Court in *Pledger* meant and what petitioners here mean by "primary interest" are not the same. A close reading of *Pledger* discloses that in the examples given by the Court, the corporation or individual preparing the legal documents was a party to the transaction. Even if petitioners were correct, however, *Pledger* is not authority for the proposition that a corporation may appear in court for someone else.

If an insurance company, through its employees, appears for an insured, it would be appearing as an attorney for someone else. The company itself is not the party to the action. The insured is the one who is named. Any judgments rendered are rendered against the insured, not against the company. The insured's property becomes subject to attachment to pay such judgment, and he may be called upon to do so if the company fails. Nor are the interests of the insurance company and the insured identical. The insured is solely responsible for any damages in excess of his insurance coverage, and he alone feels the effect of any collateral penalties that result from the litigation.

Because the insurance company's appearance in court is therefore on behalf of a "person," this appearance falls within the ban of N.C.G.S. § 84-5. The fact, much urged by petitioners and amicus Insurance Trade Associations, that the employees Nationwide proposes to use for this purpose are all licensed attorneys, does not change the situation. "Since a corporation cannot practice law directly, it cannot do so indirectly by employing lawyers to practice for it." *State ex rel. Seawell v. Carolina Motor Club*, 209 N.C. at 631, 184 S.E. at 544.

Motor Club stands for the broad proposition that a corporation cannot perform legal services for others. Petitioners argue that the case is distinguishable on various grounds from the practice they propose. In *Motor Club*, defendants Carolina Motor Club and the American Automobile Association advertised that through their legal department they would give advice to members on legal questions about automobiles, assist in the collection of damages out of court, and furnish representation to members in criminal cases. The trial judge found that these practices con-

stituted the unauthorized practice of law under a predecessor to N.C.G.S. § 84-5, and this Court affirmed.

Both petitioners and amicus Insurance Trade Associations argue that *Motor Club* can be distinguished because defendants in that case had no direct interest in the outcome of the activities in which they were engaged. Amicus states baldly that the *Motor Club* decision "merely stands for the proposition that a corporation cannot perform legal services for others when, like the Motor Club, it has no interest in a particular transaction or proceeding." In fact, the *Motor Club* opinion itself makes no reference to the defendants' lack of an interest. Accordingly, the opinion cannot stand for the proposition urged by petitioners that while a corporation cannot practice law for others for its own profit, it can do so with impunity to prevent a loss. Even if the case could so stand, N.C.G.S. § 84-5 still prohibits either practice.

Defendants in *Motor Club* conducted their activities partly through employees and partly through independent counsel. Petitioners quite correctly state that the Court made no distinctions between the two methods in forbidding defendants' activities. Petitioners emphasize that insurance companies have without objection hired independent counsel to represent insureds in this State for many years. No one appears to think they are thereby engaged in the unauthorized practice of law. They argue that their interest in the outcome of the litigation is what distinguishes them from defendants in *Motor Club*. If their current practice does not contravene N.C.G.S. § 84-5, they see no compelling reason why they cannot use salaried attorney-employees to accomplish the same purpose.

The distinction between petitioners' current and proposed practices and defendants' actions in *Motor Club* lies in the character of the performer of the services. In *Motor Club*, the corporate defendants themselves purported to supply legal services. The fact that a club sometimes did so through independent counsel was irrelevant when the club itself was the "actor." Similarly, the insurance corporation would be the "actor" in petitioners' proposed practice for the reasons we have already discussed. In petitioners' current practice, as described to this Court, it does not purport to defend or represent its insureds itself. It agrees to furnish a defense and carries out its obligation by paying an inde-

pendent attorney, assumed for the purpose of this opinion to be an independent contractor, to represent its insureds. It also has certain contractual rights, supported by its pecuniary interest, to select this attorney and to have some control over the suit. Nevertheless, the independent attorney is the "actor" who provides legal representation for the insured.

Petitioners and amicus Insurance Trade Associations also argue that other jurisdictions have not found their proposed practice to be the unauthorized practice of law. They urge this Court to consider the authority of these jurisdictions persuasive. Petitioners and their amicus cite two types of authority from other jurisdictions: case law and opinions of state bars. We note that in all of the cases cited, the courts based their decisions upon their own statutes defining the unauthorized practice of law and that these statutes as reported therein are not identical with our N.C.G.S. § 84-5. *See Coscia v. Cunningham*, 250 Ga. 521, 299 S.E. 2d 880 (1983); *Kittay v. Allstate Insurance Co.*, 78 Ill. App. 3d 335, 397 N.E. 2d 200 (1979); *Strother v. Ohio Casualty Co.*, 28 Ohio Abs. 550 (C.P. 1939). Indeed, some states have specific statutory exceptions for insurance companies. *See Kittay v. Allstate Insurance Co.*, 78 Ill. App. 3d 335, 397 N.E. 2d 200; *see also Utilities Ins. Co. v. Montgomery*, 134 Tex. 640, 138 S.W. 2d 1062 (1940). Petitioners submitted three bar opinions giving an unauthorized practice of law analysis. Like the courts, two of the three based their conclusions upon their states' statutes. Neither statute appears identical to ours. The Bar in the third state, New Jersey, based its conclusion upon the American Bar Association's Formal Opinion 282 (1950), which opined that because of identity of interest between insured and insurer, the insurer would not be engaged in the unauthorized practice of law.

While we certainly agree with petitioners and their amicus that the ABA's opinions are entitled to respect, we believe that our duty is to interpret our own state's law according to the policies expressed by our legislature and the best interests of our state. In the first instance, and absent constitutional restraint, questions as to public policy are for legislative determination. *Martin v. Housing Authority*, 277 N.C. 29, 175 S.E. 2d 665 (1970). We agree with respondent Bar and amicus North Carolina Bar Association that North Carolina has a strong policy favoring personal representation, a policy not necessarily endorsed by other

states. For example, as long ago as 1930, the Missouri Supreme Court commented:

> A generation ago the lawyer was identified with every phase of a person's fortune. He protected him in his reckless youth, he passed upon title deeds to the new home acquired at manhood, he drew up documents relating to his business, collected the accounts, drew the will, handled the settlement of the estate, and then repeated the process with a new generation; whereas, today, the defense of reckless youth falls to the insurance company—a title company passes on the deed to the new home—a charter company incorporates the business—credit insurance companies, trade associations and collection agencies collect the accounts—and a trust company writes the will and administers the estate.

Liberty Mutual Insurance Co. v. Jones, 344 Mo. 932, 959, 130 S.W. 2d 945, 956 (1930). Our state legislature, on the other hand, continues to require that individuals, not corporations, perform many of these activities. *See* N.C.G.S. § 58-132(a) (1982) (title certification). *See also* N.C.G.S. § 84-5 (1985) (requiring corporations authorized and licensed to act as fiduciaries to obtain independent attorneys for certain specified activities often considered part of a fiduciary's job); *cf. State Bar Association of Connecticut v. Connecticut Bank & Trust Co.*, 20 Conn. Supp. 248, 131 A. 2d 646 (Conn. Super. Ct. 1957), *modified in part and rev'd in part*, 145 Conn. 222, 140 A. 2d 863 (1958); *Groniger v. Fletcher Trust Co.*, 220 Ind. 202, 41 N.E. 2d 140 (1942), and *Judd v. City Trust and Savings Bank*, 133 Ohio St. 81, 12 N.E. 2d 288 (1937) (all holding that because corporate fiduciaries could perform any tasks that individual fiduciaries could perform, they could use either "house" or independent counsel). We also note that respondent Bar had the benefit of the ABA's opinion when it issued its earlier opinions.

To summarize, we agree with respondent Bar that petitioners' proposed practice of allowing employees, in the course and scope of their employment, to represent insureds would constitute the unauthorized practice of law as defined by N.C.G.S. § 84-5. CPR 326 was therefore not based upon an arbitrary distinction and is consequently not unlawful.

Because we have decided that the first ground set forth in CPR 326 for disapproving petitioners' proposed practice was correct, we need not reach the second.

[3] In their final argument, petitioners contend that CPR 326 violates Article I of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution by allegedly preventing the individual petitioner Gardner from practicing law by denying him the right to appear before a court. There is no merit to this argument. Petitioner Gardner is only prevented from representing his employer's insureds. He may freely appear in court to represent Nationwide itself. As an attorney licensed to practice law in North Carolina, he may also represent other parties desirous of his services so long as he does not do so in conjunction with Nationwide; if he chooses by contract to devote his entire time to Nationwide's affairs, he cannot be heard to complain.

In conclusion, the decision of the Superior Court, Wake County, is reversed, and this case is remanded to that court for entry of judgment 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. CHARLES GLENN PARKER

No. 580PA85

(Filed 2 April 1986)

1. Criminal Law § 91— superseding indictments—appropriateness and good faith—speedy trial

The trial court did not err in finding that superseding indictments against defendant for felonious possession of stolen property and felonious conspiracy to possess stolen property were appropriate and obtained in good faith, and the 120-day speedy trial period thus began to run at the time the superseding indictments were returned.

2. Receiving Stolen Goods § 1— elements of possession of stolen property

The elements of the crime of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. N.C.G.S. § 14-71.1.

3. Receiving Stolen Goods § 1— possession of stolen property—reasonable man standard

Since the possession of stolen property statute, N.C.G.S. § 14-71.1, includes language concerning a defendant's reasonable grounds to believe the items were stolen, the Legislature intended for the "reasonable man standard" to apply to that statutory offense.

4. Receiving Stolen Goods § 5.1— possession of stolen property—reasonable grounds to believe property was stolen

The State presented sufficient evidence in a prosecution for possession of stolen property to show that defendant had reasonable grounds to believe that a vehicle he was driving was stolen where it tended to show that defendant was used as a go-between in the purchase of the stolen vehicle even though the buyer and seller were within a short distance from each other at a motel; defendant never received a title for the vehicle to present to the buyer; the buyer gave defendant only $800.00 to purchase a two-year-old sports car which appeared to be in good condition and worth a great deal more than $800.00; and when the police tried to stop the vehicle, defendant fled at a high rate of speed, eventually wrecked the car, and then attempted to escape on foot.

5. Receiving Stolen Goods § 5— possession of stolen property—proof of dishonest purpose

The "dishonest purpose" element of the crime of possession of stolen property can be met by a showing that the possessor acted with an intent to aid the thief, receiver, or possessor of the stolen property, and the fact that defendant does not intend to profit personally by his action is immaterial.

6. Receiving Stolen Goods § 5.1— possession of stolen property—sufficient evidence of dishonest purpose

The State's evidence in a prosecution for possession of stolen property was sufficient to show that defendant possessed a stolen automobile for a dishonest purpose where it tended to show that a used car dealer purchased the automobile with knowledge that it had been stolen; defendant knew or had reasonable grounds to believe the automobile was stolen; and defendant was driving the automobile at the dealer's request with the intent to assist the dealer in converting the automobile to the dealer's own use.

ON the State's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 76 N.C. App. 508, 333 S.E. 2d 551 (1985), reversing the judgment entered by *Herring, J.*, at the 12 March 1984 Criminal Session of Superior Court, WAKE County, sentencing defendant to a term of imprison-

ment of three years upon his conviction of the offense of felonious possession of stolen property.

Lacy H. Thornburg, Attorney General, by Wilson Hayman, Assistant Attorney General, for the State-appellant.

Bass, Willoughby & Haywood, by Gerald L. Bass, for defendant-appellee.

MEYER, Justice.

The defendant and Arthur Medlin were indicted and jointly tried for the possession of a stolen automobile. The State presented evidence which tended to show that on 14 or 15 March 1983, Ione Simpson, the manager of the Journey's End Motel in downtown Raleigh, contacted the Raleigh Police Department concerning a guest at the motel. The guest in question had checked into the motel on 13 March 1983, registering under the name Willie Warren. He was staying in room 202. Simpson called the police again on the afternoon of 19 March 1983. Detective W. E. Ausley and Officer D. L. Clark of the Raleigh Police Department proceeded to the motel and spoke with Simpson. As a result of their conversation with Simpson, the police officers set up a stake-out in room 115 of the motel. Directly outside room 115 was a brown 1981 Datsun 280-ZX automobile with Texas license tags which Simpson stated was being driven by the occupant of room 202. At trial, the State introduced evidence showing that the vehicle had been stolen in Houston, Texas, on the evening of 7 March 1983. The owner, Miss Carlos Patrice Baker, purchased the car new in June of 1981 for $17,000.

Once stationed in the room, Detective Ausley checked the automobile's vehicle identification number (VIN) plate through the windshield and the federal inspection decal located in the door of the car. The federal inspection decal showed signs of having been tampered with. Later that evening, Phillip Holmes, an inspector with the License and Theft Section of the North Carolina Division of Motor Vehicles, was called to the scene, and he conducted additional checks on the vehicle. Holmes proceeded to inspect the secondary number on the firewall of the car and had that number checked through police computers. After making this inquiry, the officers obtained a warrant for the arrest of the subject in room

202 for possession of a stolen vehicle. The officers then continued surveillance of the automobile.

At approximately 10:30 a.m. on 20 March 1983, a white Camaro Z-28 driven by a man subsequently identified as Arthur Medlin, a local used car dealer, drove into the motel parking lot and parked next to the brown Datsun. The defendant got out of the right front seat and entered room 202. He stayed inside for approximately two to three minutes and then returned to the Camaro. The defendant stayed in the Camaro for about a minute and a half, and then returned to room 202. About three minutes later, the defendant returned to the Camaro, had a brief conversation with Medlin, got into the Datsun, and then drove out of the parking lot, followed by Medlin in the Camaro.

The man occupying room 202 of the Journey's End Motel was then arrested. He identified himself as Glen Dale Boyd. Boyd had $827.00 and change on his person when arrested.

Medlin was stopped by the police at an intersection approximately three-fourths of a mile from the motel. He was placed under arrest and transported to the Raleigh Police Department. A search of his person produced a Texas vehicle registration card for the Datsun. He did not, however, possess a title certificate to the Datsun.

The police also attempted to stop the defendant. He responded, however, by greatly increasing his speed, accelerating to approximately seventy to eighty miles per hour. He ran six red lights and, at one point, almost struck a station wagon. The defendant eventually left the city limits traveling south. Subsequently, he wrecked the vehicle near Garner and fled on foot. He was arrested shortly thereafter, and a search of his person incident to the arrest uncovered $5,903.42.

Following his arrest, Medlin made a statement to the police. Medlin stated that the previous week he had purchased a white Datsun 280-Z for $800.00 from a black male at a car sale. The seller told Medlin that he traveled all over the state buying cars. The man informed Medlin that he had a gold 280-Z which he desired to sell for $900.00. The man told Medlin that within the next two weeks, he would see him at another sale and bring the titles to both cars. The seller stated that his "driver" would be in con-

tact with him. On 19 March 1983, Medlin was informed by the "driver" that he was at the motel with the car. Medlin told him that he would pick up the car the next morning. Medlin stated that the next morning, he went to the defendant's house and asked him to drive the Datsun for him. When they got to the motel, Medlin gave the defendant $800.00 to give to the "driver" as payment for the vehicle.

The defendant's evidence established that at the time of the incident, he was serving an active federal prison sentence. From November 1982 until the time of his arrest, the defendant was involved in a pre-release program whereby he was allowed to work during the day while residing in a facility operated by an alternative to correction agency, ReEntry, Inc. On the weekend that he was arrested, the defendant was on a furlough for a home visit with his family. The defendant's wife testified that the defendant did not have $5,900 in his possession when he left the house on the morning of 20 March 1983. Based on this and other evidence, the defendant and Medlin were convicted of felonious possession of stolen property.

Defendant Parker and Medlin appealed their convictions to the Court of Appeals separately. In an unpublished opinion, the Court of Appeals found no error in Medlin's trial. *State v. Medlin*, 73 N.C. App. 180, 327 S.E. 2d 68 (1985).

On his appeal, the defendant raised two issues. He first argued that the prosecution failed to try the case within the time limit required by the Speedy Trial Act. The Court of Appeals rejected this argument. Second, he argued that the State's evidence was insufficient to support the conviction and that his motion to dismiss the charge should have been granted. The Court of Appeals agreed with this contention and reversed the defendant's conviction. We granted the State's petition for discretionary review. Since the defendant raised the Speedy Trial Act issue in the Court of Appeals and addressed it in his brief to this Court, we will also review that issue pursuant to Rule 16 of the North Carolina Rules of Appellate Procedure.

With regard to the Speedy Trial Act issue, the record indicates that the defendant was arrested on 20 March 1983. He was indicted for felonious possession of stolen property and

felonious conspiracy to possess stolen property on 25 April 1983.[1] Following the return of the true bills of indictment, the case was continued in Superior Court five times. One of the continuances was requested by the defendant. The other four were granted at the request of the State. Two were granted due to continuances granted to the codefendant, Medlin. One was granted due to the fact that the prosecutor assigned to the case was involved in the trial of an individual who was in custody. The other continuance was granted based on the fact that one of the State's witnesses would be involved in another trial.

On 28 December 1983, the defendant filed a motion to dismiss the indictment due to the failure of the prosecution to bring him to trial within the time limit prescribed by the Speedy Trial Act. N.C.G.S. § 15A-701, *et seq.* (1983 and Cum. Supp. 1985). On 3 January 1984, the State obtained new indictments against the defendant for the same offenses as those set out in the original indictments. Following a hearing on the defendant's motion to dismiss, Judge Coy Brewer issued an order that the defendant's motion be allowed and that the original indictments be dismissed without prejudice. In discussing the decision of whether to dismiss the indictments with or without prejudice, the trial court stated:

> In deciding that the indictments returned April 25, 1983 should be dismissed without prejudice, the Court did consider, among other matters, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissial [sic]; the impact of a reprosecution on the administration of Article 35 of Chapter 15A of the North Carolina General Statutes and the administration of justice. The Court is also of the opinion that the superseding indictments returned on January 3, 1984 against the Defendant begin a new 120 days for purposes of the application of the Speedy Trial requirements contained in G.S. 15-70 [sic] et seq. In reaching this decision the Court did find as a fact that the attainment of superseding indictments appeared to have been both appropriate and in good faith.

1. During the course of the trial, the State dismissed the conspiracy charges against both defendants.

The defendant argues that while the trial court correctly dismissed the original indictments, it erred by failing to order that the dismissal be with prejudice. The Court of Appeals held that this contention was without merit. We agree.

In pertinent part, the Speedy Trial Act provides:

> The trial of the defendant charged with a criminal offense shall begin within the time limits specified below:
>
> (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last.

N.C.G.S. § 15A-701(a1)(1) (1983 and Cum. Supp. 1985). N.C.G.S. § 15A-701(b) sets out certain periods which are to be excluded from the time computation.

[1] On 3 January 1984, the State obtained superseding indictments against the defendant for the crimes of felonious possession of stolen property and felonious conspiracy to possess stolen property. The record clearly shows that after excluding all periods permitted to be excluded, these indictments were obtained within the 120-day period set out in the Speedy Trial Act. In *State v. Mills*, 307 N.C. 504, 299 S.E. 2d 203 (1983), we held that when superseding indictments are appropriate and obtained in good faith, the 120-day period begins on the date the new indictments were returned. In his order, the trial judge found as a fact that the attainment of the superseding indictments appeared to have been appropriate and in good faith. The record fails to show that the defendant presented any evidence tending to show that the superseding indictments were inappropriate or not obtained in good faith. Absent such record evidence, we are unable to say that the trial judge erred in finding that the superseding indictments were appropriate and obtained in good faith. Therefore, under *Mills*, the 120-day speedy trial clock did not begin to run until those indictments were returned. The defendant's trial commenced within 120 days of that date. The defendant therefore cannot prevail on his claim that the State failed to try him within the time limit prescribed by the Speedy Trial Act. That portion of the opinion of the Court of Appeals overruling the defendant's assignment of error concerning the Speedy Trial Act is affirmed.

We take this opportunity to note the following. The trial judge found that the superseding indictments were appropriate and obtained in good faith. Although the trial court's order dismissing the original indictments stated that the dismissal was based on a violation of the Speedy Trial Act, this reason was erroneous in light of the fact that the speedy trial clock did not begin to run until the date of the return of the superseding indictments. Since N.C.G.S. § 15A-646 requires that the original indictments be dismissed at the defendant's arraignment on the superseding indictments, the result would be the same. Therefore, the trial judge's order dismissing them will not be disturbed. The rule is that a correct decision of a lower court will not be disturbed because the reason assigned for it is wrong, insufficient, or superfluous. The question on review of the decision in this Court is whether the ruling of the court below was correct, not whether the reason given for it is sound or tenable. *State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957).

We now address the State's contention that the Court of Appeals erred in holding that the defendant's motion to dismiss the charge against him should have been granted due to insufficient evidence.

[2] It is well established that 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. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The elements of the crime of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981). *See* N.C.G.S. §§ 14-71.1, 14-72 (1981 and Cum. Supp. 1985).

The State clearly introduced substantial evidence tending to show that on the morning of 20 March 1983, the defendant was in possession of a Datsun automobile which belonged to another. The State also produced substantial evidence tending to show that the

vehicle had been stolen from Miss Baker and that its value at the time of the possession exceeded $400.00.

With regard to the requirement that the accused know or have reasonable grounds to believe that the property was stolen, it appears that we have never had the opportunity to interpret this element in connection with the crime of possession of stolen property. However, we have addressed this element in connection with the crime of receipt of stolen property. In *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491, we noted that the only distinction between these two offenses lies in the act of possession versus the act of receipt. We therefore deem it appropriate to examine those cases construing this element in connection with the crime of receipt of stolen property.

The offense of receiving stolen goods is set out in N.C.G.S. § 14-71. Prior to 1975, the statute contained no express provision permitting the State to show merely that the person receiving the stolen property had "reasonable grounds to believe" that it had been taken or stolen. Instead, the statute's express language required proof that the accused knew the property had been stolen. However, our case law had long ago established that a defendant's "guilty knowledge" could be either actual or implied from circumstances tending to indicate that the party receiving the goods believed that they were stolen. *E.g., State v. Miller*, 212 N.C. 361, 193 S.E. 388 (1937); *State v. Spaulding*, 211 N.C. 63, 188 S.E. 647 (1936); *State v. Stathos*, 208 N.C. 456, 181 S.E. 273 (1935). However, our courts stated that to constitute the offense of receiving stolen property, the test was whether the defendant knew or *must have known* the goods were stolen, not whether a reasonable man would have suspected that they were stolen. *State v. Oxendine*, 223 N.C. 659, 27 S.E. 2d 814 (1943). *See State v. Stathos*, 208 N.C. 456, 181 S.E. 273; *State v. Grant*, 17 N.C. App. 15, 193 S.E. 2d 308 (1972). These earlier cases seem to have rejected the notion that a reasonable belief was equivalent to implied guilty knowledge. *But see State v. Ellers*, 234 N.C. 42, 45, 65 S.E. 2d 503, 505 (1951), where we stated, "Actual or constructive possession of property, *knowing or having reasonable grounds to believe* that it has been stolen, is sufficient to support a conviction for the crime of receiving." (Emphasis added.)

[3] In 1975, N.C.G.S. § 14-71 was amended to expressly provide that an accused was guilty of the offense if he received property "knowing or having *reasonable grounds to believe*" that it was stolen. The inclusion of the language concerning a defendant's reasonable grounds to believe the items were stolen signifies a clear intent by the legislature to equate a defendant's reasonable belief with implied guilty knowledge. The offense of *possession* of stolen property, N.C.G.S. § 14-71.1, was established by the legislature in 1977. Since this statute also includes the language concerning a defendant's reasonable grounds to believe, it is obvious the legislature also intended for the "reasonable man standard" to apply to that statutory offense.

[4] In this case, the State has failed to point to any direct evidence showing that the defendant had actual knowledge that the vehicle was stolen. However, we conclude that the State presented sufficient evidence to show that the defendant had reasonable grounds to believe that the Datsun was stolen. First, the mechanics of the transaction at the motel were quite unusual. The defendant was utilized as a go-between, even though Medlin and the man in room 202 were within a short distance of one another. Second, the defendant never received a title for the vehicle to present to Medlin. Third, Medlin gave the defendant only $800.00 to purchase a two-year-old sports car which appeared to be in good condition and worth a great deal more than the $800.00. In *State v. Haywood*, 297 N.C. 686, 256 S.E. 2d 715 (1979), we stated that a defendant-seller's knowledge or reasonable grounds to believe that property was stolen can be implied from his willingness to sell the property at a mere fraction of its actual value. Such knowledge or reasonable belief can also be implied where a defendant-buyer buys property at a fraction of its actual cost. Finally, we note that when the police attempted to stop the vehicle, the defendant proceeded to flee at high speed, eventually wrecking the car and attempting to escape on foot. We have recognized that an accused's flight is evidence of consciousness of guilt and therefore of guilt itself. *E.g., State v. Mash*, 305 N.C. 285, 287 S.E. 2d 824 (1982); *State v. Jones*, 292 N.C. 513, 234 S.E. 2d 555 (1977). Based on these circumstances, we conclude that the State presented substantial evidence tending to show that the defendant knew or had reasonable grounds to believe the vehicle was stolen.

The Court of Appeals reversed the defendant's conviction on the basis that the State failed to present any evidence concerning the fifth element of the offense—that the defendant possessed the stolen vehicle for a dishonest purpose. In reaching this conclusion, the Court of Appeals stated:

> There is no evidence that the defendant was being paid by Medlin or that he had any financial interest in the vehicle or that he expected to gain any financial reward for doing his friend a favor.

State v. Parker, 76 N.C. App. 508, 511, 333 S.E. 2d 551, 553 (1985). By its holding, the Court of Appeals has equated "dishonest purpose" with "financial interest, gain, or reward." We conclude that such an interpretation is erroneous, and we accordingly reverse this portion of the decision of the Court of Appeals.

Once again, it appears that we have never interpreted this element in connection with the crime of *possession* of stolen property. It is appropriate once again to examine those cases which have discussed this element in connection with the crime of *receiving* stolen property.

[5] We have previously noted that the element of receiving stolen property with a dishonest purpose is equivalent to receipt of stolen property with a felonious intent. *State v. Tilley*, 272 N.C. 408, 158 S.E. 2d 573 (1968). Our cases have clearly established that in order to successfully prosecute a defendant for receiving stolen property, it is not necessary for the State to show that he intended or expected to reap a personal profit from the act. If the receiver acted with an intent to assist the thief and all of the other elements of the crime are established, he would be guilty of receiving stolen property. *State v. Morrison*, 207 N.C. 804, 178 S.E. 562 (1935); *State v. Rushing*, 69 N.C. 29 (1873). As noted earlier, we have stated that the only distinction between the crimes of receiving stolen property and possession of stolen property concerns the act of receipt versus the act of possession. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491. We now hold that the "dishonest purpose" element of the crime of possession of stolen property can be met by a showing that the possessor acted with an intent to aid the thief, receiver, or possessor of stolen property. The fact that the defendant does not intend to profit personally by his action is immaterial. It is sufficient if he intends

to assist another wrongdoer in permanently depriving the true owner of his property.

[6] In this case, the State presented sufficient evidence tending to show that Medlin bought the Datsun knowing that it had been stolen. As noted previously, the prosecution presented substantial evidence that the defendant knew or had reasonable grounds to believe that the vehicle was stolen. There was also substantial evidence tending to show that the defendant was driving the vehicle at the request of Medlin, intending to assist Medlin in converting the property to Medlin's own use. We hold that the State presented substantial evidence tending to show that the defendant possessed the stolen automobile for a dishonest purpose. Accordingly, that portion of the decision of the Court of Appeals reversing the defendant's conviction due to insufficient evidence is also reversed.

In summary, we hold that the Court of Appeals did not err in overruling the defendant's assignment concerning the Speedy Trial Act. However, that portion of the opinion of the Court of Appeals reversing the defendant's conviction due to insufficient evidence is reversed, and the case is remanded to the Court of Appeals with instructions that the judgment of the Superior Court, Wake County, be reinstated.

Affirmed in part, reversed in part, and remanded.

STATE OF NORTH CAROLINA v. JAMES MANUEL ODOM

No. 707A84

(Filed 2 April 1986)

1. Constitutional Law § 34; Criminal Law § 128.2— mistrial—second trial not double jeopardy—no objection to lack of required findings—no error

A second trial for robbery, rape and kidnapping did not violate double jeopardy because there was sufficient evidence to support a conclusion that the jury in the first trial was hung, and although the court did not make the findings required by N.C.G.S. 15A-1064 when granting the mistrial, defendant failed to preserve any error for appellate review under the requirements of App. Rule 10(b)(2).

2. Criminal Law § 73.4— statement of eyewitness to officer—admissible as present sense impression

The trial court did not err in a prosecution for robbery, kidnapping, and rape by allowing a police officer to testify to the content of a statement given to him by an eyewitness to the abduction who died before trial. The statement was not too remote under the present sense impression exception to the hearsay rule in that the witness notified the police officer immediately after the abduction, the officer was on the scene in ten minutes, and the witness gave him a statement about the event. N.C.G.S. 8C-1, Rule 803.

3. Criminal Law § 79.1— confession and plea of codefendant—admission prejudicial

There was prejudicial error in a prosecution for robbery, kidnapping, and rape where a detective was allowed to testify that a codefendant had pled guilty but the codefendant did not testify, the crucial issue was defendant's identity as one of the assailants, the evidence was not conclusive, and the confession and guilty plea would tend to confirm defendant's identity.

4. Kidnapping § 1.3— instructions—theory not alleged in indictment—erroneous

The trial court erred by instructing the jury on kidnapping for the purpose of facilitating flight where the indictment only alleged kidnapping to facilitate rape. App. Rule 10(b)(2).

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

APPEAL by defendant from judgments entered 25 July 1984 by *Bailey, J.*, imposing consecutive sentences of life imprisonment plus two terms of forty years, following trial by a jury at the 23 July 1984 Criminal Session of Superior Court, DURHAM County. Heard in the Supreme Court 15 May 1985.

Lacy H. Thornburg, Attorney General, by Daniel F. McLawhorn, Assistant Attorney General, for the State.

Gary Berman for defendant-appellant.

FRYE, Justice.

Defendant was charged in separate bills of indictment, filed 7 November 1983, with robbery with a dangerous weapon, first degree rape, and first degree kidnapping. He was initially tried for these offenses in January of 1984 before Brannon, J., in the Superior Court, Durham County. When the jury announced itself unable to agree on any verdict, Judge Brannon declared a mistrial. Upon retrial before Bailey, J., at the 23 July 1984 Criminal Session of Superior Court, Durham County, a new jury found

defendant guilty as charged. Judge Bailey sentenced defendant to consecutive terms of life imprisonment for the first degree rape conviction and forty years for each of the two other convictions. Defendant appealed his conviction for first degree rape to this Court; his motion to bypass the Court of Appeals on the two lesser offenses was granted 21 December 1984.

Defendant brought four issues before this Court:

1) whether the declaration of a mistrial at defendant's first trial was error entitling him to have the charges against him dismissed;

2) whether the out-of-court account of an eyewitness, since deceased, given to a police officer approximately ten minutes after the victim was abducted from a public sidewalk was admissible at trial as a present sense impression under Rule 803(1);

3) whether the out-of-court statement by a codefendant who was neither tried with defendant nor called to testify was admissible; and

4) whether there was a fatal variance between the charge in the indictment and the charge to the jury on first degree kidnapping.

We find no reversible error as to the first two issues but agree with defendant that there was error with respect to the last two.

A lengthy recitation of the distressing facts surrounding the commission of these crimes is unnecessary for discussion of the issues raised on appeal. The evidence the State introduced at trial showed that defendant and Darris Brown confronted their victim[1] as she entered her car in front of the Angier Avenue Post Office in East Durham on 14 September 1983. Brown pointed "something" at the victim and demanded that she hand over her money. Defendant then got in the car and demanded her car keys. The two forced her to accompany them in the car to a more isolated location. Upon stopping, defendant clearly revealed a gun, took the victim's rings and watch, then told her to remove her clothes

1. The victim will not be named in this opinion to spare her further embarrassment.

and lie down on the back seat of the car. There the victim was raped by both defendant and Brown. The two men then took the victim to a parking lot near Durham Technical Institute and left her there, otherwise unharmed. She drove home and called her parents and her boyfriend; her parents called the police.

I.

[1] The record shows that at defendant's first trial, the jury returned to the courtroom after approximately five or six hours of deliberation. The foreman told the judge that the jury was deadlocked. He said that the jurors were split evenly on the question of defendant's guilt in all three offenses and had been so for two to three hours. The jury believed that there was no reasonable possibility for agreement. After a consultation off the record with counsel at the bench, the judge declared a mistrial *ex mero motu*. His order reads in pertinent part:

> It is now ORDERED:
>
> (xx) Other The jurors return into open court and state to the Court that they are unable to agree upon a verdict and were split 6 and 6 whereupon the Court withdraws juror #1 and declares a Mistrial on all three cases.

Prior to defendant's second trial, he moved for a dismissal of the charges against him on two grounds: that the judge failed to make the findings required by N.C.G.S. § 15A-1064, and that a second trial on these charges would violate the defendant's constitutional right against being placed in double jeopardy. The trial judge denied both motions.

The courts in this country have long held that the prohibition against double jeopardy does not prevent defendant's retrial when his previous trial ended in a hung jury. *See State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). *See also State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982), and *State v. Battle*, 279 N.C. 484, 183 S.E. 2d 641 (1971) (the general rule in North Carolina is that an order of mistrial will not support a plea of former jeopardy). The decision to order a mistrial lies within the discretion of the trial judge. *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed. 2d 717 (1978); *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *State v. Birkhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962).

Nevertheless, where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges must be granted. *State v. Birkhead*, 256 N.C. 494, 124 S.E. 2d 838; *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243 (1954); *State v. Jones*, 67 N.C. App. 377, 313 S.E. 2d 808, *cert. denied*, --- N.C. ---, 315 S.E. 2d 699 (1984). There must be a showing of "manifest necessity" for an order of mistrial over defendant's objection to be proper. *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed. 2d 717.

We note that defendant made no objection preserved in the record to the trial judge's order. He apparently had an opportunity to do so, during the bench conference, and he does not argue here that he was denied this opportunity. He has therefore waived objection on appeal. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). Even if defendant had objected, however, the trial judge's declaration of mistrial would not have been improper under the constitutional standard. A "hung" jury is a classic example of manifest necessity. *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed. 2d 717. To comply with the requirements of the United States Constitution, the presiding judge need make no specific findings so long as there is sufficient evidence in the record to justify his decision. *Id.* There is sufficient evidence in the record here to support a reasoned conclusion that the jury was truly hung: the jury had deliberated for several hours, the foreman said that they were divided six—six on each charge, that the vote had remained constant for two or three hours, and that the jurors themselves did not feel that they would ever agree. After eliciting these facts, the judge was acting within his sound discretion when he declared a mistrial.

North Carolina, on the other hand, does require by statute that the judge make findings of fact to support an order declaring a mistrial. This Court has long required such findings in capital cases. *See State v. Birkhead*, 256 N.C. 494, 124 S.E. 2d 838; *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243. The legislature in 1977 extended this requirement to all grants of mistrial.

> § 15A-1064. Mistrial; finding of facts required.
>
> Before granting a mistrial, the judge must make finding [sic] of facts with respect to the grounds for the mistrial and insert the findings in the record of the case.

N.C.G.S. § 15A-1064 (1983). The official commentary to the statute adds:

> This provision will be important when the rule against prior jeopardy prohibits retrial unless the mistrial is upon certain recognized grounds or unless the defendant requests or acquiesces in the mistrial. If the defendant requests or acquiesces in the mistrial, that finding alone should suffice.

The making of findings sufficient to support the judge's decision to grant a mistrial is therefore mandatory, and the failure to make such findings would be error. Our Court of Appeals has so held. *See State v. Jones*, 67 N.C. App. 377, 313 S.E. 2d 808, *cert. denied*, --- N.C. ---, 315 S.E. 2d 699, and *State v. Coviel*, 69 N.C. App. 622, 317 S.E. 2d 917 (1984), *cert. denied*, 312 N.C. 799, 325 S.E. 2d 634 (1985).

In the case at hand, defendant contends that the trial judge failed to make such findings. The State does not contest this assertion or contend that the judge's order did in fact contain sufficient information. We note that the judge's order included only facts suggesting that the jury had not been able to agree up to that point without referring to any of the evidence that supported a conclusion that it was not likely to agree at some later point.

However, as noted previously, the defendant failed to make any objection at trial. He has therefore failed to preserve any error for appellate review under the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure.

Defendant relies for relief upon the mandatory nature of N.C.G.S. § 15A-1064 as that statute was interpreted by the Court of Appeals in *Jones* and *Coviel*. As the State correctly contends, the defendants in *Jones* and *Coviel* did object to the declaration of mistrial while defendant here did not. The statute's mandatory nature does not relieve defendant of his responsibility to "prevent avoidable errors and the resulting unnecessary appellate review," *State v. Walker*, 316 N.C. 33, 37, 340 S.E. 2d 80, 82 (1986), by lodging an appropriate objection.

Because defendant was therefore not entitled to have the charges against him dismissed, Judge Bailey did not err in refusing to dismiss them.

II.

[2] Defendant argues secondly that the trial court erred in admitting as substantive evidence the out-of-court statement of one Willie Hartell, an eyewitness to the abduction of the victim. Immediately after the abduction, Mr. Hartell went into the post office, told a clerk what had occurred and asked him to call the police. Officer Roberts, a Durham Public Safety Officer, responded to the call and arrived on the scene ten minutes later. Mr. Hartell then described the abduction, the victim's car, and the appearance of the two assailants. Officer Roberts testified that Mr. Hartell did not appear excited or upset. Mr. Hartell died before the trial, and Officer Roberts was allowed to testify to the content of Mr. Hartell's statement to him under North Carolina Rule of Evidence 803(1), the exception to the hearsay rule for present sense impressions.

Rule 803, effective 1 July 1984, reads in pertinent part as follows:

> Rule 803. Hearsay exceptions; availability of declarant immaterial.
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> 1) Present Sense Impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

N.C.G.S. § 8C-1, Rule 803 (1985). Because Mr. Hartell's statement was not made while he was perceiving the event, it would have to qualify as being made "immediately thereafter."

The authors of the official commentary to the rules were of the opinion that the present sense exception to the hearsay rule is new to North Carolina law. Commentary, N.C.G.S. § 8C-1, Rule 803 (1983); 1 Brandis on North Carolina Evidence § 164 (2d ed. 1982); *contra* Crumpler and Widenhouse, *An Analysis of the New North Carolina Evidence Code: Opportunity for Reform*, 20 Wake Forest L. Rev. 1, 76-7 (1984). Therefore, for interpretation of the "immediately thereafter" requirement, we turn first to the words of the official commentary:

> The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. (Citation omitted.)
>
> Spontaneity is the key factor . . . .
>
> With respect to the *time element*, Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable.

Commentary, N.C.G.S. § 8C-1, Rule 803 (1983). (Emphasis in original.) The federal courts, in interpreting the identically worded requirement in the Federal Rules of Evidence, have said, "There is no *per se* rule indicating what time interval is too long under Rule 803(1) . . . . [A]dmissibility of statements under hearsay exceptions depends upon the facts of the particular case." *United States v. Blakey*, 607 F. 2d 779, 785 (7th Cir. 1979) (citations omitted). Under the identical Federal Rule, the lapse of time allowable appears to be very small, *see, e.g., United States v. Portsmouth Paving Corp.*, 694 F. 2d 312 (4th Cir. 1982); *United States v. Peacock*, 654 F. 2d 339 (5th Cir. 1981); and *United States v. Early*, 657 F. 2d 195 (8th Cir. 1981). A statement made at least fifteen and possibly forty-five minutes after an incident has been held too remote, *see Hilyer v. Howat Concrete Co., Inc.*, 578 F. 2d 422 (D.C. Cir. 1978), but one made between "several minutes" and twenty-three minutes after an event was held admissible as a present sense impression under the facts of that particular case, *see United States v. Blakey*, 607 F. 2d 779.

Mr. Hartell went to notify the police immediately after the abduction. The officer was on the scene in ten minutes; Mr. Hartell then gave him a statement about the event. Under the facts of this particular case, Mr. Hartell's statement was not too remote to be admissible under Rule 803(1).

III.

[3] Defendant contends thirdly that the trial court erred in permitting a detective to testify, over defendant's objections, that

Darris Brown had admitted his involvement and pled guilty. North Carolina recognizes a "clear rule" that "neither a conviction, nor a guilty plea, nor a plea of *nolo contendere* by one defendant is competent as evidence of the guilt of a codefendant on the same charges." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E. 2d 228, 230 (1979); *see also State v. Rothwell*, 308 N.C. 782, 303 S.E. 2d 798 (1983). While it is proper to admit such evidence if it is introduced by the testimony of the codefendant himself for some legitimate purpose, *see, e.g., State v. Rothwell*, 308 N.C. 782, 303 S.E. 2d 798, an introduction of such evidence when the codefendant does not testify deprives defendant of his constitutional right of confrontation and cross-examination. *Id. See also State v. Gonzalez*, 311 N.C. 80, 316 S.E. 2d 229 (1984) (extrajudicial confessions). Here, Darris Brown did not testify. Admission of evidence concerning his out-of-court confession and guilty plea was therefore error.

The State contends that defendant was not prejudiced by this error because of the strength of the evidence against him. The crucial issue in this case was defendant's identity as one of the victim's assailants. Basically two types of evidence connected him to the crimes. First was the victim's positive in-court identification. However, the victim testified that she was partially blindfolded during the commission of the crimes, had never seen her assailants before, was upset at the time, and had not seen either assailant in the four and a half month interval between the crimes and defendant's appearance in the dock at his first trial. She had also apparently selected a few photographs of other individuals as possibly being those of the second man. Second, as circumstantial evidence, defendant's keys were found in the victim's car, and he later had possession of her ring. Defendant gave an explanation for these circumstances at trial. He also denied any involvement in the crimes against the victim and testified that he was elsewhere on that afternoon. One of the State's witnesses placed defendant in Darris Brown's company about half an hour before the assault on the victim. Evidence that Brown had confessed and pled guilty would tend to confirm defendant's identity as Brown's partner in crime. In light of the fact that the first jury was evenly split on the question of defendant's guilt, we cannot agree with the State that the error, which was properly objected to, was not prejudicial.

IV.

[4] Defendant's fourth contention is that the trial court committed "plain error" when it instructed the jury on a kidnapping theory not alleged in the indictment. The kidnapping indictment against defendant reads in pertinent part:

> 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 [the victim], a person who had attained the age of 16 years, by unlawfully confining her and removing her from one place to another without her consent and for the purpose of facilitating the commission of a felony, rape. [The victim] was sexually assaulted.

In response to a request from the prosecutor, the trial judge instructed the jury as follows:

> For you to find the defendant guilty of first degree kidnapping there are five things that the State must prove beyond a reasonable doubt. First, that the defendant in this case, James Manuel Odom, either acting alone or in concert with some other person, unlawfully confined [the victim] within a given area, such as within an automobile or removed her from one place to another, such as the place where the rape was committed to the place where she finally made good her escape. Second, that [the victim] did not consent. Again, consent obtained or induced by fear is not consent. Third, that the defendant Odom confined or removed [the victim] *for the purpose of facilitating his flight after committing rape.* Fourth, that this confinement or restraint, this removal, confinement or removal was a separate, and complete independent act apart from any rape. What I'm saying to you, Ladies and Gentlemen, is that if the rape was completed and over with, kidnapping was done for a different purpose. If you find that, then you can find him guilty of first degree kidnapping. But if it was part and parcel of the rape *or for the purpose of committing the rape, no.* Fifth, that when the victim had been released, she had been sexually assaulted. Therefore, I instruct you that if you find from the evidence and beyond a reasonable doubt that on or about the 14th day of September 1983, James Manuel Odom unlawfully confined [the victim] in

> a motor vehicle or removed her from a place where she was to some other place, behind the apartment project, and that [the victim] did not consent to this removal or confinement and that this was done for the purpose of facilitating the defendant and Brown or either of them commit to [sic] *flight after committing the felony of rape*, and that the defendant—that the victim, when released had been sexually assaulted and that this removal or confinement of [the victim] was a separate and complete act, independent of and apart from the felony of rape, if you find those things from the evidence and beyond a reasonable doubt, it will be your duty to return a verdict of guilty of first degree kidnap [sic]. However, if you do not so find or have a reasonable doubt as to any one of these things, then for your verdict you must say that he is not guilty.

(Emphasis added.) Defendant was thus convicted of a crime for which he was not indicted.

Because the trial judge's instructions to the jury charged on a theory not supported by the indictment, the instruction was erroneous. As this Court said in *State v. Brown*, 312 N.C. 237, 248-49, 321 S.E. 2d 856, 863 (1984),

> This Court has consistently held that it is error . . . for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment. Unlike the short-form indictments authorized for homicide (N.C. Gen. Stat. § 15-144 (1983)) and rape (N.C. Gen. Stat. § 144.1 (1983)), an indictment charging first-degree kidnapping *must* include information 'regarding the factual basis under which the State intends to proceed and . . . the State is limited to that factual basis at trial.'

The State argues that because defendant did not object to the erroneous instruction at trial, Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure bars him from arguing this error on appeal.

In *State v. Brown*, however, this Court applied the "plain error" rule to a similar factual situation and awarded that defendant a new trial. The State concedes that the facts in *Brown* are substantially similar to the ones here. In *Brown*, the indictment

charged the defendant with kidnapping by reason of removing the victim from one place to another "for the purpose of facilitating the commission of a felony, to wit: attempted rape." *Brown*, 312 N.C. at 247, 321 S.E. 2d at 862. At trial, the judge instructed the jury on a completely different theory, that the kidnapping was for the purpose of terrorizing the victim. The State would distinguish the case at hand from *Brown* on the grounds that the defendant in *Brown* did object. However, because the objection was not made until the jury had retired to deliberate, objection was not timely and thus did not preserve the error for appellate review. Because defendant in *Brown* also had to rely upon the plain error rule, the State's distinction is not persuasive. Nevertheless, we need not decide whether *Brown* requires that defendant be given a new trial on the kidnapping charge in this case, since we have already determined that defendant is entitled to a new trial on all charges.

V.

To summarize, the trial court did not err in refusing to dismiss the charges against defendant before his second trial on grounds of double jeopardy or in allowing the out-of-court statement of the eyewitness, Willie Hartell, to be admitted into evidence as a present sense impression. However, the court committed prejudicial error in admitting evidence of the out-of-court confession and guilty plea of the non-testifying codefendant, Darris Brown, entitling defendant to a new trial on all charges.

New trial.

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

MICHAEL ANTHONY ESTRADA v. STEVEN J. BURNHAM

No. 338PA85

(Filed 2 April 1986)

1. **Rules of Civil Procedure §§ 11, 41.1— filing of complaint—immediate voluntary dismissal—no right to refile action within one year**

Rules of Civil Procedure 41(a)(1) and 11(a) must be construed *in pari materia* to require that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleadings, including the implicit requirement of Rule 11(a) of a good-faith filing with the intent to pursue the action. Therefore, a complaint filed by plaintiff for the sole purpose of tolling the statute of limitations and voluntarily dismissed two minutes later was a sham pleading subject to being stricken and disregarded pursuant to Rule 11(a) and could not provide a basis for the action to be refiled within one year after such dismissal.

2. **Rules of Civil Procedure § 52— no necessity for findings of fact—appellate review**

The trial court was not required to make findings of fact in its order allowing defendant's motion to dismiss plaintiff's action on the ground that it was time-barred where neither party requested that the court make findings. Furthermore, where no findings were required, it is presumed that the court on proper evidence found facts to support its judgment. N.C.G.S. 1A-1, Rule 52(a)(2).

3. **Rules of Civil Procedure § 11— sham and false complaint—judicial admissions**

A judicial admission by plaintiff's counsel in the appellate briefs and oral argument that there was never an intent to prosecute an action when it was filed and that the complaint was filed for the sole purpose of dismissing it to gain a one-year extension under Rule 41(a)(1) was sufficient to show that the complaint was sham and false and should be stricken pursuant to Rule 11(a).

ON discretionary review of a decision of the Court of Appeals, 74 N.C. App. 557, 328 S.E. 2d 611 (1985), reversing the order of *Walker, J.*, dismissing plaintiff's medical malpractice complaint filed in the Superior Court, ORANGE County, on 5 April 1984. Heard in the Supreme Court 12 February 1986.

McCain & Essen, by Grover C. McCain, Jr., and Jeff Erick Essen, for plaintiff-appellee.

Yates, Fleishman, McLamb & Weyher, by Joseph W. Yates, III, and Barbara B. Weyher, for defendant-appellant.

MEYER, Justice.

Complications arising from surgery to repair a bullet wound in plaintiff's leg resulted in his undergoing a lengthy embolectomy at North Carolina Memorial Hospital. The operation lasted from 6:00 p.m. on 18 June 1979 until 10:00 a.m. the next morning and was performed by John R. Miles, M.D., a Fellow in the Vascular Surgery Department. During the operation, Dr. Miles telephoned defendant, the attending physician, for assistance and consultation. On at least one occasion, defendant came to the operating room, but did not perform any surgery. The operation was unsuccessful in reestablishing blood flow in plaintiff's lower leg, and on the following day, his left leg was amputated below the knee.

On 18 June 1982 at 4:28 p.m., plaintiff filed with the *Durham County* Clerk of Superior Court a "bare bones" complaint alleging that the plaintiff was admitted to North Carolina Memorial Hospital for treatment of a "false aneurysm" in his left leg, that Dr. Burnham was negligent in his care and treatment of plaintiff, and that plaintiff was damaged as a proximate result of such negligence. The complaint contained no allegations with respect to the specific manner in which defendant was purportedly negligent. The unverified complaint, numbered 82CVM06216, was signed by plaintiff's attorney Jeff Erick Essen, whose name also appeared as plaintiff's attorney on a civil summons identically numbered and issued simultaneously with the filing of the complaint.

At 4:30 p.m., *two minutes* after the original complaint was filed, a notice of dismissal, numbered 82CVS01674, was filed with the Durham County Clerk of Superior Court purporting to voluntarily dismiss the action without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.[1]

1. We note that, according to the record on appeal as certified to the Court of Appeals and to this Court, the notice of dismissal bears file number 82CVS01674, while the 1982 Durham County complaint bears file number 82CVM06216. The civil magistrate (small claims) docket number was apparently stamped on the complaint and summons in error and was "whited out" on the original documents on file with the Clerk of Superior Court of Durham County and the correct CVS docket numbers inserted at the time the documents were filed. The correction was never made in the record on appeal prior to or following its certification on appeal.

Plaintiff's counsel has, in complete frankness, conceded that neither he nor anyone else ever attempted to serve the summons and complaint or the notice of dismissal in the June 1982 *Durham County action* on defendant.

The three-year statute of limitations, as set forth in N.C.G.S. §§ 1-15(c) and 1-52, expired the next day, 19 June 1982.[2] Nevertheless, on 16 June 1983, plaintiff filed with the *Orange County* Clerk of Superior Court a second unverified complaint bearing the signatures of attorneys Jeff Erick Essen and Grover C. McCain, Jr., naming Dr. Burnham as defendant and setting forth a cause of action for medical malpractice arising out of the June 1979 surgical procedures.[3] A summons issued on 16 June 1983 was served on defendant, along with the complaint of the same date, on 14 July 1983.

Upon receipt of the 1983 Orange County summons and complaint, defendant filed a motion to dismiss on 27 July 1983 pursuant to Rule 12(b)(6) of the Rules of Civil Procedure on grounds that the three-year statute of limitations prescribed by N.C.G.S. §§ 1-15(c) and 1-52 barred the action which allegedly accrued on 19 June 1979 and that the complaint failed to allege circumstances making the plaintiff's injuries not readily apparent so as to extend the limitations period under N.C.G.S. § 1-15(c) an additional year. It was not until after this motion had been filed and served that defendant first became aware that a summons had been issued and a complaint filed and voluntarily dismissed in *Durham County* one year earlier by this same plaintiff for damages arising out of the identical factual circumstances.

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2. Plaintiff's new complaint, *see infra*, appears to allege 19 June 1979 as the date of the last act by defendant giving rise to the cause of action.

3. The 1983 "Orange County complaint" contains no allegations which would support a cause of action for medical malpractice with a four-year statute of limitations under N.C.G.S. § 1-15(c) (injury not readily apparent), and plaintiff presented no evidence to support such circumstances at the 1984 hearing on defendant's motion to dismiss that complaint, nor was this theory briefed before the Court of Appeals. Thus, the question of whether plaintiff's 1983 Orange County complaint was one alleging a cause of action governed by a four-year statute of limitations is not properly before this Court. N.C.R. App. P., Rule 16(a). *See also State v. Freeman*, 308 N.C. 502, 513, 302 S.E. 2d 779, 785 (1983); *Falls Sales Co., Inc. v. Board of Transp.*, 292 N.C. 437, 443, 233 S.E. 2d 569, 573 (1977).

A hearing was conducted before Judge Russell G. Walker, Jr., on 2 April 1984 on defendant's motion to dismiss the 1983 Orange County complaint on grounds that the action was time-barred. Judge Walker ordered that defendant's Rule 12(b)(6) motion be allowed and the action be dismissed with prejudice. Plaintiff gave notice of appeal to the North Carolina Court of Appeals on 5 April 1984.

The Court of Appeals reversed Judge Walker's judgment dismissing the action, reasoning that N.C.G.S. § 1A-1, Rule 41(a)(1) does not require that a plaintiff serve or attempt to serve process upon a defendant prior to taking a voluntary dismissal of the action without prejudice, thus benefitting the plaintiff with the "saving" provision of that rule allowing the action to be refiled within one year after such dismissal. The Court of Appeals reasoned that plaintiff's 1982 Durham County action had not been discontinued by failure to attempt service and was still therefore "alive" at the time plaintiff took his Rule 41(a)(1) dismissal. In other words, prior to taking the dismissal, "no time period had lapsed during which plaintiff was required . . . to take further steps to keep his action viable." *Estrada v. Burnham*, 74 N.C. App. at 559, 328 S.E. 2d at 612. The Court of Appeals held that by his actions (filing the 1982 Durham County complaint and having summons simultaneously issued, then instantly dismissing the complaint), plaintiff "tolled the statute of limitations and effectively obtained the one year extension within which to commence a new action based on the same claim pursuant to Rule 41(a)(1)." *Id.* Because plaintiff's 1983 Orange County complaint was filed within one year of the 1982 Durham County voluntary dismissal, the Court of Appeals reversed the order dismissing plaintiff's 1983 Orange County action.

We reverse and remand for reinstatement of the order of Judge Walker dismissing the 1983 Orange County action.

N.C.G.S. § 1A-1, Rule 41(a),[4] provides in pertinent part:

(a) *Voluntary dismissal; effect thereof.*—

4. All subsequent references to "rules" are to the North Carolina Rules of Civil Procedure, Chapter 1A-1 of the North Carolina General Statutes (1983), unless otherwise specified.

(1) By plaintiff; . . . —Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case . . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . .

The Court of Appeals' opinion seems to assume that Rule 41(a)(1) may be applied in isolation. This assumption is erroneous. Rule 41(a)(1) must be applied in conjunction with the rules for drafting and certification of pleadings. It was unnecessary for the Court of Appeals to reach the question of whether a Rule 4 requirement of service or attempted service of process is engrafted on Rule 41(a)(1), because the complaint filed by plaintiff in Durham County at 4:28 p.m. on 18 June 1982 and dismissed two minutes later was a sham pleading subject to being stricken and disregarded pursuant to Rule 11(a).

We disagree with the Court of Appeals' conclusion that "[d]efendant's contentions regarding Rule 11 are . . . inapplicable to the facts of this case." On the contrary, we find Rule 11(a) dispositive. Rule 11(a) provides in pertinent part:

> (a) *Signing by attorney.*—Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . *The signature of an attorney constitutes a certificate by him that* he has read *the pleading*; that to the best of his knowledge, information, and belief there is good ground to support it; and that it *is not interposed for delay. If a pleading* is not signed or *is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false* and the action may proceed as though the pleading had not been served. (Emphasis added.)

In his briefs before the Court of Appeals and before this Court, plaintiff has candidly conceded that the 1982 Durham County "lawsuit was filed with the intention of dismissing it in order to avoid the lapse of the statute of limitations." Indeed, during oral argument before this Court in reference to his filing the

1982 Durham County complaint, plaintiff's counsel admitted, "We did not intend at that point in time to prosecute a legal action against the doctor [defendant, Burnham]." Again during oral argument before this Court, plaintiff's counsel stated, "Clearly there was an intention on our part not to prosecute that [1982 Durham County] action, and we concede that."

[1] The dispositive question is whether a plaintiff may file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to Rule 41(a)(1). We conclude that an affirmative response to this question would amount to an endorsement of a violation of the spirit as well as the letter of the North Carolina Rules of Civil Procedure.

We do not agree with plaintiff's implied assumption (and apparently that of the panel below) that Rule 41(a)(1) may be construed and applied in isolation. The Rules of Civil Procedure represent a carefully drafted scheme, modeled after the Federal Rules of Civil Procedure, "designed to eliminate the sporting element from litigation . . . . [T]he rules should be construed as a whole, giving no one rule disproportionate emphasis over another applicable rule." W. Shuford, North Carolina Civil Practice and Procedure § 1-3 (2d ed. 1981) (footnotes omitted). Although it is true that Rule 41(a)(1) does not, on its face, contain an explicit prerequisite of a good-faith filing with the intent to pursue the action, we find such a requirement implicit in the general spirit of the rules, as well as in the mandates of Rule 11(a). Construing the rules as a whole, we hold that Rules 41(a)(1) and 11(a) must be construed *in pari materia* to require that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including Rule 11(a). A pleading filed in violation of Rule 11(a) should be stricken as "sham and false" and may not be voluntarily dismissed without prejudice in order to give the pleader the benefit of the "saving" provision of Rule 41(a)(1). A second complaint, filed in reliance on the one-year "extension" in such a situation, is subject to dismissal upon ap-

propriate motion by the adverse party upon grounds that the new action is time-barred.

Plaintiff contends that a Rule 11(a) violation cannot be the basis for our upholding the trial court's allowing defendant's Rule 12(b)(6) motion to dismiss the 1983 Orange County complaint because the trial court failed to enter findings of fact or conclusions of law which would have indicated whether Rule 11(a) was a basis upon which the trial court allowed the motion to dismiss. Indeed, the trial court's order, filed 5 April 1984, states only that a hearing was conducted, and after reviewing the record and hearing arguments, the trial court allowed defendant's motion to dismiss the complaint with prejudice.

[2] Rule 52(a)(2) provides that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested by a party and as provided by Rule 41(b)." There is no indication in the record that either party requested that the trial judge make findings. Nor does Rule 12(b)(6) or Rule 11(a) require that findings be entered of record. When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment. *Williams v. Bray*, 273 N.C. 198, 201, 159 S.E. 2d 556, 558 (1968); *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E. 2d 509, 509-11 (1976).

[3] Plaintiff also contends that this Court may not uphold the dismissal of his 1983 Orange County complaint for a Rule 11(a) violation in conjunction with the 1982 Durham County complaint because an appellate court cannot make findings of fact. Plaintiff argues that his *intent* in filing the 1982 Durham County complaint is not part of the record. We disagree. It is plaintiff's counsel's intent in certifying a pleading that is relevant under Rule 11(a), and he is free to make a judicial admission as to that intent and withdraw the question from the realm of dispute either at the trial court level or upon appeal.

Judicial admissions are conclusive and are binding in every respect. *See* 2 Brandis on North Carolina Evidence § 171 (2d rev. ed. 1982).

> A *judicial* or *solemn* admission is a formal concession made by a party (usually through counsel) in the course of lit-

> igation for the purpose of withdrawing a fact or facts from the realm of dispute. . . . Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence.

2 Brandis on North Carolina Evidence § 166 (2d rev. ed. 1982) (emphasis in original) (footnote omitted). *See also Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 604, 276 S.E. 2d 375, 379 (1981).

We accept plaintiff's counsel's concession and judicial admission that "[c]learly there was an intent on our part not to prosecute [the 1982 Durham County] action" as placing his actions in certifying the complaint squarely within the prohibitions of Rule 11(a).[5] Although we accept plaintiff's counsel's statement that he filed the first complaint in good faith, believing that he could dismiss and thereby legitimately obtain the one-year extension, we cannot accept his argument that such a filing was in accord with the spirit and letter of Rule 11(a). Moreover, we find plaintiff's candid admission that the 1982 Durham County "lawsuit was filed with the [sole] intention of dismissing it in order to avoid the lapse of the statute of limitations" tantamount to a concession that his only purpose in certifying the complaint was to extend the deadline by which he must draft and file a sufficient complaint.

Plaintiff's 1982 Durham County complaint was certified in violation of Rule 11(a), as evidenced by counsel's judicial admissions that there was never an intent to prosecute that action when filed and that the complaint was filed for the sole purpose of dismissing it to gain a one-year extension under Rule 41(a)(1). We hold, therefore, that the 1982 Durham County complaint was sham and false and that it should be stricken and treated as if it had never been filed. Such a complaint does not trigger rights under Rule 41(a). Thus, plaintiff's purported Rule 41(a)(1) voluntary dismissal is without effect. The result is that plaintiff's 1983

5. The Official Comment to Rule 11 states, "As an alternative to the verification control on truth, the federal approach of constituting an attorney's signature to any pleading a *certificate of good faith* in its preparation is adopted. However, the severe explicit federal rule sanction of disciplinary action against an attorney violating this rule is dropped, retaining only the sanction of striking as sham." Commentary, N.C.G.S. § 1A-1, Rule 11 (1983) (emphasis added).

Orange County action is barred by the applicable three-year statute of limitations and was properly dismissed by the trial court upon defendant's Rule 12(b)(6) motion.

> When the complaint discloses on its face that plaintiff's claim is barred by the statute of limitations, such defect may be taken advantage of by a motion to dismiss under Rule 12(b)(6). *Travis v. McLaughlin*, 29 N.C. App. 389, 224 S.E. 2d 243, *cert. denied*, 290 N.C. 555, 226 S.E. 2d 513 (1976); *Teague v. Asheboro Motor Company*, 14 N.C. App. 736, 189 S.E. 2d 671 (1972); Wright & Miller, *Federal Practice and Procedure: Civil* § 1357, at 608 (1969).

F.D.I.C. v. Loft Apartments, 39 N.C. App. 473, 475, 250 S.E. 2d 693, 694-95, *disc. rev. denied*, 297 N.C. 176, 254 S.E. 2d 39 (1979).

Because we find plaintiff's 1982 Durham County complaint to have been certified in violation of Rule 11(a) and thus subject to being stricken as sham and false, we need not reach the issue of whether plaintiff was required to comply with Rule 4 service requirements—the grounds upon which the Court of Appeals rendered its decision.

We note, also, the plaintiff's failure to comply with the provisions of Rule 5(a) with regard to the dismissal of the 1982 Durham County complaint. Although it provides for no sanctions upon a failure to comply, Rule 5(a) requires in pertinent part: "[E]very written notice . . . shall be served upon each of the parties." Plaintiff concedes that there was never any attempt to serve a copy of the *notice of dismissal* of the 1982 Durham County action upon defendant or his counsel. Plaintiff's argument that the notice was "effective" upon filing with the clerk misses the point. We can conceive of no *valid* reason for plaintiff to conceal from the defendant the attempted commencement and summary dismissal of the 1982 Durham County action. If plaintiff needed more time to investigate his potential claims against the defendant before filing a well-pled complaint, Rule 3 provides for the commencement of an action by the issuance of a summons and application to the court for permission to file a complaint within twenty days. The Rule 3 requirement that a summons be issued and served in accordance with Rule 4, along with the court's order granting permission to file a complaint within twenty days, is intended to ensure that the defendant will have notice of the commencement of an action against him.

Statutes of limitation are intended to afford security against stale claims. With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed; and it is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action. *See Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957). Without a prospective defendant's having received some notice of a summons and complaint having been filed against him, he has no reason to believe that he must identify and secure the testimony of witnesses or obtain and continue to preserve evidence which would be useful to his defense or do any of the myriad of other things necessary to prepare a defense or that he must continue to refrain from taking actions or making statements which could be against his interest. Plaintiff's contention that prospective defendants cannot comprehend, and do not calculate or rely upon, the intricacies of N.C.G.S. § 1-15(c) is unpersuasive, especially on these facts. Indeed, plaintiff asserts that defendant was well aware of the fact that a number of fellow physicians had already been named as defendants in a medical malpractice action instituted by this plaintiff in May 1981 in Orange County, arising from the same surgical procedures conducted in June 1979. It is far from "inconceivable" that defendant, Burnham, was acutely aware that the three-year statute of limitations on alleged negligent acts occurring during Michael Estrada's surgery in June 1979 expired in June 1982. Yet, he had no notice that an action had purportedly been commenced against him in Durham County within the limitations period until after he had filed and served his Rule 12(b)(6) motion to dismiss the apparently time-barred Orange County action of June 1983.

To borrow a phrase from plaintiff's brief, we cannot agree that such "procedural gymnastics" as were employed in this case were contemplated by the drafters of the Rules of Civil Procedure. "[T]he fundamental premise of the . . . rules [of Civil Procedure] is that a trial is an orderly search for the truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons . . . ." A. Vanderbilt, Cases and Other Materials on Modern Procedure and Judicial Administration 10 (1952). "The rules are designed to eliminate legal sparring and fencing and surprise

moves of litigants." Sizemore, *General Scope and Philosophy of the New Rules*, 5 Wake Forest Intra. L. Rev. 1, 6 (1968). *See generally* W. Shuford, North Carolina Civil Practice and Procedure § 1-3 (2d ed. 1981).

In conclusion, the decision of the Court of Appeals is hereby reversed and the case is remanded to the Court of Appeals for further remand to the Superior Court, Orange County, for reinstatement of the order of Judge R. Walker, Jr., filed 5 April 1984.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES THOMAS MOORE

No. 253A85

(Filed 2 April 1986)

1. **Searches and Seizures § 16— consent to search by defendant's mother**

The evidence supported the trial court's finding that defendant's mother consented to a warrantless search of defendant's bedroom in a residence which she owned even though the printed name on the consent to search form incorrectly stated the first name of defendant's mother and the officer was mistaken as to the first name of defendant's mother.

2. **Kidnapping § 1— indictment insufficient to charge first degree kidnapping**

An indictment was insufficient to charge first degree kidnapping where it alleged that the kidnapping was committed to facilitate the commission of a first degree sexual offense but failed to allege that the victim was sexually assaulted, seriously injured, or not released in a safe place. However, the indictment was sufficient to charge second degree kidnapping. N.C.G.S. § 14-39(a) and (b).

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Tillery, J.*, at the 28 January 1985 Criminal Session of Superior Court, PITT County. We granted defendant's motion to bypass the Court of Appeals on the charge of first degree kidnapping on 22 July 1985.

Defendant was charged in indictments with first degree sexual offense and first degree kidnapping.

At trial, the State's evidence tended to show that at approximately 5:00 p.m. on 19 August 1984 James Earl Middleton, a fif-

teen-year-old high school student, and his mother went to play bingo on 10th Street in Greenville, North Carolina. After winning forty dollars, Middleton told his mother he was going to the movies and left the bingo parlor around 6:30 p.m. He walked to the theater and sat through the feature film twice. Around 11:00 p.m. when the movie ended, Middleton decided to walk to a friend's house. Finding no one at home, he started back towards the bingo parlor to walk his mother home.

Middleton testified that he walked several blocks and as he prepared to cross the street to the bingo parlor he noticed a black man in a brown station wagon signalling to him to come over to his car. Middleton obeyed, thinking that the driver needed directions. The driver opened his car door, grabbed Middleton by the shirt and arm, and threw him across the steering wheel to the passenger's side of the car. Middleton tried unsuccessfully to escape through the passenger door. The driver, identified by Middleton as the defendant, repeatedly struck him in the arm and chest with his fist to stop Middleton's attempts to flee.

After driving several miles with Middleton as his captive, the defendant stopped behind an abandoned house. He then brandished a "wierd [sic] looking knife" and ordered Middleton to take off his pants and get in the back seat. Middleton described the knife as having a two-inch blade that curved upwards. Middleton testified that he removed his pants and underclothing and climbed into the back part of the station wagon. Defendant also climbed over the back seat and laid directly on top of Middleton who was lying in a prone position. While holding Middleton by the throat with one hand, defendant shoved his penis into Middleton's rectum. At that point, Middleton began struggling very hard and managed to throw defendant off of him. He jumped over the seat, unlocked the door, and ran to the street. Middleton continued to run, clad only in his shirt and shoes, until he flagged down Police Officer Jerry Lee who took him to a hospital. Nurse Linda Ludlow testified that she examined Middleton and found a large amount of blood on the sheet wrapped around him and tears inside his rectum.

Middleton recounted the story to Deputy Sheriff Larry Parker who located at 101 Midgette Lane a car fitting the description given by Middleton. On the following day, 20 August 1984, Parker

drove to the house where the station wagon was spotted. Parker had already determined that Velma Moore and her son, the defendant, lived in the house. Finding no one at home, Parker left and returned with Middleton to identify the vehicle. Parker testified that Middleton immediately recognized the car as the vehicle used in his assault. As they stood beside the car, defendant walked out of the house. Middleton quickly identified defendant as his attacker. Defendant was placed under arrest and advised of his constitutional rights. As the three men drove back to the police station, defendant, reaching from the back seat, slapped Middleton hard across the face and exclaimed: "[W]hy did you tell on me, sissy." Parker further testified that he later returned to the Moore home, obtained Mrs. Moore's consent to search her home, and found in defendant's bedroom the knife, later identified as the one used by defendant to threaten Middleton.

Defendant testified in his own defense and stated that he had previously seen Middleton outside the Paddock Club, a gay bar in Greenville, where they had engaged in fellatio. Defendant further admitted seeing Middleton on the night of 19 August 1984. According to defendant, Middleton entered his car voluntarily and first suggested that they engage in oral sex that evening. He later suggested that they have anal intercourse. However, during this latter act, defendant realized that Middleton had just been with someone else. This fact angered defendant because he was afraid he would contract a venereal disease. At that point, Middleton jumped out of the car, leaving his pants, and ran to the road.

Deputy Sheriff Parker was also called by the defense. He testified that on 20 August 1984 defendant gave a statement which indicated that he did engage in consensual sexual relations with Middleton. Defendant told Parker that he felt Middleton reported the incident to the police to "set [him] up."

The jury returned a verdict of guilty of first degree sexual offense and first degree kidnapping. Defendant received the mandatory life sentence for the sexual assault and a consecutive twelve-year sentence for kidnapping.

Lacy H. Thornburg, Attorney General, by Gayl M. Manthei, Associate Attorney, for the State.

Malcolm Ray Hunter, Jr., Acting 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 improperly admitted into evidence the knife seized from his bedroom pursuant to an allegedly invalid third party consent search. At trial, defendant contested the identity and therefore the authority of the woman who allowed the search. He argues on appeal that the trial court's findings of fact that his mother consented to the search are not supported by competent evidence.

On direct examination prior to the *voir dire* hearing conducted to determine the admissibility of the knife, Deputy Sheriff Larry Parker testified that after defendant's arrest he went back to 101 Midgette Lane and obtained consent to search the residence from "the defendant's mother" who stated that she "lived in the house and was in charge of the house." During the *voir dire* hearing, Parker stated that Mrs. Velma Moore who identified herself as the defendant's mother signed the consent and waiver to search without a search warrant form giving him the authority "to conduct a complete search of my residence located at 101 Middgette [sic] Lane." According to Parker, Mrs. Moore stated that it was her residence and that she paid for all household expenses.

Defendant cross-examined Parker, but indicated that he had no *voir dire* evidence of his own to offer. The trial court then made these findings of fact:

> [T]he Court having heard the testimony of the officer, Officer Parker, finds as a fact that on the 22nd of August, 1984 Mr. Parker in company with another officer visited the address from which the defendant had been arrested and interviewed the defendant's mother whose name is Velma Moore and received from her permission to search without a search warrant any portion of the home in which she and the defendant resided. [Defendant's Exception No. 3.] The Court further

finds as a fact that she indicated to him that this was her residence and that the defendant was not a paying boarder.

At that point in the trial court's fact finding, defendant indicated that he did after all have some evidence to offer on *voir dire*. The trial court interrupted its findings of fact and allowed defendant to take the stand.

In his *voir dire* testimony, defendant stated that he resided with his mother at 101 Midgette Lane. He further revealed, however, that "Velma Moore" is the name of his sister who lives in Farmville, North Carolina. According to defendant, his mother's name is "Verna," not "Velma."

At the conclusion of defendant's testimony, the trial judge resumed his fact finding:

> Let the record show that State's Voir Dire Exhibit #1 in the printed portion thereof contains the name of Mrs. Velma Moore. V-E-L-M-A. And following the testimony of Mr. James T. Moore, the Court examined the signature which appears on the consent and waiver form and finds as a fact that the name that is signed thereto is Verna, V-E-R-N-A, or V-E-R-N-O, and what appears to me to be a "G" Moore. Anyway, continuing with the Court's findings of fact, the Court finds that the person who identified herself to the officer did indicate her possession of the premises and did permit him to come in and search and did escort him to the room which she pointed out as being the room in which the defendant slept. And the Court further finds as a fact that Exhibits 2 and 3 [the knife and its leather holster] were therein found. Upon the foregoing findings of fact the Court concludes as a matter of law that Officer Parker on the 22nd day of August, 1984 did receive permission to search the premises from the person in possession thereof on that occasion, and for that reason there was no requirement that a search warrant be issued or used. [Defendant's Exception #4.] The Court denies the motion to suppress the fruits of the search and overrules the objection which has been made thereto and declines to strike the evidence or to give any cautionary instructions to the jury. [Defendant's Exception #5.] To all of these findings of fact and conclusions of law and rulings the defendant through counsel objects and excepts.

Defendant contends that in order to establish the validity of the consent search the State should have been required to call his mother as a witness. We reject the notion that the State was required to call any particular person to establish the validity of the search and seizure. Rather, the evidence seized during the consent search was properly admitted if the trial court's findings of fact are supported by competent evidence. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death penalty vacated*, 428 U.S. 908, 49 L.Ed. 2d 1213 (1976). Those findings, so supported, are binding on this Court, even though there is evidence to the contrary. *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976). In determining whether the trial court's findings are supported by the evidence, we look to the entire record, not merely to the evidence presented on *voir dire*. *State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975).

We admit that the trial court's findings of fact appear inconsistent. On one hand, the trial court finds that defendant's mother's name was "Velma," but later finds that the consent form was signed by "Verna." Yet, it is obvious from the transcript that once defendant offered his evidence highlighting the fact that his mother's name was "Verna," the trial court, realizing the error in Officer Parker's testimony, corrected the mistake in the findings and clarified that "Verna" had in fact signed the consent/waiver form. This finding was supported by competent evidence.

Furthermore, the evidence presented by defendant himself reveals that he lived at 101 Midgette Lane with his mother, Verna Moore. Through Officer Parker's testimony during direct examination prior to and on *voir dire*, the State established that Parker was permitted to search 101 Midgette Lane by Verna Moore, defendant's mother.

Finally, the Constitution and related laws only protect an accused from *unreasonable* searches and seizures. The reasonableness of the search is determined under the circumstances as they appeared to the officers. *See* Price, North Carolina Criminal Trial Practice, § 4-26 (2d ed. 1985). N.C.G.S. § 15A-222(3) provides that the consent needed to justify a search and seizure may be given "[b]y a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of [the] premises." The evidence offered by the State clearly shows that

the officers conducted the search based on the consent of someone who reasonably appeared entitled to give it under the circumstances. "When judged in accordance with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,' *Brinegar v. United States*, 338 U.S. 160, 175, 93 L.Ed. 1879, 1890, 69 S.Ct. 1302 (1949)," the search was reasonable and valid under the Fourth Amendment. *Hill v. California*, 401 U.S. 797, 804-05, 28 L.Ed. 2d 484, 490 (1971). Therefore, even in light of the initial mistake concerning the defendant's mother's name, there was sufficient competent evidence and findings consistent therewith made to support the trial court's conclusion that Parker received proper consent from Mrs. Moore to search her son's bedroom and for that reason the issuance and presentation of a search warrant was unnecessary.

As previously noted, defendant did not contest the search and seizure on any ground other than the identity of the woman permitting the search. He did not assert, as he does now on appeal, that a parent has no authority to consent to the search of her emancipated, twenty-nine year old son's private bedroom. Defendant also did not object to the search on the basis that he and his mother were involved in a landlord-tenant relationship. On the contrary, there was uncontradicted and unobjected to evidence presented that defendant was not a paying boarder. Because defendant did not advance these theories at trial, he cannot assert them for the first time on appeal. *State v. Hunter*, 305 N.C. 106, 112, 286 S.E. 2d 535, 539 (1982).

We therefore hold that the trial court properly admitted into evidence the knife seized from defendant's bedroom.

[2] Defendant next contends that his kidnapping conviction must be vacated because the indictment failed to allege all of the essential elements of first degree kidnapping. Specifically, defendant argues that the indictment is fatally flawed because it fails to allege that the victim "either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted." N.C.G.S. § 14-39(b) (1981).

The kidnapping indictment in this case reads as follows:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did kidnap James Earl Middleton, a person under the age of sixteen years, by unlawfully confining and restraining and removing him from one place to another, without the consent of his parent or legal guardian, and for the purpose of holding him for facilitating the commission of a felony, to wit: first degree sexual offense.

The kidnapping statute, N.C.G.S. § 14-39, provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating the flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrain[ed] or removed or any other person.
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

In *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E. 2d 339, 350 (1983), this Court reiterated the established rule that "an indictment will not support a conviction for a crime unless all the elements of the crime are accurately and clearly alleged in the indictment." We reasoned that this general rule governed the sufficiency of a kidnapping indictment because the legislature had not established or authorized a short-form indictment for kidnapping. Because the language of N.C.G.S. § 14-39(b) states essential elements of first degree kidnapping, the State, in order to properly indict a defendant for first degree kidnapping must allege the applicable elements of both subsection (a) and subsection (b). *Id.* at 261, 307 S.E. 2d at 351.

Obviously, the indictment alleges the applicable element of subsection (a) that the kidnapping was committed for the purpose of facilitating the commission of a felony. It also alleges the felony, first degree sexual offense, that the kidnapping was committed to facilitate. Yet, even though the jury returned a guilty verdict for first degree kidnapping on the grounds that the victim was not released in a safe place and was sexually assaulted, the kidnapping indictment, itself, does not specifically allege any of the elements contained in subsection (b). This omission raises the question of whether the mere reference to the first degree sexual offense is sufficient as an allegation of the element that the victim was sexually assaulted.

We answer this question in the negative and hold that this indictment does not clearly allege all of the constituent elements of first degree kidnapping. Because the indictment does not allege in particular that the victim was sexually assaulted, seriously injured, or not released in a safe place, it is insufficient to charge kidnapping in the first degree. It is, however, a valid second degree kidnapping indictment. Since all of the elements of second degree kidnapping were found beyond a reasonable doubt by the jury by virtue of its guilty verdict of first degree kidnapping, defendant under this indictment stands convicted of second degree kidnapping. Because the indictment never charged defendant with first degree kidnapping, that offense was erroneously submitted to the jury as a possible verdict. Unlike the fatal variance between the State's proof and the averments contained in the indictment with regard to first degree kidnapping, there is no such variance between the State's allegations in the indictment of sec-

ond degree kidnapping and its proof at trial. The fact that the State proved first degree kidnapping in the opinion of the jury is immaterial. It is well settled that the indictment controls the prosecution, and evidence not supported by the indictment is unavailing. *State v. Jones*, 227 N.C. 94, 40 S.E. 2d 700 (1946). *See also State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980). We therefore hold that judgment for first degree kidnapping must be arrested and remand for resentencing on second degree kidnapping.

In conclusion, we find no error in defendant's conviction of first degree sexual offense. Judgment is arrested on first degree kidnapping. This case is remanded to the Superior Court of Pitt County for entry of judgment and sentencing for second degree kidnapping.

No. 84CRS15140—first degree sexual offense—No error.

No. 84CRS15141—first degree kidnapping—Judgment arrested and remanded for sentencing on second degree kidnapping.

STATE OF NORTH CAROLINA v. ANTHONY ELWOOD HEATH

No. 702A85

(Filed 2 April 1986)

Criminal Law § 89.1— rape of child—examination of victim's psychologist about victim's truthfulness—error

The trial court erred in a prosecution for second degree rape and second degree sexual offense by permitting the prosecutor to ask an expert in clinical psychology whether the victim had a mental condition which would cause her to fabricate a story about the sexual assault. The question addressed itself to *the* sexual assault rather than fantasizing about sexual assaults in general, and the answer was not responsive in that it was addressed to a record of lying rather than a mental condition. N.C.G.S. 8C-1, Rules 405(a), 608, and 702; N.C.G.S. 15A-1443(a).

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 77 N.C. App. 264, 335 S.E. 2d 350 (1985), which found no error in the trial of defendant before *Barefoot, J.*, at the 16 July 1984

session of Superior Court, LENOIR County, but remanded the case for a new sentencing hearing. Heard in the Supreme Court 13 March 1986.

Lacy H. Thornburg, Attorney General, by Tiare B. Smiley, Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

The question dispositive of this appeal is whether the trial court erred in permitting the prosecutor to pose a question to an expert in clinical psychology regarding whether the victim had a mental condition which would cause her to fabricate a story about the sexual assault. Concluding that it so erred, we order a new trial.

At trial the state's evidence tended to show that on 5 February 1983 thirteen-year-old Victoria Ann Purser (Vickie), who had been living with her maternal grandparents in Grifton, was visiting her parents and siblings in Kinston. Vickie had gone to a nearby house to see her friend, Lisa Warren. Vickie testified that while she was sitting alone in the front porch swing waiting for Lisa to finish a phone call, the fifty-six-year-old defendant, who lived next door and whom the neighborhood children sometimes visited, came up the porch steps, spoke to her, and put his arm around her. Afraid, Vickie tried to get up and go back into Lisa's house, but defendant held her more tightly, turned her around, and began walking her to his house, telling her he had something to show her. Still tightly gripping her, he took her into his house, then into his bedroom, and he shut and locked the bedroom door. Vickie testified that she was scared and crying. She said that as defendant was taking her clothes off, he told her that if she told anybody, he didn't know what he would do to her, that he loved her, and that what he was going to do to her wouldn't hurt. Defendant then disrobed, lay down on the bed on top of her, committed cunnilingus on her, had intercourse with her, and forced her to perform fellatio on him. He then dressed, again warned her not to tell anyone, and left. Vickie put on her clothes and ran home, where she took a bath. She stayed in her bedroom the rest of the weekend.

Vickie testified that a similar incident had occurred between defendant and her around Easter 1980, but when she had told her older sister and Lisa about it, they had laughed at her and called her a liar. Thereafter, she began to have insomnia and nightmares, and Vickie asked to live with her grandparents. She did not return to the neighborhood for more than a year. During this time, she experienced nightmares and headaches, she became withdrawn and depressed. She ate excessively and her school grades fell.

During the first week of June 1983, Vickie told two friends, two schoolteachers, and her school principal about the two incidents with defendant. One teacher and the principal notified Vickie's mother, who took her daughter to the Lenoir Memorial Hospital Mental Health Center for counseling. The sheriff's department was called, and Vickie related both incidents to Lt. Rickie Pearson. She was examined by Dr. Rudolph I. Mintz, Jr., a gynecologist and obstetrician, on 10 June 1983 and by a psychologist, Dr. Stevenson, on 13 June 1983.

Defendant was arrested on 8 June 1983 and later indicted for rape in the second degree and two counts of sexual offense in the second degree. He denied assaulting or having sexual contact with Vickie. He was found guilty by a jury on all charges and was sentenced to a total of ten years in prison.

Defendant assigns as error the trial court's admitting the testimony of clinical psychologist Deborah Broadwell, who testified as the state's expert as to whether Vickie had a mental condition which would cause her to fabricate her story. On direct examination, Mrs. Broadwell, who had been treating Vickie since August 1983, said Vickie was diagnosed as suffering from major depression, with symptoms such as difficulty in sleeping and in concentrating in school, low self-esteem, side ideations, nightmares, depression and withdrawal, which were consistent with the reaction of a child who had been sexually assaulted. She said that other than the sexual attack Vickie described, there were no other reported situations sufficiently traumatic to cause such a major depression.

Defense counsel, who had earlier asked Vickie if her sister had thought she was lying about the attack because Vickie "had lied about so many other things" and had asked Vickie's mother if

she's experienced difficulties with Vickie's "making up stories," cross-examined Mrs. Broadwell about alleged discrepancies in statements made by Vickie to personnel in the hospital emergency room and at the mental health clinic. On redirect examination, the following exchange occurred:

> Q. Mrs. Broadwell, do you have an opinion satisfactory to yourself as to whether or not Vickie was suffering from any type of mental condition in early June of 1983, or a mental condition which could or might have caused her to make up a story about the sexual assault?
>
> Objection.
>
> COURT: Overruled.
>
> Q. What is your opinion?
>
> A. There is nothing in the record or current behavior that indicates that she has a record of lying.

Defendant contends that this was improper expert testimony in that it was elicited to bolster the victim's credibility and was thus admitted in violation of North Carolina Rules of Evidence 608 and 405. We agree that the question and the response were improper.

Rule 608(a), which is addressed to impeachment and rehabilitation of the credibility of a witness or the witness's propensity for truth, provides, in pertinent part:

> (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.

The official commentary to Rule 608 emphasizes that "[t]he reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible." The relevant portion of Rule 405, which governs methods of proving character, provides:

> (a) **Reputation or Opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. *Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.*

(Emphasis added.) The commentary to Rule 405(a) makes it clear that "[s]ince Fed. R. Evid. 405 opens up the possibility of proving character by means of expert witnesses, the last sentence was added to subdivision (a) to prohibit expert testimony on character as it relates to the likelihood of whether or not the defendant committed the act he is accused of."

We would be confronted with an entirely different situation had the assistant district attorney in the case sub judice asked the psychologist if she had an opinion as to whether Vickie was afflicted with any mental condition which might cause her to fantasize about sexual assaults in general or even had the witness confined her response to the subject of a "mental condition." However, we find that both the question, which addressed itself to "*the* sexual assault," and the answer, which concerned a "record of lying," were fatally flawed.

First, the prosecutor's question was propounded to the witness in terms of whether the victim could have been suffering from "a mental condition which could or might have caused her to *make up a story* about *the* sexual assault." (Emphases added.) A reasonable interpretation of the word "the" is that it refers to the particular incident in question, i.e., the sexual assault defendant allegedly committed on Vickie on 5 February 1983. Although the inquiry was disguised in the form of a query into Vickie's "mental condition," in essence it was a question designed to elicit an opinion of the witness as to whether Vickie had invented a story, or lied, about defendant's alleged attack on her. In short, the question was designed to extract the witness's opinion as to whether the defendant actually assaulted Vickie Purser on 5 February 1983 and in effect was aimed at divining Mrs. Broadwell's opinion as to the guilt of defendant. This was clearly improper under the criterion set forth in *State v. Brown*, 300 N.C. 731, 733, 268 S.E. 2d 201, 203 (1980), and reiterated in *State v. Keen*, 309 N.C. 158,

163, 305 S.E. 2d 535, 538 (1983), which prohibits an expert's expression of an opinion as to the defendant's guilt or innocence. In addition, the question was impermissible under the mandate of Rule 405(a) against the use of expert testimony on character or a character trait as circumstantial evidence of behavior and it also violated the prohibition of Rule 608 of using expert testimony to show the propensity of a witness for truth and veracity. It is one thing to ask an expert in psychology or psychiatry whether a victim *fantasizes*, but it is another thing altogether to ask whether a witness has *made up a story*, or lied. One who fantasizes can honestly and subjectively believe in the reality of the fantasized-about occurrence, but "making up a story," or lying, denotes an affirmative or conscious intent to deceive, invent, or not tell the truth. As mentioned earlier, Rules 608 and 405(a), read together, forbid an expert's opinion as to the credibility of a witness. *See also United States v. Binder*, 769 F. 2d 595, 602 (9th Cir. 1985).

These same rules were violated when the witness's response was addressed to a "record of lying." Such expert testimony on Vickie's character—here, her propensity or past history (or lack thereof) for lying—was not admissible since it related to the likelihood of whether Vickie was telling the truth about the alleged sexual assault and thereby to the likelihood that defendant committed the rape and sexual offenses of which he was accused. *Keen*, 309 N.C. 158, 305 S.E. 2d 535.

We also find that Mrs. Broadwell's answer was not responsive to the question asked by the prosecutor. The inquiry ostensibly was addressed to a "mental condition," but the psychologist's answer concerned a "record of lying." The evidence adduced under this answer was thus incompetent under N.C.R. Evid. 702 (formerly N.C.G.S. § 8-58.13) which provides:

> **Rule 702. Testimony by Experts**
>
> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

State's witness Broadwell was qualified by virtue of her knowledge as a psychologist specializing in child abuse cases and as

Vickie's treating mental health professional to render her opinion as to Vickie's mental condition. However, her reply went beyond the scope of her expertise and was irrelevant to the topic of mental state or condition, going instead to the victim's credibility or record for truth and veracity.

Having found error, it remains for us to determine whether the trial court's failure to sustain defendant's objection to the prosecutor's question was prejudicial to defendant. We hold that it was. Our review of the transcript reveals on the one hand, inter alia, that Vickie's recountings of her story to numerous persons generally were consistent; medical opinion was that Vickie had at some point been sexually penetrated; psychologist Broadwell presented strong evidence indicating that Vickie's various symptoms were consistent with those of a child who had been sexually assaulted; Vickie's sister testified to Vickie's good reputation for truthfulness. On the other hand, however, Lisa Warren and a telephone company representative testified that the Warrens' telephone was not operational on 5 February 1983 and thus Vickie's memory of waiting on the Warrens' porch while Lisa took a call was not accurate; Lisa testified that Vickie had "been known not to always tell the truth"; the doctor's examination indicating penetration of Vickie was performed more than four months after the alleged assault; a number of witnesses testified on behalf of defendant in support of his propensity towards honesty and his good character and reputation in the community; the evidence showed that neighborhood children often visited and watched television with this retired, physically disabled defendant in his home.

The standard of harmless error is whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (1977); *State v. Sills*, 311 N.C. 370, 378, 317 S.E. 2d 379, 384 (1984). In this case, in which the evidence was fairly evenly divided between both sides, the basic issue was whether the jury believed Vickie Purser or the defendant. Consequently, the jury probably gave considerable weight to the testimony of Mrs. Broadwell. Thus, we must conclude that there is a reasonable possibility that without this question and answer the jury would have reached a different

conclusion as to the guilt of the defendant. The defendant is entitled to a new trial.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. DON MICHAEL WOODS, JR.

No. 485A85

(Filed 2 April 1986)

1. **Constitutional Law § 63; Jury § 7.11 — death qualification of jury — constitutionality**

The trial court did not err in allowing the State to death qualify the jury under N.C.G.S. § 15A-2000(a)(2) and in allowing challenges for cause of jurors opposed to the death penalty.

2. **Homicide § 32.1 — failure to submit involuntary manslaughter — error cured by felony murder conviction**

Assuming arguendo that the trial judge in a first degree murder prosecution erred in failing to instruct on involuntary manslaughter, the error was harmless because the jury specifically found that the underlying felony of kidnapping was committed, which supports defendant's conviction of first degree murder on the basis of felony murder. N.C.G.S. § 15A-1443(a).

APPEAL by defendant from judgment entered by *Preston, J.*, at the 1 April 1985 session of Superior Court, HOKE County. Defendant was convicted of murder in the first degree and kidnapping in the first degree. From the judgment of life imprisonment, defendant appeals as a matter of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 10 February 1986.

Lacy H. Thornburg, Attorney General, by Charles H. Hobgood, Assistant Attorney General, for the state.

Paul F. Herzog, Assistant Public Defender, Twelfth Judicial District, for defendant.

MARTIN, Justice.

The state presented evidence tending to show the following:

Defendant, Don Woods, and his wife, Isabelle Woods, had been living separate and apart for several months. On Labor Day weekend 1984, fifteen-year-old Michael Woods took the school bus to his father's residence to spend the weekend with him. Defendant drank throughout Friday night and Saturday and carried a .357 magnum handgun about the house. Because defendant's drinking had been increasing steadily during the weekend, Michael went into defendant's bedroom on Sunday morning while defendant was still asleep, took the gun from defendant's dresser, and hid it under a fan on the wood heater. After going to church, Michael went home with his mother.

Michael then realized he had left his running clothes and shoes at his father's house. He asked his mother if they could go by defendant's to get his clothes, but she replied they would have to wait until early Monday morning when hopefully defendant wouldn't be drinking. At about 10:00 a.m. Monday, Michael and his mother arrived at defendant's house. They went inside, to find no one at home. Michael went into his room to get his clothes and began playing his stereo. Defendant came in the house drinking a beer. When Michael came out of his room and asked if he could return a shirt to his cousin, defendant inquired as to the whereabouts of his gun and told Michael to get it for him. Michael did so. Because defendant had a gun, Isabelle Woods said she would drive Michael to his cousin's, but defendant said he would give the gun to Michael if Isabelle would stay at the house. Michael took the gun with him and ran his errand. When he returned, he left the gun in the car. As soon as Michael entered the house, defendant asked where his gun was. Michael got the gun and gave it to defendant.

About thirty minutes later, Michael went into the den and heard his father tell his mother that she might as well get ready because her time had come. Mrs. Woods, crying, got up and walked towards the door saying, "I'd rather you . . . kill me running than for me to just sit here and take it like this." Defendant replied, "Walk out the door and I will show you," grabbed his gun, and turned towards her. She shut the door and sat down.

Later, defendant and Mrs. Woods went into defendant's bedroom where they stayed for thirty to forty minutes. Defendant came out and sent Michael to the store for beer, saying he

and his mother could leave when he got back. The doors to the house were locked when Michael returned and defendant let him in. However, when Mrs. Woods asked defendant if they could leave, defendant told her they weren't going anywhere and he closed and locked the doors. Defendant began drinking and once more Mrs. Woods told defendant if he was going to kill her she'd rather he kill her running. Again defendant threatened her if she walked out the door, and Mrs. Woods did not leave.

Defendant and Mrs. Woods went into the living room and defendant left his gun in the den. Michael took the gun, unloaded it, hid the six cartridges under a pillow, and replaced the gun on the coffee table.

About thirty minutes later, defendant and Mrs. Woods came into the den. Shortly thereafter defendant asked Michael to get him paper and a pen. He then told his son, "Write what I tell you to write." For his father, Michael wrote:

> Pop Woods and Mom
>
> Love is something a person can't explain. I love you Pop & Mom. Hope yal forgive me. I couldn't help it. Mom loves you. She always will. Please be good. Straighten up. I'm so sorry.

Pop Woods is defendant's youngest son. Then defendant added in his own hand.

> Pop Mom & Dad
>
> love you
>
> Mom I. love you
> to I am so sorry
> I couldn't help it
>
> Love yal
>
> Don M Woods

Defendant attempted to get Mrs. Woods to sign the note, but she refused. Defendant then told Michael to leave. Both Michael and his mother were crying, and she begged him not to go. As Michael left, he heard his mother begging defendant not to kill her. Michael went down the driveway, but his parents came to

the door and waved him back. When Michael got to the porch, defendant, with the gun in his hand, told Michael to kiss his mother and him goodbye. Michael left and went to get his cousin, who drove Michael to the sheriff's department.

When Michael and the officers arrived at the house, Michael checked the doors, all of which were locked. As the officers approached the house, defendant came down a dirt road and asked them if they'd been in and said, "She's hurt bad." After Michael got his keys, the officers entered the house.

The officers found defendant's .357 magnum in defendant's bedroom in a fully cocked position. The gun must be cocked before it can be fired. The gun contained one spent cartridge and three live rounds. The officers then discovered the body of Isabelle Woods in the den, sprawled backwards on the hearth. Her upper body was naked and her shorts and panties were pulled down to mid-thigh. The note dictated to Michael by defendant was found on the hearth. A chair had been placed against the locked door leading from the den to outside. Detectives found the six bullets which Michael had removed from the gun under the pillow where he had hidden them.

Medical evidence established that Isabelle Woods died as a result of a gunshot wound to the right shoulder. The medical examiner testified that the lead slug, fired from a distance of one and a half to two feet away, travelled at a downward angle from front to back, passed through her clavicle, continued through her second rib, passed through her lung, and ended up in her aorta where it tore a hole. Autopsy further revealed that Mrs. Woods had swallowed a large amount of blood, which indicated that she lived for several minutes after she was shot. Sperm was found in her vagina. No gunshot residue was discovered on the victim's hands; however, such residue was found on the backs and palms of defendant's hands. After being transported to the jail and advised of his constitutional rights, officers asked him what happened. He said, "Yes, I did it. We were starting to make love and she grabbed for the gun and I grabbed it at the same time and the gun went off. The gun went off when the blue car started pulling in the drive and the brown car was behind it." He then stated that he ran through the house and jumped out the back

window as the officers' cars pulled up at the house, and commented that the officers should have heard the gun go off.

Defendant presented no evidence at trial.

[1] Defendant raises two issues for our consideration. By his first assignment of error, defendant contends that the trial court erred in allowing the state to death qualify the jury under N.C.G.S. § 15A-2000(a)(2) and in allowing the challenges for cause of jurors opposed to the death penalty, alleging that such procedures violate the Federal and North Carolina Constitutions. Although the defendant filed a motion to limit disqualification of the jurors, he failed to present evidence in support of the motion. As defendant notes, this issue was decided against him in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980), and as we said in *State v. Peacock*, 313 N.C. 554, 330 S.E. 2d 190 (1985), we decline to reconsider our holdings on this matter.

[2] Second, defendant asserts that the trial court committed plain error by failing to instruct the jury on the lesser included offense of involuntary manslaughter. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). He relies upon *Peacock*. Although *Peacock* is not based upon a "plain error" analysis, it does hold that a trial judge is required "to charge upon a lesser included offense, even absent a special request, where there is evidence to support it." 313 N.C. at 558, 330 S.E. 2d at 193.

We note that the trial judge submitted to the jury possible verdicts of murder in the first degree, murder in the second degree, voluntary manslaughter, and not guilty, and he also charged the jury on the theory of accident. Assuming arguendo that the trial judge erred in failing to instruct on involuntary manslaughter, we find the error harmless under N.C.G.S. § 15A-1443(a) because the jury specifically found that the underlying felony of kidnapping was committed, which supports defendant's conviction of murder in the first degree on the basis of felony murder. It is well established that "[t]he killing of another human being, whether intentional or otherwise, while the person who kills is engaged in the perpetration of a felony, which felony is inherently or foreseeably dangerous to human life, is murder . . . ." *State v. Shrader*, 290 N.C. 253, 261, 225 S.E. 2d 522, 528 (1976). *See also State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972); *State v. Streeton*, 231 N.C. 301, 56 S.E. 2d 649 (1949). Kid-

napping is such a felony. *Streeton*, 231 N.C. 301, 56 S.E. 2d 649; N.C.G.S. § 14-17 (1981).

Defendant, anticipating our finding, argues in his brief that just as intent to kill is irrelevant in felony murder, so such intent to kill is irrelevant for a conviction of involuntary manslaughter. He insists that "[t]he trial court should have given the jury the option of finding defendant guilty of another killing where intent was irrelevant," *i.e.*, involuntary manslaughter. He asserts that the facts could support a finding that Isabelle Woods voluntarily remained with defendant, intending, as defendant claimed, to make love to her husband, and that the jury could have found defendant guilty of kidnapping and involuntary manslaughter. We find such reasoning to be intrinsically inconsistent and unpersuasive.

First, the jury returned a verdict of guilty of kidnapping in the first degree, the indictment for which required a finding that defendant unlawfully, willfully, and feloniously confined Isabelle Woods *without her consent* for the purpose of terrorizing her. Thus there is no merit to defendant's argument that the jury could have found that Mrs. Woods voluntarily stayed with defendant yet found him guilty of both kidnapping and involuntary manslaughter. Second, death caused by the unintentional discharge of a gun in the hands of a felon engaged in the perpetration of a felony within the meaning of N.C.G.S. § 14-17 is murder in the first degree. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666. The record is devoid of evidence which might convince a rational trier of fact to convict defendant of involuntary manslaughter. *State v. Wright*, 304 N.C. 349, 283 S.E. 2d 502 (1981). We thus overrule defendant's second assignment of error.

Defendant received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. HARRISON NELSON, JR.

No. 587A85

(Filed 2 April 1986)

Criminal Law § 5— notice of insanity defense—good cause for allowing late filing

Good cause existed as a matter of law for allowing late filing of the notice of defense of insanity, and the trial court erred in refusing to allow defendant to rely upon insanity as a defense and in excluding defendant's offer of proof of insanity, where defendant's court-appointed counsel was unavailable on the date of trial because of a family medical emergency and was removed by the trial judge as defendant's counsel; an attorney who had been employed by defendant's wife, mother and sister to assist court-appointed counsel took over the case and filed and served a notice of intent to rely upon the defense of insanity as soon as he was put in the position of counsel primarily responsible for defendant's defense; and counsel employed by defendant's wife and family was not counsel of record, had not conferred with defendant personally, had not interviewed witnesses, and thus had no opportunity or authority prior to the removal of court-appointed counsel to file a notice of defense of insanity. N.C.G.S. § 15A-959(a).

APPEAL by the State of North Carolina pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 76 N.C. App. 371, 333 S.E. 2d 499 (1985) reversing the defendant's conviction on 25 October 1982 in the Superior Court, WILSON County, of second degree murder. Heard in the Supreme Court on 13 March 1986.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Robert A. Farris and Thomas J. Farris for defendant-appellee.

BILLINGS, Justice.

On 11 February 1982 the defendant was arrested and charged with the murder of Frank Junior Ward on 10 February 1982. On the next day Judge Harrell found that the defendant was indigent and appointed Milton F. Fitch, Jr. to represent him. Also on 12 February 1982 the defendant was committed to Dorothea Dix Hospital for observation and examination because it appeared from statements of the District Attorney "and others" that the defendant might be mentally incompetent to plead to the

charges. The report from that evaluation stated that the defendant had been discharged from the Marine Corps "after psychiatric treatment with 100% disability." He was diagnosed as suffering from "chronic undifferentiated schizophrenia" but was found to be competent to proceed. His mental illness was "fairly well compensated with medication."

On 7 May 1982 Judge Brown ordered that the defendant be transferred to the North Carolina Department of Correction "where he shall be safely kept and shall be given necessary medical care, treatment, and hospitalization." Apparently he was returned to Wilson County, and a probable cause hearing was held on 7 July 1982. However, a second order was entered on 1 September 1982 returning the defendant to the custody of the North Carolina Department of Correction because he was "causing security problems in the Wilson County Jail by setting fires and refusing to take medication for apparent mental condition."

On 17 February 1982 and 4 October 1982, attorney Fitch filed requests for voluntary discovery, and on 14 October 1982 the State responded to Mr. Fitch's request.

The case was scheduled for trial during the week of 25 October 1982. On the date of trial, according to an affidavit filed by Mr. Fitch, Mr. Fitch did not appear because his daughter was in the hospital and in serious condition. He telephoned either the trial judge or the District Attorney's office and explained his situation, assuming that the case would be continued. He made no motion to withdraw and was not told that the case would go to trial in his absence.

Mr. Robert A. Farris, Sr. was present in court on 25 October 1982. He had been employed by the defendant's mother, sister and wife for the purpose of assisting court-appointed counsel. The record does not indicate exactly what information was given to the trial judge regarding Mr. Fitch's failure to appear on 25 October, but the affidavit of Mr. Fitch states that after 25 October 1982 he received information that he would be allowed to withdraw.

On 25 October 1982 Mr. Farris filed a notice on behalf of the defendant of intent to rely on the defense of insanity and served

it on the District Attorney. As a result of the notice, Judge Winberry entered an order which contained the following:

> 1. That Robert A. Farris, Attorney at Law, Wilson, North Carolina, has been retained by the wife and family of the defendant to represent him.
>
> 2. Mr. Farris stated to the undersigned Judge presiding in his chambers prior to the call of this case for trial on Monday afternoon, October 25, 1982, that he had been retained several months ago and that the members of the defendant's family had been paying him his fee over a period of several months.
>
> 3. That the notice to the district attorney that the defendant intended to raise and rely upon the defense of insanity was filed with the Clerk of Superior Court of Wilson County in open court at two ten p.m., on Monday, October 25, 1982.
>
> 4. That court convened at two p.m., on October 25, 1982 and thereupon after instructions were given to the jurors, the jurors were sworn at approximately two twenty-five p.m.
>
> 5. That thereafter the Court conducted a sentencing hearing in a case and at approximately three p.m., on October 25, 1982, the district attorney called this case for trial.
>
> 6. That upon the call of this case for trial, the Court advised counsel for the defendant that he would deny to the defendant the right to raise and rely on the defense of insanity in that the same had not been properly raised pursuant to provisions of G.S. 15A-959.
>
> BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW:
>
> 1. That the defendant has not properly complied with the provisions of G.S. 15A-959 in order to raise and rely on the defense of insanity and for that reason and, in the discretion of the Court, the Court concludes that the defendant at this trial may not raise and rely on the defense of insanity.

The defendant excepted to the denial of his right to raise and rely on the defense of insanity. Trial of the case began on Tuesday, 26 October 1982. After the judge began his preliminary ex-

planation to the jury preparatory to jury selection, Mr. Farris requested a hearing and made a motion that he be allowed to withdraw. In support of his motion, he made the following statement to the court:

> He has, the defendant has indicated to me personally in no uncertain terms that he does not wish me to represent him and he would not cooperate with his counsel. He has further stated, as of yesterday, upon conferences and upon the call of this case, that he did not employ me and I would suggest to the Court that he did not personally employ me, but I was employed by his mother and sister and wife.
>
> COURT: To represent him?
>
> MR. FARRIS: To represent him and to assist Court Appointed counsel, Toby Fitch, who as I understand the Court has discharged or will discharge. The employment was on his behalf, but not by the defendant and was for the purpose of assisting his counsel. He has indicated to me yesterday and today that he refuses to cooperate with counsel and is not willing for me to represent him. . . .

Thereafter the defendant confirmed that he had not employed Mr. Farris. He stated, among other things: "He can not [sic] talk with me and I don't understand him. I am in another religion. I can't quote with him. I can't understand him. I don't want him to represent me." The trial judge did not at any time appoint Mr. Farris to represent the defendant but required the trial to continue.

The presentation of the State's case lasted until about 8:40 p.m. on 26 October. Mr. Farris then requested a recess until the next morning because he had no witnesses available other than the defendant. He issued subpoenas to other witnesses the following morning, including a psychiatrist and a mental health nurse from the Wilson-Greene Mental Health Center whom he had not interviewed before calling them to the stand. Consistently with his ruling before trial that the defendant would not be allowed to rely on the defense of insanity because his notice pursuant to N.C.G.S. § 15A-959(a) was not timely given, the trial judge sustained objections to opinion testimony regarding the defendant's mental condition at the time of the events in question.

The Court of Appeals reversed the defendant's conviction on the grounds that the termination of the attorney-client relationship between the defendant and Mr. Fitch was unjustified and that the trial court committed prejudicial error in refusing to allow defendant to introduce evidence of his insanity.

We modify and affirm.

The law is well settled that an indigent defendant is not entitled to select the attorney to be appointed to represent him. *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965). Neither is a defendant entitled to a "meaningful attorney-client relationship" with court-appointed counsel. *Morris v. Slappy*, 461 U.S. 1, 75 L.Ed. 2d 610 (1983). However, neither of these propositions determines the question at issue here, for Mr. Farris was not appointed by the court to represent the defendant. Rather, he was employed by the defendant's family "to assist Court Appointed counsel, Toby Fitch." The record suggests that in this capacity, Mr. Farris neither conferred with the defendant personally nor interviewed witnesses prior to the time that Mr. Fitch became unavailable because of a medical emergency regarding his daughter and was removed by the trial judge as defendant's counsel.

As soon as Mr. Farris was put in the position of counsel primarily responsible for the defendant's defense, he filed and served a notice of intent to rely upon the defense of insanity. Prior to that time, Mr. Farris had not made a formal appearance in the case and was not counsel of record. The trial judge ruled that the notice was not timely and that the defendant could not rely on the insanity defense.

N.C.G.S. § 15A-959(a) (1983) requires timely notice "[i]f a defendant intends to raise the defense of insanity . . ." but further provides that "[t]he court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make other appropriate orders."

A majority of the Court of Appeals said that even without giving notice as required by the statute "an accused may prove any affirmative defense, including insanity, under the general plea of not guilty," 76 N.C. App. at 374, 333 S.E. 2d at 502, citing *State v. Mathis*, 293 N.C. 660, 239 S.E. 2d 245 (1977), and *State v. Johnson*, 35 N.C. App. 729, 242 S.E. 2d 517, *rev. denied, appeal*

dismissed, 295 N.C. 263, 245 S.E. 2d 779 (1978). Judge Cozort disagreed, noting that this Court had not expressly ruled on the question but had said in *Mathis*, " '*We do not reach the point upon the present appeal as to whether, by virtue of lack of notice to the State of intent to rely upon insanity as a defense, the defendant could be properly precluded from offering evidence of insanity*'. (Emphasis added.) 293 N.C. at 673, 239 S.E. 2d at 253." 76 N.C. App. at 376, 333 S.E. 2d at 503.

We again find it unnecessary to reach the point as a general proposition, for we find in this case that the record establishes as a matter of law that good cause existed for allowing late filing of the notice of defense of insanity. The trial judge therefore erred in excluding the defendant's offer of proof of insanity and in refusing to allow him to rely upon insanity as a defense.

The record shows without contradiction that from 12 February 1982 until 25 October 1982, Mr. Fitch was undertaking to represent the defendant. Mr. Farris' role is unclear, but the record also clearly indicates that he was employed by the defendant's family, was not defendant's attorney of record, and was acting only to assist the defense counsel. When on the date of trial the counsel responsible for trial of the case was justifiably unavailable and other counsel was required to assume responsibility for the defendant's defense, the defendant's right to counsel required that his counsel be given sufficient time in preparation that his representation could be effective. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). Since Mr. Farris had no opportunity and apparently no authority prior to removal of Mr. Fitch as counsel of record to file a notice of defense of insanity on behalf of the defendant, he should have been given an opportunity to do so when, almost immediately upon removal of prior counsel, he attempted to give the statutory notice. While the record does not reflect what defense Mr. Fitch might have anticipated or what approach, based upon his evaluation of the information known to him, he was planning to use, a new attorney, not practicing in the same law firm or agency with original counsel,[1]

1. The cases of *State v. Bennett*, 237 N.C. 749, 76 S.E. 2d 42 (1953), *State v. Williams*, 34 N.C. App. 408, 238 S.E. 2d 668, *review denied, appeal dismissed*, 293 N.C. 743, 241 S.E. 2d 72 (1977), *cert. denied*, 436 U.S. 906, 56 L.Ed. 2d 404 (1978) and *State v. Moffitt*, 11 N.C. App. 337, 181 S.E. 2d 184, *appeal dismissed*, 279 N.C.

and not having dealt personally with the client in trial preparation, certainly could be expected to approach defense of the case differently than did the first lawyer. If, in his judgment, a defense of insanity would be appropriate (and the evidence in the record clearly suggests that an insanity defense would not have been frivolous in this case), he should be given a reasonable opportunity to develop the defense.

We therefore hold that under the special facts of this case, the trial judge erred in not allowing the defendant to rely on a defense of insanity. The decision of the Court of Appeals is

Modified and affirmed.

STATE OF NORTH CAROLINA v. EDWARD LEE MOSES AKA EDDIE MOSES

No. 518A85

(Filed 2 April 1986)

Rape and Allied Offenses § 4— relevancy of letter from defendant to victim's mother—probative value outweighs prejudice

In a prosecution for first degree rape and vaginal intercourse by a substitute parent, a letter written by defendant to the victim's mother when defendant was in prison for unrelated offenses in which he stated, "I promise from the bottom of my heart that I will never, as long as I live, bother [the victim] any more if she stays with us," was relevant to show defendant's commission of the offenses with which he was charged, it being for the jury to determine whether defendant meant by the word "bother" that he would never engage in sexual activity again with the victim or, as defendant testified, that he would not again discipline her. Furthermore, if the jury should find that defendant was referring to sexual activity, the probative value of the letter was great and not outweighed by its prejudicial effect. N.C.G.S. 1A-1, Rule 8C-1, Rule 403.

APPEAL by defendant from judgment entered by *Albright, J.*, at the 1 April 1985 criminal session of Superior Court, STANLY

396, 183 S.E. 2d 247 (1971) are distinguishable because they involve either the absence at trial of one of two retained counsel equally familiar with the case or substitution of counsel in the same law firm or public defender's office and because they do not involve denial of the defendant's ability to present a recognized defense due to a procedural bar.

County. Defendant was convicted by a jury of first degree rape and of vaginal intercourse by a substitute parent. He was sentenced to life imprisonment for the rape offense and to a consecutive term of fifteen years for the other offense. Defendant appeals the 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 the fifteen-year sentence was allowed by this Court on 10 September 1985. Heard in the Supreme Court on 13 February 1986.

Lacy H. Thornburg, Attorney General, by Daniel C. Higgins, Assistant Attorney General, for the State.

J. H. Rennick for defendant-appellant.

BILLINGS, Justice.

The defendant was convicted of raping Shanta Renee Hyatt on 15 February 1982 when the victim was eleven years old, the defendant being over the age of twelve and more than four years older than the victim, and of engaging in vaginal intercourse with her on 16 March 1984 while living in the home with her and her mother and having assumed the role of parent.

The victim testified to a pattern of sexual activity, which she said the defendant referred to as "training," over a period from February of 1982 until March of 1984, interrupted by periods when the defendant served time for convictions of unrelated offenses. The victim said that her mother knew about the sexual activity and on one occasion hid in the bedroom and observed the defendant undress the victim and disrobe before he discovered the mother's presence. The defendant denied any sexual contact with the victim. The victim's mother testified that she and the victim had made up a story about the defendant sexually abusing the victim which they were going to use if the defendant continued to associate with another woman, but when the mother decided not to go through with the false accusation, the victim persisted. She denied that the defendant was living with her and the victim in February of 1982 or between January and April of 1984, although he lived with them at other times.

The defendant brings forward for review only one question: Did the trial court commit prejudicial error in admitting into evidence, over objection, a letter which the defendant wrote to

the victim's mother? The letter was written at a time when the defendant was in prison for unrelated offenses. The portion of the letter to which the defendant objects is contained in the first paragraph of the letter which says:

> Dear Pamela: I truly hope this letter finds you and the children doing well and in the very, very best of health, but before I go any further let take [sic] the time to say I will not push the issued [sic] about Shanta. I though [sic] I made it clear in my other letter that I have nothing to say to that young lady. God will punish her and make her realize the mistake that she made. So let her do what she wants to do and go where she wants to go. I feel that it is way past time for playing games. It's time for us to get our lives together so if Shanta doesn't want to be a part of it, then let her go. *I promise from the bottom of my heart that I will never, as long as I live, bother her any more if she stays with us.* But if she still wants to go, I would never try to stop her. I just wanted her to be a part of the family, but it's almost as if she doesn't see it that way. [Emphasis added.]

The defendant especially complains that the underlined portion of the letter was ambiguous, irrelevant, and highly prejudicial. He relies on Rule 403 of the North Carolina Rules of Evidence which provides as follows:

> Although 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).

The defendant contends that, while living with the victim and her mother, he would discipline the child and that when he said in the letter he would never bother Shanta again he meant that he would never punish her again; he was not referring to sexual activity with her.

The question then becomes a two-part question: (1) was the letter relevant, and (2) if so, was its probative value substantially outweighed by its prejudicial effect?

N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985) defines relevant evidence as "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."

What the defendant meant by the word "bother" was appropriately a matter for the jury to determine based upon the evidence. *See People v. Hamilton*, 41 Cal. 3d 408, 221 Cal. Rptr. 902, 710 P. 2d 981 (1985); *People v. Sabell*, 708 P. 2d 463 (Colo. 1985); *State v. Gortarez*, 141 Ariz. 254, 686 P. 2d 1224 (1984); *State v. Hinds*, 437 A. 2d 191 (Me. 1981); *Bakken v. State*, 489 P. 2d 120 (Alaska 1971). If there had been no evidence of sexual abuse by the defendant, there would be no basis upon which the jury could infer that the defendant was referring to sexual conduct by use of the word "bother." However, in this case there was evidence that the defendant had "bothered" Shanta by compelling her to engage in sexual intercourse, that upon his release from prison in 1983 he had told her that there would be no more sexual activity between them, but the sexual activity began again and continued until he returned to prison, and that Pamela, Shanta's mother, knew that the defendant was sexually abusing Shanta. It was reasonable for the jury to infer that he was referring to that conduct when he promised not to bother Shanta anymore if he was permitted to return to the home upon his second release from prison. Certainly, if the jury found that the defendant was referring in the letter to sexual intercourse, the evidence would tend to make the existence of the fact of his commission of the offenses with which he was charged more probable than it would be without the evidence. We find that the content of the letter was relevant.

The defendant further contends that the probative value of the letter was outweighed by its prejudicial effect and that, even if relevant, it should have been excluded nonetheless. We disagree.

As we have indicated above, if the jury determines that the defendant was referring to sexual activity when he used the word "bother," the letter is highly probative of the very question before the jury. The fact that it would prejudice the defendant because it would tend to convince the jury of his guilt is a reason for admitting, not for excluding, the evidence. Its probative value

for the purpose admitted is great because it is an admission by the defendant himself.

If, on the other hand, the jury should find that the defendant was *not* referring to sexual activity but was promising not to discipline Shanta anymore, the statement would be irrelevant but it also would have no prejudicial effect.

Essentially, the defendant would have us hold that because the words he chose are ambiguous, we are bound to accept his explanation of their meaning and to exclude the evidence because the jury might have given them a different meaning in light of Shanta's testimony of his prior sexual abuse of her.

In *State v. Robinson*, 310 N.C. 530, 313 S.E. 2d 571 (1984) this Court found that the jury could not properly convict the defendant of first degree rape when the only evidence of what the defendant did to the three-year-old victim was the victim's statement that "he put his ding-a-ling in my mouth. He stuck his finger in my thing right there (indicating)," the examining physician's testimony that a male sex organ could cause the vaginal condition he found in the child, and the defendant's statement "I did it, but don't let them hurt me." This Court did not find that the defendant's statement was not admissible; we concluded that even with his statement, which was ambiguous and required the jury to speculate as to what the defendant meant by "it," the evidence did not establish vaginal intercourse. That was obviously because there was no evidence which identified "it" as vaginal intercourse but positive evidence that the defendant had penetrated the victim with his finger, not his penis.

Also, in *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983) this Court held that the lone statement by the defendant, "You shouldn't have enticed me" was insufficient, due to its ambiguity and virtual meaninglessness, to support a finding that he intended to rape the woman to whom he made the statement.

In neither of the cited cases was there other evidence explaining the ambiguous statement. It should be noted that in both of the cited cases, the evidence was not held inadmissible, only insufficient. Neither of these cases has a bearing on the question presented here, for there is no contention that the evidence in the instant case is insufficient to support a finding that the defendant

engaged in sexual intercourse with the victim. Whether the defendant meant that he would never engage in sexual activity again with the victim or that he would not again discipline her was a determination properly left to the jury.

The defendant contends that the issue is controlled by *State v. Phillips*, 283 N.C. 339, 196 S.E. 2d 270 (1973) in which this Court reversed a conviction of voluntary manslaughter because the trial judge had erroneously allowed into evidence a letter written by that defendant to the Director of Prisons. In the letter, the defendant indicated that she was seeking information for use in a story and wanted information on "a day in the life of a woman serving time for manslaughter." The defendant was a short story author and at the time the letter was written she discussed with her daughter-in-law a story which she anticipated writing in which she would use the information requested. The daughter-in-law typed the letter, as well as other letters and stories, for the defendant. The letter was written approximately a year before the defendant's husband was shot and killed during a domestic disturbance. This Court held that admission of the letter was prejudicial error because "[t]he legitimate purpose of the defendant's letter is explained by the State's witness as well as by the letter itself. The purpose was to obtain information for use in a story." *Id.* at 343, 196 S.E. 2d at 273. There was no ambiguity in the content of the letter, as there is in the instant case. Instead, the State attempted to prove, by use of the letter, a plan on the part of that defendant to kill her husband, although there was no evidence to support the existence of such a plan or to suggest that the purpose of the letter was not as stated. We find that case to be inapposite.

Finally, even if the trial judge erred in overruling the defendant's objection to introduction of the letter, the defendant waived the objection.

During direct examination of Pamela Hyatt, the victim's mother, she identified the letter as a letter in the defendant's handwriting which she received. Over the defendant's general objection, which did not specify the basis for the objection, the letter was received into evidence, but the record does not indicate that it was published to the jury.

During cross-examination of the defendant, the defendant, without objection, admitted that he had written the letter to Pamela Hyatt and that it contained the statement, "It's time for us to get our lives together so if Shanta doesn't want to be a part of it, then let her go. I promise from the bottom of my heart that I will never, as long as I live, bother her any more if she stays with us." On redirect examination, the defendant read almost the entire letter to the jury, including the above-quoted passage.

It is the well settled rule in this state that when evidence is admitted over objection but the same evidence is thereafter admitted without objection, the benefit of the objection ordinarily is lost. *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973). Here it was the defendant's testimony, given without objection, that put the content of the letter before the jury.

For the reasons stated, we find that the defendant received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JAMES HANNAH

No. 523A84

(Filed 2 April 1986)

1. **Rape and Allied Offenses § 4; Criminal Law § 87.2— rape—six-year-old victim—leading questions—no error**

The trial court did not abuse its discretion by permitting the prosecution to ask a six-year-old rape victim leading questions which referred to statements made by the victim during pretrial conferences with the prosecutor. The victim's grandmother and legal guardian testified that the prosecutor discussed the case with the victim twice, both times in their presence, and did not tell the victim what she should say at trial.

2. **Criminal Law § 117.5— incomplete instruction on character evidence—no objection at trial—no plain error**

Although the trial court in a rape prosecution gave an incomplete instruction on defendant's character evidence, defendant did not object at trial and it could not be said in light of the evidence that the jury would probably have reached a different result absent the error. App. Rule 10(b)(2).

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

State v. Hannah

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment, entered by *Downs, J.*, at the 24 June 1984 Criminal Session of Superior Court, HAYWOOD County, following his conviction of first-degree rape. Heard in the Supreme Court 10 June 1985.

Lacy H. Thornburg, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and Philip A. Telfer, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant seeks a new trial because of two alleged errors committed by the trial court. He first argues that the trial court abused its discretion in granting the prosecutor wide latitude when examining the prosecuting witness on direct examination. Secondly, defendant contends that the trial court erred in failing to instruct the jury that it could consider character evidence both as bearing on his credibility and as substantive evidence bearing directly on the issue of his guilt or innocence. After careful consideration of the record, the assignments of error, and the relevant law, we find that defendant has failed to demonstrate that he is entitled to a new trial.

Defendant was charged with the first-degree rape of his girlfriend's six-year-old daughter[1] in violation of N.C.G.S. § 14-27.2(a)(1). The State's evidence disclosed that around 5:30 p.m. on 10 November 1983, defendant, victim, and defendant's daughter picked up victim's mother from her place of employment. At that time, victim was crying and her pants were "covered in blood down to her knees." Defendant told victim's mother that victim was crying because "he had done something to her." Defendant said that "he had stuck it in her."

After defendant took victim's mother and the children home, he left without telling anyone where he was going. Victim's

1. We will not subject the victim and her family to further embarrassment by the use of their names in this opinion.

mother testified that defendant was threatening to kill himself when he left the house. Defendant was apprehended at a local store on the following day.

Victim's mother took her to a local hospital where she was examined by Dr. Doris Hammett. Dr. Hammett testified that victim told her that she had been hurt in her pubic area and that "[defendant] had stuck it in her." The medical examination revealed a laceration between the vaginal area and the rectum which was bleeding freely. There was trauma and bruises in the pubic area and to the lateral side of victim's vagina. In the doctor's opinion, the injuries indicated that victim's vagina had been penetrated.

At trial, victim testified and demonstrated with anatomically correct dolls that defendant had hurt her in her pubic area with his penis.

Officer Saralynn Baird was called to the hospital to investigate the rape on the evening of 10 November 1983. She testified that she observed a "wet" bloodstain on a couch in the house where the incident took place.

Defendant offered eight character witnesses at trial and testified in his own behalf. Defendant's testimony was that at 3:15 p.m. on 10 November 1983, the children's babysitter and her friend, McKinley, came to his house. The babysitter's usual job was to watch the children after they came home from school until they went with defendant to pick up victim's mother from work. Defendant testified that the babysitter and McKinley were in the house when victim and defendant's daughter arrived home from school at 3:20 p.m. and remained there until 5:30 p.m. At 5:35 p.m., defendant and the girls went to pick up victim's mother. Defendant testified that he was not aware of any injury to victim at that time. Defendant denied telling victim's mother that he had engaged in sexual activity with her daughter. Defendant subpoenaed the babysitter and McKinley, but neither appeared in court during the trial. The jury returned a verdict of guilty of first degree rape.

I.

[1] Defendant contends that he was denied a fair trial because of domination of the prosecuting witness by the prosecutor and vic-

tim's family. In support of his contention, defendant directs our attention to the prosecutor's "persistent" use of leading questions during direct examination of victim. Defendant particularly objects to leading questions asked which referred to statements made by victim during pre-trial conferences. This argument is based on defendant's contention that victim's answers to those questions were not based on her actual recall of the crime but rather were a recollection of questions and answers discussed with the prosecutor in the presence of her family.

It is settled law in this State that "leading questions are necessary and permitted on direct examination when a 'witness has difficulty understanding the question because of immaturity, age, infirmity or ignorance or when the inquiry is into a subject of delicate nature such as sexual matters.'" *State v. Higginbottom*, 312 N.C. 760, 767, 324 S.E. 2d 834, 840 (1985), *see also State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981). Furthermore, it is within the discretion of the trial judge to permit leading questions in proper instances, and such discretionary action is reversible on appeal only upon a showing of abuse of discretion. *State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834; *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980). In the case *sub judice*, the prosecuting witness was six years old at the time of trial and was testifying about a matter of a very delicate nature. We are unable to say that the trial court abused its discretion in permitting the prosecutor to ask leading questions on direct examination of this witness.

Defendant strongly objects to the leading questions which referred to statements made by victim in pre-trial conferences on the grounds that victim's responses were largely influenced by the beliefs of the prosecutor and the victim's family as to defendant's guilt. In rejecting a claim that the child showed "heavy reliance on her mother's guidance, her lack of concentration and her susceptibility to influence," this Court, in *State v. Higginbottom*, 312 N.C. 760, 766, 324 S.E. 2d 834, 839, noted that the child simply displayed the mannerisms and characteristics of any four-year-old child. Similarly, while victim's responses in this case were tentative and needed encouragement, her behavior was not abnormal for her age. Victim's grandmother and legal guardian testified that the prosecutor discussed the case with victim on two occasions, both times in her presence. She stated that the

prosecutor never told victim what she should say at trial. Absent any evidence that victim's testimony was improperly obtained, we find no abuse of discretion by the trial court in permitting the prosecutor to ask leading questions which referred to statements made by victim during pre-trial conferences with the prosecutor. We reject defendant's assignment of error.

II.

[2] Defendant next contends that the jury instruction relating to his character evidence presented at trial was erroneous and prejudicial because it did not inform the jury that character evidence could be considered both as substantive evidence and as evidence bearing on defendant's credibility.

Although defendant requested no instruction on the character evidence, the trial judge instructed as follows:

> Evidence has also been received with regard to the defendant's reputation. And although good character or good reputation is not any excuse for crime, the law recognizes that a person of good character may be less likely to commit a crime than one who lacks that character. Therefore, if you believe from the evidence that the defendant has a good character, you may consider this fact in your determination of the defendant's guilt or innocence and give it such weight as you decide it should receive in connection with all of the other evidence.

Defendant did not object to the instruction at trial. This Court has consistently held that "a failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal." *State v. Walker*, 316 N.C. 33, 37, 340 S.E. 2d 80, 82 (1986). *Accord* Rule 10(b)(2), North Carolina Rules of Appellate Procedure (1985). However, we have also decided that where the appellate court, upon an examination of the entire record, determines that an instructional error had a probable impact on the jury's finding of guilt, we would apply a "plain error" rule and require a new trial even though no objection or exception was made to the jury instructions at trial. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

It is a well-established rule that "when a defendant offers evidence of his good character and testifies in his own behalf, he is entitled to have the jury consider it as bearing on his credibility as a witness and as substantive evidence bearing directly on the issue of his guilt or innocence." *State v. Peek*, 313 N.C. 266, 273, 328 S.E. 2d 249, 254 (1985). Absent a specific request, the trial judge need not instruct on character evidence since it is a subordinate feature of a case. *Id.* However, when "the court undertakes to instruct the jury as to the legal significance of character evidence, and how it should be considered by the jury, incomplete instructions have been found to be sufficient grounds for a new trial." *Id.* at 273, 328 S.E. 2d at 254; *see also State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977); *cf. State v. Wortham*, 240 N.C. 132, 81 S.E. 2d 254 (1951); *State v. Bridgers*, 233 N.C. 577, 64 S.E. 2d 867 (1954).

In the instant case, defendant testified in his own behalf and offered several character witnesses who testified as to his good reputation in his community.[2] Upon a specific request, defendant was entitled to an instruction which informed the jury that it could consider the character evidence as both substantive evidence and as evidence bearing on his credibility. Defendant made no request for an instruction on character evidence, and therefore no instruction was required. However, the trial court *ex mero motu* gave an instruction which failed to inform the jury that the character evidence could also be considered as bearing on defendant's credibility. Assuming, *arguendo*, that the incomplete instruction constituted error, we must now determine whether defendant, having failed to object at trial, is entitled to any relief on appeal. Defendant strenuously argues that the incomplete jury instruction was an error which had a probable impact on the jury's verdict, and consequently this Court should apply the "plain error" rule.

The "plain error" rule is applicable only in exceptional cases. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375. In determining that an error committed at trial amounts to "plain error," the ap-

2. At the time of defendant's trial, character evidence was permitted only in the form of reputation evidence. The newly adopted North Carolina Rules of Evidence, N.C.G.S. § 8C-1, Rule 405(a) (effective 1 July 1984), provide that character evidence may be offered in the form of opinion or reputation evidence.

pellate court "must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. at 33, 340 S.E. 2d at --- (1986). In the instant case, we are not so convinced. The young victim testified and demonstrated with anatomically correct dolls that defendant hurt her in her pubic area with his penis. The child's mother testified that defendant confessed to committing the crime before leaving the house for an undisclosed destination. The medical examination revealed that the child had been sexually molested. Dr. Hammett, the examining physician, testified that penetration of victim's vagina had occurred. In light of this evidence, we cannot find that absent the error the jury probably would have reached a different result. Therefore, no "plain error" has been shown so as to entitle defendant to a new trial.

No error.

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

AETNA CASUALTY AND SURETY COMPANY AND ASHLEY WATSON BELL v. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY AND IMPORTS OF HIGH POINT, INC.

No. 508PA85

(Filed 2 April 1986)

Insurance § 75.2— automobile collision insurance—subrogation—summary judgment improper

Summary judgment was improperly granted against Penn in an action in which Penn sought to recover from Aetna's insured payments made by Penn to its insured for property damage to an automobile owned by Penn's insured but driven by Aetna's insured when the accident occurred. The driver of the car had no insurable interest with respect to collision coverage, the owner could sue the driver for negligently damaging the car, and Penn had the right to be subrogated to the owner's right of action.

ON defendants' petition for discretionary review of the decision of the Court of Appeals in an unpublished opinion, pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure,

affirming the entry by *Walker, J.*, of summary judgment in favor of plaintiffs in a declaratory judgment action at the 20 February 1984 session of Superior Court, GUILFORD County. Heard in the Supreme Court 11 February 1986.

Smith, Moore, Smith, Schell & Hunter, by William Sam Byassee, for plaintiff-appellees.

Henson, Henson & Bayliss, by Paul D. Coates and Perry C. Henson, for defendant-appellants.

MARTIN, Justice.

The record reveals that on 13 June 1980 Ashley Bell accompanied Joey Quick to Myrtle Beach, South Carolina. Quick drove a 1978 Mercedes Benz automobile which was owned by Imports of High Point, Inc. (Imports), of which Quick's father was president and principal stockholder, and insured by Pennsylvania National Mutual Casualty Insurance Company (Penn). Quick's father had expressly forbidden his son to allow anyone else to drive the car.

On 14 June, Bell and Quick took the Mercedes to the apartment of Quick's girlfriend. Quick gave Bell the keys to the Mercedes to get a portable cassette player and some tapes from the car. Bell did not return the keys to Quick after he brought the tapes into the apartment. Several hours later, Bell yelled upstairs to Quick and his girlfriend that he was hungry and was going to take the car to the store to get something to eat. Quick apparently did not hear Bell's announcement. While driving the Mercedes, Bell ran a stop sign and collided with another vehicle at an intersection.

Penn paid Imports under the collision coverage of the insurance policy for the damage to the Mercedes and then filed suit against Bell seeking compensation for its subrogated payment for the property damage to the automobile. Bell is insured by Aetna Casualty and Surety Company (Aetna).

The Court of Appeals affirmed the trial court's entry of summary judgment in favor of plaintiffs, holding that no genuine issue of material fact existed because it is irrelevant whether Bell was driving with Quick's permission and thus Bell was an "insured" under the terms of Penn's policy and that Penn had no subrogation or indemnity rights against its own insured. While

the Court of Appeals determined that Bell was an "insured" under Imports' "Business Auto" policy which insured against any loss as a consequence of a "covered auto's collision with another object or its overturn," we do not find it necessary under the facts of this case to resolve this issue. However, for the reasons stated below, we disagree with the Court of Appeals' determination that Penn has no rights of subrogation or indemnity against Bell, and accordingly we reverse.

Initially, we agree with the statement of the Court of Appeals that it is of no consequence who was driving the Mercedes as long as it was covered under Penn's policy and was damaged in a collision with another object. The Court of Appeals noted that because the collision coverage does not differentiate between a driver who has the permission of the named insured and one who does not, a determination of whether Bell had permission to drive the car was immaterial. However, of central importance in this case is the fact that Penn's policy is one of *collision* insurance and not *liability* insurance. The issues of who is an "insured" and of permissive use are critical in the resolution of a dispute involving automobile *liability* insurance policies but not in cases involving automobile collision coverage; liability insurance covers whomever may be construed as an "insured" under the terms of the policy and permission is relevant in determining whether the acts of the driver are insured by the policy. Collision insurance is basically a contract of indemnity which merely covers physical damage to a specific insured vehicle—here, the Mercedes itself—irrespective of who is driving. 10A Couch on Insurance 2d § 42:221 (rev. ed. 1983); 7 Am. Jur. 2d *Automobile Insurance* §§ 157, 172 (1980); Annot., *Automobile Insurance - Accident - Collisions*, 105 A.L.R. 1426, 1431 (1936). In fact, Penn does not dispute its obligation to pay Imports regardless of who was operating the vehicle or even that it would have to pay Imports for damages to the Mercedes if it had been standing still. The question we must decide, then, boils down to whether Imports has a valid cause of action against Bell and, if so, whether Penn has the right to be subrogated to that cause of action.

Our resolution of the issue in this case is premised on the type of insurance policy concerned and is founded on general principles of subrogation. Since the coverage in controversy was for damage from collision, only the owner, Imports, had an insurable

interest in the car. Imports of High Point, Inc.—the corporation itself—was indemnified by Penn pursuant to Penn's obligation under the collision coverage clause for the property damage to the Mercedes. Because Bell does not hold legal title to the Mercedes and has no equitable or economic interest in the car, he has no insurable interest with respect to collision coverage. Thus, plaintiffs' argument that permissive use exempts Bell from liability for compensation to Penn for the damage to the car is not relevant to the controversy arising on the facts before us.[1] Imports could sue Bell for negligently damaging the Mercedes. *Cf. Insurance Co. v. Webb*, 10 N.C. App. 672, 179 S.E. 2d 803 (insurance company recovered from driver for damages paid to third party). *See also General Accident Fire & Life Assur. Corp. v. Wyble*, 144 So. 2d 114 (La. App. 1962); *Dairyland Ins. Co. v. Munson*, 292 Minn. 141, 193 N.W. 2d 476 (1972); *Travelers Indemnity Co. v. Brooks*, 60 Ohio App. 2d 37, 395 N.E. 2d 494 (1977). In fact, it has done so in Superior Court, Guilford County. Even had Bell been an employee of Imports, the general rule would have allowed Imports to sue Bell for negligently damaging the Mercedes. Annot., *Liability Insurer's Subrogation Rights*, 53 A.L.R. 3d 631 (1973). For analogous cases of bailor suing bailee for negligent damage to personal property, see *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416 (1954); *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356 (1953). It is a general precept of insurance law that a subrogee's rights are derivative and are dependent on the rights of the owner, *Shambley v. Heating Co.*, 264 N.C. 456, 458, 142 S.E. 2d 18, 20 (1965); 16 Couch on Insurance 2d § 61:36 (rev. ed. 1983), and that after it indemnifies its insured an automobile collision insurer is entitled to subrogation against the tort-feasor legally responsible for the loss or harm to the insured. *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 726, 125 S.E. 2d 25, 29 (1962) (insurer subrogated to insured's right of action by agreement or by operation of law); *Smith v. Pate*, 246 N.C. 63, 67, 97 S.E. 2d 457, 460 (1957) (insurer entitled by operation of law to subrogation in auto collision cases); *Winkler v. Amusement Co.*, 238 N.C. 589, 597, 79 S.E. 2d 185, 191 (1954) (insurer entitled to subrogation under equi-

1. The question of who is driving is relevant with respect to subrogation in collision insurance cases only when the driver is the vehicle owner; this is because a subrogee's rights depend on the rights of the owner and obviously the owner could not sue himself.

table principles); *Underwood v. Dooley*, 197 N.C. 100, 106, 147 S.E. 686, 690 (1929). *See generally* 16 Couch on Insurance 2d § 61:237. Because there is no impediment to Imports suing Bell as the tortfeasor legally responsible for the damage to its Mercedes, we hold that Penn has the right to be subrogated to Imports' right of action against Bell. The decision of the Court of Appeals is therefore

Reversed.

WILLIE O. BEASLEY v. NATIONAL SAVINGS LIFE INSURANCE COMPANY

No. 395PA85

(Filed 2 April 1986)

WE granted plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 on 19 September 1985 to review the decision of the Court of Appeals (*Parker, J.*, with *Arnold, J.*, and *Eagles, J.*, concurring) reported at 75 N.C. App. 104, 330 S.E. 2d 207 (1985). This civil action was filed seeking compensatory and punitive damages growing out of defendant's failure to pay medical and hospital expenses allegedly due pursuant to provision of a contract of insurance issued by defendant. Plaintiff alleged six causes of action in support of his claim for damages: (i) breach of contract, (ii) breach of covenant of good faith and fair dealing, (iii) fraud, (iv) violation of the unfair and deceptive trade practices act, (v) intentional infliction of emotional distress and (vi) outrage. Defendant answered in the nature of a general denial and also asserted as a further defense "false, untrue, incomplete and material misrepresentations of the plaintiff" as a bar to any liability under the policy.

Defendant moved to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, and the trial court dismissed all causes of action except the claim for breach of contract. Plaintiff appealed and the Court of Appeals affirmed the judgment of the trial court.

Brenton D. Adams, attorney for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by R. Michael Strickland, David M. Duke and Edward B. Clark, attorneys for defendant-appellee.

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 19 September 1985 allowing the plaintiff's petition for discretionary review was improvidently allowed.

Discretionary review improvidently allowed.

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

AMOCO OIL CO. v. GRIFFIN

No. 94P86.

Case below: 78 N.C. App. 716.

Petition by defendant (C. B. Griffin, Jr.) for discretionary review under G.S. 7A-31 denied 7 April 1986.

BADGER v. BENFIELD

No. 68P86.

Case below: 78 N.C. App. 427.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 April 1986.

BLANTON v. MOSES H. CONE HOSP.

No. 57PA86.

Case below: 78 N.C. App. 502.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 April 1986.

CAPEL v. REED

No. 719P85.

Case below: 77 N.C. App. 666.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

CAREFREE CAROLINA COMMUNITIES v. CILLEY

No. 215P86.

Case below: 79 N.C. App. 742.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 April 1986. Petition by plaintiffs for writ of supersedeas denied 7 April 1986.

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

CHASTAIN v. WALL

No. 47P86.

Case below: 78 N.C. App. 350.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

CHILDERS v. HAYES

No. 775P85.

Case below: 77 N.C. App. 792.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986.

CLARK v. BURLINGTON INDUSTRIES, INC.

No. 121P86.

Case below: 78 N.C. App. 695.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1986.

DAVIDSON v. VOLKSWAGENWERK, A.G.

No. 106P86.

Case below: 78 N.C. App. 193.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1986.

DAVIS v. DAVIS

No. 59P86.

Case below: 78 N.C. App. 464.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986.

DeHART v. R/S FINANCIAL CORP.

No. 9P86.

Case below: 78 N.C. App. 93.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

DEWEY v. DEWEY

No. 790P86.

Case below: 77 N.C. App. 787.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

EVANS v. MITCHELL

No. 358P85.

Case below: 77 N.C. App. 598.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 April 1986.

GRANT & HASTINGS, P.A. v. ARLIN

No. 792P85.

Case below: 77 N.C. App. 813.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

HILL v. HANES CORP.

No. 144A86.

Case below: 79 N.C. App. 67.

Petition by defendant for discretionary review under G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 7 April 1986.

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

HILL v. MATTHEWS

No. 182P86.

Case below: 79 N.C. App. 369.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986. Petition by plaintiff for temporary stay denied 25 March 1986.

HINSON v. HINSON

No. 84P86.

Case below: 78 N.C. App. 613.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986.

HOMELAND, INC. v. BACKER

No. 45P86.

Case below: 78 N.C. App. 477.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986.

IN RE ESTATE OF OUTEN

No. 784P85.

Case below: 77 N.C. App. 818.

Petition by respondents for discretionary review under G.S. 7A-31 denied 7 April 1986.

IN RE FLOWERS, DAVIS AND GRANT

No. 52P86.

Case below: 78 N.C. App. 442.

Petition by juvenile respondents for discretionary review under G.S. 7A-31 denied 7 April 1986.

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

IN RE STALLINGS

No. 716PA85.

Case below: 77 N.C. App. 592.

Petition by the State for discretionary review under G.S. 7A-31 allowed 7 April 1986.

IN RE WARD

No. 38P86.

Case below: 80 N.C. App. 337.

Petition by Jeffrey Lamont Ward for writ of supersedeas and temporary stay of proceedings in the superior court, Pitt County, allowed 18 February 1986.

O'BRIEN v. PLUMIDIES

No. 152PA86.

Case below: 79 N.C. App. 159.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 7 April 1986.

PINEHURST, INC. v. O'LEARY BROS. REALTY

No. 137P86.

Case below: 79 N.C. App. 51.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 April 1986. Petition by defendants for writ of supersedeas and temporary stay denied 7 April 1986.

RAY v. NORRIS

No. 34P86.

Case below: 78 N.C. App. 379.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 April 1986.

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

RELIABLE PROPERTIES, INC. v. McALLISTER

No. 786P85.

Case below: 77 N.C. App. 783.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. ALLISON

No. 206P86.

Case below: 73 N.C. App. 334.

Petition by defendant (Allison) for temporary stay of the judgment of the Court of Appeals denied 7 April 1986.

STATE v. BARRIER

No. 780P85.

Case below: 77 N.C. App. 845.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. BARRIER

No. 85P86.

Case below: 78 N.C. App. 635.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. BLAKELY AND SADLER

No. 174P86.

Case below: 78 N.C. App. 635.

Petition by defendant (Sadler) for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1986.

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

STATE v. BROWN

No. 512P85.

Case below: 76 N.C. App. 345.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 December 1985. Motion by the State to dismiss appeal under G.S. 7A-28(a) allowed 10 December 1985.

STATE v. CAIN

No. 130P86.

Case below: 79 N.C. App. 35.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986. Petition by defendant for writ of supersedeas and temporary stay denied 7 April 1986.

STATE v. CATOE

No. 766P85.

Case below: 78 N.C. App. 167.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986. Temporary stay dissolved 7 April 1986.

STATE v. CHESSON

No. 62P86.

Case below: 78 N.C. App. 443.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. EDWARDS

No. 35P86.

Case below: 78 N.C. App. 605.

Petition by the State for discretionary review under G.S. 7A-31 denied 7 April 1986.

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

STATE v. FAIR

No. 752P85.

Case below: 77 N.C. App. 641.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. FLEMBESTER

No. 750P85.

Case below: 77 N.C. App. 666.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. FRAZIER

No. 153P86.

Case below: 78 N.C. App. 443.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 7 April 1986 for the purpose of remanding the case to the Court of Appeals for reconsideration in light of *State v. Swimm*, 316 N.C. 24 (18 February 1986), and *State v. Thompson*, 309 N.C. 421 (1983).

STATE v. GAULDIN

No. 744P85.

Case below: 77 N.C. App. 845.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986. Order for temporary stay dissolved 7 April 1986.

STATE v. GRAHAM

No. 207P86.

Case below: 79 N.C. App. 571.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 March 1986. Petition by defendant for writ of supersedeas and temporary stay denied 27 March 1986.

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

STATE v. GREGORY

No. 90P86.

Case below: 78 N.C. App. 565.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986. Motion by State to dismiss appeal for lack of substantial constitutional question allowed 7 April 1986.

STATE v. HENRY

No. 782PA85.

Case below: 77 N.C. App. 845.

Petition by defendant for discretionary review under G.S. 7A-31 allowed as to issue of appealability of the order of the superior court only 7 April 1986.

STATE v. HOSEY

No. 154PA86.

Case below: 79 N.C. App. 196.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 7 April 1986.

STATE v. JOHNSON

No. 78P86.

Case below: 78 N.C. App. 729.

Petition by the State for discretionary review under G.S. 7A-31 denied 7 April 1986. Petition by the State for writ of supersedeas denied 7 April 1986. Temporary stay dissolved 7 April 1986.

STATE v. JOHNSON

No. 63P86.

Case below: 78 N.C. App. 443.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 April 1986.

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

STATE v. LOGAN

No. 127P86.

Case below: 79 N.C. App. 420.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. LORUSSO

No. 98P86.

Case below: 78 N.C. App. 807.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 7 April 1986.

STATE v. McNAIR

No. 614P85.

Case below: 70 N.C. App. 331.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1986.

STATE v. McNEILL

No. 60P86.

Case below: 78 N.C. App. 514.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. MOORE

No. 242P86.

Case below: 79 N.C. App. 666.

Motion by defendant (Transeau) for temporary stay allowed 16 April 1986.

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

STATE v. MOXLEY

No. 87P86.

Case below: 78 N.C. App. 551.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. PARKS

No. 795P85.

Case below: 77 N.C. App. 778.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 7 April 1986.

STATE v. SEAGROVES

No. 24P86.

Case below: 78 N.C. App. 49.

Petition by the State for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. SINGLETON

No. 678P85.

Case below: 77 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

STATE v. SWYGERT

No. 128P86.

Case below: 79 N.C. App. 371.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1986.

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

STATE v. TILLMAN

No. 95P86.

Case below: 77 N.C. App. 786.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1986.

STATE CAPITAL INS. CO. v.
NATIONWIDE MUTUAL INS. CO.

No. 89PA86.

Case below: 78 N.C. App. 542.

Petition by plaintiff (State Capital Insurance Company) for discretionary review under G.S. 7A-31 allowed 7 April 1986. Petition by defendant (Nationwide Mutual Insurance Company) for discretionary review under G.S. 7A-31 allowed 7 April 1986.

SWINDELL v. DAVIS BOAT WORKS

No. 64P86.

Case below: 78 N.C. App. 393.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 7 April 1986.

THE ASHEVILLE SCHOOL v. WARD CONSTRUCTION, INC.

No. 83P86.

Case below: 78 N.C. App. 594.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986.

TOLLEY v. TOLLEY

No. 41P86.

Case below: 78 N.C. App. 444.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986.

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

TURNAGE v. DACOTAH COTTON MILLS

No. 66P86.

Case below: 77 N.C. App. 769.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1986.

PETITION TO REHEAR

WASTE MANAGEMENT OF CAROLINAS, INC.
v. PEERLESS INS. CO.

No. 70PA85.

Case below: 315 N.C. 688.

Petition by plaintiff denied 7 April 1986.

STATE OF NORTH CAROLINA v. JOHN EDWARD KUPLEN

No. 355A84

(Filed 6 May 1986)

1. Constitutional Law § 46— refusal to appoint new counsel—no violation of constitutional rights

Defendant was not denied the effective assistance of counsel, due process and equal protection by the trial court's refusal to appoint new counsel when defendant requested that his court-appointed counsel, an assistant public defender, be discharged, where the evidence showed only that defendant was refusing to cooperate with his court-appointed counsel and had gone behind counsel's back to hire a detective to investigate the case and his counsel; defendant's evidence failed to support his contention that his counsel had breached his trust with another attorney; the trial court found that there was nothing to prohibit appointed counsel from providing effective assistance to defendant; after conducting the inquiry required by N.C.G.S. § 15A-1242, the trial court permitted defendant to waive assigned counsel and appointed the assistant public defender as standby counsel; and upon defendant's request, the court reinstated the assistant public defender as full-time counsel before the trial began.

2. Constitutional Law § 68; Criminal Law § 91.7— subpoena not served—denial of motion for continuance—constitutional right to produce witnesses

The trial court's denial of defendant's motion for a continuance when his subpoena of a defense witness was not served because the witness had left the state did not violate defendant's right to compulsory process guaranteed by the Sixth Amendment to the U. S. Constitution or his right of confrontation guaranteed by Art. I, § 23 of the N. C. Constitution where defendant knew that the witness was reluctant to testify but issued a subpoena for her only four days before the trial, and where defense counsel admitted that the witness could not establish an alibi and the evidence offered on *voir dire* indicated that the testimony of the witness would not be of material aid to the defense but would show only how defendant appeared after the crimes supposedly happened.

3. Bills of Discovery § 6— statements to fellow inmate—notice of substance—admissibility

Testimony by a fellow jail inmate concerning statements made to him by defendant was not inadmissible under N.C.G.S. § 15A-903, even if it is assumed that the legislature intended for the substance of a statement made by a defendant to a person other than a law officer to be divulged by the State without a motion by defendant, where notice of the substance of the statements "relevant to the subject matter of the case" was timely given to defendant, and where those portions of the testimony concerning defendant's statements about what would happen to snitches, to which objection was made and no notice was given, related only to an explanation of why the witness came forward with the evidence.

4. Criminal Law § 73.4— statements not hearsay

Testimony concerning statements made by defendant about what would happen to snitches was not hearsay where the statements were made by defendant to the witness and not by defendant to someone else who related them to the witness. N.C.G.S. § 8C-1, Rule 801(d).

5. Constitutional Law § 70— right of confrontation—witness represented by another member of Public Defender's office

The constitutional right of confrontation of a defendant represented by an assistant public defender was not violated by the denial of his motion for a mistrial on the ground that a conflict of interest existed because a State's witness was represented for charges pending against him by another member of the public defender's staff and this conflict of interest limited defense counsel's ability to cross-examine the witness. Even if defendant's confrontation rights were violated, such error was harmless beyond a reasonable doubt since the testimony of the witness was not essential to the State's case; defense counsel in fact cross-examined the witness about whether he was to receive a benefit from the State because of his testimony, and no showing was made that the perceived conflict actually influenced the scope of cross-examination; and the State's evidence was clear, strong, consistent and overwhelming.

6. Criminal Law § 66.16— photographic identification—no individual display—independent origin of in-court identification

There was nothing in the record to support defendant's contention of a lone display of defendant's photograph to a rape and assault victim. Furthermore, the victim's in-court identification of defendant was of independent origin of any pretrial identification procedure where all the evidence showed that the only pretrial identification by the victim was a fairly conducted, multiple picture, photographic identification which was not impermissibly suggestive and that the victim knew defendant from previous contacts and spent some twenty minutes conversing with him in her apartment before he began to attack her.

7. Criminal Law § 169.6— failure of record to show excluded evidence

Defendant failed to show prejudice by the exclusion of testimony where the record failed to show what the witness's answer would have been to the question asked and thus how it was relevant.

8. Criminal Law § 55; Constitutional Law § 76— defendant's failure to provide blood sample—relevancy—no violation of right against self-incrimination

Testimony that defendant did not provide a sample of his blood was relevant to explain why no comparison of his blood with certain State's exhibits was performed. Furthermore, evidence that defendant did not provide a blood sample did not violate defendant's Fifth Amendment privilege against compulsory self-incrimination or his right under N.C.G.S. § 15A-279(d) against the use of statements made in the absence of counsel during nontestimonial identification procedures.

9. Criminal Law § 127— motions to set aside verdict and arrest judgment—discretion of court

Motions to set aside the verdict and to arrest judgment are addressed to the sound discretion of the trial judge, and in the absence of an abuse of discretion are not reviewable on appeal.

10. Criminal Law § 112.4— refusal to instruct on circumstantial evidence

The trial court properly refused to give a requested instruction on circumstantial evidence where the court gave a correct instruction on reasonable doubt.

11. Criminal Law § 95.1— photographs and diagram—refusal to give limiting instruction

The trial court did not err in refusing to give an instruction limiting the use of photographs and a diagram introduced by the State to illustrative purposes where many if not all of the photographs could properly have been considered by the jury as substantive evidence under N.C.G.S. § 8-97; it would have been necessary that defendant specifically identify those exhibits which he contended were subject only to illustrative use in order for the trial court to give a proper limiting instruction; and a general instruction on limited use of photographs and diagrams would have been incorrect and misleading.

12. Rape and Allied Offenses § 6.1— first degree sexual offense—attempted first degree rape—failure to submit lesser offenses

In a prosecution for first degree sexual offense and attempted first degree rape, there was no merit to defendant's contention that the trial court should have instructed on the lesser included offenses of second degree sexual offense and attempted second degree rape because the jury could have found that any serious injury to the victim occurred after the attempted rape and sexual offense were complete since, even if N.C.G.S. § 14-27.1 and 14-27.2 were construed to require the infliction of personal injury concomitant with the rape or sexual offense, the trial judge did not allow the jury to consider the infliction of serious personal injury to enhance the crimes to first degree but instructed only on the element that "the defendant displayed a dangerous weapon," and the uncontradicted evidence showed that defendant displayed and used a knife prior to both offenses.

13. Assault and Battery § 15.2; Rape and Allied Offenses § 6— peremptory instruction on knife as deadly weapon

The trial court in a prosecution for first degree sexual offense, attempted first degree rape and felonious assault did not err in instructing the jury that a knife capable of cutting a person's throat, going into the windpipe and going four inches into the stomach was a deadly weapon.

14. Assault and Battery § 15.3— peremptory instruction on serious injury

The trial court's instruction that "an injury going into the windpipe in the throat, and four inches deep into the stomach, is a serious injury," if error, is not plain error since it would not have had a probable impact on the jury's finding of guilt.

15. Criminal Law § 138.7— sentencing hearing—defendant's prior conduct

The district attorney could properly question a witness at defendant's sentencing hearing about defendant's conduct on a previous occasion when he assaulted other people in the witness's presence and she prevented the victims from calling the police.

16. Criminal Law § 138.21— serious injury as element of offense—especially heinous, atrocious or cruel aggravating factor

If the evidence establishes that the infliction of serious injury was done in an especially heinous, atrocious or cruel manner, N.C.G.S. § 15A-1340.4(a)(1) does not prohibit the finding of that aggravating factor merely because infliction of a serious injury is an element of the offense.

17. Criminal Law § 138.21— felonious assault—especially heinous, atrocious or cruel aggravating factor

The evidence in a prosecution for assault with a deadly weapon with intent to kill resulting in serious injury would support a finding of excessive brutality, psychological suffering and dehumanizing aspects not normally present in such an offense which in turn supports the trial court's finding as an aggravating factor that the offense was especially heinous, atrocious or cruel.

18. Criminal Law § 138.41— mitigating factor—good character—insufficient evidence

The evidence at a sentencing hearing for first degree sexual offense, attempted first degree rape and felonious assault did not require the trial judge to find the mitigating factor that defendant has been a person of good character. N.C.G.S. § 15A-1340.4(a)(2)(m).

APPEAL by defendant from judgments entered by *Rousseau, J.*, at the 30 April 1984 Criminal Session of Superior Court, GUILFORD County. Heard in the Supreme Court on 20 November 1985.

The defendant was convicted by a jury of first degree sexual offense, attempted first degree rape, and assault with a deadly weapon with intent to kill inflicting serious injury. Following a sentencing hearing, the defendant was sentenced to life imprisonment for the offense of first degree sexual offense, twenty years for attempted first degree rape, and twenty years for assault with a deadly weapon with intent to kill inflicting serious injury, all sentences to be served consecutively. The defendant appealed the life sentence 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 in the attempted rape and assault cases on 24 April 1985.

Lacy H. Thornburg, Attorney General, by James J. Coman, Special Deputy Attorney General, and Joan H. Byers, Assistant Attorney General, for the State.

Mary K. Nicholson for defendant-appellant.

BILLINGS, Justice.

The victim testified for the State and identified the defendant as the person who came to her apartment around 7:30 p.m. on 19 December 1983. She said that he identified himself as "Eddie" when he knocked on her apartment door, and when she opened the door, she recognized him as John Ed, a hairdresser friend of her roommate's. She had seen him on four previous occasions during the fall of 1983, once at his apartment on Halloween, twice when he cut her roommate's hair in her apartment and once when he dropped by the apartment in November while her mother was present.

She testified that on 19 December she was busy and after about twenty minutes she asked him to leave.

Instead of leaving, the defendant attacked the victim and threatened her with a knife. They struggled in the living room, and during the struggle she pulled a button off his shirt. He then forced her into the bedroom, disrobed and, while holding the knife on her, undressed her. After attempting to rape her but failing to achieve penetration, he forced her to perform fellatio.

After both parties dressed, the defendant became agitated and attacked the victim again, choking her and beating her head against the floor until she lost consciousness. When she returned to consciousness, she was undressed, on the bed, and the defendant was stabbing her in the stomach. She lost consciousness again and was awakened by the telephone ringing. She crawled to the telephone and called the operator for assistance.

The AT&T operator on duty at the time contacted the Greensboro Police Department. The emergency call to the Police Department was recorded at 8:52 p.m. When Officer Timothy Blair of the Greensboro Police Department arrived at the scene, he observed the victim, nude except for a pair of socks, lying in the doorway from her apartment to the hall where she had dragged herself from the bedroom. She had a three-inch laceration of her throat

and a gash in her abdomen from which her internal organs were protruding. The emergency medical personnel testified that when they arrived the victim had no blood pressure.

Doctors who treated the victim testified that her trachea had been almost completely severed, her stomach and small intestine were cut and the inferior vena cava, the body's main vein, had been severed. She was in the hospital for a month.

While in the hospital in intensive care, almost immediately after awakening from surgery, the victim told the police that a friend of her roommate's whom she knew as John Ed or Eddie had attacked her. At that point, she could not talk because of a plastic tube in her throat, but she wrote notes; she also asked for a Greensboro telephone book and pointed out the hair salon where the defendant worked. She described her assailant and the knife.

Based upon the victim's identification, the police obtained a warrant for the defendant's arrest on 20 December 1983 for the assault offense.

The police recovered from the victim's living room floor a button with attached thread and cloth which matched a blue flannel shirt they seized from the defendant's apartment. Blood which matched that of the victim was found inside a boot seized from the defendant's apartment. The defendant refused to give a blood sample; therefore, a semen stain found on a blanket taken from the victim's bed could not be tested for a match with the defendant's blood type. A head hair taken from defendant was microscopically consistent with hairs found on the victim's sweater, blanket and quilt. The defendant's housemate described a hunting knife which the defendant had purchased in the fall of 1983 and which generally fit the description of the knife which the victim said the defendant had used. No knife was produced at trial.

The defendant did not present evidence at the guilt phase of the trial. He presented character evidence at the sentencing hearing.

The defendant brings forward numerous assignments of error. We find that the defendant received a fair trial free of prejudicial error.

I. *Right to Counsel.*

[1] The defendant contends that he was denied effective assistance of counsel, due process of law and equal protection of the law when Judge Freeman refused to allow the defendant's court-appointed lawyer, Mr. Charles White, to withdraw as counsel on 19 April 1984 and to appoint new counsel when the defendant requested that Mr. White be discharged. Although the record contains a waiver of counsel signed by the defendant on 27 December 1983, it also appears that the Public Defender's Office was appointed on 4 January 1984 to represent the defendant. Mr. White, Assistant Public Defender, was assigned to the defendant's case.

On 17 April 1984 the defendant filed with the Office of the Clerk of Superior Court of Guilford County a letter notifying the Clerk that the Public Defender's Office was no longer representing him and requesting the appointment of private counsel.

On 19 April 1984, Mr. White filed a motion to withdraw from representation of the defendant and in support thereof stated:

> 3. The defendant, or others on his behalf, have employed a private investigator to explore the "feasibility" of retaining private counsel and to assist in the preparation of his case. The investigator is under instructions to not divulge the results of his investigations to the undersigned; and
>
> 4. The defendant and others on his behalf have actively pursued the possibility of retaining private counsel, thereby indicating that funds may be available for privately retained counsel. This activity has also limited the amount of time the undersigned has been able to devote to the case due to the uncertainty as to whether he will be representing the defendant at trial; and
>
> 5. The defendant has refused to provide the undersigned with information essential to his defense. The attorney-client privilege does not permit the undersigned to list specific examples; and
>
> 6. Diligent efforts have been made by the undersigned to resolve these differences with the defendant to no avail. On April 3, 1984 the undersigned wrote the defendant indicating his intention to seek the Court's permission to withdraw if

the differences between he and the defendant were not resolved; and

7. Further conversations with the defendant on April 12, 1984 led the undersigned to believe that the differences could possibly be resolved and the defendant was verbally informed that the Public Defender's Office would endeavor to continue to represent him; and

8. On April 14, 1984 the defendant wrote the Clerk of Superior Court indicating that the Public Defender had "resigned," and he requested that the State appoint a private attorney to represent him. A copy of that letter is attached; and

9. Numerous additional factors which cannot be divulged due to the attorney-client privilege have convinced the undersigned that it will be impossible for him to adequately represent the defendant, and that the ends of justice will be best served by allowing him to withdraw.

Judge Freeman conducted a hearing on Mr. White's motion on 19 April 1984. Other than the specific reasons listed in his motion, Mr. White would reveal no reason for his motion to withdraw, stating that he was concerned about possibly violating the defendant's attorney-client privilege.

When questioned about whether he wanted Mr. White to withdraw, the defendant responded that he did, but gave as his reason only that "things didn't work out as they should" and that it was important to him that his case be prepared and presented properly.

Judge Freeman conducted a very patient, thorough inquiry, but no additional basis for allowing Mr. White to withdraw was ever given other than that "irreconcilable differences" existed between the defendant and Mr. White. Mr. White said that if ordered to continue to represent the defendant, he would make every effort to represent him as "fully as I could, and to the best of my ability, and be true to my oath of office." Judge Freeman told the defendant that Mr. White was a highly competent, very experienced trial lawyer and denied the motion.

The defendant then, in open court and after conferring with Mr. White, asked that Mr. White be discharged and that the defendant be allowed to represent himself with Mr. White's help.

Judge Freeman conducted the inquiry required by N.C.G.S. § 15A-1242, and discussed at length with the defendant the consequence of not having counsel. The defendant stated that he wanted to represent himself but to have assistance from Mr. White.

At 12:43 p.m. the judge recessed court for lunch. When court reconvened at 2:00 p.m. Judge Freeman again addressed the defendant and asked if he wanted to say anything more about the nature of the conflicts between the defendant and Mr. White, particularly as to whether the conflict was over something more than trial tactics. The defendant then read to the judge from a list of his complaints against Mr. White, and Mr. White responded. This further colloquy only repeated the grounds included in Mr. White's motion and suggested that the defendant was refusing to cooperate with his counsel and was seeking to obtain the services of private counsel. Judge Freeman found that there was nothing that would prohibit Mr. White from providing effective assistance of counsel to the defendant and denied the defendant's request for appointment of another attorney.

He again asked the defendant if he wanted to represent himself with Mr. White as standby counsel. The defendant said that he did. Judge Freeman then inquired into the defendant's age, education, literacy and mental or physical handicaps. He again admonished the defendant that neither the judge nor the District Attorney would assist him in the trial of the case and asked if he understood what he faced and still wanted to represent himself. Upon receiving an affirmative response, Judge Freeman had the defendant execute a waiver of the right to assigned counsel and made the following findings of fact:

> that the defendant is an adult, that he completed the tenth grade in school, that he is able to read and write, that he has no mental handicaps or physical handicap; that he is intelligent, articulate, that he understands the nature of the charges against him, that he understands the proceedings, that he understands the possible punishment; that he understands his right to be represented by an attorney, and he understands the ramifications of his waiving an attorney.

The judge then concluded that the defendant had voluntarily and intelligently waived his right to a court-appointed attorney. He allowed Mr. White to be removed as the active attorney in the case and appointed him as standby counsel.

When the defendant's case was called for trial on 30 April 1984, Judge Rousseau, the presiding judge, questioned the defendant about his election to represent himself with Mr. White as standby counsel, and the defendant indicated that he knew his rights and wanted to proceed without an attorney.

Certain defense motions which are discussed *infra* were then ruled upon by the court. Before jury selection began, the trial judge inquired about the number of persons present in the courtroom and was informed that the defendant had subpoenaed a number of character witnesses. When the trial judge told the defendant that he would limit the number of character witnesses that the defendant could call, the defendant requested time to talk with the witnesses, and the trial judge declared a recess. At the end of the recess, the defendant requested that Mr. White be allowed to try the case, whereupon Judge Rousseau conducted an inquiry and reinstated Mr. White "as full-time counsel."

It is a cardinal principle of constitutional law that an indigent criminal defendant has a right to assistance of counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530 (1972). However, this does not mean that the defendant is entitled to counsel of his choice or that defendant and his court-appointed counsel must have a "meaningful attorney-client relationship." *Morris v. Slappy*, 461 U.S. 1, 75 L.Ed. 2d 610 (1983). Each case must be examined on an individual basis. In the absence of a constitutional violation, the decision about whether appointed counsel shall be replaced is a matter solely for the discretion of the trial court. *State v. Sweezy*, 291 N.C. 366, 371-72, 230 S.E. 2d 524, 529 (1976), quoting from *United States v. Young*, 482 F. 2d 993, 995 (1973). As this Court said in *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E. 2d 788, 797 (1981):

> In the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense. *E.g., State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976). A disagreement over trial tactics does

not, by itself, entitle a defendant to the appointment of new counsel. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980); *State v. Robinson, supra.* Nor does a defendant have the right to insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services. *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Robinson, supra.* Similarly, the effectiveness of representation cannot be gauged by the amount of time counsel spends with the accused; such a factor is but one consideration to be weighed in the balance. *E.g., Missouri v. Turley*, 443 F. 2d 1313 (8th Cir.), *cert. denied*, 404 U.S. 965 (1971); *O'Neal v. Smith*, 431 F. 2d 646 (5th Cir. 1970).

Judge Freeman found that the defendant had failed to show anything that would hinder Mr. White from providing an adequate and proper defense to the defendant or that would prohibit him from providing effective counsel to the defendant. His findings are supported by the record.

When the defendant provided his list of complaints to Judge Freeman about Mr. White's representation, he said, first, that Mr. White had breached his trust with another attorney, "without my [the defendant's] written consent."

Mr. White in response stated:

> I have, in fact, been approached by one other attorney, a member of the private Bar, . . . and I—I did not divulge anything that was not of public record at that time.
>
> We did discuss the general structure of the case, discussed what the charges were. I did not divulge anything that had arisen during the course of our relationship . . . .

The defendant has failed to establish any impropriety on the part of Mr. White in regard to his discussion of the defendant's case with any other lawyer.

Second, the defendant said "to my—in my mind, I have—I haven't had any counseling whatsoever." He then related, apparently as a part of the complaint about the lack of counseling, that Mr. White was ambivalent about hiring a private detective and did not like the fact that a friend of the defendant's had employed a private detective for him. Mr. White responded that

he would have welcomed assistance from a private detective, but that the investigator employed for the defendant was under specific instructions not to divulge information to Mr. White. He further stated that the defendant had informed him the previous week that someone on the defendant's behalf had employed a private detective "to investigate [Mr. White], personally, and [his] reputation, and as to [his] former employment in Raleigh." Mr. White then identified this "kind of thing" as having put him and the defendant "in an antagonistic situation."

The defendant also made reference to blood tests and to the fact that he was not advised of his "right to consent, or anything, involved in the blood test." As is discussed *infra*, Mr. White was on vacation when the defendant was first ordered to submit to a blood test and the defendant refused to submit to the procedure with substitute counsel in Mr. White's absence. Later, when Mr. White was present during a contempt hearing based on the defendant's refusal to comply with the order, the defendant continued to refuse to comply, and no blood was drawn.

Finally, the defendant stated generally that "just the whole —just the simple fact, like when I wanted correspondence concerning my case, you know, concerning; I never did get it, you know. So, it's just—it's just a bad situation."

Nothing in any of these statements to the hearing judge gave any reason justifying replacement of defendant's counsel. It clearly shows that the defendant was being uncooperative, working behind his counsel's back and creating a difficult, frustrating situation for Mr. White. However, Mr. White continued to be willing to represent the defendant to the best of his ability, and in fact conducted a spirited defense of his client once he was allowed to re-enter the case as counsel.

Judge Freeman's findings are fully supported by the record.

As this Court said in *Hutchins*, the findings made by the trial court at the hearing on a motion to withdraw are conclusive on appeal if they are supported by any competent evidence. 303 N.C. at 335, 279 S.E. 2d at 797-98. Having refused to cooperate with his appointed counsel and then chosen to represent himself, the defendant cannot now complain that he was entitled to substitute counsel because he would not cooperate with the first one. *See*

Thomas v. Wainwright, 767 F. 2d 738 (11th Cir. 1985), *cert. denied*, --- U.S. ---, 89 L.Ed. 2d 349 (1986); *Hutchins v. Garrison*, 724 F. 2d 1425 (4th Cir. 1983), *cert. denied, stay denied*, 464 U.S. 1065, 79 L.Ed. 2d 207 (1984); and *Morris v. Slappy*, 461 U.S. 1, 75 L.Ed. 2d 610.

With respect to the defendant's contention that he chose to represent himself only because the trial court refused to appoint substitute counsel, it is apparent from the record that that is indeed the case. However, defendant's being in the position to have to make that choice is not violative of his constitutional rights. An indigent defendant has the right to appointed counsel, but not to the counsel of his choice. If a defendant is dissatisfied with the services of his appointed counsel, but there is no reason to appoint substitute counsel, the defendant has the right not to have the services of his unwanted counsel forced on him and to represent himself. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562 (1975); *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976); *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965). The judge must conduct an inquiry pursuant to N.C.G.S. § 15A-1242 to ascertain that the defendant's waiver of counsel is knowing and voluntary. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980).

In this case, Judge Freeman spent the better part of a day investigating the nature of the problem between defendant and Mr. White and trying to find the best solution. At that time, the judge conducted the inquiry required by N.C.G.S. § 15A-1242 and satisfied himself that in light of the defendant's desire not to be represented by Mr. White, he understood what he was undertaking in choosing to represent himself. Judge Freeman then appointed Mr. White as standby counsel, in accordance with his discretionary right under N.C.G.S. § 15A-1243. This entire proceeding conformed to the proper statutory and constitutional requirements.

This assignment of error is overruled.

II. *Defendant's Motion to Continue.*

[2] The defendant next contends that the refusal of the trial court to grant a continuance until a critical witness for the defense could be present was an abuse of discretion and denied his rights guaranteed by the United States Constitution and the

North Carolina Constitution. Defense counsel renewed this motion at the close of the State's case and also moved for a recess for the purpose of allowing the defendant to secure the attendance of the witness. Both motions were denied.

The defendant filed a motion to continue on 26 April 1984 requesting a continuance because of the unavailability of a named witness for whom he had issued a subpoena. In a "memorandum in support of motion to continue," the defendant said:

> 1. That [the witness] is an essential witness to the defendant's case in that she was with the defendant on the night of the alleged crimes and is able to testify to numerous pertinent facts concerning the events of that evening and other relevant information; and
>
> 2. That the defendant has kept in constant contact with [the witness] since his arrest in January of 1984. Since that time, she has known her testimony was essential in his case, and that he was to come to trial on April 30, 1984; and
>
> 3. That the defendant last spoke with [the witness] by telephone on April 21, 1984, informing her that he would need her testimony on April 30, 1984; and
>
> 4. That the defendant wrote to [the witness] on April 24, 1984, requesting that she appear in his behalf on April 30, 1984; and
>
> 5. That upon attempting to serve a subpoena on [the witness] on April 26, 1984, the defendant learned that [the witness] had "left suddenly" for Hawaii and would not return until on or about May 7, 1984; and
>
> 6. That [the witness] had previously expressed reservations to the defendant about testifying in his behalf . . . .

When the defendant's case was called for trial on 30 April 1984 and while the defendant was appearing *pro se*, the trial judge heard arguments on the motion to continue and denied the motion.

After Mr. White was reinstated as trial counsel, before jury selection began, Mr. White renewed the defendant's motion to continue and requested that the trial judge consider additional in-

formation consisting of the testimony of Mr. Edward L. Cobbler, the private investigator employed on the defendant's behalf. Without objection by the State, the trial judge allowed the defendant to present the testimony of Mr. Cobbler on *voir dire* regarding the information that he had obtained from the witness.

In summary, the witness stated to Mr. Cobbler that the defendant came to her house in Greensboro between 5:30 p.m. and 6:00 p.m. on 19 December 1983 and remained with her until they left her house in separate cars at about 7:00 p.m. to go to his house. Although she was supposed to follow him, she lost contact about 7:15 p.m. Thereafter she looked for him at a couple of bars, on Groometown Road, at his home and at her house and could not find him until about 9:00 p.m. when she returned to his house a third time and saw his truck parked there. She went to the back door of defendant's house and he was there. He had just taken a shower, was completely nude and was doing a wash. She stated that before 7:15 p.m. he had been wearing blue jeans, his work boots, a blue-checkered flannel shirt, and "one of those mesh jackets" of black leather. She also said that he owned a new, large hunting knife that he got from the Army-Navy Surplus Store.

According to the victim's testimony at trial, the defendant arrived at the victim's apartment around 7:30 p.m. He was wearing a black jacket, a light blue plaid flannel shirt and jeans.

Other evidence for the State established that the emergency call from the victim was received at 8:52 p.m. A blue flannel shirt with a missing button was seized from the defendant's room, and the button with adhering thread and blue fabric found in the victim's living room matched the buttons, thread and fiber from the shirt.

The State offered to stipulate at trial to the testimony that the witness would have given as related by Mr. Cobbler. The defendant refused to stipulate. The trial judge again denied the defendant's motion.

Ordinarily, a motion to continue is addressed to the sound discretion of the trial judge and is reviewable only for abuse of discretion. *State v. Weimer*, 300 N.C. 642, 647, 268 S.E. 2d 216, 219 (1980).

> "An equally well-established rule, however, is that when a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances presented by the record on appeal of each case."

State v. Branch, 306 N.C. 101, 104, 291 S.E. 2d 653, 656 (1982) citing *State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981).

The defendant contends that the denial of his motion to continue denied him "due process of law and his right to equal protection of the laws, as guaranteed by the Fifth, Sixth and Fourteenth Ammendments [sic] to the United States Constitution and Art. I, Sections 19 and 23 of the North Carolina Constitution." The defendant further contends that the production of a material witness is fundamental to the rights of a defendant and that the trial judge abused his discretion by denying the motion based upon his factual determination that the defendant could have committed the offense during the time that the defendant was out of the presence of the witness. The defendant contends that he should have been given the opportunity to present the witness so that the jury could determine whether the witness' statement could establish an alibi.

Although not denominated such by the defendant, the constitutional issue presented by this assignment of error is whether the right of a criminal defendant "to have compulsory process for obtaining witnesses in his favor" guaranteed by the Sixth Amendment to the Constitution of the United States was violated by denial of the defendant's motion to continue when his subpoena was not served because the witness had left the state, and whether the same denial violated his right under the Constitution of North Carolina, Article I, § 23 which provides:

> In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony . . . .

When the trial judge denied the defendant's motion to continue the first time, he did not make findings of fact or state reasons for so doing. However, the District Attorney had argued that the defendant had failed to show that the witness was a material witness and had pointed out that in the defendant's mo-

tion the defendant indicated that the witness was reluctant to testify. After the question of the continuance was reopened, the private investigator who talked with the witness indicated that he had questioned the witness on 22 February 1984. A joint motion of the State and defendant to continue the case from 17 February through 2 April, dated 17 February 1984, had been filed and granted on 21 March 1984. In his written motion to continue from the 30 April 1984 date, the defendant stated that he had kept in constant contact with the witness since his arrest in January of 1984 and that since that time "she has known her testimony was essential in his case and that he was to come to trial on April 30, 1984." Therefore, the record clearly shows that the defendant was aware for several weeks of his trial date and yet did not issue a subpoena for this witness, who had indicated her reluctance to testify, until 26 April 1984. Further, the defendant was unable to show any way in which the witness's testimony would be helpful to the defendant, except to show "how he appeared shortly after this crime supposedly happened." Counsel admitted that the witness could not establish an alibi.

As this Court has long suggested, a motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance. *State v. Branch*, 306 N.C. 101, 105, 291 S.E. 2d 653, 657; *State v. Cradle*, 281 N.C. 198, 208, 188 S.E. 2d 296, 303, *cert. denied*, 409 U.S. 1047, 34 L.Ed. 2d 499 (1972); *State v. Gibson*, 229 N.C. 497, 501, 50 S.E. 2d 520, 523 (1948).

Although the defendant's motion to continue was accompanied by an affidavit which suggested that the witness could establish an alibi for the defendant, the evidence offered on *voir dire* indicated that the testimony of the witness would not be of material aid to the defense. In *State v. House*, 295 N.C. 189, 206, 244 S.E. 2d 654, 663 (1978) this Court addressed the identical constitutional provisions drawn into question here and stated:

> As we said in *State v. Wells*, 290 N.C. 485, 491, 226 S.E. 2d 325, 330 (1976), "Here, defendant's lack of diligence in placing his witnesses under subpoena when he had ample opportunity to do so, thus requiring their attendance from day to day, forestalls his belated attempt to place responsibility on the trial judge for their absence." Furthermore, as was said in *Hoskins v. Wainwright*, 440 F. 2d 69, 71 (5th Cir. 1971),

"The right to compulsory process is not absolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests."

While we are not prepared to say that a defendant in all cases loses his right to a continuance as a means to protect his constitutional right to produce witnesses by his failure to issue subpoenas more than four days before trial, in the instant case, the defendant has failed to establish such "colorable need for the person to be summoned" as would justify delaying the trial in order to secure attendance of the witness who was known by the defendant to be reluctant and for whom no subpoena was issued until shortly before the scheduled date of trial.

This assignment of error is overruled.

III. *Testimony of Kenneth Korn.*

[3] Defendant next contends that the trial judge committed prejudicial error in his treatment of motions related to the testimony of Kenneth Korn, a witness for the State.

Mr. Korn testified that he was incarcerated in the Guilford County Jail in early March of 1984, that he was in the same cell block as the defendant, and that the defendant told him "that he should have made sure the bitch could never walk, see or hear again, and he should have—should have made sure she was dead." He further testified that the defendant told him that snitches get their throats slit and that if Mr. Korn said anything "he [the defendant] would know where it came from, and that I would be a dead snitch."

The defendant contends that admission over defendant's objection of Mr. Korn's testimony regarding snitches and what happened to them violated N.C.G.S. § 15A-903(a)(2) which requires the State to divulge to the defendant by 12:00 noon on Wednesday prior to the week of trial any oral statement made to a person other than a law-enforcement officer, the existence of which is known to the prosecutor.

As amended, effective 26 August 1983, the portions of N.C.G.S. § 15A-903(a) relevant to this issue provide as follows:

(a) *Statement of defendant.*—Upon motion of a defendant, the court must order the prosecutor:

. . . .

(2) To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State, the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial; . . . . If the statement was made to a person other than a law-enforcement officer and if the statement is then known to the State, the State must divulge the substance of the statement no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial.

The record contains no discovery request or motion of the defendant. However, the record does reflect that on 25 April 1984 the State served upon the defendant a notice that the State intended to use an oral statement made by the defendant, the substance of which was, "If I had made sure the bitch was dead, I wouldn't be in this mess now."

The trial judge did not err by overruling the defendant's objection to the testimony of Mr. Korn on the ground of failure to comply with N.C.G.S. § 15A-903. Even if we were to assume that the legislature intended for the substance of a statement made by the defendant to a person other than a law enforcement officer to be divulged by the State without motion by the defendant, notice of the substance of the statement "relevant to the subject matter of the case" was timely given to the defendant. Those portions of Mr. Korn's testimony to which objection was made and as to which notice was not given related to an explanation of why the witness came forward with the evidence. He stated in essence that Mr. Kuplen accused him of being a snitch and threatened him by saying, "Remember, snitches always, you know, that talk, always get this (indicating), across the throat, like this." After talking with his father, Mr. Korn decided that if he was going to be accused of being a snitch anyway, he might as well tell.

Objections at trial to other references to "snitches" appeared to be made on the ground that they were hearsay, although no ground was stated. When the witness clarified that the defendant was the person who warned the witness about what would happen to snitches, the objections were overruled. We hold that there is no merit to the defendant's contention that the judge should have excluded the evidence because of a failure to comply with N.C.G.S. § 15A-903(a)(2).

Further, even if a violation had occurred, sanctions for failure to comply with discovery procedures may be imposed in the sound discretion of the trial judge. *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984). Since no discovery sanction was requested by the defendant, he cannot now claim that the failure of the trial judge *ex mero motu* to exclude the evidence as a sanction for failure to comply with discovery procedures was an abuse of discretion.

[4] We further hold that objection to the witness's testimony on the ground that it was hearsay likewise is without merit, for the witness, after the defendant's objection was made at trial, clearly stated that the statements and threats were made by the defendant to the witness, not, as suggested in the defendant's brief, by the defendant to someone else who related the statements to the witness. N.C.G.S. § 8C-1, Rule 801(d).

[5] The defendant further contends that the trial judge erred in allowing the witness Korn to testify and in not allowing the defendant's motion for a mistrial when the defense attorney learned that he had a conflict of interest and could not cross-examine Mr. Korn effectively because of the conflict.

The record reflects that no objection to Mr. Korn's testimony on the ground of a conflict of interest was made when he was called to the stand or throughout direct examination. After defense counsel questioned the witness about charges pending against him and about whether or not he was to receive a benefit from the State because of his testimony, defense counsel requested a recess during which he conferred with other members of the staff of the Public Defender's Office. He then was allowed to approach the bench, but the conference was not recorded. Defense counsel continued his cross-examination of Mr. Korn

regarding his expectation of benefit from his testimony. The witness was then excused.

When the State rested its case, the following exchange between the trial judge and defense counsel occurred out of the presence of the jury:

> THE COURT: Now, Mr. White, during your cross examination of the [sic] Kenneth Korn, you approached the bench, after you had cross examined the defendant [sic] to some extent, and stated that Mr. Churchill in the Public Defender's Office represented Mr. Korn.
>
> MR. WHITE: That's correct.
>
> THE COURT: And you raised the question of a possibility of a conflict.
>
> You stated to me, here at the bench, that you knew nothing about his case.
>
> MR. WHITE: That's right—
>
> THE COURT: Mr. Churchill representing him.
>
> MR. WHITE: That's correct.
>
> THE COURT: And, as I recall, Mr. Korn's testimony, I don't recall him saying that he talked to his lawyer about testifying here in this court.
>
> MR. WHITE: That's correct, Your Honor. I do—I do have information—I have got information as to what he is charged with, that's all the information I have.
>
> THE COURT: Well, that's public record. I told you, when you approached the bench, I told you to go ahead and cross examine him to any extent that you wanted to.
>
> All right, sir.

Defense counsel shortly thereafter made a motion for a mistrial on the basis that an inherent conflict existed because Mr. Churchill of the Public Defender's staff represented Mr. Korn. The defendant assigns denial of that motion as error.

The claim that a possible conflict of interest limited defense counsel's ability to cross-examine the witness raises a question of

whether the defendant's right to confront his accusers, guaranteed by the Sixth Amendment to the Constitution of the United States and by Article I, § 23 of the North Carolina Constitution, has been violated and if so, whether the violation was harmless.

The United States Supreme Court in *Delaware v. Van Arsdall*, --- U.S. ---, --- L.Ed. 2d ---, 54 U.S.L.W. 4347 (7 April 1986) applied the harmless constitutional error rule to a confrontation clause violation when a defendant was barred from conducting cross-examination designed to show a witness' bias. In that case the Court said:

> [A]s we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. ---, --- (1985) (*per curiam*) (emphasis in original).

Id. at ---, --- L.Ed. 2d at ---, 54 U.S.L.W. at 4349.

The Court went on to say that if a defendant's *opportunity* for effective cross-examination is denied, the error may be harmless under the rule of *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967) (the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction), and that whether an error is harmless depends on a variety of factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, --- U.S. at ---, --- L.Ed. 2d at ---, 54 U.S.L.W. at 4350.

In the instant case, we are not satisfied that the defendant's confrontation rights were violated, for the defendant has pointed to nothing which suggests that his counsel would have conducted the cross-examination of Mr. Korn differently if the perceived conflict had not been made known to him during the course of the

cross-examination. Mr. White stated that because another member of his office represented Mr. Korn, he did not want to send his investigators out "to do what they could . . . . I could not have a way to effectively dig up what I could on the guy."

At the time of the witness' testimony, he had already entered a plea of guilty to the charges upon which the Public Defender's Office was representing him and was awaiting sentence.

In *State v. Thomas*, 310 N.C. 369, 312 S.E. 2d 458 (1984) the trial judge had refused to allow defense counsel to withdraw when he learned that a former client was a potential State's witness. The representation had been in regard to an unrelated matter, but defense counsel also had advised the potential witness' mother concerning the very incident about which the witness was to testify at trial. The trial judge denied the motion, ruling that the prior representation did not create a conflict of interest as a matter of law. This Court said: "We do not reach the question of whether the denial of the motion to withdraw constituted an abuse of discretion, since defendant has failed to demonstrate that the ruling resulted in prejudice to him." *Id.* at 375, 312 S.E. 2d at 461.

Likewise, here the defendant has failed to establish prejudice. Defense counsel had conducted a substantial portion of his cross-examination before he became aware of the possible conflict. He denied having any information which his agency's representation of Mr. Korn had made available to him. Whether Mr. Korn was represented by another member of the Public Defender's staff or by an unrelated attorney, the attorney-client privilege would prevent the attorney from being called as a witness to testify, over Mr. Korn's objections, to conversations between the attorney and his client in refutation of Mr. Korn's denial that he had talked with his attorney about the effect of his testimony. Further, nothing in the attorney-client privilege prohibited Mr. White from obtaining non-privileged information concerning the witness and using it to this defendant's benefit. A concern in that case about creating an appearance of impropriety might suggest the necessity for Mr. Churchill to withdraw as counsel for Mr. Korn if Mr. Korn so desired, but no prejudice to the present

defendant could be demonstrated. Mr. Korn at no time sought to invoke the attorney-client privilege.

If, however, we were to conclude that the defendant's confrontation rights were violated, we further conclude that such error was harmless beyond a reasonable doubt. The testimony of the witness Korn was not essential to the State's case, although it supported the inference of an intent to kill that was raised by the nature and extent of the injuries inflicted upon the victim. The defense counsel in fact cross-examined the witness concerning the witness' reason for testifying, attempting to show that the witness had a motive of self-benefit which tended to impeach his credibility. No showing has been made that the perceived conflict *actually* influenced the scope of cross-examination. And, finally, the State's evidence was clear, strong, consistent and overwhelming.

This assignment of error is overruled.

IV. *Pre-trial Identification.*

[6] In his brief the defendant states that he:

> contends that the admission over the defendant's objection at trial of eye witness identification testimony following a pretrial identification by photograph was reversible error in that such identification was based solely on the lone display of the defendant's photograph to the victim and was so impermissibly suggestive as to give use [sic] to a very substantial likelihood of irreparable misidentification.

Not only does the record not support this assertion, but the defendant failed to make a pre-trial motion to suppress the evidence or to show that he did not have a reasonable opportunity to do so as required by N.C.G.S. § 15A-975.

The defendant did object at trial to the victim's in-court identification of the defendant. Following an unrecorded bench conference the objection was overruled. On cross-examination the following questions were asked by defense counsel and answers given by the victim:

> Q. Okay. Do you recall Detectives Brady and Baulding coming into the intensive care unit, and showing you some pictures?

A. Yes, I do.

Q. Would you describe those pictures for us?

A. It was a big mug book. And I thumbed through several pages, and when I saw the defendant, I pointed to the defendant, and said, this is the man that did this to me—or, well, I indicated, since I couldn't talk, I indicated, and then they took the book and left.

On re-direct, the victim identified and the District Attorney introduced State's Exhibit 25, which was a double page from a mug book and contained eight black and white photographs of white males. The victim stated that Detective Brady showed her the pictures while she was in the hospital but that no one suggested which photograph she should pick and that she pointed to the defendant's picture. The victim's description of the photographic identification was corroborated by Detective Brady. There is absolutely nothing in the record which suggests a "lone display of the defendant's photograph to the victim."

Even if the defendant had not waived his right to object to the in-court identification by failing to make a pre-trial motion to suppress, this Court has held that the failure of the trial court to conduct a *voir dire* examination and make findings of fact when a defendant objects to an in-court identification will be deemed harmless error when the record shows that the in-court identification was not tainted by an improper pre-trial identification. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968). *See also State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980) (where there is no material conflict in the evidence on *voir dire*, it is not error to admit challenged evidence without making specific findings of fact). In the instant case, all of the evidence shows that the only pre-trial identification by the victim was a fairly conducted, multiple picture, photographic identification which was not impermissibly suggestive. Further, the evidence is uncontradicted that the victim knew the defendant from previous contacts and spent some twenty minutes conversing with him in her apartment before he began to attack her. Thus, her in-court identification of the defendant was of an origin independent of any pre-trial identification procedure.

This assignment of error is totally without merit.

V. *Cross-examination of the Victim.*

When the defense counsel was cross-examining the victim about how she knew the defendant, he asked her about a time when the victim's mother was visiting her and the defendant showed up at her apartment one evening in November of 1983 at around 10:00 p.m. The following exchange took place:

Q. Do you recall telling him about an incident that happened before, that startled you, as a result of someone coming into your apartment?

A. Yes, I told him about it.

Q. Can you tell the jury about that—

MR. COMAN: I object to that; that's irrelevant.

THE COURT: All right. Sustained.

By MR. WHITE:

Q. Have you previously called the police, about somebody coming into your apartment?

MR. COMAN: Object, unless he can connect it to this, Your Honor.

THE COURT: Well, sustained, as to that question.

[7] The defendant argues on appeal that the question was relevant and the trial court, by sustaining the objection to it, deprived him of his right effectively to confront the witness against him and the right to present his defense. "It is well settled that in a criminal case an accused is assured his right to cross-examine adverse witnesses by the constitutional guarantee of the right of confrontation." *State v. Newman*, 308 N.C. 231, 254, 302 S.E. 2d 174, 187 (1983). However, the defendant has not shown in the record what the witness' answer would have been to this question and thus how it was relevant. By this omission, he has failed to show prejudice by the exclusion of the testimony. *State v. Maynard*, 311 N.C. 1, 11, 316 S.E. 2d 197, 203, *cert. denied*, --- U.S. ---, 83 L.Ed. 2d 299 (1984); *State v. Banks*, 295 N.C. 399, 410, 245 S.E. 2d 743, 750 (1978). "This rule applies not only to direct ex-

amination but to questions on cross-examination as well." *State v. Miller*, 288 N.C. 582, 593, 220 S.E. 2d 326, 335 (1975).

This assignment of error is therefore overruled.

VI. *Evidence of Defendant's Refusal to Comply with Nontestimonial Identification Order.*

[8] The next question presented by the defendant is:

> Did the trial court err in permitting the prosecutor to question its witnesses about the defendant's failure to provide a blood sample, on the grounds that the questioning was improper and deprived the defendant of his right to remain silent and due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Art. I, Sections 19 and 23 of the North Carolina Constitution.

The defendant twice refused to comply with a nontestimonial identification order to submit to a blood test, once when his attorney was out of the country and he refused the services of a substitute attorney, and again when his attorney had returned. He was found in contempt of court but no punishment was imposed. The defendant filed a motion *in limine* requesting exclusion of any evidence regarding his refusal to submit to the blood test. The ground for the motion was that the evidence was incompetent, irrelevant and immaterial. The trial judge reserved ruling on that portion of the defendant's motion.

Maureen Higgins, an FBI agent in the Forensic Serology Unit of the FBI Crime Laboratory, testified at trial that one of the State's exhibits was a blood sample from the victim. The prosecutor then asked:

> Q. All right. Did you ever receive a blood sample, identified to you as coming from the defendant?
>
> MR. WHITE: Object.
>
> THE COURT: Overruled.
>
> A. No, I did not.

Agent Higgins went on to testify that the bloodstain in the left boot of one pair of boots seized from the defendant's apart-

ment was consistent with the victim's blood, and that there was a semen stain on a blanket taken from the victim's bedroom. The prosecutor asked:

Q. During the course of your analysis at the lab, did the defendant ever provide a sample of his blood, in order for you to analyze it?

A. No—

MR. WHITE: Objection—

THE COURT: Sustained. Don't answer.

MR. COMAN: Sir?

THE COURT: She answered "no"; overruled. No.

The defendant at no time objected at trial upon any of the grounds which he attempts to bring forward on this appeal. His objection to the testimony on the ground of relevancy was properly overruled, for the State was entitled to explain why no comparison of his blood with the relevant State's exhibits was performed.

Although not properly before us, we also note that admission of the evidence violated neither the defendant's constitutional privilege against compulsory self-incrimination nor his statutory right under N.C.G.S. § 15A-279(d) against the use of statements made in the absence of counsel during nontestimonial identification procedures.

A criminal defendant's Fifth Amendment privilege against compulsory self-incrimination does not prevent the State from taking blood samples over the defendant's objection and using analysis of the sample as evidence against him. *Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908 (1966). Likewise, the defendant's failure to submit a sample of his blood is not testimony. *See South Dakota v. Neville*, 459 U.S. 553, 74 L.Ed. 2d 748 (1983). The evidence introduced did not indicate that the defendant had refused to allow his blood sample to be taken.

Neither does evidence that the defendant did not provide a sample of his blood constitute use of a statement by the defendant in violation of N.C.G.S. § 15A-279(d).

N.C.G.S. § 15A-279(d) (1983) provides that:

> No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

In this case, however, nothing defendant said was admitted into evidence. The fact that he did not submit a blood sample is not a statement made during nontestimonial identification procedures and is not a violation of defendant's rights under N.C.G.S. § 15A-279(d).

This claim of error is frivolous and is overruled.

VII. *Defendant's Motions Testing Sufficiency of the Evidence.*

Although the defendant contends in his brief that the trial judge erred in denying his motion, made at the conclusion of the evidence, to dismiss as to all charges, he fails to point to any element upon which the evidence was not overwhelming, let alone sufficient. Likewise, the defendant's motion for judgment notwithstanding the verdict was properly denied.

[9] The defendant also assigns as error the denial of his motions to set aside the verdict and to arrest judgment. Such motions are addressed to the sound discretion of the trial judge, and in the absence of an abuse of discretion are not reviewable on appeal. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979). The record reveals no abuse of discretion. The jury was properly presented with the evidence.

These assignments of error are overruled.

VIII. *Jury Instructions.*

The defendant contends that the trial judge erred in the following particulars relating to the jury instructions:

1. He denied the defendant's request that he instruct on the use of circumstantial evidence.

2. He denied the defendant's request that he instruct on the limited use of maps and exhibits.

3. He erred in failing to instruct as to second degree sexual offense, attempted second degree sexual offense, and attempted second degree rape.

4. He violated the rule of *State v. Carter*, 233 N.C. 581, 65 S.E. 2d 9 (1951), which requires impartiality on the part of the trial judge, by instructing the jury that "a knife capable of cutting a person's throat, going into the windpipe or stabbing them in the stomach and going four-inches deep, is a dangerous weapon," and by instructing that "an injury going into the windpipe in the throat, and four-inches deep into the stomach, is a serious injury."

N.C.G.S. § 15A-1231(a) provides that a party may tender written instructions to the judge and must furnish copies to the other parties at the time he tenders them to the judge.

The trial judge refused the defendant's request for instructions in part because the defendant's request consisted only of a list of sections from the Pattern Jury Instructions, Criminal, and was not in compliance with the statutory requirement for written instructions with copies provided to the opposing parties. We do not find it necessary to decide whether a judge may properly refuse a request for instructions on the basis that the instructions are not separately written when the party is requesting an instruction contained in the Pattern Jury Instructions. Rather, we affirm the refusal to give the requested instructions on other bases.

[10] In regard to the instruction on circumstantial evidence, it must be noted that the victim in this case gave direct testimony regarding each element of the crimes charged, except the element of intent to kill in the assault charge, and direct, positive identification of the defendant as the perpetrator. Even when the conviction of the defendant depends upon proof by circumstantial evidence, this Court has held that a failure to give a requested instruction on circumstantial evidence is not error. Chief Justice Branch stated in *State v. Adcock*, 310 N.C. 1, 36, 310 S.E. 2d 587, 607 (1984):

> We hold that an instruction on circumstantial evidence to the effect that a conviction may not be based upon it unless the circumstances point to guilt and exclude to moral

certainty every reasonable hypothesis except that of guilt is unnecessary when a correct instruction on reasonable doubt is given.

In this case the jury was given a correct instruction on reasonable doubt; thus the trial judge properly refused to give the requested instruction on circumstantial evidence.

[11] During the trial of the instant case, the State introduced a number of photographs and a diagram of the victim's apartment. Although the District Attorney usually stated that the exhibits were offered for illustrative purposes when he offered them into evidence, the defendant did not ask for and the judge did not give a limiting instruction at the time of their receipt. However, during the charge conference the defense counsel requested an instruction "on Photographs, Maps and Models . . . . The charge on that, concerning that they are used only to illustrate the testimony Criminal Instruction 104.50." When the trial judge pointed out that no maps or models had been introduced, defense counsel said: "Well, Judge, the photographs and diagrams in evidence."

N.C.G.S. § 8-97, effective 1 October 1981 and applicable at the time of this trial, provides as follows:

> Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictoral representation solely for the purpose of illustrating the testimony of a witness.

Many if not all of the photographs which were received into evidence could properly have been considered by the jury as substantive evidence. For the trial judge to give a proper instruction limiting the State's exhibits to illustrative use would have required that the defendant specifically identify those exhibits which he contended were subject only to illustrative use. He did not do so, and it was not error for the trial judge to refuse to give the instruction when the request was a general one which applied to all photographs and diagrams. A general instruction on limited use of photographs and diagrams would have been incorrect and misleading. It would seem to be the better practice for a

party wishing to limit the use of evidence offered by his opponent to request a limiting instruction at the time of its admission in order to avoid the kind of problem that existed here. If a proper instruction is given at the time of admission, it is not necessary for the trial judge to repeat it in the final charge. *State v. Crews*, 284 N.C. 427, 201 S.E. 2d 840 (1974).

The defendant's contention that the trial judge should have instructed the jury on attempted second degree sexual offense is totally without merit. No evidence was offered of an unsuccessful attempt to commit a sexual offense, and the trial judge properly denied the defendant's request for an instruction on an offense not supported by the evidence.

[12] In regard to the trial judge's refusal to submit to the jury the lesser-included offenses of second degree sexual offense and attempted second degree rape, the defendant contends that the jury could have found that any serious injury to the victim occurred after the attempted rape and the sexual offense were complete and that the infliction of serious injury was sufficiently separate from the rape and sexual offense to be a totally separate episode, not usable to enhance those offenses from second degree to first degree.

N.C.G.S. § 14-27.2 (Supp. 1985) provides:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon . . ., or
>
> b. Inflicts serious personal injury upon the victim or another person . . . .

A sexual offense under N.C.G.S. § 14-27.4 likewise is enhanced to first degree upon a finding that in addition to engaging in a forcible sexual act, defined in N.C.G.S. § 14-27.1(4) (1981) as "cunnilingus, fellatio, analingus, or anal intercourse," the defendant employed or displayed a dangerous or deadly weapon *or* inflicted serious personal injury upon the victim or another person.

Even if we agreed with the defendant's attempt to construe the statute to require the infliction of serious personal injury concomitant with the rape or sexual offense, which we do not, the defendant's contention would still lack merit, for the uncontradicted evidence was that the defendant pulled out a knife and placed it at the victim's throat in the living room, used the knife to force her into the bedroom where the offenses occurred and had the knife out when he forced her down on the bed. She stated that she "knew he had the knife" and "was afraid for [her] life."

The trial judge did not allow the jury to consider the infliction of serious personal injury as the element necessary for first degree sexual offense or attempted first degree rape; he instructed them only on the element that "the defendant displayed a dangerous weapon." No evidence was offered which suggested that the defendant did not display the knife prior to both offenses. The evidence would not have justified submission either of second degree sexual offense or attempted second degree rape.

We note that no objection was made at trial to the peremptory instructions regarding the existence of a deadly weapon and of serious injury. The defendant has therefore waived his right to appellate review of the instructions (N.C. R. App. P. 10(b)(2)) unless the trial court committed "plain error" (*State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983)). The defendant does not rely in his brief upon plain error and in fact makes no argument other than the citation to *Carter* and the statement that "the law is well-settled that the trial judge may not express an opinion based on his own view in the presence of the jury." The instructions took from the jury and determined as a matter of law the issues of whether the weapon as described constituted a deadly weapon and whether the injury as described constituted serious bodily injury.

[13] As to the contention that the trial judge committed reversible error in taking from the jury the question of whether a knife (described as being a large knife with a long shiny blade) which was capable of cutting a person's throat, going into the windpipe and going four inches into the stomach was a deadly weapon, we find that not only has the defendant shown no "plain error," he has shown no error at all. *See State v. Torain*, 316 N.C. 111, 340

S.E. 2d 465 (1986) and cases cited therein where this Court rejected a similar contention.

[14] On the other hand, the question of whether the trial court may properly determine that an injury constitutes "serious bodily injury" as a matter of law has not been settled by this Court. *Compare State v. Joyner*, 295 N.C. 55, 65, 243 S.E. 2d 367, 374 (1978) ("whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question which the jury must decide under proper instructions") *with State v. Pettiford*, 60 N.C. App. 92, 97, 298 S.E. 2d 389, 392 (1982) ("We believe the better rule is that where, as here, the evidence is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted, the issue may properly be resolved by the Court by a peremptory instruction.").

However, even if the trial judge's instruction was error, it did not amount to plain error. As this Court said in *Odom*: "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." 307 N.C. at 661, 300 S.E. 2d at 378-79.

In the instant case the employee of the Guilford County Emergency Medical Services who administered treatment to the victim at the scene described her injuries as follows:

> She had a stab wound to her throat . . . To the middle of her throat, just above her chest . . . . And she also had a large laceration to her abdomen, with her intestines exposed. . . . She had no blood pressure that we could find.

Timothy D. Blair, a Greensboro Police Officer, described the wounds he observed as follows:

> The first thing I saw was a wound, or laceration to the throat, appeared to be about three inches in length.
>
> . . . .
>
> And there was another wound to the lower, right part of her abdomen. And this was a large wound. And her internal organs were, a football-size amount, were exposed and laying [sic] outside.

The physician who was called to the emergency room and treated the victim stated:

> I saw a young woman in shock, with intestines hanging out, unable to breath [sic], with blood all over the place; and realized that this lady was in severe distress.
>
> . . . .
>
> The wound in the abdomen was approximately four inches long, up and down direction, at the level of the belly button, right at the umbilicus.
>
> The second wound was in the neck, and seemed to be transverse in nature . . . it appeared to cut through the windpipe.
>
> . . . .
>
> We then explored the internal organs, and found three injuries . . . .
>
> The first injury was through the stomach; there was a stab wound that was completely cut through the stomach. It was about two inches to three inches in length.
>
> Beneath that, there was an incision, or laceration of the intestine; it, also, measured approximately the same magnitude.
>
> As significant injuries as these were, these were minor compared to the major injury, which was a transection, or cutting through, of the vena cava . . . . [t]he major vein that collects the blood from both legs and a portion of the bowel . . . .
>
> . . . .
>
> In addition to that, there was one more injury which was not repaired, but was noted; which was that of the sacrum, or bone.
>
> What had happened was, that whatever object had caused this injury, had gone through several things, and actually, approximately a half-inch into the bone.

Other evidence of the injuries merely amplified and corroborated this testimony. No contradictory evidence was offered.

We find that error in the instruction, if any existed, regarding the element of serious bodily injury would not have "had a probable impact on the jury's finding of guilt."

The defendant's objections to the trial judge's instructions are overruled.

IX. *Defendant's Motion in Limine.*

The defendant contends that the trial judge erred in denying a motion *in limine* which the defendant filed on 30 April 1984 while acting *pro se*. The trial judge in fact delayed ruling on the evidentiary points presented by the motion, and most of the evidence which was the subject of the motion was never offered into evidence. To the extent that evidence which was the subject of the motion was received, this opinion addresses the question of admissibility under other assignments of error.

It is unnecessary to discuss those questions further here, and this assignment of error is overruled.

X. *Sentencing Phase.*

Finally, the defendant contends that the trial judge erred in admitting into evidence at the sentencing hearing evidence of prior acts of the defendant and in his determination of aggravating and mitigating factors.

[15] The defendant cites no authority and makes no argument regarding the assignment of error concerning the admission of the contested evidence other than that it was error to allow the State "to cross-examine a witness as to a pending charge against the defendant in another State for the purpose of showing bias and prejudice when she already stated that she had been the fiance [sic] of the defendant." Again, the defendant's brief is misleading. The District Attorney questioned the defendant's witness about the defendant's conduct on a previous occasion when he assaulted other people in the witness' presence and she prevented the victims from calling the police. She was not questioned about charges against him. The defendant's conduct on the prior occasion was a proper subject of inquiry at the sentencing hearing.

This assignment of error is without merit.

The trial judge found as an aggravating factor applicable to the charges of first degree rape and of assault with a deadly weapon with intent to kill inflicting serious bodily injury that the defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. The defendant does not except to this finding. The trial judge further found as an aggravating factor applicable to the assault charge that the offense was especially heinous, atrocious or cruel. He found no mitigating factors applicable to either offense and imposed sentences which exceeded the presumptive sentence in both cases.

[16] The defendant argues that because serious injury is a necessary element of the offense of assault with a deadly weapon with intent to kill inflicting serious bodily injury, the finding as an aggravating factor that the offense was especially heinous, atrocious or cruel violates N.C.G.S. § 15A-1340.4(a)(1) (1983) which provides that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." We disagree.

As we stated in *State v. Abdullah*, 309 N.C. 63, 76, 306 S.E. 2d 100, 107 (1983), construing N.C.G.S. § 15A-1340.4(a)(1):

> By this language it seems clear that it is not the use of evidence which is merely "inherent in the offense" but the use of evidence *necessary to prove an element of the offense* which is proscribed. [Emphasis in original.]

If the evidence establishes that the infliction of serious injury was done in an especially heinous, atrocious or cruel manner, N.C.G.S. § 15A-1340.4(a)(1) does not prohibit the finding of that aggravating factor merely because infliction of a serious injury is an element of the offense.

As Justice Meyer said in *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983), "the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*." [Emphasis in original.] We have in an earlier portion of this opinion set out some of the witnesses' descriptions of the injuries inflicted upon the victim. The surgeon who repaired the injuries to the victim's abdomen testified that both injuries, the one to the throat and the one to the abdomen,

were lethal. "[T]hey were more than life-threatening, they were incompatible with life." The victim described the defendant's choking her and beating her head against the floor until she lost consciousness. When she woke up, she was lying on her back on the bed and felt "the powerful thrusts of—of what felt like somebody's fists beating my stomach; and, then, I began feeling the pain and the—and then I heard my—my intestines gurgling and breathing . . . ." When she next regained consciousness, she called the telephone operator. She described her subsequent efforts to get help as follows:

> . . . I went towards the bedroom door, it was dark. And I pulled myself up on the wall. And my bedroom door was shut; I opened it, using my left arm to hold the contents of my stomach together, and using my right arm to hold myself and slide myself towards the front door.

[17] We find that the evidence here would support a finding of excessive brutality, psychological suffering and dehumanizing aspects not normally present in the offense of assault with a deadly weapon with intent to kill resulting in serious bodily injury. Therefore the trial judge's finding that the offense was especially heinous, atrocious or cruel is amply supported by the record.

[18] The defendant further contends that the trial judge erred in failing to find as a mitigating factor that the defendant "has been a person of good character or has had a good reputation in the community in which he lives." N.C.G.S. § 15A-1340.4(a)(2)(m) (1983).

The defendant's first witness at the sentencing hearing, a Nautilus instructor who had known the defendant for a year and a half, testified that the defendant's character and reputation in the community were "Good, as far as I know." On cross-examination, the witness admitted that he did not know anything about the defendant's friends or activities, had associated with him at the club, and had had his hair cut by the defendant for the previous six months.

Robin Boles, defendant's ex-fiancee, a barber-stylist and licensed practical nurse who had known defendant for four and one-half years, testified for the defendant. She described his general character and reputation in the community as follows:

For what people think of him, he's a very—he's—a very good person.

. . . .

He has a zest for life; he lives for life. That's something that, in my opinion, is most important to him, as far as what he wants to do with his life, in life, of what he wants to accomplish, what goals he wants to secure.

She also said that the defendant had not been violent with her with a knife, and that he had sudden changes in his demeanor. On cross-examination, the prosecutor elicited information that the witness was present with the defendant when he assaulted his sister and niece; that he had hit her (the witness) but "[n]ot to the point of assault" and not "to the point of actually hurting me."

The defense also introduced a letter of praise from the president of the Winston-Salem Barber School.

The defendant's past criminal record consisted of 1979 convictions for forcible trespass, misdemeanor breaking and entering, eluding a law enforcement officer, and transportation of alcoholic beverages, and an early 1970s conviction of misdemeanor breaking and entering and larceny.

This evidence is not sufficient to mandate a finding that the defendant is of good character. *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783; *State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983).

This assignment of error is overruled.

After a thorough review of the record, we find that the defendant received a fair trial, free of prejudicial error.

No error.

ROBERT E. PEOPLES, EMPLOYEE v. CONE MILLS CORPORATION, EMPLOYER, SELF-INSURER

No. 460PA84

(Filed 6 May 1986)

1. **Master and Servant § 68— byssinosis—disability—ability to perform tailored job**

The Court of Appeals erred in a byssinosis action by sustaining the Industrial Commission's finding that plaintiff was physically unable to perform a modified supply room job Cone had offered him and was therefore disabled. All the evidence tended to show that plaintiff was capable of performing the physical requirements of the supply room job because Cone had modified the job to make it entirely sedentary; Cone would make the job available to plaintiff on a part-time basis so that he would not have to work when he did not feel like working; the medical testimony was uncontroverted that plaintiff was capable of that kind of totally sedentary employment; and the evidence was that current environmental conditions in the supply room would not endanger plaintiff's health.

2. **Master and Servant § 68— byssinosis—ability to perform tailored job—no evidence of ability to earn wages**

A job offered to a byssinosis victim by Cone could not be considered as evidence of the victim's ability to earn wages because the job had been so modified to fit the victim's limitations that it was not ordinarily available in the competitive job market. The Workers' Compensation Act does not permit Cone to avoid its duty to pay compensation by offering employment which the injured employee could not find elsewhere under normally prevailing market conditions and which Cone could terminate at will or for reasons beyond its control. N.C.G.S. 97-2(9).

3. **Master and Servant § 68— byssinosis—total disability—availability of appropriate employment**

The Industrial Commission did not err in a byssinosis case by awarding plaintiff compensation for total and permanent disability under N.C.G.S. 97-31 where there was uncontradicted medical testimony that plaintiff could perform sedentary employment. There was evidence that plaintiff had little education and was of such an advanced age that he would have scant hope of using more education after he obtained it; plaintiff had worked at Cone almost his entire adult life and had no vocational training other than at Cone, where he had performed only physically demanding, unskilled work; and plaintiff had no experience even with simple household financial matters. An employee need not prove that he unsuccessfully sought employment if he proves he is unable to obtain employment.

4. **Master and Servant § 68— byssinosis—total disability—tailored job refused**

A byssinosis plaintiff was not precluded from receiving compensation under N.C.G.S. 97-32 because he refused employment suitable to his capacity where Cone created for him a position not ordinarily available in the job

market. The Industrial Commission properly determined that plaintiff is permanently totally disabled and N.C.G.S. 97-32 cannot apply to bar him from receiving compensation.

Justice MEYER dissenting.

Justice BILLINGS took no part in the consideration or decision of this case.

ON defendant's petition for further review pursuant to N.C.G.S. § 7A-31 (1981) of a decision of the Court of Appeals, 69 N.C. App. 263, 317 S.E. 2d 120 (1984), affirming a workers' compensation award by the Industrial Commission.

Kirby, Wallace, Creech, Sarda & Zaytoun by John R. Wallace for plaintiff appellee.

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

EXUM, Justice.

This is an occupational lung disease case. The Industrial Commission awarded plaintiff, Robert E. Peoples, compensation for total and permanent disability. Defendant, Cone Mills Corporation (hereafter Cone), appealed to the Court of Appeals. As alternative grounds to support its position that plaintiff is not entitled to compensation, Cone argued: (1) Plaintiff is not disabled within the meaning of the Workers' Compensation Act, N.C.G.S. § 97-2(9), because Cone offers plaintiff employment consistent with his medical limitations at no reduction in salary; and (2) N.C.G.S. § 97-32 bars plaintiff from compensation because he is not justified in refusing tendered employment suitable to his capacity. The Court of Appeals concluded that although the evidence is conflicting, it supports the Commission's finding of fact that the job Cone offers plaintiff is incompatible with plaintiff's medical limitations. Accordingly, it affirmed the Commission's award.

The questions presented by this appeal are: (1) Whether the evidence supports the Commission's finding that the proffered employment is not suitable to plaintiff's capacity; (2) even if the evidence does not support such a finding, whether plaintiff is nevertheless disabled and entitled to compensation; and (3) if

plaintiff is disabled, whether N.C.G.S. § 97-32[1] operates as a bar to compensation.

I.

Plaintiff was born 6 December 1929 and completed the fifth grade. Cone is a textile manufacturing corporation. Plaintiff began working in the card room of Cone's Edna Plant in 1955. He worked there for twenty-four years and was promoted to card room supervisor. Plaintiff was continually exposed to cotton dust and lint in the card room.

Plaintiff noticed his breathing problem after working for several years. He experienced chest tightness, a rasping cough, and breathing difficulty when he came to work on Mondays after spending the weekend away from the plant. These symptoms eventually began to appear on every day of the week. Dr. George Kilpatrick, Jr., a pulmonary specialist, examined plaintiff on 20 June 1978. He diagnosed plaintiff as having chronic obstructive pulmonary disease with a byssinosis component. He categorized plaintiff as having moderate lung impairment. Another pulmonary specialist, Dr. Mario Battigelli, confirmed Dr. Kilpatrick's diagnosis. When Cone learned of Dr. Battigelli's diagnosis, it transferred plaintiff from the card room to the supply room to avoid exposing him further to cotton dust.

In the supply room plaintiff filled parts orders, handled parts shipments and took inventory. His work required bending, lifting, reaching and walking. After working four days in the supply room plaintiff was hospitalized because of chest pain and breathing difficulty. Plaintiff testified the supply room job was tiresome. He said, "I had to rest practically the whole 16 hours that I was home just to be able to get back and make it." Plaintiff also stated that dust filtered down from the production areas through the elevator and flooring into the supply room and "it was bothersome." Plaintiff did not return to work after he was discharged from the hospital.

Cone expressed a desire to employ plaintiff despite his medical limitations. Cone modified an existing third shift supply room position and offered it to him. Cone's attorney wrote plaintiff's attorney describing the position as follows:

1. This statute is quoted in full, *infra*, p. 444.

(1) The environment was lint and dust free;

(2) The lifting or physical exertion requirements were as light in this position as any other place in the plant;

(3) This position is currently being occupied by a female employee on other shifts, and this position is traditionally held by a female employee;

(4) At the time Mr. Peoples was offered this job, he was informed that it would not require any reduction in his current salary;

(5) The volume of work in this position is not great, and it would not be unusual for as much as an hour to pass at this job when there were no requests for orders to be filled;

(6) Although there may be heavier parts in the room, it is my understanding that 90% of the parts required to be moved would weigh five pounds or less. If there were objects that weighed more than this, or if there were objects that Mr. Peoples felt he could not lift, the fixer who had taken the order to the supply room would be available to assist or move the object himself.

. . . Additionally, Cone has indicated to me that it is perfectly agreeable with them for Mr. Peoples to attempt to come back to this job on a part-time basis rather than feel any pressure to work a full eight-hour day.

During the hearing Randolph Stephenson, personnel manager at Cone's Edna Plant, confirmed the supply room position remains available to plaintiff. He stated that because of plaintiff's limited ability to work the job description recited above should be modified to mean that plaintiff will not be required to lift *any* object. Because plaintiff will lift no parts, the person who comes to the supply room with a parts order will lift the requested part. Further, plaintiff will not have to engage in any physical activity of which he does not feel capable. He will work only the number of hours he desires and will not be required to work if he does not feel like doing so. Stephenson testified a job such as the one Cone offered plaintiff has never before existed at Cone's Edna Plant. It

was created especially for plaintiff with his physical limitations in mind. Cone desires to retain plaintiff despite his limitations because of his "knowledge of the operation." Stephenson stated no person other than plaintiff would be hired to work in the supply room at the wages he was offered. Furthermore, there is no position at Cone other than the modified supply room job which plaintiff can fill.

The Industrial Commission employed an industrial hygienist, Melvin Witcher, to evaluate the dust content in the supply room at Cone's Edna Plant. Mr. Witcher testified the supply room area is "very clean." In it there is no appreciable accumulation of dust. He reported a dust concentration reading of ninety-eight micrograms per cubic meter, well below the five-hundred-microgram limit permitted by OSHA regulations. The ninety-eight-microgram reading is comparable to the dust level one would expect to find in a typical office room or outside on a clear fall day. Although the instruments he used provided a quantitative rather than a qualitative measure of dust, he believed much of the dust collected was nuisance dust or dust similar to that which would be found in a house or office.

Evidence relating to plaintiff's earning ability was presented to the Industrial Commission. Dr. Kilpatrick believed that plaintiff was unable to work in all but sedentary employment. Dr. Battigelli testified "even a menial, a minimal amount of activity indeed may be taxing Mr. Peoples' tolerance to a significant extent." Dr. Kilpatrick was not aware of a job situation a person with plaintiff's qualifications could do which did not require physical exertion.[2]

Both physicians were of the opinion that plaintiff could not work in an environment in which he would be exposed to substantial quantities of cotton dust. Dr. Battigelli added, "I think cotton

2. Dr. Kilpatrick elaborated on this opinion saying:

> "I'm not aware of a job situation that he could do. What I'm saying is that if he has self-employment in which he can sit by a telephone and maybe make guesses on what the best stock is to invest in and read on it and this type of thing, if somebody wanted to employ him for that, then he probably could do all right. You know, Jimmy the Greek probably does pretty good on things just like that. But I don't think Mr. Peoples probably could get employment in that."

dust exposure as well as any exposure to any irritant will deteriorate his condition unequivocally."

Both physicians believed, however, an environment similar to that reported by Mr. Witcher as existing in the supply room would not be harmful to plaintiff's health. Dr. Kilpatrick testified:

> Q. The quantity of dust, regardless of cotton dust, that would be necessary to aggravate or cause Mr. Peoples' problems, would have to be greater than is present in the type of office environment we're in right now, isn't that correct?
>
> A. That's correct.

Dr. Battigelli gave similar testimony:

> Now, Doctor, with regard to the position that has been offered and assuming the dust levels that are indicated as per the Industrial Hygiene Survey Report, which you have before you—do you have an opinion as to the suitability of that position for Mr. Peoples?
>
> A. Yes, I do.
>
> Q. All right, Doctor, what would that opinion be?
>
> A. That in my view would be acceptable and compatible with my understanding of Mr. Peoples' ability to perform work—to sustain in—employment.

Dr. Thomas K. White, a psychologist with expertise in vocational rehabilitation and job skills testified: "Such an individual [as plaintiff] could not undertake a job existing in the regional and national economies in significant numbers." With respect to the job Cone offers plaintiff, Dr. White stated: "[I]n my review of the description of the job . . . as compared with the jobs that are open in the market, it appears to me that there is not a job like that available anywhere to my knowledge. . . . I am not aware of a job on the market like that job." He explained:

> I am not aware of any job on the market today similar to that job with the same pay scale. . . . [U]nder item 5, it says the volume of work in this position is not good. Traditionally, supply room jobs are characterized by a pretty fast pace, a brisk level of activity. . . . [T]his is not really a standard job which is in existence in the labor market but that this is go-

> ing to be a tailored, engineered type of job. . . . Concerning the description in the beginning paragraph after paragraph 6 that that job would be available on a part-time basis and then convert to a full-time basis depending on the individual's feeling about work, that is unique.

Dr. White thought the job was "engineered and designed specifically for an individual."

II.

Cone's first assignment of error is that the Court of Appeals erred in holding that plaintiff is disabled. An employee seeking non-scheduled compensation for occupational disease must prove that such a disease resulted in "disablement." N.C.G.S. § 97-52. Disablement generally means the equivalent of "disability." N.C.G.S. § 97-54. Disability means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9). Cone concedes plaintiff is incapable as a result of occupational disease of earning wages in his former employment as a card room supervisor. Cone argues plaintiff is capable of receiving wages at "other employment," however, because Cone is willing to employ plaintiff in a job tailored to plaintiff's physical limitations. Cone offers to employ plaintiff at no reduction in wage in its Edna Plant supply room. The Industrial Commission made specific findings of fact regarding plaintiff's ability to perform this job. It found, "the work's actual physical requirements exceed plaintiff's physical capacity and the environmental conditions would aggravate and endanger plaintiff's health."

A.

[1] The scope of appellate review of questions of fact is limited. The Industrial Commission is constituted as the fact-finding body in workers' compensation cases. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976). The authority to find facts necessary for an award is vested exclusively in the Commission. *Moore v. Electric Co.*, 259 N.C. 735, 131 S.E. 2d 356 (1963). The Commission's fact findings will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding. *Jones v. Desk Co.*, 264 N.C. 401, 141 S.E. 2d 632 (1965). Where, however, there is a

complete lack of competent evidence in support of the findings they may be set aside. *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E. 2d 389 (1980); *Logan v. Johnson*, 218 N.C. 200, 10 S.E. 2d 653 (1940). Cone argues the Court of Appeals erred in affirming the Commission's findings regarding plaintiff's inability to perform the supply room job because they are not supported by evidence in the record. We agree.

All the evidence tends to show plaintiff is capable of performing the physical requirements of the supply room job because Cone has modified it to make it entirely sedentary. Cone agrees to allow plaintiff to sit at a desk in the supply room. He will not be required to lift any parts or engage in any physical activity of which he does not feel capable. Persons who come to the supply room with a parts order will obtain the part.[3] Additionally, Cone will make the job available to plaintiff on a part-time basis so that he will not have to work when he does not feel like doing so.

The medical testimony is uncontroverted that plaintiff is capable of this kind of totally sedentary employment. His physician, Dr. Kilpatrick, stated: "So long as he is not exposed to physical exertion, then he is perfectly capable of performing a sedentary job." More to the point of plaintiff's ability to perform the modified supply room position, Dr. Battigelli testified:

> Q. . . . [D]o you have an opinion as to whether or not Mr. Peoples is able to perform a job with the characteristics listed in Defendant's Exhibit Number 2 with those pulmonary problems?
>
> A. [A] work position which is tailored to the ability of the person to do whatever such a person can do, avoiding anything that such a person believes cannot do, . . . then I would say that such a position would be compatible.
>
> Q. And by 'compatible' what do you mean by that?
>
> A. Could be accepted and feasible and—and consistent with the—with the residual ability that I recognized in Mr. Peoples' medical ability, physical ability, energy ability. . . .

3. Plaintiff's responsibility is only to make certain the person leaves with the correct part. Other responsibilities of plaintiff are to receive incoming calls to the plant and mark computer cards for each item distributed.

Equally devoid of any evidentiary support is the Commission's finding of fact that the environmental conditions in the supply room would endanger plaintiff's health. Melvin Witcher testified there was no appreciable accumulation of dust in the supply room. The dust concentration of ninety-eight micrograms was "quite low" in relation to permissible limits. There was little difference between the quality of air in the supply room and an office environment.[4] His opinion was that much of the dust collected in the supply room was nuisance dust rather than cotton dust. Both physicians testified the quantity of dust measured in the supply room by Mr. Witcher would not be harmful to plaintiff's condition.

Because it is not supported by the evidence, the Commission's finding that the proffered job's environmental conditions would endanger plaintiff's health must be rejected.[5]

We hold, therefore, the Court of Appeals erred in sustaining the Industrial Commission's finding that plaintiff is physically unable to perform the modified supply room job Cone offers him.

B.

[2] Although plaintiff is capable of performing it, Cone's tendered employment, as a matter of law, is no indication of plaintiff's ability to earn wages. Disability is defined by the Act as impairment of one's earning capacity rather than physical disablement. N.C.G.S. § 97-2(9). "Under the Workmen's Compensation Act disability refers not to physical infirmity but to a diminished

4. The 98 micrograms of dust collected in the supply room was actually less than the 130-microgram sample taken from the Personnel Manager's Office. The Personnel Manager's Office is in a building detached from the operations building at Cone's Edna Plant.

5. The only evidence that, standing alone, might support this finding is plaintiff's testimony that cotton dust filtered into the supply room through the floors and elevator and was "bothersome." This evidence was based on plaintiff's experience working in the supply room in 1978. There is evidence that conditions in the supply room were not the same in 1979 as they were in 1978. Cone offered evidence that there has been a general lessening in the quality of cotton dust in the air in its Edna Plant since 1979 as a result of OSHA requirements and its own efforts. Furthermore there is no processing of cotton and synthetic blends and the output has been reduced at Edna since plaintiff was there. In light of uncontroverted evidence that conditions in the supply room have changed since plaintiff's experience there, we conclude plaintiff's testimony based on his experience will not support the finding.

capacity to earn money. *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 [1951]; *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438 [1951]; *Hill v. DuBose*, [234 N.C. 446, 67 S.E. 2d 371 (1951)]; *Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764 [1956]; *Barnhardt v. Cab Co.*, 266 N.C. 419, 146 S.E. 2d 479 [1966]." *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 84, 155 S.E. 2d 755, 761 (1967).

In *Ashley* an employee suffered severe burns in a work-related accident. Before he resumed working, he spent several months in convalescence. During that time he received his full salary. His employer argued he was never disabled within the meaning of the workers' compensation statutes because he never ceased receiving the same wages he earned before his injury. Speaking through Justice, now Chief Justice, Branch, the Court held:

> In the instant case it would indeed be harsh to deprive claimant of medical expenses otherwise due him on the theory that his capacity to earn wages was not diminished because his employer saw fit, from motives of generosity or otherwise, to continue to pay the same wages after his injury. It would strain credulity to hold that an employee who was in a semi-conscious condition for ten weeks after an injury, or confined to the hospital in a cast, was not disabled. A *fortiorari* [sic] the act of his employer in paying his wages in full from the date of the injury should not be determinative of the employee's disability and thereby relieve the employer or insurance carrier from liability for hospital and medical care designed to improve his capacity to earn wages. It would be unconscionable to hold that a man who had been so severely burned and disfigured that he is unable to hold a pencil, pick up a water glass, or lift his arm high enough to comb his hair, has not suffered any diminished capacity to earn wages simply because his employer, for an indeterminate period of time, continues to pay claimant the same wages he received before the injury. The rule adopted by the majority of the decisions since *Branham v. Panel Co.*, [223 N.C. 233, 25 S.E. 2d 865 (1943)], is: Under the Workmen's Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money.

Id. at 83-84, 155 S.E. 2d at 761. The Court explained why post-injury earnings of an employee may under some conditions not accurately reflect the employee's earning capacity:

> Certainly the amount of wages received by the employee after his injury should be strong evidence of his capacity or incapacity to earn wages, but under the conditions here disclosed receipt of wages in the amount received before the injury cannot be conclusive proof that no 'disability' exists. *How long will employer continue to employ claimant if his condition remains unchanged? What would become of claimant if employer should not continue his business? Must claimant continue to be employed by the same employer against his will in order to receive payment of compensation . . . ?*

Id. at 85, 155 S.E. 2d at 762 (emphasis supplied).

The principle underlying the holding of *Ashley* was elucidated by *Allen v. Industrial Commission*, 87 Ariz. 56, 347 P. 2d 710 (1959). In that case an employee was injured when a tire exploded as he was inflating it. The employee was a thirty-six-year-old service salesman with nine years' experience with the company when the accident occurred. His duties were to make sales calls on commercial accounts and to change customers' tires. After the accident occurred the employee returned to his service salesman position. He, his employer and his doctors testified he could not work as efficiently as before the accident. His employer stated the employee had no chance of being employed by other companies. His own company would not have hired a person in the employee's condition if not for the company's policy to keep disabled workers on the job at the same pay. The Industrial Commission found that plaintiff suffered no loss of earning capacity because he was employed after his injury at no reduction in wage. The Arizona Supreme Court reversed.

The court stated post-accident earnings are not the conclusive measure of earning capacity. It said:

> Also to be taken into consideration is whether the post-injury earnings are a proper index of the employee's earning capacity or whether the amount of such earnings truly reflects other considerations which may exaggerate such capacity and be only of a temporary nature.

Id. at 65, 347 P. 2d at 716 (citations omitted). The court concluded:

> The sole evidence to support the Commission's finding was petitioner's actual post-injury earnings. These earning were not evaluated in the light of whether there was a change of business conditions or an adjustment in wages for economic reasons in the almost two-year period between the date of the injury and the date petitioner's condition became stationary. Nor did the Commission adequately consider the policy of the employer to retain at their previous wages all employees disabled as the result of on-the-job injuries. *Thus, wages may reflect not the employee's earning capacity in a competitive situation but rather a company policy which, if abrogated for any reason by the employer, will force the employee into a position where he will be unable, because of his injuries, to continue to earn such wages or to secure equivalent employment.*

Id. at 67-68, 347 P. 2d at 718 (emphasis supplied).

The *Allen* and *Ashley* cases rest on the principle that an injured employee's earning capacity must be measured not by the largesse of a particular employer, but rather by the employee's own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity.

> The ultimate objective of the disability test is . . . to determine *the wage that would have been paid in the open market under normal employment conditions to claimant as injured* . . . .
>
> Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and for purposes of determining permanent disability are to be discounted accordingly. The same is true if the injured man's friends help him to hold his job by doing much of his work for him, or if he manages to continue only by delegating his more onerous tasks to a helper, or if the work for which claimant is paid is 'made work' or 'sheltered work.'

2 A. Larson, *The Law of Workmen's Compensation* §§ 57.21, 57.34 (1983) (footnotes omitted) (emphasis supplied).

The same principle applies when a person has been offered but has not accepted employment after an accident. If the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market. The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated. Termination of the employee would not necessarily signal a bad motive on the part of the employer. An employer facing a business decline reasonably could determine that continued retention of the employee was not feasible. The employee also could be dismissed for misconduct. The employer could, for reasons beyond its control, simply cease doing business.

In this case the supply room employment Cone offers plaintiff is not an accurate measure of plaintiff's ability to earn wages in a competitive market. There is no evidence other employers besides Cone would hire plaintiff at the wage Cone is offering. Randolph Stephenson, personnel manager at Cone, admitted no person other than plaintiff would be hired to work in the supply room at the wage offered plaintiff. Dr. White, an expert in vocational rehabilitation and job skills, testified: "[I]t is unusual to find a supply room job which would have so high a level of salary." He was "not aware of a job on the market today similar to that job with the same pay scale." Similarly, all the evidence tends to show Cone has so modified the supply room position because of plaintiff's medical condition that the position would not be offered in the competitive job market. Dr. White concluded: "There's not a job like this for an individual on the market." It is "engineered and designed for an individual." The Court of Appeals accurately described the unique opportunity Cone offers plaintiff as follows:

> Theoretically, given our understanding of Mr. Peoples' medical limitations, defendant is willing to pay him the same salary in the supply room job that he was earning as a super-

> visor without regard for whether he comes to work, how long he stays, and how much he does while he is there.

Peoples v. Cone Mills Corp., 69 N.C. App. 263, 272-73, 317 S.E. 2d 120, 126. We can conceive of no employer other than Cone who would employ plaintiff on these terms.

The Workers' Compensation Act does not permit Cone to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which Cone could terminate at will or, as noted above, for reasons beyond its control.

We hold the job Cone offers plaintiff cannot be considered as evidence of plaintiff's ability to earn wages.

C.

In holding that plaintiff is disabled, the opinion below states, "An employer may *not* avoid its liability under the workers' compensation law by offering an injured employee a job at his old wage that is within his ability to perform." *Id.* at 275, 317 S.E. 2d at 127. The Court of Appeals made this statement while attempting to distinguish some equally potentially misleading language which appears in a decision by this Court in *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943), where we said:

> However urgently he may insist that he is 'not able to earn' his wages, the fact remains that he is receiving now the same wages he earned before his injury. That fact cannot be overcome by any amount of argument. It stands as an unassailable answer to any suggestion that he has suffered any loss of wages within the meaning of the Act.
>
> . . . .
>
> But the appellant contends that he is not now earning his wages; that they are paid to him 'because of his long service and the sympathetic attitude of his employer.' Hence, he says, he is not now 'able to earn' and is not earning any wage. Conceded, *arguendo*, the final result is the same. While the employer here, as is ordinarily the case, has an insurance carrier standing by under contract to pay whatever it is called upon to pay, it is the one primarily liable. It is paying

> and the employee is receiving more than the assessable amount of compensation. What boots it whether the 'wages' received by him are paid for services rendered or as compensation for the injury received? In either event, under the express terms of the Act, he cannot recover additional compensation.

223 at N.C. 237, 25 S.E. 2d at 868.

While language in *Branham* may erroneously imply the earning capacity of an employee cannot decrease so long as the employee suffers no reduction in wages after an injury, the statement from the opinion below, by suggesting post-injury employment of an employee by the employer can never reflect an ability to earn wages, errs in the opposite extreme.

The principle we adopt in this case resolves the inconsistency between the two opinions. The statement in *Branham* that there is no disability if the employee is receiving the same wages in the same or other employment is correct only so long as the employment reflects the employee's ability to earn wages in the competitive market. In like manner the language in the opinion below that an employer may not avoid liability under the Act by offering an injured employee a job at his old wage within his ability to perform is accurate only if the proffered job is not available generally in the market. If the proffered job is generally available in the market, the wages earned in it may well be strong, if not conclusive, evidence of the employee's earning capacity.

III.

[3] Although Cone's offer of employment has no bearing on it, an issue remains as to whether the Industrial Commission erred in awarding plaintiff compensation for total and permanent disability under N.C.G.S. § 97-31. In workers' compensation cases a claimant ordinarily has the burden of proving both the existence and degree of disability. *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965). Cone contends plaintiff has proved at most that he is only partially disabled; and if compensated at all, plaintiff should be compensated only under N.C.G.S. § 97-30 for partial disability.[6] Cone concedes that plaintiff is unable to return to his old job in the card room, but it relies upon uncontradicted testimony

6. Cone assigns no error to the Commission's conclusion that plaintiff's lung disease is permanent.

by Drs. Battigelli and Kilpatrick which, describing plaintiff's condition as moderate pulmonary impairment, agreed, from a medical standpoint, that plaintiff can perform sedentary employment.

That plaintiff can perform only sedentary work does not in itself preclude the Commission from making an award for total disability if it finds upon supporting evidence that plaintiff because of other preexisting limitations is not qualified to perform the kind of sedentary jobs that might be available in the marketplace. If preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone younger or who possesses superior education or work experience. *Little v. Food Service*, 295 N.C. 527, 532, 246 S.E. 2d 743, 746 (1978).

It follows where occupational lung disease incapacitates an employee from all but sedentary employment, and because of the employee's age, limited education or work experience no sedentary employment for which the employee is qualified exists, the employee is entitled to compensation for total disability. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983). Evidence in *Rutledge* tended to show that chronic obstructive lung disease prevented claimant from doing anything but sedentary work. The claimant in *Rutledge* was forty-eight years old and possessed a tenth-grade education. She began working in a cotton mill at age eighteen and labored in the textile industry for twenty-five years before becoming disabled. She acquired no vocational training except for what she received in the mill. The Court held:

> From this evidence the Commission could have found as facts, although it would not have been compelled to find, that: . . . (8) because of her age, limited education, and her lifetime of employment in the textile industry, claimant is neither trained nor qualified to do other kinds of work and, at this time, is not able to be gainfully employed . . . .

Id. at 106, 301 S.E. 2d at 372. For cases to like effect decided by the Court of Appeals, see *Anderson v. Smyre Manufacturing Co.*, 54 N.C. App. 337, 283 S.E. 2d 433 (1981);

Mabe v. Granite Corp., 15 N.C. App. 253, 189 S.E. 2d 804 (1972) (evidence sufficient to support compensation award for total disability where lung disease rendered worker capable of performing only sedentary work for which worker's job training and skills did not qualify worker).

Here the Commission found in effect that because of plaintiff's lack of job skills there is no available sedentary employment for which plaintiff is qualified. The Commission found as a fact, to which Cone did not except, that plaintiff " 'could not undertake significant gainful employment existing in the regional and national economies in significant numbers' because of his lack of residual and transferable job skills."[7]

The evidence amply supports this finding. Plaintiff has little education and is of such advanced age that after the time it would take to obtain more education, he would have scant hope of using it. Now fifty-seven years old, plaintiff entered but did not complete the sixth grade. Plaintiff also has worked in textile manufacturing at Cone since he was twenty-five years old, almost his entire adult life. He has no vocational training other than at Cone where he performed only physically demanding, unskilled work. Plaintiff testified, "I don't know anything except the job skills I used in the mill which I feel are currently going unused." Plaintiff has no experience even with simple household financial matters. He testified his wife files their taxes, keeps their checkbook and handles their other financial affairs. Dr. White testified:

> I am saying that he does not have significant occupational characteristics that are residual and transferable that

7. The Industrial Commission frequently couches its findings of fact in the form of recitations of testimony without declaring whether it finds the testimony to be a fact. Here, for example, it found:

"Plaintiff was also examined by Dr. Thomas K. White, a private psychologist with special expertise in vocational rehabilitation and job skills. This doctor was of the opinion that plaintiff . . . 'could not undertake significant gainful employment existing in the regional and national economies in significant numbers' because of his lack of residual and transferable job skills."

We interpret the Commission's practice of reciting testimony to mean that it does find the recited testimony to be a fact. We, nevertheless, suggest to the Commission to make its findings in the form of declarations of facts rather than recitations of testimony.

> they would suit him in terms of skills to obtain and hold significant gainful employment.

He concluded:

> [Plaintiff] could not undertake significant gainful employment existing in the regional and national economies in significant numbers.

Thus, in addition to and independently of its erroneous findings concerning plaintiff's inability to perform the Cone supply room job, the Commission made a factual finding supported by evidence that supports its award for total disability.

Cone contends, nevertheless, that plaintiff failed to sustain his burden of proving that he is totally and permanently disabled because there is no evidence plaintiff attempted to obtain employment within his residual physical ability and failed. As authority for this argument Cone cites *Hilliard v. Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). In that case plaintiff, a finishing carpenter, developed an acute sensitivity to sawdust and paint fumes. He was forced to quit his job working in a cabinet shop. He testified, on the one hand, he was unable to obtain employment other than finishing carpentry work because of his age, inexperience and lack of education. He stated, on the other hand, he had "not gone out to seek any other jobs." The Industrial Commission concluded plaintiff was not disabled and denied compensation. This Court reversed and remanded. A majority of the Court regarded plaintiff's testimony pertaining to his lack of effort to obtain other employment as inconsistent with his testimony that he was unable to obtain other employment. The factual issue was whether plaintiff had tried and failed to obtain other work or whether he had simply not tried at all. Because the Commission in its findings of fact did not resolve this issue, the Court held the findings were insufficient to determine the rights of the parties and the case was remanded for additional findings. The Court cautioned, however, that it is "plaintiff's burden to persuade the Commission not only that he had obtained no other employment but that he was *unable* to obtain other employment." *Id.* at 295, 290 S.E. 2d at 684.

Hilliard simply states that, in order to prove disability, an injured employee must prove he is unable to work and not merely

that he unsuccessfully sought work. The converse is not true. In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment. An unsuccessful attempt to obtain employment is, certainly, evidence of disability. Where, however, an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist. In this case all the evidence tends to show any effort by plaintiff to obtain sedentary employment, the only employment of which he is physically capable, would have been futile because of such preexisting factors.

The Court of Appeals, we conclude, did not err in affirming the Industrial Commission's conclusion that plaintiff is totally and permanently disabled under N.C.G.S. § 97-29 and entitled to compensation under that section.

IV.

[4] Cone finally argues that plaintiff is precluded from compensation because he was not justified in refusing employment offered by Cone suitable to his capacity. N.C.G.S. § 97-32 provides:

> If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

Cone's argument that this statute bars plaintiff from compensation has no merit.

A canon of statutory interpretation is that statutes dealing with the same subject matter must be construed together and harmonized, if possible, to give effect to each. *Coach Lines v. Brotherhood*, 254 N.C. 60, 118 S.E. 2d 37 (1960); *Justice v. Scheidt*, 252 N.C. 361, 113 S.E. 2d 709 (1960). If employers were able to avoid paying compensation merely by creating for their injured employees makeshift positions not ordinarily available in the market, N.C.G.S. § 97-32 would render N.C.G.S. § 97-29 meaningless. We believe the legislature never contemplated such a use of N.C.G.S. § 97-32. One purpose of that section is to prevent a

partially disabled employee from refusing employment within the employee's capacity in an effort to increase the amount of compensation payable to the employee. *Branham v. Panel Co.*, 223 N.C. 233, 236, 25 S.E. 2d 865, 867. Where an employee is properly determined to be totally and permanently disabled under N.C.G.S. § 97-29, N.C.G.S. § 97-32 has no application. The Commission here has properly determined that under N.C.G.S. § 97-29, plaintiff is permanently and totally disabled. This means that there is no employment "suitable to his capacity," and N.C.G.S. § 97-32 cannot apply to bar plaintiff from receiving compensation.

For all the reasons given above the opinion of the Court of Appeals is modified and affirmed.

Modified and affirmed.

Justice BILLINGS took no part in the consideration or decision of this case.

Justice MEYER dissenting.

The claimant here was a 46-year-old man suffering from "moderate pulmonary impairment." The majority flatly concedes that "all the evidence tends to show plaintiff is capable of performing the physical requirements" of an "entirely sedentary" job. As to the medical evidence in particular, the majority says, "The medical testimony is uncontroverted that plaintiff is capable of this kind of totally sedentary employment. His physician, Dr. Kilpatrick, stated: 'So long as he is not exposed to physical exertion, then he is perfectly capable of performing a sedentary job.' " Indeed, the majority refers to the "uncontradicted testimony by Drs. Battigelli and Kilpatrick which, describing plaintiff's condition as a moderate pulmonary impairment, agreed, from a medical standpoint, that plaintiff can perform sedentary employment."

Having established that the claimant here is capable of doing sedentary work, the burden is on the claimant to prove that no such work is available to him. The only evidence even remotely pertinent to this question comes from Dr. Thomas K. White, a private psychologist. That evidence, as the majority concedes, is only to the effect that claimant "could not undertake significant

gainful employment existing in the regional and national economies in significant numbers." This was precisely the "finding" of the Commission—that the claimant "could not undertake significant gainful employment existing in the regional and national economies in significant numbers." By no stretch of the imagination can this recitation of the evidence given by Dr. White be considered a proper finding. Even if it had been an adequate finding of fact, it does not address the availability of sedentary jobs in the *local* economy. Nor does it speak to jobs that might be available in less than "significant numbers."

The majority has stretched the record before us beyond the breaking point in stating that "[h]ere the Commission found in effect that because of plaintiff's lack of job skills there is no available sedentary employment for which plaintiff is qualified." Most assuredly, it cannot be said that the Commission's recitation of Dr. White's testimony was "in effect" a finding that there is no available sedentary employment for which the claimant is qualified.

It is common knowledge that there are numerous sedentary jobs in the economy—the parking lot attendant who simply receives money for parking, the factory timekeeper whose only job is to see that incoming and outgoing workers properly punch their time cards, the employee who takes orders by phone, the bank or factory guard who simply clocks people in and out of buildings, the cashier at the car wash, and perhaps a hundred others. Having determined that the claimant here is capable of sedentary work, surely it is not too much to ask that *someone* testify that no such jobs are available locally to this claimant. This case should be remanded to the Commission for a proper finding regarding the availability of sedentary jobs to Mr. Peoples.

This claim was litigated, argued, and briefed in the Court of Appeals and argued and briefed in this Court on the issue of whether the claimant is required to accept what the majority characterizes as a "make-work" job tendered to him by his employer, Cone Mills. Little or no attention has been paid throughout this proceeding to the question of whether there were available to the claimant other sedentary jobs in the local economy. The evidence in the record before us on this issue is inade-

quate, and certainly there is no proper finding by the Commission on this issue. The conclusion on this issue by the majority is unsupported in the record. I vote to remand this case to the Commission for an appropriate hearing and a proper finding regarding the availability of sedentary jobs to the claimant.

ELLEN SPEAR MARKS v. EDGAR SEYMOUR MARKS

No. 475PA85

(Filed 6 May 1986)

1. **Divorce and Alimony § 19.5— separation agreement—merger into consent judgment—jurisdiction over agreement**

Where a pre-*Walters* consent judgment provided that a separation agreement was "hereby incorporated by reference," the agreement merged into the consent judgment and was superseded by the court's decree notwithstanding contrary language in the judgment that the agreement was "not merged in this order." Thus, the trial court had jurisdiction over the agreement. N.C.G.S. § 50-16.9(a).

2. **Divorce and Alimony § 19.5— consent judgment—support and property settlement provisions—presumption of separability**

Where the issue of separability of support provisions from property settlement provisions in a separation agreement incorporated into a consent judgment is not adequately addressed in the document itself, there is a presumption that the provisions therein are separable and subject to modification by the court upon a showing of changed circumstances, and the party opposing modification has the burden of proof on the issue of separability by a preponderance of the evidence. Therefore, the Court of Appeals erred in holding that a separation agreement incorporated into a consent judgment was an integrated property settlement which could not be modified by the trial court where no evidence was presented in the district court to rebut the presumption of separability of provisions.

3. **Divorce and Alimony § 19.4— termination of alimony obligation—showing of changed circumstances**

The trial court did not err in finding that changed circumstances justified the termination of defendant's obligation to pay alimony pursuant to a 1974 consent judgment where the evidence supported the trial court's findings of a significant change in the parties' incomes, estates, health and other factors following entry of the 1974 consent judgment, and the findings supported the court's conclusion that plaintiff is no longer a dependent spouse.

ON discretionary review pursuant to N.C.G.S. § 7A-31 from a decision of a unanimous panel of the Court of Appeals, 75 N.C. App. 522, 331 S.E. 2d 283 (1985), reversing an order of *John, J.*, entered 30 March 1984 allowing defendant's motion in the cause to modify an existing order for alimony, 74CVD9434, heard at the 12 December 1983 Civil Session of District Court, GUILFORD County. Heard in the Supreme Court 12 March 1986.

Hunter, Wharton & Howell, by John V. Hunter III, for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by William D. Caffrey and Richard L. Pinto, for defendant-appellant.

MEYER, Justice.

On 30 April 1974, plaintiff and defendant entered into a "Deed of Separation" which resolved questions of child custody and support, division of marital property, alimony, and certain other rights as set forth therein. Shortly thereafter, on 15 May 1974, plaintiff filed a civil action, No. 74CVD9434, in District Court, Guilford County, for child custody, child support, and alimony. On 21 May 1974, a consent order was entered in that action, which stated, *inter alia*:

> [I]t is ORDERED, ADJUDGED and DECREED:
>
> A. That the Deed of Separation duly executed by plaintiff and defendant on April 30, 1974, is hereby incorporated by reference in its entirety in this Order, and, by consent of the parties, is a part of the judgment of this Court; and that its terms shall control and determine alimony, child support, attorneys' fees paid by defendant for the benefit of plaintiff and all other matters set out therein; but that said Deed of Separation is not merged in this Order to the end that a final termination of this cause, if such should occur, will leave the parties free to enforce said Deed of Separation by independent action.

The alimony award in the consent order, as detailed in the incorporated Deed of Separation, provided that defendant would transfer to plaintiff his one-half interest in the parties' homeplace in lieu of alimony payments for the period of the first seven years. The value of defendant's interest in the property was

$105,000; it represented defendant's alimony obligation to plaintiff in the amount of $15,000 per year for the seven-year period. After this period, future alimony would be determined by a paragraph entitled "*Permanent Alimony*" pursuant to which defendant was to pay to plaintiff a sum equal to twenty-seven and one-half percent of his gross personal income, with a minimum payment of $15,000 per year, terminable upon plaintiff's death or remarriage.

On 22 December 1981, plaintiff instituted a separate civil action, 81CVD8326, also in the District Court, Guilford County, for breach of contract, seeking to recover alimony arrearages and an order of specific performance of the Deed of Separation. Defendant answered and counterclaimed in this contract action and also filed a motion in the cause in the alimony action, 74CVD9434, to modify that order for alimony on grounds of changed circumstances.

Both plaintiff's contract action and defendant's motion in the alimony action were calendared for hearing during the week of 25 July 1983. The parties stipulated that the question of the modifiability of the alimony provisions of the Deed of Separation as incorporated into the consent judgment should first be determined. The parties further stipulated that if the trial court ruled in favor of plaintiff (that the alimony provisions are not modifiable), the court would hear evidence on plaintiff's breach of contract action; if the trial court ruled in favor of defendant (that they are modifiable), the court would hear evidence on defendant's motion to modify his alimony obligations. Following a hearing at the 25 July 1983 Civil Session of District Court, Guilford County, Judge Joseph R. John entered findings of fact and conclusions of law, and ordered:

> WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the alimony provisions set forth in the "Deed of Separation" executed on April 11, 1974, as incorporated into, adopted and ordered by the Consent Judgment entered on May 21, 1974, be and the same are hereby held to be modifiable as a matter of law upon a showing of changed circumstances; and that this cause (74 CvD 8326) [sic] be and same is hereby held open pending a hearing on the question of changed circumstances for a final determination of defendant's Motion to Modify

Order for Alimony in accordance with this order and the stipulations of the parties.

This the 9th day of ~~October~~ Nov., 1983, nunc pro tunc 7/25/83.

s/ JOSEPH R. JOHN
Presiding District Court Judge

In December 1983, pursuant to the above referenced order, lengthy evidentiary hearings were held in 74CVD9434 on the question of whether circumstances had changed to such a degree so as to warrant a modification of the alimony provisions of the 1974 consent judgment. On 30 March 1984, Judge John entered an order finding "a significant and sufficient change in circumstances . . . which warrants a modification of the alimony award encompassed in the Consent Judgment of May, 1974." Judge John ordered that defendant's obligation to pay alimony be terminated completely as of 8 January 1982.

Plaintiff appealed the entry and signing of the March 1984 order, and the Court of Appeals reversed the judgment in *Marks v. Marks*, 75 N.C. App. 522, 331 S.E. 2d 283. The panel below concluded that the alimony provisions contained in the consent judgment were not alimony at all, but were "actually a part of an overall property settlement by the parties; that they [were] not separable from the other provisions of the Deed of Separation; and that modification of the alimony provisions now would destroy the agreement." *Id.* at 529, 331 S.E. 2d at 287. Having found error in the trial court's determination that the consent judgment was modifiable, the panel below did not address assignments of error regarding changed circumstances and termination of defendant's spousal support obligations.

For the reasons set forth below, we reverse the decision of the Court of Appeals and reinstate the 30 March 1984 judgment of the District Court, Guilford County.

We note at the outset that this case is governed by the law as it existed prior to our decision in *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338, *reh'g denied*, 307 N.C. 703 (1983). The holding

in *Walters*[1] was expressly made prospective only and applies to judgments entered on or after 11 January 1983. The consent judgment in this case was entered in May 1974. Thus, because the following discussion involves pre-*Walters* law, this opinion will have limited public interest.

N.C.G.S. § 50-16.9(a) provides:

> § 50-16.9. *Modification of order.*
>
> (a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon a motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

N.C.G.S. § 50-16.9(a) (1984). This statutory provision is satisfied when the following three elements are met:

(1) The court has jurisdiction over the parties and the agreement sought to be modified. Jurisdiction is attained over the agreement when the support provisions of the agreement constitute an order of the court.

(2) The support provisions ordered by the court constitute true "alimony or alimony pendente lite" and are not in fact merely part of an integrated property settlement. The support provisions of the agreement must be separable from the property settlement provisions.

(3) The party seeking modification meets his or her burden of demonstrating such a change in circumstances as would warrant a modification of the alimony or alimony pendente lite obligations imposed by court order.

1. "[W]e now establish a rule that whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case." *Walters*, 307 N.C. at 386, 298 S.E. 2d at 342.

See White v. White, 296 N.C. 661, 666-67, 252 S.E. 2d 698, 701 (1979); *Walters v. Walters*, 307 N.C. 381, 387-88, 298 S.E. 2d 338, 342-43 (1983) (Exum, J., dissenting); Note, *Domestic Relations—Presumed Separability of Support and Property Provisions in Ambiguous Separation Agreements—White v. White*, 16 Wake Forest L. Rev. 152, 156 (1980).

A. ORDER OF THE COURT.

[1] Prior to our decision in *Walters*, this Court recognized two types of consent judgments. In the first type, which is nothing more than a contract, the court merely approves the payments and sets them out in a judgment. *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E. 2d 240, 242 (1964). These court-approved contracts are not orders of the court. *Id.* In the second type of consent judgment, "the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders . . ." that the provisions of the separation agreement be observed. *Id.* "When the parties' agreement with reference to the wife's support is incorporated in the judgment, their contract is superseded by the court's decree." *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E. 2d 71, 73 (1967). *Walters* abolished this bifurcated view of consent judgments and thus prospectively alleviated the complex analysis previously required by *Bunn* and its progeny in determining whether the first element ("court order" confers jurisdiction) of N.C.G.S. § 50-16.9(a) has been met.

Since *Walters* does not apply to the instant case, we must determine whether the trial court correctly found that the support provisions of the Deed of Separation were in fact ordered by the court. In pertinent part, the consent judgment entered 21 May 1974 states:

> [I]t is ORDERED, ADJUDGED and DECREED:
>
> A. That the Deed of Separation duly executed by plaintiff and defendant on April 30, 1974, is hereby *incorporated by reference in its entirety* in this Order, and, by consent of the parties, is a *part of the judgment of this Court*; and that *its terms shall control and determine alimony*, child support, attorneys' fees paid by defendant for the benefit of plaintiff and all other matters set out therein; but that said Deed of Separation is not merged in this Order to the end that a final termination of this cause, if such should occur, will leave the

parties free to enforce said Deed of Separation by independent action.

(Emphasis added.)

In his 9 November 1983 order, nunc pro tunc 25 July 1983, on the issue of modifiability, the trial judge found that:

> 4. It was the intent of the parties and of this Court to make the terms governing the alimony payable by defendant to plaintiff as set forth in the "Deed of Separation" a part of the judgment of this Court entered on May 21, 1974, and to adopt the provisions of the "Deed of Separation" and to order the defendant to comply with the alimony provisions.

We agree with the trial court's conclusion because it is in conformity with pre-*Walters* case law which governs the case at bar. In *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978), we extended the rule stated in *Bunn* and *Mitchell* to hold that when a separation agreement providing for spousal support is incorporated by reference in a judgment of the court, the parties' contract is superseded by the court's decree. In this situation, the agreement is adopted by the court and becomes a part of the court's judgment which orders compliance with the terms of the agreement.

The third clause of paragraph A of the May 1974 order states, in effect, that, notwithstanding the preceding two clauses making the Deed of Separation an order of the court, such deed "is not merged in this Order." We can only imagine what result the drafter had in mind in wording paragraph A in this manner.

A separation agreement adopted by the court and incorporated into a consent judgment ordering compliance therewith *merges* into the court order; the court's decree supersedes the separation agreement, which then ceases to exist as an independently enforceable contract. *Henderson v. Henderson*, 307 N.C. 401, 407, 298 S.E. 2d 345, 350 (1983); *Levitch v. Levitch*, 294 N.C. 437, 438-39, 241 S.E. 2d 506, 507; *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E. 2d 71, 73. On the other hand, a separation agreement merely approved by the court but not incorporated into or ordered to be performed by the consent judgment is not a court order, does *not merge* into the consent judgment, and remains a separately enforceable contract between the parties. *See, e.g., Moore v. Moore*, 297 N.C. 14, 16, 252 S.E. 2d 735, 737 (1979); *Levitch v. Levitch*, 294 N.C. 437, 438, 241 S.E. 2d 506, 507; *Bunn*

v. Bunn, 262 N.C. 67, 69, 136 S.E. 2d 240, 242. *See generally* Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C. L. Rev. 819, 848-53 (1981).

The parties cannot have it both ways. After plaintiff and defendant signed the Deed of Separation in April 1974, it became a valid contract, fully enforceable by traditional contract principles, including suit for breach or for specific performance. However, when plaintiff took the contract into court in May 1974 for incorporation into a consent judgment, obviously for the purpose of having the executory support provisions become court ordered and thus enforceable by the court's contempt power, the "burden" of modifiability of court-ordered support payments accompanied the "benefit" of enforceability by contempt. *See, e.g., Henderson v. Henderson*, 307 N.C. 401, 407, 298 S.E. 2d 345, 349.

We hold, therefore, that where, as here, the court incorporates by reference a separation agreement into a consent judgment, making the agreement a part of the judgment and ordering compliance with its terms, the agreement merges into the consent judgment and is superseded by the court's decree, any language to the contrary notwithstanding. *Cf. id.* at 408, 298 S.E. 2d at 350 (court-ordered consent judgment is enforceable by civil contempt notwithstanding the fact that it contains unequivocal language that it is nonmodifiable); *Acosta v. Clark*, 70 N.C. App. 111, 115, 318 S.E. 2d 551, 554 (1984) (separable and independent alimony provisions incorporated into divorce judgment are modifiable notwithstanding any express language to the contrary).

In summary, we hold that the trial court did not err in finding that the spousal support provisions of the Deed of Separation were ordered by the court in its 21 May 1974 judgment consented to by the parties. Thus, the trial court had jurisdiction over the agreement as required by the first element of N.C.G.S. § 50-16.9(a).

B. TRUE ALIMONY—SEPARABILITY.

[2] The second requirement for modification pursuant to N.C.G.S. § 50-16.9(a) is that the support provisions ordered by the court constitute "alimony or alimony pendente lite." *See* N.C.G.S. §§ 50-16.1(1) and -16.1(2) (1984). Support provisions, although denominated as "alimony," do not constitute true alimony within the meaning of N.C.G.S. § 50-16.9(a) if they actually are part of an integrated property settlement. The test for determining if an

agreement is an integrated property settlement is whether the support provisions for the dependent spouse "and other provisions for a property division between the parties constitute reciprocal consideration for each other." *White v. White*, 296 N.C. 661, 666, 252 S.E. 2d 698, 701. *See also Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E. 2d 240, 243 ("if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties").

The panel below found that the support provisions in the instant case were *not* alimony but instead represented "a reciprocal obligation supported by consideration and [were] part of an integrated property settlement." *Marks v. Marks*, 75 N.C. App. 522, 529, 331 S.E. 2d 283, 287. We find the reasoning as well as the result of the opinion below to be erroneous, and we therefore reverse.

In its opinion, the Court of Appeals reviewed pre-*Walters* case law, noted our holding in *Walters*, and recognized that *Walters* does not govern the resolution of this case. The opinion then went on to state, however, that the support provisions in question here "are clearly within *the exception* set out in *White* and *Rowe*." *Id.* at 526-27, 331 S.E. 2d at 285 (emphasis added). We note, first, the rule that support provisions in an integrated property settlement are not "alimony" and are not modifiable is not an "exception" to any rule. It is merely a definitional method of determining whether the second element of N.C.G.S. § 50-16.9(a) has been met, that is, whether the provisions sought to be modified are true alimony as required by the statute or are, in fact, something else. If support provisions are found to be consideration for, and inseparable from, property settlement provisions, the support provisions, even if contained in a court-ordered consent judgment, *are not alimony* but instead are merely a part of an integrated property settlement which is *not* modifiable by the courts.

Second, although the panel below seemed to recognize that the cases of *White v. White*, 296 N.C. 661, 252 S.E. 2d 698, and *Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982), control the separability issue here, it failed to recognize the principle upon which those cases are based.

In *White*, the primary issue was the separability of support provisions from property settlement provisions contained in a consent judgment. There, as here, the subject matter of the consent judgment included (1) support provisions for the dependent spouse and (2) provisions for a division of property. Whether these provisions were separable and independent depended upon the intent of the parties. There, as here, the parties did not indicate their intent regarding separability of the provisions. *But see Acosta v. Clark*, 70 N.C. App. 111, 114, 318 S.E. 2d 551, 554 (support and property division provisions expressly stated to be independent); *Britt v. Britt*, 36 N.C. App. 705, 711, 245 S.E. 2d 381, 385 (1978) (same).

Recognizing the anomalous results produced by "technical hair-splitting" in case-by-case determinations of parties' intent regarding the separability/integration issue, this Court adopted the reasoning of the Idaho Supreme Court in *Phillips v. Phillips*, 93 Idaho 384, 462 P. 2d 49 (1969), and announced the rule that, in cases in which the document itself does not adequately address the issue of separability,

> there is a presumption that provisions in a separation agreement or consent judgment made a part of the court's order are separable and that provisions for support payments therein are subject to modification upon an appropriate showing of changed circumstances. The effect of this presumption is to place the burden of proof on the party opposing modification. . . . [T]his burden [is] discharged only by a preponderance of the evidence.

White v. White, 296 N.C. 661, 671-72, 252 S.E. 2d 698, 704. *See also Rowe v. Rowe*, 305 N.C. 177, 184, 287 S.E. 2d 840, 844; *Cecil v. Cecil*, 74 N.C. App. 455, 456-57, 328 S.E. 2d 899, 900 (1985); *Rowe v. Rowe*, 74 N.C. App. 54, 57, 327 S.E. 2d 624, 626, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 489 (1985).

Contrary to any assumption implicit in cases such as *Allison v. Allison*, 51 N.C. App. 622, 277 S.E. 2d 551, *disc. rev. denied*, 303 N.C. 543, 281 S.E. 2d 660 (1981); *Barr v. Barr*, 55 N.C. App. 217, 284 S.E. 2d 762 (1981); and *Walters v. Walters*, 54 N.C. App. 545, 284 S.E. 2d 151 (1981), *rev'd*, 307 N.C. 381, 298 S.E. 2d 338 (1983), the *White* presumption is not an *alternative* method of resolving the issue of separability where the documents are unclear on the

point. As the Court of Appeals later recognized in *Cecil v. Cecil*, 59 N.C. App. 208, 296 S.E. 2d 329 (1982), *disc. rev. denied*, 307 N.C. 468, 299 S.E. 2d 220 (1983), the *White* presumption evidentiary hearing is required in those cases in which the presumption properly arises. *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E. 2d 840, 846; *White v. White*, 296 N.C. 661, 672, 252 S.E. 2d 698, 704. Thus, if the party with the burden of proof (the party opposing a determination of separability) fails to rebut the *White* presumption by a preponderance of evidence at the evidentiary hearing in the district court, the *White* presumption of separability of provisions prevails.

In the instant case, the trial court held a hearing on 25 July 1983 on the sole issue of the "modifiability of the alimony provisions." The record before us contains no transcript of evidence presented in that hearing, and plaintiff's counsel stated during oral argument before this Court that he believed the trial judge was asked to rule on the issue on the strength of the pleadings and relevant documents as a matter of law. Indeed, the order entered pursuant to that hearing states in pertinent part:

> [A]fter hearing arguments of counsel, reviewing the file, including the "Deed of Separation" and Consent Judgment, and after reviewing the briefs of counsel and the cases cited therein, *and after both parties declined the opportunity to put forth additional physical evidence or testimony in support of their respective positions after having been given the opportunity to do so by the Court*, the Court makes the following Findings of Fact:
>
> . . . .
>
> 4. It was the intent of the parties and of this Court to make the terms governing the alimony payable by defendant to plaintiff as set forth in the "Deed of Separation" a part of the judgment of this Court entered on May 21, 1974, and to adopt the provisions of the "Deed of Separation" and to order the defendant to comply with the alimony provisions.

(Emphasis added.)

In that same order, the trial judge concluded as a matter of law, *inter alia*:

> [T]herefore *the alimony provisions* located in the "Deed of Separation" as incorporated into, adopted and ordered by the Consent Judgment *are subject to modification* upon a showing of changed circumstances.

(Emphasis added.)

The trial judge's findings of fact and conclusions of law compel the conclusion that plaintiff, by failing to offer "additional physical evidence or testimony," failed to carry her burden of rebutting the *White* presumption of separability. In the instant case, because no evidence appears in the record that would support a contrary result, the trial judge's findings must be presumed to have been based on the apparent failure of plaintiff to produce such evidence as was required in order for her to carry her burden of proof. *Cf. In re McCarroll*, 313 N.C. 315, 317, 327 S.E. 2d 880, 881 (1985) (where evidence not included in the record, it is presumed that the evidence was sufficient to support the findings of fact); *Britt v. Britt*, 49 N.C. App. 463, 469, 271 S.E. 2d 921, 926 (1980) (same). Because the presumption was not rebutted by a preponderance of the evidence, the provisions for support are deemed separable from property settlement provisions and, because they were court ordered, were modifiable pursuant to N.C.G.S. § 50-16.9(a) upon defendant's showing of changed circumstances.

The Court of Appeals erred in failing to recognize that the *White* presumption applies in this case and that the presumption was not rebutted in the district court, and in undertaking its own "technical hair-splitting" analysis of the documents in question. The *White* presumption was announced for the purpose of avoiding such an analysis as was applied in *Allison*, *Barr*, *Walters I*, and by the panel below in the instant case, and of providing instead a "common-sense" approach to the resolution of the complex separability question. The district court must conduct the *White* evidentiary hearing in which the party with the burden of proof is afforded an opportunity to present evidence in rebuttal of the presumption of separability of provisions in all cases in which the presumption properly arises. On review of the district court's judgment following such a hearing, the appellate court may not substitute its own analysis of the parties' intent; it is limited to a review of the sufficiency of the evidence, if any, before the dis-

trict court, assuming that the issue is properly preserved for such a review.

As stated above, our review of the record reveals no evidence presented to the district court which would tend to rebut the *White* presumption of separability of provisions. The Court of Appeals therefore erred in holding that the Deed of Separation incorporated into the 1974 consent judgment was an integrated property settlement which could not be modified by the trial court.

C. CHANGED CIRCUMSTANCES.

[3] Following lengthy hearings on the question of changed circumstances, the trial judge entered detailed findings of fact and conclusions of law and entered an order on 30 March 1984 terminating defendant's obligation to pay alimony to plaintiff as of 8 January 1982, the date of defendant's motion to modify the 1974 order.

The party moving for a modification of an alimony award has the burden of proving, by a preponderance of the evidence, that there has been a substantial or material change of circumstances. *See Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E. 2d 921, 926. The final decision must be based on a comparison of the facts existing at the time of the original order and the time when the modification is sought. *Broughton v. Broughton*, 58 N.C. App. 778, 781, 294 S.E. 2d 772, 775, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982). Among the circumstances to be considered by the trial judge upon a motion to modify an award of alimony are those factors listed in N.C.G.S. § 50-16.5(a) ("estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case"). *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E. 2d 840, 846 (N.C.G.S. §§ 50-16.1 through -16.10 to be construed *in pari materia*).

> [A]ny considerable change in the health or financial condition of the parties will warrant an application for change or modification of an alimony decree, and "the power to modify includes, in a proper case, power to terminate the award absolutely" . . . . "The fact that the wife has acquired a substantial amount of property, or that her property has increased in value, after entry of a decree for alimony or maintenance is an important consideration in determining whether and to what extent the decree should be modified."

Sayland v. Sayland, 267 N.C. 378, 383, 148 S.E. 2d 218, 222 (1966) (citations omitted).

We do not deem it necessary to set out the particulars of the trial judge's findings in support of his ordering the termination of defendant's obligation to pay alimony to plaintiff. A careful review of the record convinces us that there was ample evidence to support the trial judge's order. As plaintiff herself has pointed out, the "overriding principle" in cases determining the correctness of alimony is "fairness to all parties." *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E. 2d 407, 413 (1976).

The March 1984 order clearly indicates that the trial judge took into consideration, and found a significant change in, the incomes, estates, health, and other factors during the years following the entry of the May 1974 consent judgment. Although plaintiff contends that the trial court erroneously considered a non-income producing asset in making its determination, the record indicates otherwise. The trial judge specifically excluded this asset in calculating plaintiff's present annual net income; he considered it solely in his review of the parties' overall financial circumstances. Likewise, it was not error for the trial judge to consider changes in the parties' net worth among the many other factors constituting the parties' "financial condition."

Finally, plaintiff's contention that she does not enjoy as high a standard of living as she did in 1974 and that defendant's standard of living is significantly higher than hers is not borne out by the record. The trial judge found as facts, for example, that plaintiff lives in a fully furnished, three bedroom condominium with her live-in companion (whose housing, food, clothing, recreation, and gifts are voluntarily furnished by plaintiff); enjoys a membership in the Starmount Country Club, as she did during her marriage to the defendant; and drives a Cadillac automobile. When defendant filed bankruptcy in January 1975, plaintiff purchased the majority of defendant's assets at the resulting bankruptcy sale, thereby increasing the value of her estate. Plaintiff's present net worth is $724,290; defendant's present net worth is $83,500, plus an eighty percent vested interest in his $230,000 retirement account.

These and all the other findings of fact are supported by competent evidence of record. "When the trial judge is authorized to find the facts, his findings, if supported by competent evidence,

will not be disturbed on appeal . . . ." *Beall v. Beall*, 290 N.C. 669, 673, 228 S.E. 2d 407, 409. The findings, in turn, fully support the trial judge's conclusion that "plaintiff is no longer a dependent spouse," which supports his order terminating defendant's spousal support obligations. Only a "dependent spouse" is entitled to alimony. *See generally Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980); N.C.G.S. §§ 50-16.1(3) and -16.2 (1984). We conclude, therefore, that the trial court did not err in terminating defendant's obligation to pay alimony pursuant to the 1974 consent judgment.

In summary, we hold that the order of the trial court was properly entered, and we therefore reverse the opinion of the Court of Appeals.

Reversed.

LETA PEARCE, ON HER OWN BEHALF AND IN HER CAPACITY AS ADMINISTRATRIX AND NORTH CAROLINA ANCILLARY ADMINISTRATRIX OF THE ESTATE OF DOUGLAS ALLEN PEARCE v. AMERICAN DEFENDER LIFE INSURANCE COMPANY

No. 468PA85

(Filed 6 May 1986)

1. **Insurance § 14— life insurance—accidental death rider—exclusion for death in aircraft—judgment n.o.v. proper**

The trial court correctly granted defendant's motion for judgment n.o.v. as to a breach of contract claim arising from an accidental death rider to a life insurance policy on an Air Force flyer where the claim was based on estoppel, waiver, actual or apparent authority of defendant's employee to contract with a client for defendant, and ratification.

2. **Insurance § 8— life insurance—exclusion—ratification of coverage by acceptance of premiums**

The trial court did not err in an action arising from an accidental death rider to a life insurance policy covering an Air Force flyer by refusing to instruct the jury on ratification where the insured had inquired about his coverage, received a reply which could be interpreted to state that he was covered, and continued to pay premiums for eight years until his death. Defendant continued to provide coverage under the rider for injuries or death resulting from unexcepted causes.

3. **Appeal and Error § 22.1— discretionary review—claims not briefed in Court of Appeals—not properly before Supreme Court**

Claims against an insurance company based upon negligence, breach of fiduciary duty, and breach of the duty to investigate claims in a fair and equitable manner arising from an exclusion to an accidental death rider on a

life insurance policy were not briefed in the Court of Appeals and were not properly before the Supreme Court. N.C. App. Rule 16.

4. **Insurance § 14— life insurance—aircraft exclusion—fraud—directed verdict proper**

The trial court did not err by directing verdict against plaintiff's claim based on fraud in an action arising from an exclusion to an accidental death rider to a life insurance policy for aircraft crew members where the insured had written defendant inquiring about coverage and a reply had been written which could be interpreted as stating falsely that the insured would be covered if he died in an airplane crash. Whether the misstatement was the result of inartful wording or of intentional misleading would be purely a matter of conjecture.

5. **Unfair Competition § 1— insurance—unfair or deceptive trade practice**

A violation of N.C.G.S. 58-54.4 as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. 75-1.1.

6. **Unfair Competition § 1; Evidence § 34.5— statement of insured regarding coverage—not hearsay**

In an action arising from an exclusion in an insurance policy for aircraft crew members, the testimony of a widow that her husband had said he was covered while on flying status was not inadmissible hearsay and was relevant because the remarks were not offered to prove the fact of coverage, but to demonstrate the insured's state of mind and the fact of his reliance on a letter from defendant. N.C.G.S. 8C-1, Rules 803(3) and 801(c).

7. **Unfair Competition § 1— insurance—extent of coverage—evidence of deceptive trade practice sufficient**

There was sufficient evidence of an unfair trade practice to survive a motion for a directed verdict in an action arising from an exclusion to an accidental death rider for aircraft crewmen. N.C.G.S. 58-54.4.

Justice MEYER concurring in part and dissenting in part.

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, 74 N.C. App. 620, 330 S.E. 2d 9 (1985), affirming judgment entered by *Ellis, J.*, at the 14 May 1984 session of Superior Court, WAKE County. Heard in the Supreme Court 10 February 1986.

Graham & James, by J. Jerome Hartzell and Charles H. Mercer, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Ted R. Reynolds and Benjamin F. Davis, Jr., for defendant appellee.

MARTIN, Justice.

In 1968 plaintiff's decedent, Douglas Allen Pearce, then a college student, purchased a $20,000 life insurance policy from the American Defender Life Insurance Company (American Defender). Pearce also purchased an accidental death rider, which provided for the payment of an additional $40,000 if he were to be injured or to die by accident. The rider specifically excepted from coverage death or injuries resulting under certain circumstances, including

> (a) travel or flight in or descent from any species of aircraft if (i) you are a pilot, officer, or other member of the crew of such aircraft while in flight, or (ii) the aircraft is maintained or operated for military or naval purposes . . . .

In 1971 Pearce entered the Air Force. In May of that year American Defender received the following letter from C. L. Dickerson, who, according to the letterhead, was an employee of "Military Associates, Inc.," "Specialists in Military Financial Planning," dealing in "Financial Programming, Investments, [and] Insurance."

> 4 May 1971
>
> American Defender Life Insurance Company
> P. O. Box 2434
> Raleigh, North Carolina 27602
>
> Re: Douglass Allen Pearce, Pol. No. 82-0058
>
> Gentlemen:
>
> Lt. Pearce signed an application in 1968 for $20,000 and he is concerned as to whether or not he is fully covered now that he is in the USAF. He is a 2nd Lt. enrolled in The Navigation School at Mather, Ca. He is flying the T-29 which is a trainer for the Nav School. He has flown 6 hours so far and expects to fly approximately 250 hours during the next 12 months. After graduation he does not have any idea as to which plane he will be assigned.
>
> Will you please check over his coverage and advise us. I feel sure that he is fully covered, however, to make him feel at ease and appreciate his policy and its protection—he would

like to have it spelled out over the signature of one of your executives.

Thanks for your usual very prompt service.

Sincerely,

C. L. Dickerson

cld:pp

Within two weeks, Pearce received the following response:

May 12, 1971

Mr. Douglas Allen Pearce
10484 Investment Circle, #40
Rancho Cordova, California 95610

Policy number: 82-0058

Dear Mr. Pearce:

We have received Mr. C. L. Dickerson's letter of May 4, 1971, concerning the coverage of your above numbered policy.

Your policy has a $20,000.00 College Defender Program with a $40,000.00 Accidental Death and Dismemberment Rider, $10,000.00 Guaranteed Insurability Option. Your program does not contain a war clause. In other words, the basic program is in full force and effect regardless of your occupation. The Accidental Death Rider portion of the policy would not be payable should your death occur as the result of a direct act of war. However, in addition to the basic policy, this Accidental Death Rider would also be payable should his death occur while in the Armed Forces but not as the result of an act of war.

Should this letter not fully answer your questions or if you would like additional information, please write directly to us or call us collect.

Sincerely yours,

(Miss) Linda Wynne
Policyowners' Service

LEW/yaw

bcc: Mary Feiton
Arden French

Pearce was killed in a flight training mission off the coast of England in 1979. His widow, the beneficiary of Pearce's policy with American Defender and plaintiff in this suit, informed the company of her husband's death and received a check for $20,000. American Defender refused to pay her benefits under the accidental death rider, referring her to the exceptions paragraph and to a paragraph in the general provisions portion of the basic policy, which stated in pertinent part, "No alteration of this policy and no waiver of any of it's [sic] provisions shall be valid unless made in writing by us and signed by our President, Vice President or Secretary."

Mrs. Pearce timely filed a complaint alleging claims for relief based upon unfair trade practices, breach of contract, breach of fiduciary duty, negligence, fraud, and breach of the insurance company's duty to investigate claims in a fair and equitable manner. The trial judge granted American Defender's 12(b)(6) motion, which was subsequently vacated and remanded to the trial court by the Court of Appeals. *Pearce v. American Defender Life Ins. Co.*, 62 N.C. App. 661, 303 S.E. 2d 608 (1983).

On remand, the trial judge granted a directed verdict at the close of plaintiff's evidence against her claims based upon fraud and unfair trade practices. The remaining claims for relief were subsumed in this issue, which the jury answered in the affirmative:

> Was the insured's death covered under that portion of the insurance policy issued by the defendant, which provided for the payment of $40,000 to the beneficiary in the event of the insured's accidental death?

The trial judge allowed American Defender's motion for judgment notwithstanding the verdict. The Court of Appeals held that the trial court had not erred in granting either motion. *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E. 2d 9 (1985).

[1] Mrs. Pearce's breach of contract claim was based upon four theories—estoppel, waiver, the actual or apparent authority of

Ms. Wynne to contract with Lt. Pearce on her employer's behalf, and ratification. Addressing the waiver and estoppel bases for this claim, which were included in the trial court's judgment notwithstanding the verdict, the Court of Appeals noted that the flight exception to the rider was unambiguous. That court relied on the well-settled rule that the doctrines of waiver and estoppel have been applied in order to obviate the forfeiture provisions in insurance contracts, but that they "are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom . . . ." *Hunter v. Insurance Co.*, 241 N.C. 593, 595, 86 S.E. 2d 78, 80 (1955) (quoting 29 Am. Jur. *Insurance* § 903, at 690 (1960)). Because "application of the doctrines of waiver and estoppel on these facts would essentially rewrite the policy, extending coverage to a risk expressly excluded therefrom, and obligating defendant to pay a loss for which it charged no premium," the Court of Appeals concluded that neither doctrine was available to Mrs. Pearce as a basis for relief. 74 N.C. App. at 626-27, 330 S.E. 2d at 13.

The Court of Appeals also rejected the argument that Ms. Wynne, who answered C. L. Dickerson's letter of inquiry, had the actual or apparent authority to modify Lt. Pearce's policy. Ms. Wynne, who was neither president, vice-president, nor secretary of American Defender, had no actual authority to modify the policy; and, because a caveat to this effect was expressly included in Lt. Pearce's policy, he "knew or in the exercise of reasonable care should have known that the agent was not authorized to enter into the contract." *Lucas v. Stores*, 289 N.C. 212, 220, 221 S.E. 2d 257, 263 (1976). If Lt. Pearce assumed that Ms. Wynne "had the authority to bind the company in the face of clear written notice to the contrary," the Court of Appeals concluded, then he "must . . . be held to have acted unreasonably." 74 N.C. App. at 628, 330 S.E. 2d at 14.

We find that the reasoning of the Court of Appeals was correct regarding these bases for Mrs. Pearce's breach of contract claim. Under the facts of this case, *Hunter*, 241 N.C. 593, 86 S.E. 2d 78, refutes plaintiff's estoppel and waiver arguments. And we agree with the Court of Appeals that there was insufficient evidence to support a breach of contract claim based upon Ms. Wynne's implied or actual authority.

[2] Plaintiff argues that the trial court erred in refusing to instruct the jury on ratification, and she requests that such an instruction be submitted should she be granted a new trial on her contract claim. Plaintiff argues that American Defender's acceptance of Lt. Pearce's premiums for eight years after his receipt of Ms. Wynne's letter without any indication to him of its inaccuracy constitutes ratification of its terms. Even assuming arguendo that inaccuracy, we are not persuaded that American Defender's acceptance of premiums constitutes conduct "inconsistent with an intent not to ratify," *Equipment Co. v. Anders*, 265 N.C. 393, 401, 144 S.E. 2d 252, 258 (1965). Throughout that eight-year period, Lt. Pearce continued to receive coverage under the rider for injuries or death resulting from *unexcepted* causes. Because American Defender continued to provide coverage in return for Lt. Pearce's premiums, we do not agree with plaintiff that its silence regarding the letter's contents must necessarily be interpreted as ratification of the letter's arguably erroneous terms. We therefore hold that the trial court did not err in refusing to instruct the jury on ratification.

[3] Plaintiff's claims based upon negligence, breach of fiduciary duty, and breach of an insurance company's duty to investigate claims in a fair and equitable manner were not included in the parties' briefs before the Court of Appeals and therefore were not considered by that court. Petitioners whose cases come before this Court on discretionary review are limited by Rule 16 of the North Carolina Rules of Appellate Procedure to those questions they have presented in their briefs to the Court of Appeals. Because these causes of action were not argued to that court, they are not properly before us.

[4] We now consider the claims based upon fraud and unfair trade practices which were included in the directed verdict. A directed verdict is proper only when it appears that the nonmovant fails to show a right of recovery upon *any* view of the facts that the evidence tends to establish. *West v. Slick*, 313 N.C. 33, 40, 326 S.E. 2d 601, 606 (1985); *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). Upon defendant's motion for a directed verdict in a jury case, the trial court must consider all the evidence in the light most favorable to the plaintiff, and it may grant that motion only if, as a matter of law, the evidence is in-

sufficient to justify a verdict for the plaintiff. *West v. Slick*, 313 N.C. at 40-41, 326 S.E. 2d at 606.

The elements of fraud are (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). In viewing the evidence in the light most favorable to the plaintiff, we hold it to be insufficient to support a jury finding that defendant wrote and mailed the letter to Lt. Pearce with the intent to deceive him. Intent to deceive is an essential element of actionable fraud. *Tarlton v. Keith*, 250 N.C. 298, 108 S.E. 2d 621 (1959). Although the jury could find that the reply to Lt. Pearce as written could be interpreted to state falsely that he would be covered by the Accidental Death Rider if he died in the crash of an aircraft of which he was a crew member, whether that misstatement was the result of inartful wording or of intentional misleading would, without more, be purely a matter of conjecture. A jury may not base its verdict upon conjecture. *Kinlaw v. Willetts*, 259 N.C. 597, 131 S.E. 2d 351 (1963); *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E. 2d 392 (1955). Under these circumstances, the fact that the letter was mailed to Lt. Pearce would not sustain a finding that defendant intended to deceive him.

With this holding, it is unnecessary for us to review the evidence as to the other essential elements of fraud, and we express no opinion concerning the sufficiency of the evidence with respect to them. The Court of Appeals properly affirmed the directed verdict against plaintiff's fraud claim.

[5] Unfair or deceptive trade practices in the insurance industry are governed by N.C.G.S. § 58-54.4, a regulatory statute, which defines such practices, in pertinent part, as "[m]aking, issuing, circulating, or causing to be made, issued, or circulated, any . . . statement misrepresenting the terms of any policy issued . . . or the benefits or advantages promised thereby . . . ." In *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271 (1980), the Court of Appeals noted that these provisions included no private cause of action, and it held that N.C.G.S. § 75-1.1 provides a remedy for unfair or deceptive trade practices in the insurance industry. *See also Phillips v. Integon Corp.*, 70 N.C. App. 440, 319

S.E. 2d 673 (1984). In *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E. 2d 677 (1985), this Court approved the *Ellis* court's reasoning and its result for claims alleging fraudulent representations brought under statutes regulating employment agencies. Justice Meyer wrote for the Court in *Winston Realty*:

> Although defendant is correct in pointing out that Chapter 95 is regulatory in nature, this fact does not prevent the finding of an unfair or deceptive trade practice based on the conduct proscribed by Chapter 95. N.C.G.S. § 97-47.5 prohibits private personnel services from engaging in specific conduct and activities, including the conduct specified in subsections (2) and (9) quoted above. Although the authority to enforce the Chapter 95 provisions rests with the Commissioner of Labor, it is obvious that the list of proscribed acts found in N.C.G.S. § 95-47.6 were designed to protect the consuming public. The Court of Appeals confronted a similar issue in *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271 (1980), where the defendant contended plaintiff could not recover damages under N.C.G.S. § 75-1.1 because unfair and deceptive acts in the insurance industry were regulated exclusively by the insurance statutes, N.C.G.S. § 58-54.1, *et seq.*, which do not contain a right of private action. Chapter 95 similarly contains no right of private action. The *Ellis* court held that N.C.G.S. § 75-1.1 does provide a remedy for unfair trade practices notwithstanding that insurance is regulated by statute. 48 N.C. App. at 183, 268 S.E. 2d at 273. We find this reasoning persuasive and hold that a violation of either or both N.C.G.S. §§ 95-47.6(2) and (9) as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1.

314 N.C. at 97, 331 S.E. 2d at 681. The business of insurance is unquestionably "in commerce" insofar as an "exchange of value" occurs when a consumer purchases an insurance policy, *see Johnson v. Insurance Co.*, 300 N.C. 247, 262, 266 S.E. 2d 610, 620 (1980); people who buy insurance are consumers whose welfare Chapter 75 was intended to protect, *see Lindner v. Durham Hosiery Mills, Inc.*, 761 F. 2d 162 (4th Cir. 1985). The language of the Declaration of Purpose of Article 3A of Chapter 58 reveals that in part the intent of Article 3A is to define and prohibit unfair and deceptive trade practices.

The reasoning in *Winston Realty* is equally applicable to unfair and deceptive acts in the insurance industry. We now hold that a violation of N.C.G.S. § 58-54.4 as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1.

Section 75-1.1 of the North Carolina General Statutes provides, in pertinent part:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

This section is enforced by section 75-16, which authorizes a private cause of action and which mandates the automatic assessment of treble damages once a violation of section 75-1.1 is shown. *See Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981). Section 75-16 provides:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

It is axiomatic that proof of fraud itself necessarily constitutes a violation of the prohibition against unfair or deceptive trade practices. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. at 97, 331 S.E. 2d at 681. However, in order for Mrs. Pearce to make out a claim under section 58-54.4 as augmented by section 75-1.1, she must show only some—but not all—of the same elements essential to making out a cause of action in fraud.

Under the facts of this case, Mrs. Pearce must first demonstrate that Ms. Wynne's letter had the capacity or tendency to

deceive. Unlike a claim based upon fraud, proof of actual deception is not necessary. *Johnson v. Insurance Co.*, 300 N.C. at 265, 266 S.E. 2d at 622. Even a truthful statement may be deceptive if it has the capacity or tendency to deceive. *Id.* at 266, 266 S.E. 2d at 622. "In determining whether a representation is deceptive, its effect on the average consumer is considered." *Id.* at 265-66, 266 S.E. 2d at 622.

[6] Unlike the third element of proof in a fraud claim, the question "whether the defendant acted in bad faith is not pertinent" to whether his representation violated N.C.G.S. § 75-1.1. *Marshall v. Miller*, 302 N.C. at 544, 276 S.E. 2d at 400-01. But the second requisite to making out a claim under this statute is similar to the detrimental reliance requirement under a fraud claim. It must be shown that the plaintiff suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation. *See Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271. Mrs. Pearce testified on voir dire:

> Q. Did you have any further discussion with Captain Pearce concerning life insurance coverage?
>
> A. Yes, we did.
>
> . . . .
>
> Q. Would you tell the Court, please, what transpired during that discussion. What was said.
>
> A. We were leaving a party, or dinner, and we were in the car going home, and I commented to Doug that at the party the conversation had turned to life insurance and being covered while being on flying status. And I commented to him that I thought it was a rather morbid topic to be discussing among other fliers and the wives. And he said that it was important and that he knew he was covered, and that while he was on flying status the accidental death, or whatever phrase he used, double indemnity, was in effect, and that I didn't need to worry about it. And that there was no further need we'd have to discuss it.
>
> Q. Did you have any discussion with him as to how he knew it was in effect?

A. Just that he had inquired about it when he went on to flying status, and he had been made aware by the company, he had checked into it and that he was covered.

The trial court sustained defendant's objection to the above testimony as hearsay. We do not consider Lt. Pearce's remarks to be hearsay. The remarks contain two assertions—that Lt. Pearce believed himself to be "fully" covered and the basis for that belief, namely, that "he had been made aware by the company, he had checked into it." Plaintiff offered these remarks to prove not the fact of coverage, but the fact of her husband's reliance upon defendant's letter. They were not offered as proof of their content but only that the remarks were made demonstrating the state of mind of Lt. Pearce. For this purpose the remarks were not hearsay and were admissible. N.C.R. Evid. 803(3) and 801(c); 1 Brandis on North Carolina Evidence §§ 161, 141 (1982).

American Defender contends that, even if it is admissible as a state of mind exception, evidence of Lt. Pearce's state of mind regarding his coverage is not relevant. We disagree. What Lt. Pearce believed about the extent of his life insurance coverage and why he believed it is directly pertinent to the question of his reliance upon defendant's misrepresentation.[1]

[7] Upon considering the entire evidence, including the erroneously excluded testimony, in the light most favorable to plaintiff, we hold that the evidence is sufficient to support a finding that Lt. Pearce relied to his detriment upon the statements in defendant's letter. The evidence supporting the unfair trade practice claim by a violation of N.C.G.S. § 58-54.4 was sufficient to survive the motion for directed verdict.

Accordingly, we affirm that part of the Court of Appeals decision that affirms the trial court's judgment notwithstanding the verdict and the directed verdict as to the fraud claim. We reverse that portion of the Court of Appeals decision that affirms

1. American Defender asserts that from the date Lt. Pearce's policy was issued until his death, there was no life insurance policy on the market that did not have a similar aviation exclusion clause. This fact, if true, does not preclude the possibility of detrimental reliance on the part of Lt. Pearce. Had he known that his widow would receive only $20,000 in benefits rather than the $60,000 she alleges was his belief, he might have purchased additional basic coverage or made other arrangements to provide for her financial security after his death.

the trial court's directed verdict as to the unfair trade practice claim.

Affirmed in part; reversed in part.

Justice MEYER concurring in part and dissenting in part.

I concur in that portion of the majority opinion affirming the trial judge's entry of judgment notwithstanding the verdict for the defendant carrier on the contract claim and the directed verdict on the fraud claim. I dissent from that portion of the majority opinion which holds that the Court of Appeals erred in affirming the trial judge's entry of a directed verdict in favor of the defendant carrier on plaintiff's claim for unfair or deceptive trade practices. The evidence was, as a matter of law, insufficient to justify a verdict for the plaintiff on this claim.

The majority hardly mentions the unique nature of the policy in question. Unlike standard policies, the "college defender policy" here has no exclusion for death occurring as a result of war or as a result of flight while a crew member as far as the $20,000 basic coverage is concerned.

The $40,000 accidental death benefit rider did, however, specifically contain exclusions for death caused by:

a. travel or flight in any aircraft if

i. the insured is a pilot or crew member, receiving instructions, or any duty whatsoever, or

ii. the aircraft is used for military purposes, or

b. military service during war.

In his application for this policy in 1968, Mr. Pearce answered the following questions as indicated:

10. a. Have you ever taken flights in private aircraft? If so, when? ..... No

b. Military aircraft? When? ..... No

c. Total hours flown ..... None

d. Do you have or have you ever had a pilot's license? ..... No

(Complete aviation questionnaire if answered YES and attach to application.)
Date of last flight ..... None

e. Do you contemplate future aviation training? . No

11. a. Were you in Military Service? ..... No

b. Are you in the active reserve now? ..... No
Inactive? ..... No

When Mr. Dickerson, who was a "Specialist in Military Financial Planning," reviewed the policy (with the application attached) in 1971 and wrote to the defendant carrier, the exclusion for flight as a crew member or trainee on the $40,000 accidental death benefit was obvious, and he apparently had no concern or question about the accidental death benefit coverage. He specifically asked only about the "application in 1968 for $20,000" and whether Lt. Pearce was fully covered for that amount now that he was an Air Force officer flying as a crew member or trainee on jet aircraft while in training and after graduation—particularly in view of the answers on the original application to which he referred. The letter made no reference to the $40,000 accidental death rider, but only to the $20,000 basic coverage. The only possible indication to the contrary would be a strained interpretation of the word "fully" in the first sentence of the letter: "Lt. Pearce signed an application in 1968 for $20,000 and he is concerned as to whether or not he is fully covered now that he is in the USAF." Because it was in the same sentence referring to the "$20,000" and to the "application" which contained the answers regarding this connection with flying on aircraft, it is obvious that the word "fully" refers to the $20,000 basic policy. I find untenable the majority's suggestion that this inquiry letter referred to the $40,000 accidental death benefit which was the subject of a specific exclusion.

It should also be noted that Mr. Dickerson's letter evidences his awareness that only specifically designated executives of the company could waive provisions of the policy. His letter closes with the admonition that Lt. Pearce "would like to have it spelled out over the signature of one of your executives."

It is likewise clear from the policyowners' service worker who responded to the inquiry that she was answering the precise question asked. In pertinent part, her reply was:

> Your program [already referring to the basic program] does not contain a war clause. In other words, the *basic program* is in full force and effect regardless of your occupation. The Accidental Death Rider portion of the policy would not be payable should your death occur as the result of a direct act of war. However, in addition to the basic policy, this Accidental Death Rider would also be payable should his [sic] death occur while in the Armed Forces but not as the result of an act of war.

(Emphasis added.)

The carrier responded directly to the precise inquiry concerning the $20,000 basic program and explained that it would be payable "regardless of your occupation" and even as a result of war. The reply was truthful in every respect and cannot, in my opinion, be said to be false or recklessly made or have any tendency to deceive. In fact, the response closed with this entreaty:

> Should this letter not fully answer your questions or if you would like additional information, please write directly to us or call us collect.

I find insufficient evidence in this record to support a verdict based upon any unfair or deceptive trade practices.

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

HERBERT L. CLARK AND WIFE, BOBBIE C. CLARK v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

WALTER RULE AND WIFE, NANCY RULE v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

WILLIAM B. PFEIFFER AND WIFE, LEIGH PFEIFFER v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

HERBERT F. MOORE AND WIFE, LORETTA MOORE v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

HARRY GOLDEN AND WIFE, RUTH GOLDEN v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

TANIA ROLLMAN v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

ARTHUR E. JACOBSON, SENIOR WARDEN, ST. LUKE'S EPISCOPAL CHURCH, DAN WALL, JUNIOR WARDEN, ST. LUKE'S EPISCOPAL CHURCH v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

CHARLES CROCKER AND WIFE, MAE CROCKER v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

ANGELO G. DOTSIKAS AND WIFE, CATHERINE M. DOTSIKAS v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

ALLEN WALTON YOUNG AND WIFE, BIRGIT YOUNG v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

WINSTON C. LITTLE AND WIFE, LINDA B. LITTLE v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

EDSEL RITTER AND WIFE, NORMA RITTER v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

EUGENE C. SANFORD AND WIFE, PATRICIA G. SANFORD v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

J. ROBERT HUFSTADER AND WIFE, JEAN HUFSTADER v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

WILLIAM L. SUTTON AND WIFE, BETTY A. SUTTON v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

KENNETH W. BROWNELL, JR. AND WIFE, MARGARET SLACK BROWNELL v. ASHEVILLE CONTRACTING COMPANY, INC. A NORTH CAROLINA CORPORATION, BAXTER H. TAYLOR AND THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 73PA85

(Filed 6 May 1986)

1. Appeal and Error § 6.2— mandatory injunction—immediately appealable due to no delay finding

In an action arising from the disposal of rock waste on private property in a highway construction project, the matters addressed and adjudicated in the summary judgment entered by the trial court were properly before the Court of Appeals for appellate review where the trial court made a finding of no just reason for delay even though the summary judgment did not address or dispose of cross-claims for indemnity among the defendants or a claim in trespass against defendants. N.C.G.S. 1A-1, Rule 54(b).

2. Highways and Cartways § 7.2— highway construction—disposal of rock waste —DOT not liable

The trial court erred in an action arising from the disposal of rock waste from a highway construction project by failing to enter summary judgment in favor of DOT where the acts complained of could not be viewed as a taking for a public use because the provisions in the contract between the company and DOT clearly showed that the disposal of rock waste from the highway project on the property chosen by the company was not required by the State and was solely for the convenience of the company. N.C. App. Rule 28(b).

3. Highways and Cartways § 7.2— highway contract—disposal of rock waste on private property—no contract or immunity—summary judgment improper

In an action arising from the disposal of rock waste from a highway construction project, the contractor immunity rule of *Moore v. Clark*, 235 N.C.

364, did not apply because the acts complained of did not constitute a taking for public use; however, summary judgments against the contractor and its president were reversed where there were genuine issues of material fact.

ON discretionary review of the decision of the Court of Appeals, 72 N.C. App. 143, 323 S.E. 2d 765 (1984), reversing judgment by *Lewis, J.*, filed 1 January 1983 in Superior Court, BUNCOMBE County. Heard in the Supreme Court 16 October 1985.

Long, Howell, Parker & Payne, P.A., by Ronald W. Howell, for the plaintiff appellees.

Lacy H. Thornburg, Attorney General, by James B. Richmond, Special Deputy Attorney General, and Alfred N. Salley, Assistant Attorney General, for the defendant appellant The North Carolina Department of Transportation.

Adams, Hendon, Carson & Crow, P.A., by George Ward Hendon, for the defendant appellees Asheville Contracting Company, Inc. and Baxter H. Taylor.

MITCHELL, Justice.

The questions presented for discretionary review arise from sixteen separate civil actions, consolidated for purposes of trial and appeal, brought by property owners in the City of Asheville as a result of the disposal of waste materials from the Beaucatcher Mountain Highway Project. The defendants are the Department of Transportation [hereinafter "DOT"], Asheville Contracting Company, Inc. [hereinafter "Company"] and its president, Baxter H. Taylor. The plaintiffs are owners of real property in Mountainbrook, a subdivision in Asheville.

The plaintiffs brought actions against all of the defendants by the filing of complaints alleging that the plaintiffs' property was damaged by the action of the defendants in placing rock waste materials on property adjacent to or near the property of the plaintiffs. At least four claims were common to all of the complaints. Each complaint alleged that: (1) the defendants created a nuisance; (2) the defendants placed rock waste on property owned by Taylor in Mountainbrook Subdivision in violation of a restrictive covenant; (3) the placing of the rock waste materials by the defendants violated a zoning ordinance of the City of Asheville;

and (4) the defendant DOT had authorized the Company to place rock waste from the highway project in such places and manner as to result in the taking of a compensable interest in the plaintiffs' property by DOT. Some of the plaintiffs also asserted a fifth claim for relief against Taylor and the Company by alleging that rock waste from the project placed on property of those defendants diverted the natural flow of water and caused water to flow on the plaintiffs' property to their damage. Additionally, some of the plaintiffs asserted a sixth claim for relief against Taylor and the Company by alleging that they had entered those plaintiffs' property without permission and cut trees and dumped waste rock thereon. The plaintiffs' prayer for relief against Taylor and the Company sought both a mandatory injunction and pecuniary damages. The plaintiffs prayed in the alternative that DOT be required to compensate them for the taking of an interest in their property.

DOT filed answers to the complaints denying most of the essential allegations of the plaintiffs. In its answer DOT also moved to dismiss the claims against it for failure to state a claim upon which relief can be granted and cross-claimed against the Company, praying for indemnification in the event DOT should be found liable. The Company and Taylor filed answers to the complaints admitting certain allegations and denying others. In their answers they also moved to dismiss the actions against them for failure to state a claim upon which relief can be granted and cross-claimed against DOT for indemnification in the event they should be found liable.

The plaintiffs' cases against the defendants were brought before the trial court for a hearing for the first time on 16 November 1981. A second hearing was held on 11 December 1981. During the course of these hearings, the trial court received testimony by witnesses for the plaintiffs and the defendants. Written stipulations of the parties and numerous documents and attachments, including the contract between DOT and the Company for disposal of the rock waste from the project, the restrictive covenants for Mountainbrook Subdivision and ordinances of the City of Asheville were also received in evidence.

The evidence introduced during the hearings tended to show *inter alia* that DOT, an agency of the State, was required to make

a large cut through Beaucatcher Mountain in the process of building a highway there. This required the removal of more than 2,000,000 cubic yards of excess or waste material composed primarily of granite and disposal of the material off the project site. As a result of competitive bidding procedures, the defendant Company was awarded a contract on 1 December 1976 to remove the excess or waste material. A special provision was included in the contract which contained the following:

> "DISPOSAL OF WASTE AND DEBRIS:
>
> The 1972 Standard Specifications shall be revised as follows:
>
> Pages 382 and 383, Section 802. Delete this section in its entirety and replace with the following:
>
> DESCRIPTION
>
> The work covered by this section consists of the disposal of waste and debris in accordance with the requirements of these provisions. Waste will be considered to be all excavated materials which are not utilized in the construction of the project. Debris will be considered to be all undesirable material encountered on the project other than waste or vegetative material resulting from clearing and grubbing operations.
>
> GENERAL REQUIREMENTS
>
> *Waste and debris shall be disposed of in areas* that are outside of the right of way and *provided by the Contractor*, unless otherwise required by the plans or special provisions or unless disposal within the right of way is permitted by the Engineer.
>
> The Contractor shall maintain the earth surfaces of all waste areas, both during the work and until the completion of all seeding and mulching or other erosion control measures specified, in a manner which will effectively control erosion and siltation."

(Emphasis added.) The special provision also set forth lengthy requirements establishing the maximum angle for slopes created by disposal of the waste, requirements for covering the waste with earth and seeding and mulching. The special provision gave DOT

authority to refuse to approve the disposal if it would result in excessive siltation, pollution or instability to the existing ground.

The Company bought land and acquired an easement adjoining the Mountainbrook Subdivision. Taylor, the president of the Company, bought two lots in Mountainbrook Subdivision. Waste material from the project, composed primarily of granite in sizes ranging from large "boulders" to fine particles, was placed on the Company property adjoining the subdivision and on the lots owned by Taylor in the subdivision. The waste material was then covered with a layer of earth.

The plaintiffs' evidence tended to support their view that the placing of the waste material from the project on the Company property adjoining the subdivision and on the Taylor lots in the subdivision "considerably raised the level of the land immediately adjoining their properties, blocking view, creating water drainage problems and in general, totalling [sic] changing the character of the neighborhood from a quiet residential area to that of a commercial waste site." There also was evidence that removal of the waste from the property adjoining the subdivision and the lots owned by Taylor in the subdivision would require the removal of from 1,300,000 to 1,500,000 cubic yards of waste material and would take nine years at a cost of $13,500,000.00.

Restrictive covenants for the subdivision provided that all lots in the subdivision will be used for residential purposes and included a specific covenant that: "No trade or business and no noxious or offensive activities shall be carried on upon any lot or tract, nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood." The covenants also specifically provided that no lot in the subdivision "shall be used or maintained as a dumping ground for rubbish, trash, garbage or other waste . . . ."

The evidence also tended to show that at all pertinent times, some or all of the areas where the waste material from the highway project was placed were within an area zoned as a R-2 Low Density Residential District. Under Ordinance No. 322, as amended, "AN ORDINANCE PROVIDING FOR THE ZONING OF THE CITY OF ASHEVILLE," § 30-5-3 A, land in such districts "shall be used only for the following uses: Residences, neighborhood playgrounds, home occupations, golf courses, community centers, public facili-

ties accessory buildings, condominiums, and greenhouses, used as an accessory building to the primary residence."

An erosion control ordinance of the City of Asheville, Ordinance No. 813, as revised by Ordinances No. 846 and No. 986 of City of Asheville, also applied at all pertinent times to all private and public property within the jurisdiction of the City of Asheville. That ordinance by its terms sought to prevent accelerated erosion and sedimentation and any hazards to the public health, safety, or welfare or potential damage to any private or public property. To this end it directed those engaged in any form of land disturbing activities to comply with lengthy and detailed requirements to prevent such unwanted consequences.

At the end of the 11 December 1981 hearing the trial court denied the defendants' motions to dismiss and for summary judgment. The record on appeal also reflects that: "At this point the Court asked the plaintiffs if they desired to elect to pursue an equitable remedy of removal of the rock from the waste areas and lots *or* to pursue the remedy of damages. The plaintiffs elected to pursue an equitable remedy." (Emphasis added.) The trial court then granted a continuance to allow the defendants to prepare and present evidence as a result of the election by the plaintiffs.

The record on appeal also reflects the following:

> THE COURT: Let the record show that at a previous hearing unreported no additional evidence was offered, but arguments were made to the Court and that during that argument the landowners through their counsel of record, pursuant to a direct request from the Court, elected to pursue an equitable remedy in which the landowners request the Court to order that the Department of Transportation and the contractor remove the waste previously deposited on the property in question. This election *was opposed to* a possible claim for relief in damages.

(Emphasis added.) The record on appeal does not reflect when the unreported hearing referred to by the trial court was held, but apparently it was held after the 11 December 1981 reported hearing and before the 16 December 1982 reported hearing.

On 7 July 1982, the trial court entered an order denying all of the defendants' motions for summary judgment. On 12 October

1982, the plaintiffs filed motions for summary judgment in their favor as to all defendants.

The last reported hearing was held before the trial court on 16 December 1982. Before the presentation of any evidence at that hearing, DOT moved to dismiss all claims of all of the plaintiffs against it "based on the State's Sovereign Immunity as a result of the plaintiffs' election to pursue an equitable remedy and as a result of their pursuit of a remedy not provided by Statute." The trial court denied that motion. DOT then moved under Rule 12(b)(6) for dismissal of all claims against it by all plaintiffs for failure to state a claim upon which relief can be granted. That motion also was denied.

In its judgment filed 3 January 1983, the trial court found that there was no genuine issue as to any material fact and concluded that "the acts of the defendants were not and are not for a proper public purpose, and that plaintiffs are entitled to Judgment against the defendants . . . ." The trial court further found and concluded "that the plaintiffs will suffer irreparable harm for which they have no adequate remedy at law unless the nonconforming use of the property . . . is eliminated, and said plaintiffs . . . elected to pursue in the alternative an equitable remedy to eliminate such nonconforming use of the said waste areas . . . ." The trial court granted summary judgment in favor of each of the plaintiffs against the defendants and ordered the defendants to "cease and desist, and eliminate the nonconforming use of [all property which had been used as waste areas] . . . and that defendants remove all waste rock material placed on the property . . . within a reasonable time to be established by further orders of the Court." The judgment also recites that "final Judgment is entered as to fewer than all the claims presented in this action as the Court hereby determines that there is no just reason for delay of the entry of this final judgment." All of the defendants excepted to the judgment and gave notice of appeal to the Court of Appeals.

The Court of Appeals held that the trial court erred by failing to dismiss all claims against the Company, except the claims in trespass by some of the plaintiffs alleging that the defendants entered their property and cut trees and dumped rock without permission. As to those claims in trespass, the Court of Appeals

held that the trial court properly denied the Company's motions to dismiss and for summary judgment. The Court of Appeals also held that the trial court properly denied Taylor's motion to dismiss. It held that the trial court erred by allowing the motions for summary judgment against DOT. It reversed the summary judgment entered by the trial court against all of the defendants and remanded the cases to the Superior Court, Buncombe County. DOT filed a petition for discretionary review which was allowed by this Court on 7 May 1985.

[1] At the outset we take notice of the statement in the opinion of the Court of Appeals that:

> [W]hen the court entered a mandatory injunction requiring the defendants to remove the waste, this concluded the lawsuit. Although the judgment did not award the plaintiffs any damages in accordance with some of their claims, it was a final judgment for which there is the right to an immediate appeal regardless of whether the superior court made a determination that there is no just reason for delay.

72 N.C. App. at 147-48, 323 S.E. 2d at 768. If this statement was intended only to indicate that the summary judgment was a complete adjudication of the claims it addressed, the statement was correct. The summary judgment of the trial court did not, however, address or dispose of the various cross-claims for indemnity among the defendants or the plaintiffs' claims in trespass against the defendants for entering the plaintiffs' property and cutting trees and dumping rocks thereon. Therefore, it was not an adjudication of all the claims of all of the parties. The trial court having made a determination of "no just reason for delay," however, the matters addressed and adjudicated in the summary judgment entered by the trial court were properly before the Court of Appeals for appellate review. N.C.G.S. § 1A-1, Rule 54(b).

[2] Turning to the assignments and contentions of the parties on appeal, we first address the contention of the defendant DOT that the trial court's conclusion that the acts of the defendants were "not for a proper public purpose" compelled entry of summary judgment in favor of DOT as to all claims against it by all plaintiffs. We find merit in this contention.

DOT argues that the trial court's conclusion that the acts of the defendants were not for a public purpose is supported and in fact compelled by the terms of the contract between DOT and the Company. DOT argues that the contract did not require that the waste rock from the highway project be placed at the site chosen by the Company but specifically stated that areas for disposal of that waste be provided by the Company, subject only to the requirement that the waste be placed on the site ultimately chosen in an environmentally sound manner. DOT argues that these provisions in the contract clearly show that the disposal of waste rock from the highway project on the property chosen by the Company was not required by the State and was solely for the convenience of the Company and, therefore, was not for a public purpose. *See generally, e.g., Converse v. Refining Corp.*, 281 F. 981 (4th Cir. 1922); *Sam Finley, Inc. v. Waddell*, 207 Va. 602, 151 S.E. 2d 347 (1966); *Kochtitzky v. Bond*, 128 Ark. 255, 194 S.W. 8 (1917); *Bates v. Holbrook*, 171 N.Y. 460, 64 N.E. 181 (1902). It is unnecessary for us to address or decide the issues raised by this argument, however, and we do not do so here.

In their briefs and oral arguments before this Court, no party has challenged the trial court's conclusion that the acts of the defendants in disposing of the waste materials from the project were not for a public purpose. Our review on appeal "is limited to questions so presented in the several briefs." N.C. App. R. 28(a). Therefore, the parties are deemed to have abandoned any right to assign error to that conclusion. *Id.*

This Court has previously pointed out that: "It is clear that private property can be taken by exercise of the power of eminent domain only where the taking is for a public use." *Highway Commission v. Thornton*, 271 N.C. 227, 241, 156 S.E. 2d 248, 259 (1967). As the acts the plaintiffs complain of were not for a public purpose, they were beyond the authority of DOT to take property for public use in the exercise of its statutory power of eminent domain. *See generally* N.C.G.S., ch. 136, art. 2. Since DOT as a matter of law is incapable of exceeding its authority, the acts complained of could not be a condemnation and taking of property *by DOT* or an actionable tort *by DOT*. At most, the acts complained of could have been unauthorized trespasses by agents of DOT, for which no actionable claim exists against DOT. *Thornton*, 271 N.C. at 236, 156 S.E. 2d 255; *Highway Commission v. Batts*,

265 N.C. 346, 361, 144 S.E. 2d 126, 137 (1965). DOT, like the State Highway & Public Works Commission which preceded it,

> is an inanimate, artificial creature of statute. Its form, shape and authority are defined by the Act by which it was created. It is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism. It can commit no actionable wrong. Hence the owner of property cannot maintain an action against it in tort for damages to property. . . . It follows, as of course, he cannot maintain an action against it to restrain the commission of a tort. As against the defendant, his remedy is that, and that only, provided by statute—a proceeding in condemnation for the assessment of compensation for property *taken for public use.*

Schloss v. Highway Commission, 230 N.C. 489, 492, 53 S.E. 2d 517, 519 (1949) (emphasis added) (citation omitted). More recently, this Court stated that:

> The owner of property cannot maintain an action against the State or any agency of the State in tort for damages to property (except as provided by statute, G.S., Ch. 143, Art. 31). It follows that he cannot maintain an action against it to restrain the commission of a tort. However, the landowner is not without a remedy. When public officers whose duty it is to supervise and direct a State agency attempt or threaten to invade the property rights of a citizen in disregard of law, they are not relieved of responsibility by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State.

Shingleton v. State, 260 N.C. 451, 458, 133 S.E. 2d 183, 188 (1963). Likewise, private parties would not be relieved of responsibility when they assumed to act under such authority.

As previously discussed herein, the acts of the defendants forming the basis of the claims by the plaintiffs and the cross-claims by the other defendants against DOT must be viewed as not having been a taking for a public use. Therefore, neither the plaintiffs nor the other defendants could maintain an action against DOT arising from those acts. The trial court erred by fail-

ing to enter summary judgment in favor of DOT as to all claims against it by all plaintiffs and by the other defendants.

[3] The remaining defendants contend that the trial court also erred in granting summary judgment against them. With regard to Taylor, the Court of Appeals held that there were genuine issues as to material facts and reversed the summary judgment against him. We agree.

The Court of Appeals held that the trial court erred by failing to dismiss all claims against the Company, except the claims in some of the complaints that the Company entered certain plaintiffs' property and cut trees and dumped rock without permission. For its holding in this regard, the Court of Appeals referred to the rule set forth in *Moore v. Clark*, 235 N.C. 364, 367-68, 70 S.E. 2d 182, 185 (1952) that:

> A contractor who is employed by the State Highway and Public Works Commission to do work incidental to the construction or maintenance of a public highway and who performs such work with proper care and skill cannot be held liable to an owner for damages resulting to property from the performance of the work. The injury to the property in such a case constitutes a *taking* of the property *for public use* for highway purposes, and the only remedy available to the owner is a special proceeding against the State Highway and Public Works Commission under G.S. 136-19 to recover compensation for the property taken or damaged.

(Emphasis added.) Relying upon *Moore*, the Court of Appeals held that whatever claims the plaintiffs might have, other than the claims in the nature of trespass, were "against the Department of Transportation for the diminution of their property values." 72 N.C. App. at 148, 323 S.E. 2d at 769. As the acts complained of in the present case were not a taking for public use, however, the borrowed immunity rule of *Moore* has no applicability, and the Court of Appeals' reliance was misplaced. The Company was not entitled to dismissal.

We hold, however, that the trial court's summary judgment against the Company and Taylor must be reversed. The trial court's findings of fact and conclusions of law are insufficient to enable us to determine with certainty on appellate review which

of the plaintiffs' claims against these two defendants the trial court felt to have merit and which of them, if any, were without merit. It suffices to say that as to all or most of the claims there is conflicting evidence and that there are genuine issues as to material facts arising therefrom. In fairness to the trial court, we note that its apparent failure in this regard seems to have arisen from the confusion engendered at the trial level as to whether the acts complained of were to be considered and treated by the parties as the acts of an agency of the State. No such confusion should arise on remand of this case to the trial court, however, since we conclude that the acts complained of were not acts of DOT and that summary judgment must be entered in favor of DOT.

The plaintiffs elected to pursue only the remedy of injunctive relief. As this case must be remanded for further proceedings in the trial court, we find it worthwhile to repeat the cautionary statement of the Court of Appeals that on remand "the court must consider the relative convenience-inconvenience and the comparative injuries to the parties . . . . In this case some findings of fact should be made in this regard before ordering the removal of the material." 72 N.C. App. at 149, 323 S.E. 2d at 769.

The ultimate result reached by the Court of Appeals was to reverse the trial court's entry of judgment as to each of the defendants. Although we hold that the trial court erred in entering summary judgment against any of the defendants and that the ultimate result reached by the Court of Appeals was correct, we do so for different reasons as previously stated herein. The decision of the Court of Appeals reversing summary judgment for the plaintiffs, as modified by this opinion, is affirmed. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Buncombe County, for further proceedings not inconsistent with this opinion.

Modified and affirmed and remanded.

JENNIFER LEE, BY HER GUARDIAN *AD LITEM*, E. S. SCHLOSSER, JR., PLAINTIFF v. MOWETT SALES COMPANY, INC., AND LOWE'S OF N.C., OPERATING AS LOWE'S OF NORTH GREENSBORO, DEFENDANTS, AND MOWETT SALES COMPANY, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. KYU C. LEE, THIRD-PARTY DEFENDANT

No. 627A85

(Filed 6 May 1986)

Parent and Child § 2.1— child injured by lawn mower—parent-child immunity—manufacturer's action for contribution against parent barred

In an action against the manufacturer of a lawn mower to recover for injuries received by the minor plaintiff when she was struck by the blade of a riding lawn mower operated by her father, the doctrine of parent-child immunity barred the manufacturer's third-party action against the father for contribution on the theory of joint or concurring negligence.

Justice MARTIN dissenting.

Justice EXUM dissenting.

APPEAL of right under N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 76 N.C. App. 556, 334 S.E. 2d 250 (1985), affirming the dismissal of the third-party plaintiff's complaint, by *Washington, J.*, on 17 October 1984 in Superior Court, GUILFORD County. Heard in the Supreme Court 12 February 1986.

Nichols, Caffrey, Hill, Evans & Murrelle by Karl N. Hill, Jr. and Clyde H. Jarrett, for the third-party plaintiff appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts and Margaret F. Shea, for the third-party defendant appellee.

MITCHELL, Justice.

This appeal involves an action by the defendant third-party plaintiff, Mowett Sales Company, Inc., against the plaintiff's father, Kyu C. Lee, for contribution on the grounds that he was negligent in supervising the plaintiff, his daughter Jennifer Lee; that he failed to keep a proper lookout while operating a lawn mower; that he operated the lawn mower in a reckless manner; and that he failed to adequately familiarize himself with the lawn

mower. We conclude that this action against the father fails to state a claim upon which relief can be granted.

On 25 April 1980, the plaintiff Jennifer Lee, an unemancipated minor, was injured when a lawn mower driven by her father, the third-party defendant, came in contact with her feet. The accident resulted in the amputation of her left foot and of three toes of her right foot.

In her complaint the plaintiff child alleged that her injuries were the result of defects in the lawn mower manufactured by the defendant third-party plaintiff, Mowett Sales Company, Inc. The complaint alleged specifically that the lawn mower failed to stop operating when the plaintiff's father removed his foot from the accelerator pedal. The defendant Mowett Sales Company, Inc., filed a third-party complaint against the plaintiff's father seeking contribution. The third-party defendant father moved pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) to dismiss the third-party complaint for failure to state a claim upon which relief can be granted, because the parent-child immunity doctrine barred the action. On 17 October 1984, Judge Washington granted the motion to dismiss. The defendant third-party plaintiff, Mowett Sales Company, Inc., appealed to the Court of Appeals.

In affirming the trial court's order granting the father's motion to dismiss, the Court of Appeals relied on *Watson v. Nichols*, 270 N.C. 733, 155 S.E. 2d 154 (1967) in which a demurrer to a cross-action against a minor plaintiff's father was sustained. In *Watson*, this Court held that a third party may not maintain an action for contribution against a parent in such cases, since the parent cannot be held liable in a direct action by the injured child. We affirm the holding of the Court of Appeals.

Mowett Sales Company, Inc., the third-party plaintiff, urges us now to abolish the doctrine of parent-child immunity stating that the doctrine is riddled with exceptions and is no longer backed by sound policy reasons. Because the parent-child immunity doctrine is firmly embedded in our case law and the legislature has declined to enact its abolition, we do not disturb the doctrine as it now exists.

The doctrine of parent-child immunity was first introduced in 1891 in the case of *Hewlett v. George*, 68 Miss. 703, 9 So. 885

(1891). In *Hewlett*, an unemancipated minor child brought an action against her mother for her illegal imprisonment in an insane asylum which had been motivated by her mother's desire to obtain the child's property. The court denied the child's claim explaining that:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim of civil redress for personal injuries suffered at the hand of the parent.

68 Miss. at 711, 9 So. at 887.

In North Carolina, the doctrine was first applied in the case of *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923). In denying the minor child's action against her father to recover damages caused by an automobile collision, this Court stated that:

> No greater disservice could be rendered to any child than to teach its feet to stray from the path of rectitude, or to suffer its mind to be poisoned by ideas of disloyalty and dishonor . . . . From the very beginning the family in its integrity has been the foundation of American institutions, and we are not now disposed to depart from this basic principle. Freedom in this country is the self-enforcement of self-enacted laws; and liberty with us is the right to go and do as you please under the law, or so long as you please to do right. Hence, in a democracy or a polity like ours, the government of a well ordered home is one of the surest bulwarks against the forces that make for social disorder and civic decay. It is the very cradle of civilization, with the future welfare of the commonwealth dependent, in a large measure, upon the efficacy and success of its administration. Under these conditions, the State will not and should not permit the management of the home to be destroyed by the individual members thereof, unless and until the interests of society itself are threatened.

185 N.C. at 584, 118 S.E. at 15.

The *Small* decision enunciated the rule that an unemancipated minor child may not maintain an action based on ordinary negligence against his parents. *Redding v. Redding*, 235 N.C. 638,

70 S.E. 2d 676 (1952); *Evans v. Evans*, 12 N.C. App. 17, 182 S.E. 2d 227, *cert. den.*, 279 N.C. 394, 183 S.E. 2d 242 (1971). In *Watson* the rule was applied when this Court held that, since a parent is not liable in a direct action for the plaintiff child's injury, the parent cannot be held liable for any contribution for damages awarded against another as a result of such injury. 270 N.C. at 735, 155 S.E. 2d at 156. However, the parent-child immunity doctrine does not apply to actions by an unemancipated minor with respect to contract and property rights, actions by an unemancipated minor involving willful and malicious acts, or actions by an emancipated child for torts committed after emancipation. 3 Lee, *North Carolina Family Law* § 248 (4th ed. 1981).

In *Skinner v. Whitley*, 281 N.C. 476, 189 S.E. 2d 230 (1972), this Court was urged to abolish the parent-child immunity doctrine in the case of a wrongful death caused by a father's negligence. The plaintiff, the administrator of an unemancipated minor's estate, argued that "the rationale for the immunity rule—the maintenance of family harmony and parental discipline—cannot be applied to the facts here since, by reason of the death of the daughters and their father, there no longer exists a parent-child or other family relationship." 281 N.C. at 479, 189 S.E. 2d at 232.

The Court in *Skinner* recounted the history of the immunity doctrine which dated back to 1891. The Court determined that five policy reasons were relied upon in support of the immunity: (1) disturbance of domestic tranquility, (2) danger of fraud and collusion, (3) depletion of the family exchequer, (4) the possibility of inheritance, by the parent, of the amount recovered in damages by the child, and (5) interference with parental care, discipline and control. 281 N.C. at 480, 189 S.E. 2d at 232. After reviewing the law of the different jurisdictions, this Court declined to modify or abolish the doctrine stating that:

> Piecemeal abrogation of established law by judicial decree is, like a partial amputation, ordinarily unwise and usually unsuccessful. When the question of parental immunity was first presented to this Court nearly fifty years ago in *Small v. Morrison, supra* [185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135 (1923)], we expressed the view that the government of the home was the surest bulwark against social disorder and

> civic decay. We based the immunity rule on the basic principle that parents and unemancipated children in the home constitute a social unit different from all other groups so as to make suits by one against the other for negligent injury most unseemly and productive of great mischief. Our decision there was grounded on considerations of broad public policy, and in our view those considerations still outweigh the arguments for change in cases involving ordinary negligence resulting in unintended personal injury or death . . . .
>
> If the immunity rule in ordinary negligence cases is no longer suited to the times, as some decisions suggest, we think innovations upon the established law in this field should be accomplished *prospectively* by legislation rather than *retroactively* by judicial decree. Such changes may be accomplished more appropriately by legislation defining the areas of nonimmunity and imposing such safeguards as may be deemed proper. Certainly that course is much preferred over judicial piecemeal changes in a case-by-case approach. A similar conclusion has been reached by others. "The simplest way to effectuate a change in the law is to enact a statute doing so. The courts have frequently said that the question of public policy is to be determined by the legislature and not by the court." 3 Lee, North Carolina Family Law, § 248. *Accord, Downs v. Poulin*, 216 A. 2d 29 (Me. 1966); *Castellucci v. Castellucci*, 94 R.I. 34, 188 A. 2d 467 (1963).

281 N.C. at 484, 189 S.E. 2d at 235.

In an apparent response to the language in *Skinner*, the General Assembly in 1975 enacted a statute that abolished the parent-child immunity doctrine *only in motor vehicle cases*. N.C.G.S. § 1-539.21 (1975). That statute provides that:

> The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent. (1975, c. 685, s. 1.)

This legislative action may have resulted in part from a recognition of the compulsory nature of modern automobile liability insurance statutes. *See* N.C.G.S. ch. 20, art. 9A.

This Court is aware of the trend in abolishing or modifying the parent-child immunity doctrine. Without addressing the modern applicability of the policy reasons supporting the doctrine, we note that in approximately half of the states the doctrine is still in force. *See, e.g., American Fire & Casualty Co. v. State Farm Mut. Auto Ins. Co.*, 290 Ala. 21, 273 So. 2d 186 (1973); *Thomas v. Inmon*, 268 Ark. 221, 594 S.W. 2d 853 (1980); *Horton v. Reaves*, 186 Colo. 149, 526 P. 2d 304 (1974); *Dennis v. Walker*, 284 F. Supp. 413 (D.D.C. 1986); *Orefice v. Albert*, 237 So. 2d 142 (Fla. 1970); *Coleman v. Coleman*, 157 Ga. App. 553, 278 S.E. 2d 114 (1981); *Thomas v. Chicago Bd. of Educ.*, 77 Ill. 2d 165, 395 N.E. 2d 538 (1979); *Vaughan v. Vaughan*, 161 Ind. App. 497, 316 N.E. 2d 455 (1974); *Bondurant v. Bondurant*, 386 So. 2d 705 (La. Ct. App. 1980); *Shell Oil Co. v. Ryckman*, 43 Md. App. 1, 403 A. 2d 379 (1979); *Rayburn v. Moore*, 241 So. 2d 675 (Miss. 1970); *Fugate v. Fugate*, 582 S.W. 2d 663 (Mo. 1979); *State Farm Mut. Ins. Co. v. Leary*, 168 Mont. 482, 544 P. 2d 444 (1975); *Pullen v. Novak*, 169 Neb. 211, 99 N.W. 2d 16 (1959); *Fitzgerald v. Valdez*, 77 N.M. 769, 427 P. 2d 655 (1967); *Chaffin v. Chaffin*, 239 Or. 374, 397 P. 2d 771 (1964); *Matarese v. Matarese*, 47 R.I. 131, 131 A. 198 (1925); *Oldman v. Bartshe*, 480 P. 2d 99 (Wyo. 1971). *See also* Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 Fordham L. Rev. 489, 528-32 (1982).

After this Court's decisions in both *Watson* and *Skinner*, the legislature reviewed the parent-child immunity doctrine and carved out *only a single exception* involving a child's personal injuries resulting from a parent's operation of a motor vehicle. Having spoken in 1975, the legislature otherwise left the parent-child immunity doctrine intact in cases involving personal injury resulting from the ordinary negligence of a parent or child.

To judicially abolish the parent-child immunity doctrine after the legislature has considered and retained the doctrine would be to engage in impermissible judicial legislation. If the doctrine is to be abolished at this late date, it should be done by legislation and not by the Court. *Skinner*, 281 N.C. at 484, 189 S.E. 2d at 235. *See Steelman v. City of New Bern*, 279 N.C. 589, 594, 184 S.E. 2d 239, 243 (1971) (court refused to abolish the firmly established doctrine of sovereign immunity, stating modification should come from the General Assembly). "It is not reasonable to assume that the legislature would leave an important matter . . . open to

speculation, consequently, the judiciary should avoid 'ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.' " *Deese v. Southeastern Lawn*, 306 N.C. 275, 278, 293 S.E. 2d 140, 143 (1982), *quoting Shealy v. Associated Transport*, 252 N.C. 738, 741, 114 S.E. 2d 702, 705 (1960). We decline to adopt judicial "legislation" by abolishing the parent-child immunity doctrine. The doctrine will continue to be applied as it now exists in North Carolina until it is abolished or amended by the legislature.

Affirmed.

Justice MARTIN dissenting.

I respectfully dissent, and vote to reverse the decision of the Court of Appeals. This appeal gives this Court an opportunity to move our jurisprudence forward with the mainstream of current judicial thought on the issue of parent-child immunity. The considerations that led this Court to adopt the theory of parent-child immunity in *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923), have been eroded throughout the sixty-three intervening years. The exceptions have almost consumed the rule. The remaining vestiges of the principle can best be addressed by the question: Why should the law favor negligent parents over their injured children?

I can add little to the excellent, scholarly analysis of this issue by Judge Becton, and adopt his dissenting opinion reported in *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 334 S.E. 2d 250 (1985).

Additionally, the open courts provision of our constitution mandates that children should have a remedy against their negligent parents. N.C. Const. art. I, § 18.

It is also to be noted that the issue in this appeal is between Mowett Sales Company, Inc., and Kyu C. Lee on a cross-action asking for contribution from Lee on the theory of joint and concurring negligence. This is not a suit by Jennifer Lee against her father. In *Watson v. Nichols*, 270 N.C. 733, 155 S.E. 2d 154 (1967), relied upon by the third-party defendant, Kyu Lee, the original defendant attempted to cross-claim against the parents of plaintiff and escape liability on allegations of primary and secondary

liability. (Although defendant also alleged contribution, this Court did not consider that question.) I find *Watson* to be an unwarranted extension of the flawed parent-child immunity doctrine and vote for its reversal. Such valid reasons, if any, that could possibly support the parent-child immunity doctrine are certainly not available to sustain Mowett's cross-claim against Lee. In reality, the true situation here presented is whether Mowett's insurance carrier can receive contribution from Lee's carrier, far removed from the soaring arguments of counsel.

Where this Court has established a precedent, as in *Small v. Morrison*, which deprives a recognized segment of our society of its just rights, it should not hesitate to remedy its own wrongs. Such is not judicial legislation, but judicial enlightenment.

"Suffer the little children to come unto me . . . ." Mark 10:14. Surely, this Court can do no less.

Justice EXUM dissenting.

It would be difficult to mount a more persuasive argument for the judicial abrogation of the doctrine of parental immunity in tort actions such as this one, not involving the exercise of parental authority over a child or the exercise of those actions inherent in the parent-child relationship, than that mounted by Judge Becton in his dissent in this case in the Court of Appeals.

This case, however, does not require us to face the question whether the much-criticized doctrine should be abrogated altogether. This is not an action by a child against the child's parent. This is a third-party claim brought by Mowett Sales Company, Inc., as defendant and third-party plaintiff, against Lee, the plaintiff's parent, for contribution in the plaintiff's action against Mowett Sales. None of the policy reasons said to justify parental immunity against ordinary tort actions by children appertain to cross-claims by third-party plaintiffs who are not children of the defendant.

In *Watson v. Nichols*, 270 N.C. 733, 735, 155 S.E. 2d 154, 156 (1976), relied on by the majority, the Court, without citing any authority and without any analysis of the issue, said simply, "Since the parent is not liable in a direct action against him, he cannot be made liable by cross-action." To me this is an unwar-

ranted extension of the parental immunity doctrine in a situation to which none of the policy reasons said to justify the doctrine appertain. *Watson* did not nor does this case involve an action by the child against the parent. Both are actions by the child against third parties over which the child, of course, has no control. Such actions for contribution, or even indemnity, by third parties against the plaintiff's parents do not adversely implicate harmonious family relations, the maintenance of which is said to be the policy underlying the parental immunity doctrine.

Without, then, going so far as to abolish the doctrine, I would hold simply that the doctrine should not be *extended* to preclude the maintenance of Mowett Sales Company's cross-action against Lee, the plaintiff's parent, in this case. Insofar as *Watson* holds to the contrary, I would vote to overrule it.

STATE OF NORTH CAROLINA v. WAYNE GORDON

No. 359A85

(Filed 6 May 1986)

1. **Criminal Law § 162; Witnesses § 1.2— competency of witness—failure to object**

   By failing to object to the court's implicit finding that a child was competent to testify, the defendant waived his right to assign this as error on appeal, N.C.G.S. § 15A-1446(d)(9) being applicable only where there was an improperly overruled objection to the competency of a witness.

2. **Witnesses § 1.2— competency of six-year-old child to testify**

   The trial court did not abuse its discretion in finding that a six-year-old child was competent to testify in a rape trial where the witness did, at certain points in her *voir dire* testimony, show an understanding of the difference between truth and falsehood and of the importance to tell the truth, notwithstanding some of the witness's answers during *voir dire* were ambiguous and vague and she was completely unable to answer some of the questions asked her.

3. **Criminal Law § 34.8— intercourse with another child—competency to show common scheme or plan**

   In a prosecution of defendant for the rape of his six-year-old stepdaughter, testimony that defendant had told the witness that he had engaged in sexual intercourse with his three-year-old daughter was admissible under N.C.G.S. 8C-1, Rule 404(b) to show a common scheme or plan by defendant to take sex-

ual advantage of the availability and susceptibility of his young daughters. Furthermore, such testimony was not unfairly prejudicial to defendant so as to require exclusion under Rule 403.

4. Criminal Law § 85.3— rape trial—sexual advances toward another—improper cross-examination

In a prosecution of defendant for rape of his six-year-old stepdaughter, the prosecutor's cross-examination of defendant about sexual advances which he allegedly made toward his sister-in-law was improper under N.C.G.S. 8C-1, Rule 608(b) since extrinsic evidence of sexual misconduct is not probative of a witness's character for truthfulness or untruthfulness. However, such error was not prejudicial where the evidence against defendant was strong, the prosecutor had previously asked defendant without objection whether he had molested another sister-in-law, and there was no reasonable possibility that a different result would have been reached had the error not been committed. N.C.G.S. § 15A-1443(a).

BEFORE *Friday, J.*, at the 22 April 1985 Criminal Session of Superior Court, HENDERSON County, defendant was convicted of first-degree rape and sentenced to the mandatory term of life imprisonment. The defendant appeals as a matter of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 10 March 1986.

Lacy H. Thornburg, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

The defendant was charged in an indictment, proper in form, with on or about 4 January 1985 engaging in sexual intercourse with Dena Shackelford, a child under the age of thirteen. The State's evidence tended to show that the defendant and his wife, Sandra, were married in August 1981. At the time of the trial, their family consisted of five children: Lonnie, age eleven, the defendant's son by a previous marriage; Eddeana (also known as Dena), age six, Sandra's daughter by a previous marriage; a son, Vance, age unknown, and two daughters, Andrea, age four, and Jennifer, age seven months, the children of the defendant and Sandra. They resided in a mobile home park in Henderson County. Sometime in October 1984, the couple separated. However, during the last few days of December 1984, Sandra moved back

into their mobile home with the defendant, the children, and her sister Patty. Sandra testified that at some point during the last three days of December 1984, she went on an out-of-town trip with another man. She returned a few days after 1 January 1985.

From the second week in November 1984 until 4 January 1985, Eddeana stayed with her mother and Lorraine Shackelford, Sandra's other sister. Lorraine testified that on 31 December 1984, the defendant came to her house looking for Sandra. Eddeana asked the defendant if he was going to see her mother. When he replied in the affirmative, Eddeana asked if she could accompany him. The defendant acquiesced, and they drove off. Lorraine was unable to recall the exact length of time that Eddeana was gone; however, she knew that she was gone at least overnight.

Eddeana testified that, at some point in time, the defendant took off her panties and put his "ding-a-ling" in her "tee-tee." When asked to indicate where her "tee-tee" was, the witness pointed to her genital area. She stated that her mother was not at home when this took place. On cross-examination, Eddeana stated that the incident occurred before Christmas. She also testified that her brothers and sisters were sleeping in the same bed with her when the defendant committed this act.

Sharon Hensley, a social worker with the Henderson County Department of Social Services, testified that on the evening of 31 December 1984, she received a report that the children in the Gordon mobile home were hungry and dirty. Subsequently, Hensley, the children's grandmother, and law enforcement officers went to the mobile home to investigate the report. They arrived at approximately 11:00 p.m. Hensley testified that they discovered a man sleeping on a couch in the living room and the defendant in bed with Eddeana, Vance, Andrea, and Jennifer. They were all asleep. At that point, Hensley removed Vance, Andrea, and Jennifer from the bed, and the grandmother took them with her. Eddeana was left with the defendant. Neither Eddeana nor the defendant woke up during Hensley's visit.

Dahlene Morse, an employee with the Henderson County Department of Social Services, testified that her office had received a complaint from some of the Gordons' neighbors regarding the welfare of the children. On 4 January 1985, Morse went to Ed-

deana's school and talked with her. Morse testified that Eddeana said the defendant had put his "ding-a-ling" in her "tee-tee." Morse further testified that she had Eddeana use anatomically correct dolls to show what had occurred. She stated that Eddeana used the dolls to indicate that the defendant had engaged in vaginal intercourse with her.

Dr. James Volk, a pediatrician, testified that he examined Eddeana on 4 January 1985. He discovered that her vaginal opening was much larger than normal for a girl her age and that her hymen ring was not present. He also found her labia to be somewhat swollen. On cross-examination, Dr. Volk acknowledged that these conditions could have been caused by some means other than vaginal intercourse.

David Pressley testified that he had known the defendant since 1982 or 1983. Pressley stated that he had been convicted of breaking and entering and larceny and had been placed on probation. However, in February 1985, the sentence had been activated due to a probation violation, and he was incarcerated in the Henderson County jail. As a result of the charges in this case, the defendant was also incarcerated in the jail at that time, and he and Pressley were placed in the same cell. Pressley testified that while incarcerated together, the defendant stated that he had engaged in sexual intercourse with his three-year-old daughter (Andrea—defendant's natural daughter) and that he had attempted to do so with his five-year-old daughter (Eddeana—defendant's stepdaughter), but that she had showed resistance.

The defendant testified in his own behalf and denied having ever sexually molested Eddeana. The defendant's ex-wife testified that during their marriage, he had never done anything to cause her to suspect that he might be sexually abusing their two children.

Nancy Bell, the supervisor of children's services at the Trend Mental Health Agency, testified in rebuttal for the State. She stated that she had counseled Eddeana. Bell further testified that on three occasions, Eddeana used words and anatomically correct dolls to describe acts of sexual intercourse committed against her by a person Eddeana identified as the defendant.

Based on this and other evidence, the defendant was convicted of first-degree rape. The trial court entered judgment sentencing the defendant to the mandatory term of life imprisonment.

The defendant's first argument concerns the question of whether Eddeana was competent to testify at the trial. After the prosecution called Eddeana as a witness, a voir dire hearing was held to determine whether she was competent to testify. At the conclusion of the hearing, the trial judge stated that, in his opinion, Eddeana was able to recognize and distinguish between truth and untruth, and he permitted her to testify. Although the trial court did not expressly state that the witness was competent to testify, the fact that he permitted her to do so constituted an implicit finding to that effect. *See State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). The defendant argues that the evidence at the voir dire hearing did not support the judge's implicit finding that the witness was competent, and the trial judge therefore erred by allowing her to testify.

[1] Under N.C.G.S. § 15A-1446(d)(9), the subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is incompetent may be asserted as error on appeal notwithstanding the lack of an objection to or motion to strike the testimony at trial. Initially, we note that the defendant failed to object to the court's finding that Eddeana was competent to testify. The State asserts that because there was no improperly overruled objection to Eddeana's competence as a witness—due to defendant's failure to object to the court's finding that she was competent—the defendant is precluded from using this exception to assign error to her testimony on the ground that she was incompetent. We agree with the State's interpretation of the statute. By failing to object to the court's implicit finding that Eddeana was competent to testify, the defendant waived his right to assign this as error on appeal. The issue of the witness' competence would nevertheless be reviewable under the "plain error" standard. *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986); *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). We conclude, however, that in this case the trial court did not err in finding Eddeana competent to testify.

Prior to the adoption of the North Carolina Rules of Evidence, the test for whether a witness was competent to testify was whether the witness understood the obligation of an oath or affirmation and had sufficient capacity to understand and relate facts which would assist the jury in reaching its decision. *State v. McNeely*, 314 N.C. 451, 333 S.E. 2d 738 (1985); *State v. Price*, 313 N.C. 297, 327 S.E. 2d 863 (1985); *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). We had also held that there was no fixed age limit below which a witness was incompetent to testify. *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984); *State v. Gibson*, 221 N.C. 252, 20 S.E. 2d 51 (1942). The determination of the competency of a witness was entrusted to the discretion of the trial judge, and his determination was conclusive on appeal absent a showing of an abuse of discretion. *State v. McNeely*, 314 N.C. 451, 333 S.E. 2d 738.

The determination of the competency of witnesses in trials occurring after 1 July 1984 is governed by Rule 601 of the North Carolina Rules of Evidence. Rule 601(b) provides:

> (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.

As noted in *State v. Fearing*, 315 N.C. 167, 337 S.E. 2d 551 (1985), this standard is consistent with traditional North Carolina practice and case law concerning the issue of the competency of a witness. *See also* Official Commentary to N.C.G.S. § 8C-1, Rule 601; 1 Brandis on North Carolina Evidence § 55 (1982 and Supp. 1983).

[2] The defendant argues that the evidence elicited at the voir dire hearing indicates that Eddeana was incapable of understanding the duty to tell the truth. Specifically, he contends that the evidence failed to demonstrate that she understood the difference between truth and falsehood or the importance of telling the truth. We do not agree.

The record indicates that the witness was clearly able to differentiate between a true statement and one which was false.

Furthermore, she showed a general knowledge of the difference between right and wrong. Regarding her understanding of the importance of telling the truth, Eddeana testified that if she put her hand on the Bible and swore to tell the truth, it meant that she had to tell the truth.

It is true that some of the witness' answers during the voir dire were ambiguous and vague. Also, she was completely unable to answer some of the questions which were put to her. However, we have previously noted that such a performance is not unusual when the witness is a young child. *See State v. McNeely*, 314 N.C. 451, 333 S.E. 2d 738; *State v. Robinson*, 310 N.C. 530, 313 S.E. 2d 571 (1984). As noted previously, the witness did, at certain points in her testimony, show an understanding of the difference between truth and falsehood and of the importance of telling the truth. This testimony supports the implicit finding of the trial judge—who was present and able to observe the demeanor of the child firsthand—that the witness was competent. We are therefore unable to say that the trial judge abused his discretion in finding Eddeana competent to testify at the trial. This assignment of error is overruled.

[3] The defendant next argues that the trial court erred by allowing David Pressley to testify that the defendant had told him that he had engaged in sexual intercourse with his three-year-old daughter. This evidence was introduced solely for the purpose of showing that the defendant engaged in a common scheme or plan embracing this crime, and the jury was instructed to that effect. The defendant contends that this evidence was inadmissible for this purpose.

Initially, we note that although the defendant did object to this testimony when it was first elicited, Pressley later gave the same testimony on direct examination without objection. Where evidence is admitted without objection, the benefit of a prior objection to the same or similar 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). Moreover, even if the defendant had properly preserved this issue for appellate review, he would have been unable to prevail,

since it is clear that this evidence was properly admitted by the trial court.

At common law, the general rule was that the State could not introduce evidence tending to show that a defendant had committed an independent offense even though it was of the same nature as the charged offense. *State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). In *McClain*, the Court enumerated eight exceptions to this general rule. One of these exceptions was:

> Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.

McClain, 240 N.C. at 176, 81 S.E. 2d at 367. Both the general prohibition against the use of other crimes and misconduct and certain exceptions to the rule, including the common scheme or plan exception, have been codified in Rule 404(b) of the North Carolina Rules of Evidence. As noted in *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986), this provision is consistent with prior North Carolina practice. *See also* Official Commentary to N.C.G.S. § 8C-1, Rule 404.

This Court has been quite "liberal in admitting evidence of similar sex crimes" under the common plan or scheme exception. *State v. Effler*, 309 N.C. 742, 748, 309 S.E. 2d 203, 207 (1983). This position has included allowing the admission of evidence showing sexual assaults by the defendant against people other than the victim in the crime for which he is on trial. For example, in *State v. Arnold*, 314 N.C. 301, 333 S.E. 2d 34 (1985), the defendant was charged with committing a sexual offense against his nine-year-old nephew. We held that the testimony of the victim's brother to the effect that the defendant had committed sexual acts with him were admissible under the common plan exception of *McClain*, as it tended to prove that the defendant engaged in a scheme whereby he took sexual advantage of the availability and susceptibility of his young nephews each time they were left in his custody. In *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981) (judgment reversed due to fatal variance between allegations and proof), the defendant was charged with two counts of first-degree sexual of-

fense against two girls. We held that the testimony of a third girl with whom the defendant had engaged in sexual misconduct was admissible under the common plan exception of *McClain.*

We conclude that Pressley's testimony that the defendant had admitted engaging in sexual intercourse with his three-year-old daughter tended to show a common scheme or plan by the defendant to take sexual advantage of the availability and susceptibility of his young daughters. The testimony was therefore admissible under Rule 404(b).

The defendant goes on to argue that even if the evidence was admissible under the common plan exception, it should have been excluded under Rule 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. We do not agree. While it is true that the evidence was prejudicial to the defendant—as is true of most of the prosecution's evidence against a defendant—it cannot be said that it was *unfairly* prejudicial. The testimony was not unduly cumulative nor grossly shocking. Also, the trial judge gave a proper limiting instruction to the jury regarding this evidence. This assignment of error is overruled.

[4] Finally, the defendant argues that the trial court erred by permitting the prosecutor to cross-examine him concerning sexual advances which he allegedly made toward his sister-in-law Lorraine Shackelford. On cross-examination of the defendant, the following exchange took place:

> [PROSECUTOR:] Haven't you also been interested in bothering and attempting to molest Lorraine who testified this morning?
>
> MR. REDDEN [DEFENSE COUNSEL]: Objection.
>
> COURT: Sustained. You may rephrase your question.
>
> [PROSECUTOR:] You've made sexual advances toward Lorraine numerous times through the years, haven't you, Mr. Gordon?
>
> MR. REDDEN: Objection.
>
> COURT: Overruled. I'll allow that.
>
> [WITNESS:] I wouldn't know if you'd call it that or not. I'd say she's offered to me as much as I ever offered to her.

The defendant argues that this questioning was improper, as it constituted an impermissible attempt to attack his credibility. Rule 608(b) of the North Carolina Rules of Evidence states that the credibility of a witness may not be attacked through the introduction of evidence of specific acts of conduct unless it concerns his character for truthfulness or untruthfulness. We agree that extrinsic evidence of sexual misconduct is not in any way probative of a witness' character for truthfulness or untruthfulness. *See State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986). The prosecutor's questioning of the defendant regarding his sexual advances toward Lorraine was therefore improper. We conclude, however, that the error does not require that a new trial be granted, as there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1983 and Cum. Supp. 1985).

The evidence against the defendant was strong. Furthermore, the prosecutor had previously asked the defendant whether he had molested Patricia Shackelford, another sister-in-law. This question was not objected to, and the defendant denied the accusation. It is well established that the admission of testimony or other evidence over objection is ordinarily harmless error when testimony or other evidence of the same import has previously been admitted without objection. *E.g., State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981); *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978). The prosecutor's question and the defendant's answer regarding his alleged conduct toward Patricia was of the same import as the questions and answer concerning his alleged conduct toward Lorraine. The failure of the trial court to sustain the defendant's objection to the prosecutor's cross-examination of the defendant as to alleged misconduct toward Lorraine was clearly harmless error.

The defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JAMES ELIJAH ARTIS

No. 292A85

(Filed 6 May 1986)

1. **Criminal Law § 15— hearing on change of venue—time certain not set—no error**

The trial court did not err in a prosecution for rape and assault by failing to set a time certain for the presentation of evidence on defendant's motion for a change of venue or a special venire where the motion was heard in chambers when the case was called for trial. The court acted within the time frame set out in N.C.G.S. 15A-952 (1983), the court stated that it would consider the substance of the motion if problems appeared during jury selection, and defendant showed no prejudice relating to the panel chosen.

2. **Jury § 6— individual voir dire denied—no abuse of discretion**

There was no showing that the trial judge abused his discretion in an assault and rape prosecution by denying defendant's motion for an individual *voir dire* where the jury selection was not recorded, the trial judge was especially aware of the necessity for impaneling jurors who had not been exposed to pretrial publicity, and defense counsel indicated satisfaction with the jury as constituted.

3. **Constitutional Law § 31— appointment of juristic psychologist denied—no abuse of discretion**

The trial court did not abuse its discretion in a prosecution for assault and rape by denying defendant's motion for the appointment of a juristic psychologist where defendant failed to show a particularized need for the requested expert.

4. **Rape § 5; Assault and Battery § 14.5— rape and assault—evidence sufficient**

Although defendant failed to meet the requirements of App. Rule 28(b)(5) and raised no issues regarding the denial of his motion for a directed verdict of not guilty of first and second degree rape, assault with intent to kill and assault inflicting serious injury, the Supreme Court reviewed the transcript in the interest of justice and found that the evidence fully supported the jury's verdict.

5. **Criminal Law § 138— pregnancy of victim as aggravating factor—no error**

The trial court did not err in a prosecution for assault and rape by finding as a non-statutory aggravating factor that the victim was eight months pregnant at the time of the assault. The victim's testimony indicated that her pregnancy did have an effect on her mental and physical reactions at the time of the crime and that it did increase her vulnerability.

THE defendant, originally charged upon proper indictments with first degree rape, assault with a deadly weapon inflicting serious bodily injury, and assault with a deadly weapon with intent

to kill inflicting serious bodily injury, was convicted of first degree rape, assault with a deadly weapon inflicting serious injury (victim A), and assault with a deadly weapon (victim B) at the 14 January 1985 Criminal Session of WILSON County Superior Court, *Winberry, J.*, presiding. Following a sentencing hearing, the defendant was sentenced to life imprisonment on the rape conviction, ten years for the felonious assault to run concurrently with the life sentence, and two years for the misdemeanor assault to run consecutively to the ten-year sentence. The defendant appealed the life sentence 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 assault cases on 30 May 1985. Heard in the Supreme Court 10 February 1986.

Lacy H. Thornburg, Attorney General, by T. Buie Costen, Special Deputy Attorney General, for the State.

C. David Williams, Jr. for the defendant-appellant.

BILLINGS, Justice.

The State's evidence tended to show that on 10 May 1984 the seventeen-year-old defendant forced his way into the home of victim A, a young, married woman who was almost eight months pregnant and lived near Stantonsburg, North Carolina. She recognized the defendant as the son of a woman who worked on her father-in-law's farm and lived within sight of her home. The defendant attacked victim A with a butcher knife and began trying to pull her pants off. During the struggle, victim A's hands were cut several times by the defendant's knife. Her sister, who was visiting at the time, first sought to aid the victim and then went next door to get help from victim A's mother-in-law, victim B. The mother-in-law came to the house, and the defendant stabbed her in the chest, causing a wound about one inch deep. When the sister and mother-in-law left to get help, the defendant forced victim A into the bathroom and raped her. She tried to fight off the defendant with her sewing scissors. A deputy sheriff, flagged down by the sister, got victim A out of the house, but the defendant ran upstairs. Following a five-hour siege involving a number of patrol cars and sheriff's deputies, the defendant was removed from the house.

On 5 November 1984 the defendant filed a motion for change of venue or in the alternative a special venire pursuant to N.C. G.S. § 15A-957 on the ground of extensive television and newspaper coverage at the time of the incident. In the motion the defendant asked that the trial court set the matter for hearing at a date and time certain so the defense could present subpoenaed testimony. When the case was called for trial as scheduled on 16 January 1985, Judge Winberry heard the pre-trial motions in his chambers. He said he was ready at that time to hear evidence on the defendant's motion. The defense counsel said he had not seen all the material but wanted a time set so that he could subpoena it since it would consist not only of newspaper articles but also of videotapes from various television news stations in the area. Judge Winberry pointed out that the case was on the calendar, counsel had had the opportunity to subpoena witnesses, and he was ready to hear the evidence. When no evidence was offered, he denied the motion but said that he would reconsider his ruling if it appeared during jury selection that the defendant could not get a fair and impartial jury in Wilson County.

[1] The defendant assigns as error the failure of the trial judge to set a time certain for the presentation of evidence on his motion.

N.C.G.S. § 15A-952 (1983) provides:

> (f) When a motion is made before trial, the court in its discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial.

The trial judge acted within the time frame set out in the statute. Given that the motion had not been heard before trial, "the date set for trial before a jury" was in itself a specific time when defense counsel should have been prepared to present evidence on the motion. Considering that the trial judge said he would reconsider the substance of the motion if problems appeared during jury selection and the fact that the defendant has shown no prejudice relating to the panel chosen, we disagree with the defendant's contention that the failure to set a time certain amounted to a refusal by the trial judge to give defendant a meaningful opportunity to be heard and a refusal by the judge to exercise his discretion. The defendant relies on *State v. McDou-*

gald, 38 N.C. App. 244, 248 S.E. 2d 72 (1978), *cert. denied and appeal dismissed*, 296 N.C. 413, 251 S.E. 2d 472 (1979) and *State v. Partin*, 48 N.C. App. 274, 269 S.E. 2d 250, *cert. denied and appeal dismissed*, 301 N.C. 404, 273 S.E. 2d 449 (1980). Neither case supports the defendant's contention, however. In *Partin*, the Court of Appeals held that, in the absence of a showing of prejudice by the defendant, it was not error for the trial judge to fail to rule on a motion for change of venue. In *McDougald* the court held that the failure of the trial court to take judicial notice of news broadcasts "did not deny the defendant the opportunity to prove the occurrence of such broadcasts or their contents. Such facts could have been easily proven by witnesses ordinarily available." 38 N.C. App. at 248, 248 S.E. 2d at 77. This assignment of error is overruled.

[2] Also on 5 November 1984 the defendant filed a motion for individual *voir dire* and sequestration of jurors during *voir dire* on the grounds that: 1) defendant is a black male; 2) the victim is a married white female who was seven and 1/2 months pregnant at the time of the alleged rape; 3) there was extensive publicity; 4) collective *voir dire* would educate the jurors to prejudicial and incompetent material, precluding a fair and impartial jury; 5) the issues involve asking sensitive and embarrassing questions of the potential jurors; and 6) collective *voir dire* will preclude candor and honesty on the part of the jurors. The defendant assigns as error the trial judge's denial of this motion.

It is well settled that a motion for individual *voir dire* and sequestration is addressed to the sound discretion of the trial judge and will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137 (1980); *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978). In *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976) the defendant asked for a change of venue on the ground that word-of-mouth pre-trial publicity made it unlikely that the defendant could receive a fair trial in the county. She offered the results of an unscientific poll that showed that 73 people responded affirmatively to a questionnaire, saying that they had heard at least one of seven rumors about the defendant. The trial judge had denied the defendant's request to be allowed to ask prospective jurors what they had heard about the defendant. This Court indicated that the solution

to determining whether prospective jurors had heard rumors about the defendant without tainting the entire jury panel would have been to question the jurors separately, but noted that a request for individual *voir dire* had not been made. In *Boykin*, we noted that because the record did not establish what rumors, if any, the jurors had heard about the defendant we had no basis upon which to find prejudice. We said:

> This Court finds itself in a position analogous to that presented when a trial judge sustains an objection to a question and examining counsel fails to have recorded what the answer would have been.

291 N.C. at 273, 229 S.E. 2d at 919-20.

Although individual *voir dire* may be necessary in some cases in order for the defense attorney to examine prospective jurors effectively about their pre-trial knowledge of and opinions about the case, denial of a motion for change of venue on the ground of pre-trial publicity does not always trigger a right to individual *voir dire*. "[T]he suggestion contained in *State v. Boykin, supra*, . . . does not give a defendant a right to separately examine each prospective juror for reasons of pretrial publicity." *Thomas*, 294 N.C. at 115, 240 S.E. 2d at 434.

In the instant case, the jury selection was not recorded, so we have no way of knowing what the jurors were asked. The defendant claims that counsel could not adequately question the jurors about their impartiality on issues of racial prejudice, crimes of sexual violence and pre-trial publicity without educating or offending the remaining panel, but no record has been preserved which we can examine to determine whether the defendant was hampered in his questioning of jurors by the procedure employed. Defense counsel did indicate satisfaction with the jury as constituted. In light of the fact that the trial judge was especially aware of the necessity for impaneling jurors who had not been exposed to pre-trial publicity, and the absence of any indication that an untainted jury was not ultimately seated, we find no showing of an abuse of discretion. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208 (1976). This assignment of error is overruled.

[3] The third motion filed by the defendant on 5 November 1984 requested appointment of a jury selection expert. The trial judge denied the motion, saying that the defendant had not made a showing that would entitle him to the appointment. This decision by the trial judge was in accord with the North Carolina statutes and case law on the appointment of experts.

N.C.G.S. § 7A-450(b) (1981) provides for the appointment of "counsel and the other necessary expenses of representation" when a defendant is determined to be indigent. In *State v. Oliver*, 309 N.C. 326, 336, 307 S.E. 2d 304, 312 (1983), we said that the burden was on the defendants to show that "there was a reasonable likelihood that a social psychologist would materially assist in the preparation of their defenses or that they would not receive a fair trial without a social psychologist's aid." The defendant argues that placing the burden on the defendant to make a showing that the appointment is necessary violates the defendant's constitutional right under *Ake v. Oklahoma*, 470 U.S. ---, 84 L.Ed. 2d 53 (1985). In *Ake*, the United States Supreme Court held that the state is required to provide a psychiatrist when sanity is a substantial factor in the defense. Even when the defendant's sole defense is insanity, the *Ake* decision provides that an indigent defendant is entitled to a psychiatrist provided at state's expense only upon an initial showing by the defendant "that his sanity at the time of the offense is to be a significant factor at trial." *Id.* at ---, 84 L.Ed. 2d at 66. A subsequent decision by the United States Supreme Court, *Caldwell v. Mississippi*, 472 U.S. ---, 86 L.Ed. 2d 231 (1985), further diminishes the defendant's argument based upon the decision in *Ake* and reinforces the correctness of the position of this Court in *Oliver*, *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984) (upholding the denial of appointment of a sociologist), and *State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984) (upholding the denial of appointment of a statistician). In *Caldwell* the Mississippi court had granted the defendant's request for a psychiatrist but denied requests for appointment of a criminal investigator, a fingerprint expert, and a ballistics expert because there was no showing of the reasonableness of the requests. In affirming the Mississippi Court, the United States Supreme Court said: "Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in

the trial judge's decision. Cf. *Ake v. Oklahoma . . .*" 472 U.S. at ---, 86 L.Ed. 2d at 236 n. 1.

In the instant case, since the defendant failed to show a particularized need for the requested expert, we find no abuse of discretion by the trial judge in denying the appointment of a juristic psychologist. This assignment of error is overruled.

[4] The defendant assigns as error the failure of the trial judge to grant his motion at the close of all the evidence for a directed verdict of not guilty of first and second degree rape, assault with intent to kill, and assault inflicting serious injury. Defense counsel's argument on this issue consists of a statement that he thinks the State's evidence was sufficient to resist such a motion but he would like for this Court to review the record and transcript to determine any errors that might have been overlooked. Although the defendant's request fails to meet the requirement of Rule 28(b)(5) of the Rules of Appellate Procedure and thus raises no issue for our consideration, in the interest of justice we have reviewed the entire transcript. We note that the trial judge did not submit to the jury an offense which included as an element an intent to kill. The evidence fully supported the jury's verdict as to all offenses of which the defendant was convicted.

[5] The offense of assault with a deadly weapon inflicting serious injury carried a presumptive prison term of three years and a maximum of ten years. The trial judge sentenced the defendant to the maximum of ten years after finding that a single, nonstatutory aggravating factor, that the victim was eight months pregnant at the time of the assault, outweighed the five mitigating factors. One of the mitigating factors was that the defendant had no prior convictions; the other four related to the defendant's limited intellectual and social capacity and to his physical condition of having severely burned arms from a childhood accident.

The defendant assigns as error the finding of the nonstatutory aggravating factor. Both parties cite *State v. Eason*, 67 N.C. App. 460, 313 S.E. 2d 221, *affirmed per curiam on other grounds*, 312 N.C. 320, 321 S.E. 2d 881 (1984), as the only other reported case finding pregnancy of the victim as an aggravating factor. In *Eason*, the victim was nine months pregnant. The Court of Appeals found the pregnancy to be a condition analogous to in-

firmity in statutory factor N.C.G.S. § 15A-1340.4(a)(1)(j) (1983), that the "victim was very young, or very old, or mentally or physically infirm." The concern addressed in that factor is the increased vulnerability of the victim. *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E. 2d 689, 701 (1983). With respect to the pregnancy, the opinion in *Eason* said that the advanced stage of pregnancy could be viewed as an infirmity which made the victim vulnerable and relatively defenseless.

> This condition generally would diminish the victim's capacity to resist the offender. It would augment the potential adverse consequences of the offense, in that not only the victim, but her unborn child as well, are vulnerable to the offender's intrusion. The trauma to the victim is enhanced by concern for her unborn child added to normal concern for herself. The impact of the crime on the victim is relevant to the question of sentencing and is properly considered under G.S. 15A-1340.4(a)(1). *State v. Blackwelder*, 309 N.C. 410, 413 n. 1, 306 S.E. 2d 783, 786 n. 1 (1983).

67 N.C. App. at 464, 313 S.E. 2d at 224.

We agree with this analysis by the Court of Appeals. The defendant argues that the facts in this case are distinguishable from those in *Eason* in that, because the victim valiantly fought off her attacker with her sewing scissors, she was not rendered more vulnerable and defenseless by her pregnancy. To the contrary, the evidence shows that her efforts to resist the defendant by stabbing him with the small sewing scissors did not deter him at all. In addition, victim A testified at trial that when the defendant first pushed his way into her house:

> . . . I was trying to fight with him because I thought he was going to stab me. He had the butcher knife pointed right at my chest and stomach area and I was pregnant and I was afraid he was going to hurt my baby.
>
> . . .
>
> I was so far along in my pregnancy I wasn't feeling well.
>
> . . .

> And, so my sister came in and she saw that he had a knife and he was trying to hurt me and she yelled at him to please stop, not to hurt me I was pregnant.

The victim said that after the defendant forced her into the bathroom and pushed her into the bathtub where she hit her head, he had the knife raised and she thought he was going to kill her, "[b]ecause I couldn't move, I couldn't get up because I was so big."

She stated that during the rape:

> My main concern at that time was keeping him from hurting my baby and I wasn't as concerned about whether or not he was penetrating me completely . . . because I wasn't as concerned about that as I was keeping myself and my baby alive because I still thought he had the knife.

This testimony indicates that the victim's pregnancy did have an effect on her mental and physical reactions at the time of the crime and that it did increase her vulnerability. It was not error for the trial judge to find the victim's advanced stage of pregnancy as a non-statutory aggravating factor and based thereon to sentence the defendant to a term of years greater than the presumptive term provided for the offense.

No error.

STATE OF NORTH CAROLINA v. GUSTARIVUS WHITAKER

No. 502A85

(Filed 6 May 1986)

1. Kidnapping § 1.2— removal to facilitate attempted rape—sufficiency of evidence

The evidence was sufficient to support defendant's conviction for kidnapping to facilitate attempted second degree rape, although defendant made a statement to the victim alluding to cunnilingus and not vaginal intercourse, where it tended to show that defendant grabbed the victim by the throat, ordered her to drive her taxi to a secluded, deserted church parking lot at 2:00 a.m. and turn off her taxi's lights; defendant commanded the victim to pull her pants down to her knees and inquired about her underclothing; and while driv-

ing to another location, the victim escaped from defendant when she accelerated rapidly as if to ram the car ahead of her, defendant grabbed the steering wheel, and the taxi ran into a street sign and utility pole.

2. Kidnapping § 1.3— necessity for instruction on false imprisonment

In a prosecution for kidnapping to facilitate attempted second degree rape, the trial court erred in refusing to instruct on the lesser-included offense of false imprisonment where a statement by defendant to the victim alluded to cunnilingus and not vaginal intercourse, and the jury could have inferred from defendant's statements and acts that he did not intend to rape the victim but intended only to commit some sexual offense short of attempted rape.

APPEAL by defendant of right pursuant to N.C.G.S. § 7A-30 (2) from the decision of a divided panel of the Court of Appeals (*Cozort, J.*, with *Johnson, J.*, concurring and *Chief Judge Hedrick* dissenting), reported at 76 N.C. App. 52, 331 S.E. 2d 752 (1985), finding no error in the trial below, wherein defendant, before *Walker (Hal), J.*, and a jury at the 7 January 1984 Criminal Session of GUILFORD County Superior Court, was acquitted of attempted second degree rape but convicted of second degree kidnapping, and received a sentence of 24 years in prison.

Lacy H. Thornburg, Attorney General, by Eugene A. Smith, Senior Deputy Attorney General, and Michael Rivers Morgan, Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, for defendant appellant.

EXUM, Justice.

In his appeal defendant contends (1) the evidence presented at trial was insufficient to support his conviction for kidnapping to facilitate attempted second degree rape;[1] and (2) the trial court committed reversible error by denying defendant's timely request to instruct the jury on the lesser included offense of false imprisonment. The Court of Appeals answered both questions adversely to defendant. We agree with the Court of Appeals'

1. The Court of Appeals concluded, and we agree, that although the better procedure would have been to indict defendant for kidnapping with the intent to commit second degree rape, the presence of the word "attempted," illogical though it may be, is not fatally defective. Under N.C.G.S. § 14-27.6, attempted second degree rape is a Class H felony, and properly can serve as the underlying felony in a kidnapping indictment. *State v. Whitaker*, 76 N.C. App. at 57-58, 331 S.E. 2d at 755.

decision insofar as it concluded the evidence is sufficient to support defendant's conviction, but we disagree insofar as it concluded that defendant was not entitled to an instruction on the lesser included offense. We thus affirm in part and reverse in part the Court of Appeals' decision and remand for a new trial.

I.

The evidence presented at trial tended to show the victim, a female taxi driver, was driving defendant around Greensboro sometime after 2 a.m. on 20 May 1983 when he directed her to a dead-end street, threw her radio microphone to the other side of the cab, and grabbed the victim by the throat, ordering her to continue driving. Defendant then directed her to a church parking lot in downtown Greensboro and ordered her to pull in beside a church activity bus and get out of the car. The victim refused to get out of the car because it was raining heavily and she feared defendant would shoot her, steal her taxi, and leave her in that deserted spot. In an apparent attempt to mollify him, she suggested they go get something to eat and discuss the situation. At that point defendant remarked, "I want to eat you," asked the victim if she had panties on, to which she replied affirmatively, and told her to pull her pants down to her knees. The victim then said, "Let's not do anything like this in the church yard." Defendant assented, and directed the victim to drive away, continuing to hold her by the throat all the while. Ignoring his directions, she drove instead towards more populous areas in town, further angering defendant who, having pulled an object out of his pocket, held it to the victim's throat. Believing the object to be a knife (she soon observed it actually was a comb), she accelerated rapidly as if to ram the car ahead. Seeing this, defendant wrenched the wheel towards him, causing the taxi to run into a street sign and a utility pole. The victim and defendant both jumped out of the taxi and ran off in opposite directions. Police apprehended defendant some two months later when the victim saw him standing on a sidewalk and had him arrested.

II.

Defendant's appeal focuses on two different considerations of the sufficiency of the evidence: (1) whether the evidence, considered in the light most favorable to the state, is sufficient to support defendant's conviction for second degree kidnapping; and

(2) whether the evidence, considered in the light most favorable to defendant, would have also supported a conviction of the lesser included offense of false imprisonment had that offense been submitted to the jury and the defendant been found guilty of it.

[1] Defendant's kidnapping indictment charges in pertinent part that he confined, restrained and removed his victim "who had attained the age of sixteen (16) years . . . for the purpose of facilitating the commission of a felony, Attempted Second Degree Rape."

N.C.G.S. § 14-39 describes kidnapping 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:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony;
>
> . . . .
>
> (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.

A definition of second degree rape pertinent to this case is "vaginal intercourse with another person . . . [b]y force and against the will of the other person . . . ." N.C.G.S. § 14-27.3(a)(1). Attempted second degree rape is a Class H felony. N.C.G.S. § 14-27.6.

Defendant contends his vulgar play on words "I want to eat you" supports at most an inference that he intended to commit cunnilingus, a second degree sex offense, and there is no evidence of a purpose to attempt to rape his victim.

When an indictment for kidnapping alleges an intent to commit a particular felony, the state must prove the particular intent alleged. *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984); *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982). "Intent, or the absence of it, may be inferred from the circumstances surrounding the event and must be determined by the jury." *Id.* at 48, 296 S.E. 2d at 271. In considering the sufficiency of the evidence to survive 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. Covington*, 315 N.C. 352, 361, 338 S.E. 2d 310, 316 (1986).

We conclude that when so considered the evidence supports a reasonable inference that defendant removed his victim for the purpose of facilitating an attempt to rape her. Defendant grabbed the victim by the throat, ordered her to drive to a secluded, deserted parking lot beside a bus and turn off her taxi's lights. He commanded her to pull her pants down to her knees and inquired about her underclothing. He stated his intent to commit at least one manner of sexual attack on her, not necessarily to the exclusion of any other. The jury could have reasonably inferred that, but for the victim's ingenuity and courage, she would have been subjected to attempted forcible sexual intercourse. We therefore hold the evidence was enough to support the jury's verdict.

We find support for our conclusion in *State v. Hudson*, 280 N.C. 74, 185 S.E. 2d 189 (1971), *cert. denied*, 414 U.S. 1160, 39 L.Ed. 2d 112 (1974). In *Hudson*, the defendant challenged the sufficiency of the evidence to support his conviction for felonious assault with intent to rape a fourteen-year-old female victim. He claimed the evidence showed he assaulted her not to rape her but to commit other types of sex offenses. The victim testified that during defendant's assault he did not attempt sexual intercourse but did insert his finger and a foreign object into her vagina. He further sexually abused her, wrote Justice (later Chief Justice) Sharp, "in a manner too revolting to relate." *Id.* at 75, 185 S.E. 2d

at 190. The Court in *Hudson* noted "[t]o convict a defendant of an assault with intent to commit rape 'an actual physical attempt forcibly to have carnal knowledge need not be shown.' " *Id.* at 77, 185 S.E. 2d at 191 (citation omitted). The Court held that, despite the absence of testimony regarding attempted vaginal intercourse, defendant's attack "was indisputably sexually motivated, and we think the jury could reasonably infer from his treatment of her that defendant intended at some time during his continuous assaults to rape [the victim] if he could, notwithstanding any resistance on her part . . . ." *Id.*

Hudson parallels the case at bar in that the attack here, as in *Hudson*, was indisputably sexually motivated, despite lack of evidence of an actual physical attempt forcibly to have vaginal intercourse. The jury could thus reasonably infer that defendant abducted his victim for the purpose of attempting to have vaginal intercourse with her even though he never actually made the attempt.

III.

[2] Defendant next contends the trial court committed reversible error by denying his timely request to instruct the jury on false imprisonment.

The crime of false imprisonment is a lesser included offense of kidnapping. *State v. Bynum*, 282 N.C. 552, 193 S.E. 2d 725, *cert. denied*, 414 U.S. 839 (1973). When any evidence presented at trial would permit the jury to convict defendant of the lesser included offense, the trial court must instruct the jury regarding that lesser included offense. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). "So, whether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment depends upon whether the act was committed to accomplish one of the purposes enumerated in our kidnapping statute." *State v. Lang*, 58 N.C. App. 117, 118-19, 293 S.E. 2d 255, 256, *cert. denied*, 306 N.C. 747, 295 S.E. 2d 761 (1982). The crux of this question, then, concerns whether "there was evidence from which the jury could have concluded that the defendant, although restraining, confining and

removing the victim, [did so] for some purpose other than . . . to commit [attempted second degree] rape." *Id.*

The evidence here does not so unerringly point to a purpose to rape the victim as to preclude the jury from reasonably finding defendant guilty of the lesser included offense of false imprisonment. Left to its own devices after having been instructed fully on all pertinent law in the case, the jury reasonably could have inferred from defendant's statement and acts that he did not intend to attempt to rape his victim, but intended only to commit some sexual offense short of attempted rape. Defendant's statement alluded to cunnilingus, not vaginal intercourse. He did not make at any point thereafter statements of a sexual nature to the victim. The question of defendant's purpose in abducting the victim, being a question of his state of mind, should have been for the jury to decide, as the evidence did not point unerringly to a conclusion that defendant did or did not intend to attempt to rape the victim.

In agreeing with that part of Chief Judge Hedrick's dissent in which he concluded defendant was entitled to have the lesser offense of false imprisonment submitted, we find support in relevant case law. In *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978), defendant forced himself on the female victim in a bus terminal restroom, rubbing his genitalia against hers and compelling her at knifepoint to perform oral sex. The Court held that, while there was no evidence that defendant attempted vaginal intercourse, his actions obviously were designed to gratify some sort of sexual desire, thus permitting the reasonable inference that the assault was motivated at some point by an intent to commit rape. Nevertheless, the Court also held the evidence sufficient to support either a verdict of assault with intent to commit rape or the lesser included offense of assault upon a female. In *Banks* we held "the factual issue which separates the greater offense from the lesser, *i.e.*, intent, is not susceptible to clear-cut resolution. Under these circumstances, the trial judge should have submitted to the jury the lesser included offense. . . ." *Id.* at 416, 245 S.E. 2d at 754. In *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973), only the state offered evidence and defendant was convicted of first degree burglary. The only question on appeal was whether the trial court erred in failing to submit the lesser offense of felonious breaking or entering. The evidence tended to show that

in the early morning hours one of the occupants of a children's home in Winston-Salem awoke to find defendant in her bed armed with a knife. The evidence was equivocal on the question of whether certain doors and windows were left open or were closed at the time entry might have been accomplished by defendant. This Court concluded there was error in failing to submit the lesser offense, saying:

> The evidence in the case and the inferences to be reasonably drawn therefrom were not such as would have *required* the jury to find that defendant entered the Julia Higgins Cottage by a burglarious breaking. Conversely the jury might reasonably have inferred that defendant made his entry without a burglarious breaking.
>
> Under these circumstances, defendant was entitled '. . . to have different views arising on the evidence presented to the jury upon proper instructions. . . .' *State v. Childress*, [228 N.C. 208, 45 S.E. 2d 42].

State v. Bell, 284 N.C. at 420, 200 S.E. 2d at 604.

We are satisfied such is also the case here. "Simply put, the law does not point inexorably and unerringly to defendant's guilt or innocence of the offense of kidnapping, since the jury could reasonably conclude that defendant did not intend to gratify his passion on the prosecuting witness notwithstanding any resistance on her part." *State v. Lang*, 58 N.C. App. at 120, 293 S.E. 2d at 257.

The result is: Insofar as the Court of Appeals held the evidence was sufficient to support the verdict of guilty of kidnapping, its decision is affirmed; insofar as the Court of Appeals held defendant was not entitled to an instruction on the lesser included offense of false imprisonment, its decision is reversed; and the case is remanded to the Court of Appeals for further remand to the superior court for a new trial.

Affirmed in part; reversed in part; remanded for new trial.

STATE OF NORTH CAROLINA v. FRANKLIN DELANO DENNING

No. 467A85

(Filed 6 May 1986)

1. **Automobiles and Other Vehicles § 130— sentencing under Safe Roads Act—aggravating factors—constitutional**

The aggravating factors for driving while impaired enumerated by N.C.G.S. 20-179 are not elements of the offense and their consideration for purposes of sentencing is a function of the judge and therefore is not susceptible to constitutional challenge based upon either the Sixth Amendment right to a jury trial or Art. I, § 24 of the North Carolina Constitution. N.C.G.S. 20-138.1 (1983), N.C.G.S. 15A-928(a) (1983), N.C.G.S. 14-39(b).

2. **Automobiles and Other Vehicles § 120— *driving while impaired—statute not* unconstitutionally vague**

N.C.G.S. 20-138.1(a)(2) and 20-4.01(33a) are not unconstitutionally vague.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(1) from the decision of the Court of Appeals, 76 N.C. App. 156, 332 S.E. 2d 203 (1985), affirming judgment entered by *Clark, J.*, at the 8 October 1984 session of Superior Court, BLADEN County. Heard in the Supreme Court 10 March 1986.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery III, Special Deputy Attorney General, for the state.

Hulse & Hulse, by Herbert B. Hulse, for defendant.

MARTIN, Justice.

On 3 April 1984 defendant was convicted in District Court, Bladen County, of driving while impaired in violation of N.C.G.S. § 20-138.1 of the Safe Roads Act of 1983. He appealed to the superior court for a trial de novo and was found guilty by a jury. The trial judge, authorized by N.C.G.S. § 20-179 to impose one of five levels of punishment depending upon statutorily enumerated aggravating and mitigating factors, found one grossly aggravating factor—that defendant had a prior conviction for a similar offense within seven years—and imposed a Level Two punishment.[1]

1. A Level Two punishment subjects the defendant to a prison term of no less than seven days and no more than twelve months, and he may be fined up to $1,000.

Defendant appealed to the Court of Appeals, contending that for a trial judge to consider as aggravating factors separate criminal offenses or elements of the charged offense, as permitted by N.C.G.S. §§ 20-138.1 and -179, denies the defendant his constitutional right to a trial by jury. In dicta, the Court of Appeals agreed with defendant that criminal offenses for which defendant has not been tried should be alleged in a criminal pleading and considered by a jury and cannot be used to increase punishment for the original crime charged. That court held, however, that defendant lacked standing to attack these provisions because he had not been injured by them.

> [A]lthough defendant's jury trial argument might have been more successfully lodged if he had been found "guilty" in the sentencing phase of other aggravating factors, such as reckless and dangerous driving, or passing a stopped school bus, which are separate criminal offenses, and for which one accused of them should be formally charged and tried, he does not now have standing to attack those portions of the statute as he was not injured directly by them.

76 N.C. App. at 157, 332 S.E. 2d at 204.

[1] We agree with the Court of Appeals that defendant has no standing to raise this issue regarding section 20-179, but we disavow its dicta. We hold that because the factors before the trial judge in determining sentencing are not elements of the offense, their consideration for purposes of sentencing is a function of the judge and therefore not susceptible to constitutional challenge based upon either the sixth amendment right to a jury trial or article I, section 24 of the North Carolina Constitution.

A defendant is entitled to a jury trial only as to every essential element of the crime charged. *See State v. Lewis*, 274 N.C. 438, 442, 164 S.E. 2d 177, 180 (1968). The three essential elements of the offense of impaired driving are (1) driving a vehicle (2) upon any public vehicular area (3) while under the influence of an impairing substance or "[a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more." N.C.G.S. § 20-138.1 (1983). The legislature deliberately separated the definition of the offense, N.C.G.S. § 20-138.1, from the statute governing sentencing, which is detailed in N.C.G.S. § 20-179.

Section 20-179 delineates five levels of punishment options ranging from a fine of $100 to $1,000 and imprisonment from twenty-four hours[2] to twenty-four months, depending upon the presence or absence of specified grossly aggravating, aggravating, and mitigating factors. A finding of one or more grossly aggravating factors mandates punishment under Level One or Two; a balancing of other aggravating and mitigating factors requires the judge to select a punishment from among the three remaining levels. That the range of punishments is divided into five classes and that the trial judge determines the class of a defendant's punishment by finding certain grossly aggravating factors or by weighing other aggravating and mitigating factors signifies nothing more than the legislature's desire to establish a logical sentencing scheme.

These factors are not elements of the offense: an evidentiary finding of their presence or absence does not affect the fact that the defendant has been found to have committed the underlying crime. This is not a situation, like those requiring a special indictment charging the defendant with a previous conviction, where "the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter." N.C.G.S. § 15A-928(a) (1983). A prior conviction of impaired driving within seven years does not elevate the offense to first degree DWI; nor would a clean driving record mitigate the DWI charge to one of second degree.

Defendant's argument before us relies heavily upon cases decided under the precursor to N.C.G.S. § 20-138, in which this Court held that a prior conviction for drunken driving, second offense, was an element of the offense requiring jury determination. *See, e.g., State v. Powell*, 254 N.C. 231, 118 S.E. 2d 617 (1961); *State v. Cole*, 241 N.C. 576, 86 S.E. 2d 203 (1955). The legislature's amendments to the driving-while-impaired provisions in the Safe Roads Act, however, excised all mention of prior or subsequent convictions from section 20-138 and removed that element to section 20-179, the sentencing provision. Because of this modification,

2. The twenty-four-hour imprisonment minimum can be satisfied in one or more ways, including community service or suspension of driving privileges for thirty days.

we hold that prior convictions are not an element of the offense but are now merely one of several factors relating to punishment. And "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination" of "the appropriate punishment to be imposed on an individual." *Spaziano v. Florida*, 468 U.S. 447, 459, 104 S.Ct. 3154, 3162, 82 L.Ed. 2d 340, 352 (1984). It is to be noted that defendant has already been accorded his right to a jury trial on his prior conviction.

The 1983 changes in the driving-while-impaired statute are the mirror image of amendments made to the kidnapping statute, N.C.G.S. § 14-39(b), in 1979.[3] Prior to these amendments, whether a victim had been sexually assaulted, seriously injured, or released in an unsafe place determined the kidnapper's punishment: an "aggravated" kidnapping, in which one or more of these circumstances had occurred, was punishable by imprisonment for no less than twenty-five years nor more than life; a "simple" kidnapping, in which the victim, unharmed, had been safely released, was punishable by imprisonment for no more than twenty-five years and/or a fine of no more than $10,000. This Court held in *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978), that these victim-focused factors related only to matters which could be shown in mitigation of punishment and did not create separate offenses or add any additional elements to the offense of kidnapping. A procedure requiring that a defendant's sentence be determined separately from the jury's determination that the defendant has committed the substantive offense and requiring the sentencing judge to consider all aggravating and mitigating factors as well as evidence from the substantive phase "comports with both state and federal constitutional requirements," the *Williams* Court held. *Id.* at 670, 249 S.E. 2d at 719. "That the judge rather than the jury makes the crucial factual determinations upon which the ultimate sentence is based does not contravene either state or federal constitutional guarantees of a jury trial in criminal cases." *Id.*, 249 S.E. 2d at 719-20.

The 1979 amendments to the kidnapping statute effected a critical change in the statutory role of those mitigating circumstances. They were converted from being mere mitigating factors for purposes of sentencing to factors that determined whether the

3. These amendments were made effective 1 July 1981.

offense was to be punishable as a first degree kidnapping, a Class D felony, or as a second degree kidnapping, a Class C felony. In *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983), this Court held that because of these modifications, "the language of G.S. 14-39(b) states essential elements of the offense of first-degree kidnapping and does not relate to matters in mitigation of punishment." *Id.* at 261, 307 S.E. 2d at 351.

Because the current driving-while-impaired provisions are structurally analogous to the kidnapping statute in effect at the time of *Williams* rather than that in effect when *Jerrett* was issued, the opposite result obtains in the case before us: the factors listed in N.C.G.S. § 20-179 relate only to matters of punishment and do not state essential elements of the offense of driving while impaired. This comparison of the significance of recent amendments to the kidnapping and driving-while-impaired statutes supports our holding that the sentencing procedure of N.C.G.S. § 20-179, like the procedure considered in *Williams*, contravenes neither state nor federal constitutional guarantees of a jury trial in criminal cases.

Objections on sixth amendment grounds to the use of prior convictions as an aggravating factor in sentencing have also been answered by courts reviewing certain recidivist statutes.[4] A federal statute providing for increased sentences for defendants of "dangerous special offender status," 18 U.S.C. § 3575(b), provides that the court, sitting without a jury, determine whether the defendant is "dangerous" or a "special offender." The Fourth, Fifth, and Sixth Circuits have all held that this statute "does not create a new and distinct criminal charge. Rather, the dangerous special offender criteria provide for an increase in the penalty for the offense itself." *United States v. Williamson*, 567 F. 2d 610, 614 (4th Cir. 1977); *United States v. Bowdach*, 561 F. 2d 1160, *reh'g denied*, 565 F. 2d 163 (5th Cir. 1977); *United States v. Stewart*, 531 F. 2d 326 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976).[5]

4. The North Carolina statute governing the sentencing of habitual offenders, N.C.G.S. §§ 14-7.2 to -7.5, requires that a jury consider a separate indictment charging that the defendant is an habitual felon. Sixth amendment questions concerning those provisions have therefore not arisen in cases construing them.

5. In addition, N.C.G.S. § 20-179 specifically requires the state "to prove any grossly aggravating or aggravating factor by the greater weight of the evidence."

[2] Defendant also argued before the Court of Appeals and before this Court that N.C.G.S. §§ 20-138.1(a)(2) and 20-4.01(33a) (defining as "relevant" "[a]ny time after the driving in which the driver still has in his body alcohol consumed before or during the driving") are unconstitutionally vague. The Court of Appeals notes, as we do, that these challenges were answered in *State v. Rose*, 312 N.C. 441, 323 S.E. 2d 339 (1984), and *State v. Howren*, 312 N.C. 454, 323 S.E. 2d 335 (1984). We reaffirm these decisions.

We hold that N.C.G.S. §§ 20-138.1 and -179 do not violate the constitutional rights of a defendant to trial by jury.

The decision of the Court of Appeals is accordingly

Modified and affirmed.

STATE OF NORTH CAROLINA v. RICHARD LEWIS TREXLER

No. 626A85

(Filed 6 May 1986)

1. **Criminal Law § 106.4— corpus delicti rule—applicability to confessions and admissions**

The *corpus delicti* rule applies with equal force to confessions and admissions.

2. **Criminal Law § 106.4— corpus delicti rule—trustworthiness of confession—expanded rule**

The decision of *State v. Parker*, 315 N.C. 222, 337 S.E. 2d 487 (1985), expanded the type of corroboration which may be sufficient to establish the trustworthiness of a confession for the purpose of the *corpus delicti* rule. The pre-*Parker* rule is still fully applicable in cases in which there is some evidence *aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred.

This evidentiary standard is synonymous with "preponderance of the evidence," which has passed constitutional muster with the courts in *Williamson*, *Bowdach*, and *Stewart*, as well as with the Seventh Circuit. *United States v. Williamson*, 567 F. 2d 610; *United States v. Bowdach*, 561 F. 2d 1160; *United States v. Stewart*, 531 F. 2d 326; *United States v. Neary*, 552 F. 2d 1184 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977).

3. Criminal Law § 106.4— driving while impaired—proof of corpus delicti

The State presented sufficient evidence of the *corpus delicti* to support defendant's conviction of the crime of driving while impaired where a highway patrolman testified to admissions by defendant that he was driving an automobile when it overturned, that he had "a couple of beers" before driving the automobile, that he went home and returned to the scene with his father, and that he had nothing to drink after the accident, and where evidence of the *corpus delicti aliunde* defendant's admissions tended to show that (1) the overturned automobile was lying in the middle of the road and a single person was seen leaving the automobile, (2) when defendant returned to the scene, he appeared to be impaired as a result of using alcohol, (3) defendant later blew a 0.14 on a breathalyzer, and (4) the wreck was otherwise unexplained.

APPEAL as of right pursuant to N.C.G.S. § 7A-30(2) from the judgment of the North Carolina Court of Appeals, 77 N.C. App. 11, 334 S.E. 2d 414 (1985), reversing and remanding the conviction of Richard Lewis Trexler for driving while impaired in violation of N.C.G.S. § 20-138.1. Defendant Trexler was convicted at the 13 August 1984 Criminal Session of BUNCOMBE County Superior Court, *Allen, J.*, presiding.

The State's evidence at trial tended to show that on 13 May 1984 at approximately 2:15 a.m. Horace Hall was awakened by a loud noise outside his home. He looked out the window of his front door and saw a car lying upside down in the road and someone leaving the vehicle. Mr. Hall telephoned the sheriff's department and approximately ten minutes later a deputy arrived. R. L. Robinson, a trooper with the North Carolina Highway Patrol, arrived at the scene at approximately 3:15 a.m. Mr. Hall testified that he heard defendant tell Trooper Robinson that he had had "[a] couple of beers" to drink. Hall also stated that he talked with defendant about repairing his and his neighbor's mailboxes which had been damaged during the wreck.

Trooper Robinson testified that when he arrived at 216 Stradley Mountain Road he observed a Datsun passenger car lying on its top in the middle of the highway. Robinson related that although he could find no registration card in the vehicle defendant approached him and stated that the car was his and that he was the person driving it. Defendant further indicated that he had left the scene, had been home, and had returned with his father. Robinson also stated that defendant revealed that prior to the accident he had been at a party further up Stradley Mountain Road and that he had not had anything to drink since the acci-

dent. After talking with and observing defendant, Trooper Robinson determined that defendant in his opinion had consumed a sufficient amount of some intoxicating beverage to noticeably and appreciably impair both his mental and physical faculties. Shortly thereafter, Robinson placed defendant under arrest for driving while impaired and transported him to the Buncombe County Sheriff's Department.

At approximately 5:09 a.m., defendant was required to take a breathalyzer test. The chemical analysis revealed that defendant's blood alcohol content was 0.14.

Defendant moved at the close of the State's evidence to dismiss the charge against him on the ground that the State had failed to present sufficient evidence to prove the *corpus delicti* of the offense. The trial court denied this motion. After choosing to offer no evidence, defendant renewed his motion to dismiss which was again denied. The jury returned a verdict of guilty of driving while impaired. Defendant was sentenced to thirty days in jail which was suspended for three years and he was placed on unsupervised probation for three years.

Lacy H. Thornburg, Attorney General, by W. Dale Talbert, Assistant Attorney General, for the State.

Roberts, Cogburn, McClure & Williams, by Max O. Cogburn, Isaac N. Northup, Jr., and Glenn S. Gentry, for defendant-appellee.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Charles A. Lloyd, for Greensboro Criminal Defense Lawyer's Association, amicus curiae.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether the majority of the panel in the Court of Appeals correctly determined that the trial court erred in denying defendant's motion to dismiss on the basis that the State had failed to prove the *corpus delicti* of the charged offense. The majority felt that it was bound by this Court's decision in *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983).

[1] There is some question in the present case as to whether defendant's extrajudicial statements should be categorized as a con-

fession or an admission. An admission is a statement of pertinent facts which, in light of other evidence, is incriminating. 2 Brandis on North Carolina Evidence § 182, n. 3 (1982). Our State law defines a confession as "an acknowledgement in expressed words by an accused in a criminal case of his guilt to the crime charged or of some essential part of it." *State v. Fox*, 277 N.C. 1, 25, 175 S.E. 2d 561, 576 (1970). *See also State v. Shaw*, 284 N.C. 366, 373, 200 S.E. 2d 585, 589 (1973). A confession, therefore, is a type of an admission. 2 Brandis on North Carolina Evidence, § 182 (1982); 3 Wigmore, *Evidence* § 821 (1970). We conclude that the *corpus delicti* rule applies with equal force to confessions and admissions. *Cf. State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210 (1976); *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971). The United States Supreme Court, in applying its *corpus delicti* rule in *Opper v. United States*, 348 U.S. 84, 90, 99 L.Ed. 101, 107 (1954), in part, stated: "[a]n accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and that corroboration should be required." Thus, regardless of whether defendant's statements constitute an actual confession or only amount to an admission, our long established rule of *corpus delicti* requires that there be corroborative evidence, independent of the statements, before defendant may be found guilty of the crime.

It is well established in this jurisdiction that a naked, uncorroborated, extrajudicial confession is not sufficient to support a criminal conviction. Our application of the *corpus delicti* rule before our decision in *State v. Parker*, 315 N.C. 222, 337 S.E. 2d 487 (1985), required that there be corroborative evidence, independent of defendant's confession, which tended to prove the commission of the charged crime. *State v. Franklin*, 308 N.C. 682, 304 S.E. 2d 579 (1983); *State v. Green*, 295 N.C. 244, 244 S.E. 2d 369 (1978); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated*, 428 U.S. 908, 49 L.Ed. 2d 1213 (1976); *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960).

This Court recently examined the *corpus delicti* rule in *State v. Parker*, 315 N.C. 222, 337 S.E. 2d 487. After an exhaustive review of the case law in this and other jurisdictions, Justice Billings, speaking for the Court, in part, stated:

> 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.

Id. at 236, 337 S.E. 2d at 495.

[2] We discern from our examination of *Parker* that the pre-*Parker* rule has not been abandoned but that *Parker* expanded the type of corroboration which may be sufficient to establish the trustworthiness of the confession. The pre-*Parker* rule is still fully applicable in cases in which there is some *evidence aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred. The rule does not require that the *evidence aliunde* the confession prove any element of the crime. The *corpus delicti* rule only requires *evidence aliunde* the confession which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred. 30 Am. Jur. 2d *Evidence* § 1142 (1967). The independent evidence must touch or be concerned with the *corpus delicti*. *State v. Parker*, 315 N.C. 222, 337 S.E. 2d 487. The expanded rule enunciated in *Parker* applies in cases in which such independent proof is lacking but where there is substantial independent evidence tending to furnish strong corroboration of essential facts contained in defendant's confession so as to establish trustworthiness of the confession.

Although the burden is on the State to prove that defendant was the perpetrator of the crime, it is obvious that a confession will ordinarily furnish this proof.

Defendant admitted that the wrecked automobile was his, that he was driving it when it overturned, and that he had "a couple of beers" before driving the car. He further admitted that he went home and returned to the scene with his father and that he had nothing to drink after the accident. Thus, the only remaining question is whether defendant was intoxicated at the time he drove the motor vehicle on a public highway. We need not rely upon the *Parker* rule for here there is *evidence aliunde* defendant's confession touching on the *corpus delicti* which when considered with other evidence tends to support a finding that the charged crime occurred.

[3] *Evidence aliunde* admissions by defendant which tends to establish the *corpus delicti* is as follows: (1) the fact that the overturned automobile was lying in the middle of the road and that a single person was seen leaving the automobile; (2) the fact that when defendant returned to the scene, he appeared to be impaired as a result of using alcohol; (3) the fact that defendant later blew 0.14 on a breathalyzer; and (4) the fact that the wreck was otherwise unexplained. This evidence is sufficient to corroborate defendant's admission that he drove the vehicle on a public highway or vehicular area after he had consumed alcohol and, when considered with his admissions, was sufficient to support a reasonable inference that at the time he was driving the motor vehicle he had consumed a sufficient amount of alcohol to raise his blood alcohol level to 0.10 or greater at a relevant time after driving.

We are of the opinion that the majority of the panel in the Court of Appeals mistakenly concluded that *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89, mandated that defendant's assignment of error be sustained. We initially note that in *Parker* the Court expressly overruled the language in *Brown* which is inconsistent with the holding in *Parker*. *Parker*, 315 N.C. at 239, 337 S.E. 2d at 497. Further, we think that the facts in the instant case distinguish it from *Brown*. In *Brown* a mobile home was destroyed by fire while the owner of the home was away. The State's evidence tended to show that the fire was probably not caused by

conditions existing inside the mobile home. On the day the fire occurred, officers found personal property belonging to the owner of the burned home in the defendant's possession. The defendant was carried to the sheriff's office where he signed the following statement: "I, Ricky Brown, burnt down a trailer last night at Sid Jones Trailer Park belonging to Cindy." At the time the statement was signed, the defendant had been drinking, smoking marijuana, and was unable to keep food on his stomach. The jury returned verdicts of guilty of burning personal property and guilty of felonious breaking or entering. The defendant appealed and the Court of Appeals found no error in the defendant's trial. We allowed the defendant's petition for discretionary review and reversed that part of the Court of Appeals' decision holding the defendant guilty of the charge of burning personal property. In so holding, this Court stated:

> Even though the defendant's confession identifies him as the person who committed the burning, the State must first establish the *corpus delicti*, that a crime was in fact committed.
>
> The *corpus delicti* in this case is the criminal burning of personal property, to-wit Cindy Blackman's mobile home. There is no dispute either that Ms. Blackman's mobile home was destroyed by fire or that the origin of the fire was never discovered. The State presented evidence designed to show that the fire was most probably not the result of some condition present inside the mobile home. However, the State's evidence was insufficient to show the fire had a criminal origin. In fact it is just as reasonable to assume from the State's evidence that the fire was the result of a negligent act or an accident.

Brown, 308 N.C. at 183, 301 S.E. 2d at 90.

The statement made by the defendant in *Brown* was neutral as to criminal intent as related to the charge of burning personal property. Neither did the *evidence aliunde* the confession tend to support a finding that the crime of burning personal property had occurred.

We therefore hold that the trial court properly denied defendant's motion to dismiss.

Reversed.

STATE OF NORTH CAROLINA v. WILLIAM RUSSELL STALLINGS

No. 652A85

(Filed 6 May 1986)

1. **Criminal Law § 142.3— probation—conditions—authority of court**

A court has the inherent power to suspend a judgment upon just and reasonable conditions and need not rely on its additional statutory authority to dictate the conditions of probation. N.C.G.S. 15A-1343(b).

2. **Criminal Law § 142.3— probation—restitution of drug purchase money—proper**

The restitution a defendant was ordered to pay as a condition of probation was reasonably related to the rehabilitative objectives of probation and was reasonable and just under the circumstances of the case where defendant was convicted of possession and delivery of cocaine and was ordered to repay the $600 paid by an SBI agent for the purchase of cocaine. N.C.G.S. 90-95.3 (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 77 N.C. App. 375, 335 S.E. 2d 344 (1985), which found no error in the trial and conviction of defendant before *Martin, J.*, at the 18 June 1984 session of Superior Court, JOHNSTON County. Heard in the Supreme Court 15 April 1986.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Leland Q. Towns, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

Evidence for the state was presented chiefly through the testimony of Rod A. Broadwell, a special agent for the SBI, who had been involved in an undercover drug investigation in Johnston County since March 1983. He testified that in December of

that year, he had gone with two other individuals to a mobile home where defendant lived with Rickie Williams. Williams agreed to purchase some cocaine for one of the individuals accompanying Broadwell. Williams and Broadwell then left the trailer in search of cocaine but returned empty-handed. According to Broadwell's testimony, Williams told Broadwell to give him $600 and he and defendant would "get it." Broadwell then paid the $600 to Williams. Broadwell further testified that defendant agreed to drive the car and that defendant left with Williams. They returned about an hour later, and defendant produced from his left coat pocket a plastic zip-lock bag containing a white powder substance, which he handed to Broadwell. The powder was subsequently tested and determined to be cocaine.

[1] Defendant was found guilty of possession and delivery of cocaine in violation of N.C.G.S. § 90-95(a)(1) and (3). The trial court sentenced him to three years, the presumptive term for a Class H felony, of which six months was to be served actively, and recommended work release. As a regular condition of probation, the trial court ordered defendant to pay from his work release earnings $600 in restitution to the SBI. Defendant contends that restitution under these circumstances is not authorized by N.C.G.S. § 15A-1343(b) and that it was error to require its payment as a condition of work release. We hold, however, that because a court has the inherent power to suspend a judgment upon reasonable and just conditions, the trial court need not rely on its additional statutory authority to dictate the conditions of probation.

The power of the courts to suspend judgment existed at common law. 4 W. Blackstone, *Commentaries* *394. It has been recorded in the opinions of this Court at least since *State v. Bennett*, 20 N.C. 170 (1838). In *Myers v. Barnhardt*, 202 N.C. 49, 51, 161 S.E. 715, 716 (1932), this Court held:

> The practice of suspending judgments in criminal prosecutions, upon terms that are reasonable and just . . . with the consent of the defendant, has so long prevailed in our courts of general jurisdiction that it may now be considered established, both by custom and judicial decision, as a part of the permissible procedure in such cases.

The adoption of Article 82, Probation, of Chapter 15A did not affect the inherent power of the court to suspend sentences in

criminal cases upon reasonable and just conditions. Article 82 establishes cumulative and concurrent procedures which supplement rather than limit the inherent sentencing power of the court. As this Court held with respect to the predecessor probation statute, Article 82 only provides the courts with additional authority concurrent with the inherent power of the court.

> A court has the inherent power to suspend a judgment or stay execution of a sentence in a criminal case. The probation statute, General Statutes, Ch. 15, Art. 20, adopted in 1937, did not withdraw this authority from the courts. That Act provides a procedure which is cumulative and concurrent rather than exclusive.

State v. Simmington, 235 N.C. 612, 614, 70 S.E. 2d 842, 844 (1952). In *Simmington* this Court made it clear that a judge is free to suspend the execution of a sentence of imprisonment on condition the defendant compensate those whom he has injured and that the defendant has the option to serve his sentence or accept the conditions imposed or appeal. Our holding is buttressed by the express language of N.C.G.S. § 15A-1343(a) (1983):

> The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

[2] It is clear that the $600 paid by the SBI agent in the purchase of the cocaine is a proper subject of restitution. N.C.G.S. § 90-95.3 (1985). Any other result would not only deprive the state of the money, but would unjustly enrich criminals. *Shore v. Edmisten, Atty. General*, 290 N.C. 628, 227 S.E. 2d 553 (1976). In the case before us, a jury found defendant guilty of possession and delivery of cocaine, and the trial court offered him the option of serving a three-year active sentence or serving six months and paying restitution. The amount ordered was patently relevant to the pecuniary injury inflicted upon the state by defendant's criminal activities: the $600 was paid by an agent of the state to Williams for the purchase of cocaine, whereupon defendant delivered the drug to officer Broadwell. We find that the restitution ordered was reasonably related to the rehabilitative objectives of probation, N.C.G.S. § 15A-1343(a), and that the condition was reasonable and just under the circumstances of this case. *Simmington*, 235 N.C. 612, 70 S.E. 2d 842. It is perceived to be a

rehabilitative advantage to have a defendant assume full responsibility for all consequences of his misdeeds. *Alexander v. Johnson*, 742 F. 2d 117 (4th Cir. 1984). By so doing, the defendant will realize the full implications of unlawful acts and be less likely to commit further crimes.

Contrary to defendant's argument, the trial court's order for restitution was not made as a condition of attaining work release pursuant to N.C.G.S. § 148-33.2(c). Work release was ordered by the trial court pursuant to N.C.G.S. § 148-33.1(a). The order for restitution was a regular condition of probation. Moreover, defendant's reliance upon *Evans v. Garrison*, 657 F. 2d 64 (4th Cir. 1981), is misplaced. As a condition of parole, the trial court in *Evans* ordered defendant to pay to the state $2,500 as restitution for "estimated investigative expenses" with respect to the drug activities of defendant. Under the facts of that case, the appellate court held that the state was not a "victim of crime" within the meaning of N.C.G.S. § 15A-1343(d) and therefore the order was invalid. *Cf. Alexander v. Johnson*, 742 F. 2d 117 (4th Cir. 1984) (restitution to state of costs of court-appointed counsel under North Carolina statutes held to be constitutional). *Evans* is readily distinguishable from the case at hand. Here, we are concerned not with "estimated investigative expenses" but with the actual $600 of which the state was deprived by the defendant's criminal acts. Most assuredly, the state was a "victim of crime" because of the sale and the delivery of the cocaine. We note from the transcript that codefendant Williams was not ordered to pay restitution.

The amount of restitution ordered was supported by the record. We find the judgment to be reasonable, just, relevant to the purposes of sentencing, and "reasonably necessary to insure that defendant will lead a law-abiding life." N.C.G.S. § 15A-1343(a).

The decision of the Court of Appeals is accordingly

Modified and affirmed.

GROVER C. MORETZ, JR., EMPLOYEE v. RICHARDS & ASSOCIATES, INC., EMPLOYER, AND UNITED STATES FIDELITY & GUARANTY INSURANCE COMPANY, INSURER, DEFENDANTS

No. 263PA85

(Filed 6 May 1986)

1. **Master and Servant § 69— workers' compensation—permanent disability—no deduction for temporary disability payments**

Where defendants accepted plaintiff's injury as compensable and began making disability payments, those payments were "due and payable" and were not deductible under N.C.G.S. § 97-42 from an award for permanent disability so long as the payments did not exceed the amount determined by statute and by the Commission to compensate plaintiff for his injuries.

2. **Master and Servant § 72— workers' compensation—beginning of payments for permanent disability—plaintiff already fully compensated**

When plaintiff reached his maximum recovery in December 1977, his compensation for temporary total disability ended and his compensation for permanent disability began, and plaintiff has been fully compensated for his injury where he was entitled to 180 weeks of permanent disability payments according to N.C.G.S. § 97-31 and the findings of the Commission, and he has received 255 weeks of disability payments since December 1977.

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, 74 N.C. App. 72, 327 S.E. 2d 290 (1985), which vacated the opinion and award of the North Carolina Industrial Commission filed 4 April 1984 in Docket No. I-2238 and remanded the cause to the Commission. Heard in the Supreme Court 20 November 1985.

Hedrick, Eatman, Gardner & Kincheloe, by Philip R. Hedrick and Thomas E. Williams, for plaintiff-appellant.

Jones, Hewson & Woolard, by R. G. Spratt III and Hunter M. Jones, for defendant-appellees.

MARTIN, Justice.

Plaintiff was employed as a pipe welder for Richards & Associates, Inc., on 6 November 1975 when he suffered a back strain while lifting a heavy bottle of veneer. Defendant carrier, United States Fidelity & Guaranty Insurance Company, accepted the injury as compensable and now concedes that it is bound by that acceptance. The parties stipulated that: the injury was com-

pensable; the plaintiff's average weekly wage was $262.38; the defendant carrier paid disability benefits to plaintiff for 362 weeks and 2 days between 7 November 1975 and 25 October 1982; and plaintiff's condition has not undergone any significant change since 1 December 1977.

As a result of plaintiff's confinement following the back injury, he developed phlebitis of the left leg and suffered a pulmonary embolism. Plaintiff's back has healed; but he continues to have severe pain in his leg, cannot stand on the leg for more than thirty minutes at a time, and is required to take regular medication.

The hearing commissioner found that plaintiff had a 90 percent partial disability of the left leg for which he was entitled to compensation for permanent disability at the rate of $146 per week for a period of 180 weeks. The commissioner concluded that payment was to have begun 26 October 1982. In his findings of fact, the commissioner rejected defendants' contention that they be allowed a credit under N.C.G.S. § 97-42 for compensation already paid to plaintiff for temporary total disability from 7 November 1975 through 25 October 1982.

Defendants appealed to the full Commission, arguing that the award of 180 additional weeks of benefits effectively awarded plaintiff a double payment and that the commissioner's refusal of a credit for benefits already paid was in error. The full Commission adopted the opinion and award of the hearing commissioner and affirmed its results.

The Court of Appeals noted that the findings of the Commission supported a conclusion that by December 1977 plaintiff had achieved maximum recovery and there was no evidence that temporary total disability continued thereafter. "Accordingly, all disability payments made by defendants after 1 December 1977 should be characterized as 'permanent partial' disability payments for which defendants are eligible for a credit in the discretion of the Industrial Commission pursuant to G.S. 97-42." 74 N.C. App. 72, 75, 327 S.E. 2d 290, 293 (1985). The Court of Appeals acknowledged that under N.C.G.S. § 97-42, granting the employer a credit for or deduction of past payments from payments due was within the discretion of the Industrial Commission, but it held

that the Commission had abused its discretion in denying a credit under the circumstances of this case.

Section 97-42 states:

> Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment.

N.C.G.S. § 97-42 (1985). These provisions are typically limited to situations where, for example, an employer pays a disabled employee wages intended as compensation (and not as a gratuity) throughout the period of the latter's absence from work, or where the employer pays the employee a lump sum in settlement of an anticipated award but a change in the latter's condition causes the award to be diminished. *See* 99 C.J.S. *Workmen's Compensation* § 330, at 1181-87 (1958); *Ingram v. Bituminous Casualty Corporation*, 109 Ga. App. 87, 134 S.E. 2d 861 (1964). In North Carolina, this section has been held not to apply to fringe benefits or to insurance proceeds that are of a contractual nature rather than proceeds that are grounded in the workers' compensation law. *Ashe v. Barnes*, 255 N.C. 310, 121 S.E. 2d 549 (1961). None of these circumstances are present in this case.

[1] This section expressly provides that payments made by the employer which were "due and payable" when made are not deductible. The parties to this action stipulated before the hearing commissioner that the carrier accepted plaintiff's injury as compensable shortly after his accident and thereafter began making disability payments. The Workers' Compensation Act provides that a policy insuring an employer against liability arising under that Act must contain an agreement by the insurer to pay promptly all benefits conferred by its provisions, and that such agreement is to be construed as a direct promise to the person entitled to compensation. N.C.G.S. § 97-98 (1985). By virtue of this promise, once the employer has accepted an injury as compensable, benefits are "due and payable." *See also* N.C.G.S. § 97-18(b)

(1985). Because defendants accepted plaintiff's injury as compensable, then initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of section 97-42, *so long as* the payments did not exceed the amount determined by statute or by the Commission to compensate plaintiff for his injuries.

Regarding the issue of excessive payment, then, the question remains whether plaintiff is entitled to further compensation for his disability. The hearing commissioner, citing *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978), concluded that plaintiff was entitled to benefits as scheduled under N.C.G.S. § 97-31(15) and (19), and that this precluded compensation for permanent total disability under N.C.G.S. § 97-29. Section 97-31 provides that compensation shall be paid for disability during the "healing period," which has been characterized as compensation for temporary disability. *See, e.g., Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 326 S.E. 2d 328 (1985). In addition, that section provides that compensation be paid for any remaining disability, which "shall be deemed to continue for the period specified." N.C.G.S. § 97-31 (1985).

[2] Plaintiff's "healing period" had stabilized and he had reached his maximum recovery by December 1977, and it is this date that marks the termination of his compensation for temporary total disability and the initiation of compensation for permanent disability. According to the payment schedule of section 97-31 and in accord with the findings of the Commission, plaintiff was entitled to 180 weeks of disability payments. Plaintiff has received nearly 255 weeks of disability payments since that date. Plaintiff has therefore already received more than he was entitled by statute to receive. We hold that, regardless of how the payments made to plaintiff were characterized, the date upon which he reached his maximum recovery determined the initiation of the statutorily scheduled period of benefits for his remaining disability. Plaintiff has already been fully compensated for his injury, and we hold that defendants owe plaintiff no additional compensation.

The decision of the Court of Appeals is accordingly

Modified and affirmed.

SERVOMATION CORPORATION, PLAINTIFF v. HICKORY CONSTRUCTION COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF v. MILLER-BROOKS ROOFING COMPANY, THIRD PARTY DEFENDANT

No. 298PA85

(Filed 6 May 1986)

Arbitration § 2— arbitration not waived

The defendant in a construction action did not waive arbitration by filing an answer where there was no trial; there was no evidence that plaintiff had lost helpful evidence or taken steps in litigation to its detriment; there was no evidence to support allegations that plaintiff had incurred large expenses answering defendant's interrogatories; plaintiff failed to demonstrate that the judicial discovery procedures used by defendant or their equivalent would not have been available in arbitration; and there was no evidence in the record that plaintiff incurred increased expenses or was prejudiced in any way by being required to meet defendant's legal defenses as well as its demand for arbitration at a summary judgment hearing. N.C.G.S. 1-567.3, N.C.G.S. 1-567.2(a).

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals reported at 74 N.C. App. 603, 328 S.E. 2d 842 (1985), affirming its prior decision that defendant waived its right to compulsory arbitration.

Plaintiff instituted an action alleging that defendant negligently constructed the roof on plaintiff's warehouse and office facility. On 28 April 1982 defendant filed an answer in which it asserted several defenses, including plaintiff's failure to channel its complaints through the architect and submit the dispute to arbitration as required by the contract. Defendant also filed a third party complaint against its subcontractor seeking indemnity and served numerous interrogatories on plaintiff. On 4 May 1983 defendant moved for summary judgment based on its defense that the statute of limitations had run as well as on its procedural contractual defenses. In the alternative defendant moved the trial court to stay the legal action and compel plaintiff to arbitrate. The trial court denied these motions and defendant appealed. The Court of Appeals upheld the trial court's ruling on both grounds. *Servomation Corp. v. Hickory Construction Co.*, 70 N.C. App. 309, 318 S.E. 2d 904 (1984). Defendant petitioned this Court for discretionary review, and we remanded the action to the Court of Appeals for reconsideration in the light of our decision in *Cyclone Roofing Co. v. Lafave Co.*, 312 N.C. 224, 321 S.E. 2d 872 (1984).

Servomation Corp. v. Hickory Construction Co., 312 N.C. 794, 325 S.E. 2d 632 (1985). On remand the Court of Appeals determined that defendant had waived its right to compel arbitration according to the terms of the contract.

Rudisill & Brackett, P.A., by J. Richardson Rudisill, Jr., and Keith Bridges, for plaintiff-appellee.

Patrick, Harper & Dixon, by Stephen M. Thomas, for defendant-appellant.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether defendant waived its right to compulsory arbitration. We hold that it has not.

N.C.G.S. § 1-567.2(a) provides that an arbitration agreement is valid, enforceable and irrevocable unless the parties agree to the contrary.

The leading case on arbitration in North Carolina, *Cyclone Roofing Co. v. Lafave Co.*, 312 N.C. 224, 321 S.E. 2d 872, teaches that arbitration is a contractual right which may be waived. However, the mere filing of a complaint or answer does not result in waiver of arbitration absent evidence showing prejudice to the adverse party.

A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration.

There is a strong public policy favoring the settlement of disputes by arbitration, and doubts concerning the scope of arbitrable issues will be resolved in favor of the party seeking arbitration.

We note holdings from other jurisdictions, consistent with *Cyclone*, to the effect that a party waives arbitration when it engages in conduct inconsistent with arbitration which results in prejudice to the party opposing arbitration. *Maxum Foundations, Inc. v. Salus Corp.*, 779 F. 2d 974, 981 (4th Cir. 1985); *ATSA of*

California, Inc. v. Continental Ins. Co., 702 F. 2d 172, 175 (9th Cir. 1983).

Applying these rules of law to the facts of instant case we initially observe that there has been no long trial. Further there is no evidence that plaintiff has lost helpful evidence or taken steps in litigation to its detriment.

Plaintiff most forcefully argues that it has been prejudiced by being required to answer numerous interrogatories posed by defendant.

A sizeable portion of the interrogatories were directed toward securing information related to the arbitration clause contained in the contract. Although plaintiff's counsel stated in oral argument before this Court that it had incurred large expenses in answering defendant's interrogatories, the record is barren of evidence supporting this statement. In any event, we are of the opinion that evidence of expenses related to defendant's interrogatories would have been irrelevant since plaintiff has failed to demonstrate that the judicial discovery procedures used by defendant, or their equivalent, would be unavailable in arbitration. Thus plaintiff might well have incurred the same expense during arbitration.

Likewise, we fail to see how plaintiff has been prejudiced by the fact that defendant argued its legal defenses during the hearing on its motion for summary judgment and at its argument in the Court of Appeals. There is no evidence *in the record* that plaintiff incurred increased expenses or was prejudiced in any way by being required to meet defendant's legal defenses as well as its demand for arbitration at the summary judgment hearing. Because the trial judge in ruling on defendant's summary judgment motion refused to stay the proceedings and order arbitration, defendant was entitled to argue its legal defenses as well as its demand for arbitration in the Court of Appeals.

The question of prejudice by delay would not be before us if either party had sought an early hearing on defendant's motion to stay the legal action and compel arbitration.

N.C.G.S. § 1-567.3(d) provides:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an ap-

plication therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

Strong public policy favoring settlement of disputes by arbitration requires us to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. We hold that plaintiff has failed to demonstrate such prejudice as would result in a waiver of defendant's right to arbitration.

The decision of the Court of Appeals is reversed and the case is remanded to that court with direction that it further remand the case to the superior court for entry of an order staying the legal action and ordering arbitration pursuant to the terms of the contract.

Reversed and remanded.

ELIZABETH C. LESSARD, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DENISE RENEE LESSARD v. LOUIS RAYMOND LESSARD

No. 663A85

(Filed 6 May 1986)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 77 N.C. App. 97, 334 S.E. 2d 475 (1985), reversing summary judgment for defendant entered by *Chief Judge Lanning* on 13 August 1984 in MECKLENBURG District Court. Heard in the Supreme Court 14 April 1986.

Walker, Palmer & Miller, P.A., by Joe T. Millsaps, for defendant-appellant.

Erwin, Beddow & Reese, P.A., by Fenton T. Erwin, Jr., for plaintiff-appellee.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. WALTER EUGENE SPINKS, JR.

No. 747A85

(Filed 6 May 1986)

ON appeal as a matter of right under N.C.G.S. § 7A-30(2), from a decision of a divided panel of the Court of Appeals, 77 N.C. App. 657, 335 S.E. 2d 786 (1985), finding no error in the defendant's trial and conviction for robbery with a dangerous weapon. Heard in the Supreme Court 16 April 1986.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for the defendant-appellant.

PER CURIAM.

Affirmed.

C. A. CAMPBELL v. EVELYN CONNOR AND HUSBAND, JACK CONNOR, AND JOHN T. HENDERSON

No. 748A85

(Filed 6 May 1986)

APPEAL 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, 77 N.C. App. 627, 335 S.E. 2d 788 (1985), awarding a new trial. Heard in the Supreme Court 14 April 1986.

Pope, McMillan, Gourley & Kutteh, by William H. McMillan, for petitioner-appellant.

McElwee, McElwee, Cannon & Warden, by E. Bedford Cannon, for respondent-appellees.

PER CURIAM.

Affirmed.

ALEXANDER P. SABOL AND PEGGY W. SABOL v. PARRISH REALTY OF ZEBULON, INC., A NORTH CAROLINA CORPORATION AND RALPH McCOIG, JR.

No. 776A85

(Filed 6 May 1986)

APPEAL by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals reported at 77 N.C. App. 680, 336 S.E. 2d 124 (1985), reversing plaintiffs' recovery for damages to a dwelling on the theory of negligence and affirming plaintiffs' recovery of nominal damages on the claim for breach of contract.

Larry E. Norman, for plaintiffs-appellants.

Smith, Debnam, Hibbert & Pahl, by W. Thurston Debnam, Jr. and Jerry Talmadge Myers, for defendants-appellees.

PER CURIAM.

Affirmed.

CONNIE WOODELL AND JAMES WOODELL, III v. PINEHURST SURGICAL CLINIC, P.A., MICHAEL T. PISHKO, M.D., W. K. KILPATRICK, M.D., CLIFFORD J. LONG, M.D., AND JERRY E. SMITH, M.D.

No. 8A86

(Filed 6 May 1986)

PLAINTIFFS appeal 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, 78 N.C. App. 230, 336 S.E. 2d 716 (1985), affirming the order granting summary judgment for defendants entered by *Helms, J.*, on 5 September 1984 in Superior Court, MOORE County. Heard in the Supreme Court 16 April 1986.

Staton, Perkinson, West, Doster & Post, by Stanley W. West, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and William H. Moss, for defendant-appellees.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

WILLIAM A. DAVIDSON v. UNITED STATES FIDELITY AND GUARANTY COMPANY

No. 13A86

(Filed 6 May 1986)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision by a divided panel of the Court of Appeals, 78 N.C. App. 140, 336 S.E. 2d 709 (1985), affirming summary judgment for defendant entered by *Judge Burroughs* on 10 December 1984 in MECKLENBURG Superior Court.

Lewis, Babcock, Gregory & Pleicones by A. Camden Lewis and Daryl G. Hawkins; Hamel, Hamel & Pearce, P.A., by Hugo A. Pearce, III and Reginald S. Hamel for plaintiff appellant.

Jones, Hewson & Woolard by Harry C. Hewson and Hunter M. Jones for defendant appellee.

PER CURIAM.

Plaintiff seeks a declaratory judgment that he is entitled to recover under his "underinsured motorist" coverage provided in his automobile liability policy issued by defendant. Both the trial court and a majority of the Court of Appeals, one judge dissenting, concluded that plaintiff was not entitled to any benefits under his underinsured motorist coverage. We agree. The decision of the Court of Appeals is, therefore,

Affirmed.

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

DUNN v. PRENTIS

No. 53P86.

Case below: 78 N.C. App. 635.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

DURHAM COUNCIL OF THE BLIND v.
EDMISTEN, ATT'Y GENERAL

No. 149P86.

Case below: 79 N.C. App. 156.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986. Motion by defendants to dismiss appeal for lack of significant public interest allowed 6 May 1986.

E. F. BLANKENSHIP CO. v.
N. C. DEPT. OF TRANSPORTATION

No. 205A86.

Case below: 79 N.C. App. 462.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals allowed 6 May 1986.

FIDELITY BANKERS LIFE INS. CO. v. DORTCH

No. 132PA86.

Case below: 79 N.C. App. 148.

Petition by defendant (Patricia Dortch) for discretionary review under G.S. 7A-31 allowed 6 May 1986.

GREAT AMERICAN INS. CO. v. ALLSTATE INS. CO.

No. 100P86.

Case below: 78 N.C. App. 653.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 May 1986.

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

HICKS v. REAVIS

No. 74P86.

Case below: 78 N.C. App. 315.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 6 May 1986.

IN RE APPEAL OF BASSETT FURNITURE INDUSTRIES

No. 147A86.

Case below: 79 N.C. App. 258.

Motion by Rockingham County to dismiss appeal for failure to show a substantial constitutional question allowed 6 May 1986.

LAND-OF-SKY REGIONAL COUNCIL v. CO. OF HENDERSON

No. 7P86.

Case below: 78 N.C. App. 85.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

OLYMPIC PRODUCTS CO. v. ROOF SYSTEMS, INC.

No. 231P86.

Case below: 79 N.C. App. 436.

Petitions by defendants (Carolina Steel and Craven Steel, Inc.) for discretionary review under G.S. 7A-31 denied 6 May 1986. Motion by plaintiff and defendant (Carlisle Co.) to dismiss appeals by defendants (Carolina Steel and Craven Steel, Inc.) for lack of substantial constitutional question allowed 6 May 1986.

PARKS v. DEPT. OF HUMAN RESOURCES

No. 151P86.

Case below: 79 N.C. App. 125.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

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

POFF v. BOLEN

No. 6P86.

Case below: 78 N.C. App. 222.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

SCHUMAN v. INVESTORS TITLE INS. CO.
AND SCHUMAN v. BEEMER

No. 112P86.

Case below: 78 N.C. App. 783.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

STATE v. BURNS

No. 118P86.

Case below: 78 N.C. App. 807.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

STATE v. CAMPANIELLO

No. 19P86.

Case below: 78 N.C. App. 222.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

STATE v. DAYE

No. 115PA86.

Case below: 78 N.C. App. 753.

Petition by the State for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1986.

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

STATE v. FELTS

No. 113P86.

Case below: 79 N.C. App. 205.

Petition by the State for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

STATE v. HODGES

No. 195A86.

Case below: 79 N.C. App. 370.

Motion by the State to dismiss appeal for failure to show a substantial constitutional question allowed 6 May 1986.

STATE v. HOLLOWAY

No. 26P86.

Case below: 78 N.C. App. 223.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

STATE v. HUNT

No. 96P86.

Case below: 78 N.C. App. 223.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 May 1986.

STATE v. INMAN

No. 134P86.

Case below: 79 N.C. App. 370.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

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

STATE v. McCULLOUGH

No. 241P86.

Case below: 79 N.C. App. 541.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 May 1986.

STATE v. McLAURIN

No. 249P86.

Case below: 80 N.C. App. 167.

Petition by defendant for writ of supersedeas and temporary stay denied 22 April 1986.

STATE v. MARRERO-ALDAMA

No. 157P86.

Case below: 79 N.C. App. 571.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986. Temporary stay entered by this Court pending consideration of the substantive petition in this case dissolved 6 May 1986.

STATE v. SHOEMAKER

No. 243P86.

Case below: 80 N.C. App. 95.

Petition by defendant for writ of supersedeas and temporary stay denied 17 April 1986.

STATE v. TAFT

No. 250P86.

Case below: 80 N.C. App. 168.

Petition by defendant for writ of supersedeas and temporary stay of the judgment of the Court of Appeals denied 23 April 1986.

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

STATE v. THRIFT

No. 23P86.

Case below: 78 N.C. App. 199.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986. Motion by the State to dismiss appeal for lack of substantial question allowed 6 May 1986.

STATE ex rel. UTILITIES COMM. v. MACKIE

No. 108A86.

Case below: 79 N.C. App. 19.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1986. Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as basis for dissenting opinion allowed 6 May 1986.

TROUGHT v. RICHARDSON

No. 116P86.

Case below: 78 N.C. App. 758.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

TURLINGTON v. McLEOD

No. 135P86.

Case below: 79 N.C. App. 299.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1986.

STATE OF NORTH CAROLINA v. JACKIE EDWARD MASSEY

No. 552A84

(Filed 6 May 1986)

1. **Constitutional Law § 31— first degree murder—private detective denied—no abuse of discretion**

The trial court did not abuse its discretion in a first degree murder prosecution by denying defendant's motion to hire a private investigator where defendant did not show a reasonable likelihood that the efforts of a private investigator would have materially assisted in the preparation and presentation of his case or that without such assistance he did not receive a fair trial. N.C.G.S. 7A-450 (1981); N.C.G.S. 7A-454 (1981).

2. **Constitutional Law § 31— first degree murder—statistician to examine jury venire denied—no abuse of discretion**

The trial court did not abuse its discretion in a first degree murder prosecution by denying defendant's motion for funds to employ a statistician to review the jury venire over a substantial period of time. Defendant presented no evidence that the jury selection process was discriminatory or that a statistician would have resulted in a more favorable jury; defendant was in effect asking the court to appoint a statistician to go on a fishing expedition.

3. **Constitutional Law § 31— first degree murder—assistant counsel denied—no abuse of discretion**

The trial court did not abuse its discretion in a first degree murder prosecution by denying defendant's motion for the appointment of an assistant counsel where there was no evidence that the case was so complex or plagued with other difficulties as to require the appointment of assistant counsel or that defense counsel handled the trial and appeal other than in a competent manner. N.C.G.S. 7A-450(b)(1) (Cum. Supp. 1985).

4. **Constitutional Law § 31— first degree murder—social psychologist and private psychiatrist denied—no error**

The trial court did not abuse its discretion in a prosecution for first degree murder by denying defendant's motions to hire a social psychologist and a private clinical psychiatrist where defendant offered no evidence that a social psychologist or a clinical psychiatrist would have materially aided him in the preparation of his defense or that he would not otherwise receive a fair trial. Evidence that defendant was mildly retarded was not a sufficient basis to require the appointment of a private psychiatrist where defendant had already been examined by a psychiatrist at State expense and there was no serious contention that defendant's sanity at the time the offense was committed would be a significant factor at trial.

5. **Jury § 5.1— venire—statutory requirements for selecting not followed—indictment not quashed**

The trial court did not err in a murder prosecution by denying defendant's motion to quash the petit jury and the indictment against him

where the jury commissioners failed to strictly comply with the statutory requirements in preparing jury lists but all of the evidence tended to negate any corrupt intent, discrimination, or irregularities which affected the actions of the jurors actually drawn and summoned. N.C.G.S. 9-2, N.C.G.S. 9-2.1, N.C.G.S. 9-3, N.C.G.S. 9-5.

6. Criminal Law § 91.1— continuance for further psychiatric examination—denied—no error

The trial court did not err in a prosecution for murder by denying defendant's motion for a continuance so that his recently hired clinical psychologist could further evaluate defendant's mental condition where two months elapsed between the date defendant's final motion for the appointment of a psychiatrist was denied and the trial date; the psychologist testified in a manner favorable to defendant; and defendant made no serious contention that the testimony could have been more favorable or persuasive if he had been granted a continuance.

7. Criminal Law § 75.14— waiver of rights—knowing, voluntary, intelligent

A confession in a first degree murder prosecution was properly admitted where defendant was fully advised of his *Miranda* rights and his waiver of those rights was knowing, voluntary, and intelligent in that defendant was questioned in a police car with three officers at the scene of the crime; defendant was familiar with the name of the primary officer and the other two were not always present; there was no evidence that any officer displayed a weapon, touched defendant, or used threatening language; defendant said at trial that he confessed to protect his brother; defendant was not tricked as to why he was being questioned; defendant did not appear to be under the influence of alcohol or drugs; the questioning lasted less than two hours; defendant was eighteen years old and could read and write to a limited degree; defendant had acquired a driver's license at sixteen and had worked a short time; defendant's answers were responsive to questions asked by his attorney; and defendant appeared to have no difficulty answering his attorney's questions notwithstanding his mild mental retardation.

8. Criminal Law § 75.3— first degree murder—confession—not tainted fruit of prior illegal confession

A confession by a first degree murder defendant to his father while an officer was present was not the fruit of a prior illegal confession where the prior confession was legal; moreover, the confession to defendant's father was admissible as a voluntary statement against interest because defendant was not being subjected to custodial interrogation and any compelling influence was exerted by the father rather than the officer.

9. Homicide § 21.6— first degree murder—evidence sufficient

Defendant's motion to dismiss a murder charge was properly denied where defendant's voluntary written confession revealed that the victim was killed during the robbery of his store by defendant and his brother; the victim was found shot to death outside his store; the cash register was empty and two empty .22 caliber shells were found at the murder scene; a .22 caliber rifle

which was later identified as the murder weapon was found in defendant's house; and defendant admitted to his father that he had shot the victim.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment, entered by *Rousseau, J.*, at the 7 May 1984 Criminal Session of Superior Court, UNION County, following his conviction of murder in the first degree. Heard in the Supreme Court 11 September 1985.

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

W. David McSheehan, for the defendant-appellant.

FRYE, Justice.

Defendant contends that the trial court erred in denying his motions for independent experts; in refusing to quash the indictment and petit jury venire; in denying his motions to continue, to suppress, to dismiss, to set aside the verdict based on the insufficiency of the evidence and to set aside the verdict as being against the greater weight of the evidence. For the reasons stated in this opinion, we find no error in the trial proceedings leading to defendant's convictions of the crimes charged.

Defendant was charged with murder in the first degree and armed robbery. The State's evidence tended to show that shortly after 8:00 p.m. on 20 December 1983, Al Simpson was found shot to death outside his country store on Highway 200 in Union County. He was last seen alive by his wife around 7:30 that night. A lieutenant with the Union County Sheriff's Department, Jack Carpenter, arrived at the store around 8:30 p.m. and began investigating the death of Mr. Simpson. The cash register in the store was empty. Two empty .22 caliber shells were found at the scene. While in the store, Lieutenant Carpenter received a phone call concerning a car which had been seen earlier near Simpson's store. A woman entering a nearby church had noticed a car parked off Highway 200 near Simpson's store and became suspicious. She drove near the vehicle and noted the license plate number. After learning of Al Simpson's death, she gave this information to the police. The car was registered to defendant.

Sometime during the early morning hours of 21 December 1983, two police officers went to defendant's grandmother's house where defendant was staying. A car fitting the description given by the woman and bearing the same license plate number was parked in the yard. When the officers shined spotlights on the vehicle, several people came out on the front porch. After ascertaining his identity, the officers asked defendant to accompany them to Al Simpson's store to talk to Lieutenant McCain. Defendant agreed and went to the crime scene with the officers.

Defendant was advised of his *Miranda* rights prior to police questioning. Initially, defendant denied any complicity in the crimes but later confessed to the murder and robbery. According to defendant's written confession, he and his brother, Bobby, went to Mr. Simpson's store to rob it. They took with them a .22 caliber rifle which belonged to their father. When Mr. Simpson let them into the store, defendant told him that they wanted his money. Mr. Simpson backed up to a counter and sat down. He then "came at [defendant] grabbing the gun." Defendant shot him several times. While this was occurring, Bobby took the money out of the cash register. Defendant and his brother ran back to the car which was parked on a side road off Highway 200 north of the store, and drove back to their grandmother's house. Bobby gave defendant $17 of the money that he took from the store. Defendant hid the rifle in a closet in his grandmother's house.

On the day following his arrest, defendant admitted to his father in the presence of Officer Rollins that he had shot Al Simpson.

Investigating officers found a .22 caliber rifle in a closet in defendant's grandmother's house. An analysis of the bullets taken from Simpson's body disclosed that the rifle taken from the closet was the murder weapon.

Defendant testified in his own behalf. Defendant's testimony was that around nighttime on 20 December 1983 he and his brother, Bobby, were on their way to get gas from Al Simpson's store when his car ran out of gas. Defendant parked the car on a side road off Highway 200 near the store. Bobby walked to the store to get some gas while defendant stayed with the car. When Bobby returned with the gas, defendant put it in the car and drove to the store to get some more gas. At that time they saw a car at

the store. The two men drove back to their grandmother's house; defendant changed clothes and went to visit several people. Defendant testified that he heard about Al Simpson's murder on that night. Upon hearing this news, he and another brother went out to his car to get the rifle that he had put there earlier for hunting. Defendant found that the bullets were missing but didn't know how this had happened. Defendant testified that he confessed to the murder and robbery because he was covering for Bobby. The jury returned verdicts of guilty of murder in the first degree and armed robbery. Judgment was arrested on the armed robbery conviction. Defendant was sentenced to life imprisonment after the jury was unable to reach a verdict at the sentencing phase of his trial. N.C.G.S. § 15A-2000(b) (1983).

I.

Defendant first assigns as error the denial of his motion for appointment of assistant counsel and the denial of his motions for funds to hire an independent clinical psychologist or psychiatrist, a private investigator, a social psychologist and a statistician. Defendant contends that the denial of these motions severely limited his ability to properly prepare a defense in the case against him.

N.C.G.S. § 7A-450 (1981), provides in pertinent part:

. . . .

(b) Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation . . . .

N.C.G.S. § 7A-454 (1981) further provides: "The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person . . . . Fees and expenses accrued under this section shall be paid by the State."

It is well established that the question of whether an expert should be appointed at the expense of the State to assist an indigent defendant is within the sound discretion of the trial judge and his decision thereon will not be reversed on appeal absent a showing of abuse of that discretion. *State v. Williams*, 304 N.C.

394, 284 S.E. 2d 437 (1981). "Experts for trial preparation should be provided only when there is a reasonable likelihood that the expert will materially aid the defendant in the preparation or presentation of the defense or that without such help it is probable the defendant will not receive a fair trial." *State v. Gardner*, 311 N.C. 489, 498-99, 319 S.E. 2d 591, 598 (1984); *see also State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983).

In *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591, this Court considered whether an indigent defendant was entitled to the appointment of a private investigator to assist in his defense. This Court stated that such an appointment is within the discretion of the judge. We held that "the appointment of a private investigator should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense, since '[t]here is no criminal case in which defense counsel would not welcome an investigator to comb the countryside for favorable evidence.'" *State v. Gardner*, 311 N.C. at 499, 319 S.E. 2d at 598; *see also State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562.

[1] Applying the above stated principles to the facts of the instant case, we conclude that the trial judge did not abuse his discretion in refusing to appoint a private investigator to assist defendant. Defense counsel requested the appointment of a private investigator because he did not have time to single-handedly gather available evidence and interview potential witnesses in preparation for the trial. At the motion hearing, defense counsel stated:

> We feel that we need an investigator to go out into the community to gather not only evidence but to interview potential witnesses for the defense, to investigate the background of any of the veniremen that are called to hear this case . . . we need that investigator to be able to do a very thorough search through the broadcasts, newspaper media records to determine if he can or to assist counsel in determining whether or not defendant's rights have been prejudiced by pretrial publicity; that we need that information at our disposal . . . we need to check into all of [defendant's] background, school records, work records, life style, anything of a necessary—to go into trial of the case, to go not only for

> the guilt or innocence phase, but also to prove mitigating circumstances in any pre-sentence hearing that may be held in this case . . . .

While defendant's need to obtain all available evidence to aid in his defense has great merit, we do not believe that his arguments rise to the level of showing a reasonable likelihood that the efforts of a private investigator would have materially assisted in the preparation and presentation of his case or that without such assistance he did not receive a fair trial. "[T]he State is not required by law to finance a fishing expedition for defendant in the vain hope that something will turn up." *State v. Gardner*, 311 N.C. at 499, 319 S.E. 2d at 599. We find no abuse of discretion in the trial court's refusal to appoint a private investigator.

[2] Secondly, defendant contends that the trial judge erred in denying his motion for funds to employ a statistician. In the record and at the hearing on the motion, defendant stated that he needed a statistician to review the jury venire in Union County over a substantial period of time to determine whether the jury commission failed to perform its statutory duty when compiling the jury venire from which defendant's jury would be selected. *See* N.C.G.S. § 9-2 (1981 & Cum. Supp. 1985). Defendant presented no evidence that the new jury selection process in Union County was discriminatory, or that the services of a statistician would have resulted in the selection of a more favorable jury. In effect, defendant was asking the trial court to appoint a statistician to go on a fishing expedition in search of potential violations of the statutes regulating the preparation of jury lists. This is not a sufficient basis to justify the appointment of a statistician. *See State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437. The trial court did not abuse its discretion in denying this motion.

[3] We now consider the trial court's denial of defendant's motion for the appointment of assistant counsel.[1] At the hearing on the motion, defense counsel essentially stated that assistant counsel was needed because he, as a sole practitioner, didn't have

1. The 1985 amendment to N.C.G.S. § 7A-450 is not applicable to the present case. The 1985 amendment, effective 1 July 1985 and applicable to indictments returned after 11 July 1985, requires appointment of an assistant counsel for an indigent person indicted for murder if the State is seeking the death penalty. N.C.G.S. § 7A-450(b)(1) (Cum. Supp. 1985).

the manpower to adequately prepare, research, and investigate matters in the case.

In *State v. Williams*, 304 N.C. 394, 406, 284 S.E. 2d 437, 445, this Court held that

> as in the case of providing private investigators or other expert assistance to indigent defendants, we think the appointment of additional counsel is a matter within the discretion of the trial judge and required only upon a showing by a defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial.

In the instant case, defendant presented no evidence to the trial court that would tend to establish nor does the record disclose that defendant's case was so factually or legally complex, or plagued with other difficulties as to require the appointment of assistant counsel to ensure defendant's right to a fair trial and an adequate defense. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). We note that there is nothing in the record which indicates that defense counsel handled the trial or appeal of defendant's case other than in a competent manner. We find no abuse of discretion in the trial judge's failure to appoint assistant counsel.

[4] Defendant next contends that the trial court erred in denying his motion for funds to employ a social psychologist. Defendant offered no evidence that such an expert would have materially aided him in the preparation of his defense or that absent such assistance it was probable that he would not receive a fair trial. Accordingly, we reject this contention.

Lastly, defendant contends that the trial judge erred in denying his motion for funds to hire a private clinical psychologist or psychiatrist.

By order of Judge Michael E. Beale, dated 27 December 1983, defendant was transferred to Dorothea Dix Hospital for observation and treatment to determine his capacity to proceed to trial. The psychiatrist's report indicated that defendant is mildly mentally retarded and as a result has limited intellectual ability and judgment. In the examining psychiatrist's opinion, defendant was capable of proceeding to trial in that he understood the charges

against him and was capable of aiding his attorneys in his defense.

On 6 February 1984, by oral motion, and 2 March 1984, by written motion, defense counsel moved that funds be made available to hire a private psychiatrist to assist in determining whether defendant's mental capacity was such that he could have voluntarily and intelligently waived his *Miranda* rights prior to making incriminating statements to the police. Following hearings on the motions, both were denied by the trial court. We find no error in the trial court's refusal to provide funds for an additional psychiatric evaluation. Evidence that an indigent defendant is mildly retarded is not a sufficient basis to require the appointment of a private psychiatrist, at least where the defendant has already been examined by a psychiatrist at State expense. *See State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591. Defendant has not shown that there is a reasonable likelihood that an additional psychiatrist would have materially aided in the preparation and presentation of his case or that he was denied a fair trial.

Defendant contends that *Ake v. Oklahoma*, --- U.S. ---, 84 L.Ed. 2d 53 (1985), requires the appointment of a private psychiatrist in this case. In *Ake*, the Court held that an indigent defendant has a constitutional right to be examined by a private psychiatrist when he has "demonstrated to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Ake*, --- U.S. at ---, 84 L.Ed. 2d at 66. In the instant case, we are convinced that defendant failed to make such a demonstration. While there is clear and uncontroverted evidence that defendant is mildly retarded, there was no serious contention that defendant's sanity at the time the offense was committed would be a significant factor at trial. There was no abuse of discretion in the judge's failure to appoint a private psychiatrist for this defendant.[2]

II.

[5] Defendant next argues that the trial court erred in refusing to quash the petit jury venire and the indictment against him. By

2. We note that the co-defendant, defendant's brother Bobby, was examined by the same State psychiatrist and found to be so seriously retarded as to only meet the minimum standard for capacity to proceed to trial. Upon this showing, the trial judge afforded Bobby Massey access to an additional psychiatric evaluation.

this assignment of error, defendant contends that the Union County Jury Commission violated several statutory provisions regulating the procedure to be used in preparing jury lists. Specifically, defendant complains that the Commission failed to prepare the jury list at least thirty days prior to 1 January 1984. N.C.G.S. § 9-5 (1981). Also, defendant contends that the commission failed to follow the procedure set forth in N.C.G.S. § 9-2(d) in selecting the jurors, and failed to put in writing a procedure whereby the data processing department was to maintain and effectively preserve public access to the list of prospective jurors, and the time sequence for drawing and summoning a jury panel in violation of N.C.G.S. § 9-2.1. The crux of defendant's arguments is that the statutes use the word "*shall*" throughout which is generally imperative or mandatory and not merely directory. The pertinent statutory provisions are as follows:

N.C.G.S. § 9-2—Preparation of jury lists; sources of names.

(a) It shall be the duty of the jury commission beginning July 1, 1981, (and each biennium thereafter) to prepare a list of prospective jurors qualified under this Chapter to serve in the biennium beginning January 1, 1982, (and each biennium thereafter).

. . . .

(d) When more than one source is used to prepare the jury list the jury commission shall take randomly a sample of names from the list of registered voters and each additional source used. The same percentage of names must be selected from each list. The names selected from the voter registration list shall be compared with the entire list of names, from the second source. Duplicate names shall be removed from the voter registration sample, and the remaining names shall then be combined with the sample of names selected from the second source to form the jury list. If more than two source lists are used, the same procedure must be used to remove duplicates.

(e) As an alternative to the procedure set forth in subsection (d), the jury commission may merge the entire list of names of each source used, remove the duplicate names, and

randomly select the desired number of names to form the jury list.

N.C.G.S. § 9-2.1. Alternate procedure in certain counties.

(a) In counties having access to electronic data processing equipment, the functions of preparing and maintaining custody of the list of prospective jurors, the procedure for drawing and summoning panels of jurors, and the procedure for maintaining records of names of jurors who have served, been excused, been delayed in service, or been disqualified, may be performed by this equipment, except that decisions as to mental or physical competency of prospective jurors shall continue to be made by jury commissioners. The procedure for performing these functions by electronic data processing equipment shall be in writing, adopted by the jury commission, and kept available for public inspection in the office of the clerk of court. The procedure must effectively preserve the authorized grounds for disqualification, the right of public access to the list of prospective jurors, and the time sequence for drawing and summoning a jury panel.

N.C.G.S. § 9-5. Procedure for drawing panel of jurors; numbers drawn.

The board of county commissioners in each county shall provide the clerk of superior court with a jury box, the construction and dimensions of which shall be prescribed by the administrative officer of the courts. At least 30 days prior to January 1 of any year for which a list of prospective jurors has been prepared, a number of discs, squares, counters or markers equal to the number of names on the jury list shall be placed in the jury box. The discs, squares, counters, or markers shall be uniform in size, weight, and appearance, and may be made of any suitable material. They shall be numbered consecutively to correspond with the numbers on the jury list. The jury box shall be of sufficient size to hold the discs, squares, counters or markers so that they may be easily shaken and mixed, and the box shall have a hinged lid through which the discs, squares, counters or markers can be drawn. The lid shall have a lock, the key to which shall be kept by the clerk of superior court.

> At least 30 days prior to any session or sessions of superior or district court requiring a jury, the clerk of superior court or his assistant or deputy shall, in public, after thoroughly shaking the box, draw therefrom the number of discs, squares, counters, or markers equal to the number of jurors required for the session or sessions scheduled . . . .

The trial court, after hearing evidence offered by defendant and the State, made findings of facts summarized as follows:

The jury commissioners, along with the clerk of superior court, the county manager and others [including an advisor from the Administrative Office of the Courts] met on 15 December 1983 to discuss the preparation of the jury list for the 1984-85 biennium. The committee decided to follow the procedure outlined in N.C.G.S. § 9-2, using both the list of registered voters and licensed drivers in Union County. The names from the driver's license list were selected by a computer utilizing an interval selection method. The data processing office selected every seventh name beginning with the fourth name and each seventh name thereafter. The names from the list of registered voters which had already been entered in the computer were selected in the same manner. Those names from the voter registration list which had not yet been entered into the computer were manually selected by the clerk of superior court using the same interval selection process. The manually selected voter list was entered into the computer and a single voter list was compiled. The voter list and the driver's license list were examined and all duplications and disqualified persons under N.C.G.S. § 9-3 were stricken. A final list of prospective jurors was completed 20 December 1983.

The trial court concluded that

> even though the Jury Commission may not have followed in detail the exact mandate of the statute, there has been no showing that the Jury Commission or anyone acting on their behalf acted arbitrarily or capricious [sic]. To the contrary, it appears and the court concludes that the names of potential jurors was [sic] randomly selected, both from the voter list and the driver's license list. The court further concludes that the slight variation in the procedure is not a substantial violation of obtaining a randomly selected jury. The court

> further concludes that the defendant has not shown any identifiable class who may or might have been excluded from the jury list, nor have they [sic] shown any systematic exclusion of any group of persons, and the court further concludes that the selection of the master jury list in Union County in December 1983 is in substantial compliance with the law.

These conclusions are clearly supported by the record. Thus, the issue before this Court is whether technical and insubstantial violations of the statutes regulating jury selection procedure in Chapter 9 of the General Statutes are sufficient to vitiate a jury list or afford a challenge to the array. We think not.

In *State v. Koritz*, 227 N.C. 552, 556, 43 S.E. 2d 77, 80 (1947), this Court stated that "mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly, or intentionally discriminatory, would not vitiate the list or afford a basis for a challenge to the array." Nevertheless, the jury commissioners may not " 'substitute for the methods chosen by the Legislature those of their own as being more desirable and better adapted to accomplish the end in view.' " *State v. Ingram*, 237 N.C. 197, 204, 74 S.E. 2d 532, 537 (1952), quoting from *State v. Mallard*, 184 N.C. 667, 114 S.E. 17 (1922).

In *State v. Vaughn*, 296 N.C. 167, 250 S.E. 2d 210 (1978), *cert. denied*, 441 U.S. 935, 60 L.Ed. 2d 665 (1979), the defendant moved to quash the indictment against him alleging that the Cabarrus County Jury Commission followed improper procedure in compiling the final jury list from which members of his grand jury were selected. We noted that even if there had been a showing that some qualified persons were improperly disqualified from the jury list, dismissal of the indictment would not have been required, "absent a showing of corrupt intent or systematic discrimination in the compilation of the list, or a showing of the presence upon the grand jury itself of a member not qualified to serve." *Id.* at 175, 250 S.E. 2d at 215. The Court further stated that

> This Court has held on numerous occasions that, in the absence of statutory language indicating that preparation of jury lists shall be void if the directions of the act be not strictly observed, a mere showing of a violation of the statutory procedures will not merit the quashing of an indictment. *See State v. Yoes, et al.*, and cases cited therein, 271 N.C.

> 616, 157 S.E. 2d 386 (1967). The fact that these cases were decided prior to the various 1967 amendments to Chapter 9, Article 1, does not vitiate the force of this prior law, for absent from such amendments is the language requiring dismissal unless strict observance is shown. Therefore, we hold that in order to justify a dismissal of an indictment on grounds that statutory procedures were violated in the compilation of the jury list, a party must show either corrupt intent (citation omitted), discrimination (citation omitted), or irregularities which affect the actions of the jurors actually drawn and summoned (citation omitted).

Id. at 175, 250 S.E. 2d at 215.

In the instant case, while it is clear that the jury commissioners failed to strictly comply with the statutes, all of the evidence tends to negate any corrupt intent, discrimination, or irregularities which affected the actions of the jurors actually drawn and summoned. The jury commission did not consciously substitute for the methods chosen by the legislature those of their own as being more desirable or better adapted to accomplish the end in view. Instead, realizing that a part of their voter registration records were not yet on computer, they sought assistance from the Administrative Office of the Courts and the Institute of Government in a belated effort to comply with the mandate of the statute. The trial judge found, on competent evidence, that the jurors were randomly selected, both from the voter list and the driver's license list and that the selection of the master jury list was in substantial compliance with the law. Under these circumstances, there is no justification for a dismissal of the indictment or challenge to the array on the basis that statutory procedures were violated in the compilation of the jury list.

III.

[6] Defendant next assigns error to the trial court's denial of his motion for a continuance. At the hearing on the motion, defense counsel argued, among other things, that a continuance was essential so that defendant's recently hired clinical psychologist, Dr. Stack, could further evaluate defendant's mental condition. Defendant contends that it was paramount to his case that he have a proper evaluation and sufficient time for his counsel to talk with

the psychologist in order to properly prepare his defense related to his motion to suppress and other matters.

"A motion for a continuance is ordinarily addressed to the sound discretion of the trial court. Therefore, the ruling is not reversible on appeal absent an abuse of discretion." *State v. Smith*, 310 N.C. 108, 111, 310 S.E. 2d 320, 323 (1984). However, if "a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal." *Id.* at 112, 310 S.E. 2d at 323. In his brief, defendant does not base his motion on a specific constitutional right. However, "every defendant possesses a due process right to a reasonable time and opportunity to investigate his case and produce competent evidence in his defense." *Id.*

Assuming, *arguendo*, that defendant is asserting a constitutional right, we must determine whether he is entitled to any relief on appeal. Defendant made requests on 6 February and 2 March 1984 for State funds to hire a private psychiatrist or psychologist. After hearings on the motions, both were denied. Approximately two months elapsed between the date defendant's final motion for the appointment of a psychologist or psychiatrist was denied and the trial date. Dr. Stack examined defendant on 4 May 1984. The trial commenced on 7 May 1984.

In support of his motion, defense counsel argued that a psychologist had not been retained earlier because defendant and his family could not raise sufficient funds to employ such services. Defense counsel stated that he had agreed to pay Dr. Stack's fees from his personal account. While evidence of defendant's financial hardship does not fall on deaf ears, we cannot conclude that the trial court deprived defendant of a reasonable opportunity to investigate his case or produce competent evidence by refusing to grant a continuance. Defendant's motion for funds for a private psychologist was denied as early as 6 February 1984, some three months prior to the actual beginning date of the trial. Under these circumstances, it is difficult to justify a continuance based on the last minute hiring of a psychologist.

Even if the trial court erred in refusing to grant defendant's motion for a continuance, defendant was not prejudiced thereby. Dr. Stack examined defendant prior to trial and testified in a manner favorable to defendant at the suppression hearing. Dr.

Stack testified that in his opinion defendant did not knowingly and intelligently waive his right to counsel before he made incriminating statements to the law enforcement officers. Defendant makes no serious contention that the psychologist's testimony could have been more favorable or persuasive if he had been granted a continuance. Thus, we find that denial of the motion to continue, if error, was harmless beyond a reasonable doubt.

IV.

[7] Defendant contends that his confession to the charged crimes was inadmissible because (1) it was obtained during a custodial interrogation and (2) his waiver of the *Miranda* warnings was not a knowing, intelligent, and voluntary decision. We do not agree.

The trial court's findings of fact following a voir dire hearing on the voluntariness of a confession are conclusive on appeal if they are supported by competent evidence in the record. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983); *see also State v. Poole*, 304 N.C. 201, 283 S.E. 2d 732 (1981). "No reviewing court may properly set aside or modify those findings if so supported. (Citations omitted.) This is true even though the evidence is conflicting." (Citations omitted.) *State v. Jackson*, 308 N.C. at 569, 304 S.E. 2d at 145. Thus, we must determine whether the findings are supported by the record.

At the voir dire hearing conducted to determine the admissibility of defendant's confession, the trial court heard evidence, including the testimony of defendant, made the appropriate findings of fact and then concluded as follows:

> Based on the foregoing findings of fact the court concludes that on or about the early morning hours of December 21, 1983 the defendant was picked up by Officer Carpenter; that he was not under arrest and that he voluntarily went with the officers back to the scene; that the officers had not had probable cause to arrest the defendant and that while he was being questioned from about 1:00 A. M. to about 3:00 A. M. the defendant was not in custody.
>
> The court further concludes that even if he were in custody that the officers advised the defendant of his constitutional rights and that the defendant signed a waiver of those rights.

The court further concludes that after being advised of his Miranda rights the defendant voluntarily, knowingly and intelligently waived his right to an attorney and voluntarily, knowingly and intelligently made a statement to the Deputy Sheriff, and that that statement is admissible in the trial of this case.

Defendant challenges the trial court's conclusion that he was not in custody when questioned by the officers on the morning of 21 December 1983. Defendant contends that a "custodial interrogation" was conducted and that he was deprived of his freedom of action in a significant way, thereby constituting a *de facto* arrest and custodial restraint. We find it unnecessary to decide the question of "custodial interrogation," since defendant was, in any event, fully advised of his *Miranda* rights prior to police questioning concerning the homicide and armed robbery. *See Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966). Assuming, *arguendo*, that defendant was in custody, we will address his contention that the confession was inadmissible because he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. Defendant argues that he signed the waiver of rights form due to psychological pressure and coercion and his limited intellectual and mental abilities.

In determining the voluntariness of a confession, we must look at the totality of the circumstances of the case. *See State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134. The testimony of several officers and defendant discloses that defendant was questioned in a police car in the presence of three officers at the murder scene. Defendant testified that he was familiar with the name of Lieutenant McCain, the officer who primarily conducted the interview. The evidence also shows that the other two officers were not present at all times during the interview. There is no evidence that any officer displayed a weapon, touched defendant, or used threatening language. Defendant testified at trial that he was in no way threatened by the officers nor did he complain to them about the manner in which he was being treated. According to defendant's testimony, he confessed in order to protect his brother, Bobby, his co-defendant. Prior to any questioning about the murder and robbery, defendant was read his *Miranda* rights and stated that he understood them. No promises or inducements were made to defendant. Defendant was not tricked as to why he

was being questioned. During the questioning defendant did not appear to be under the influence of alcohol or drugs. He was questioned for less than two hours. Defendant was eighteen years old and could read and write to a limited degree. He acquired a driver's license at age sixteen, had worked for a short time, and had never been in trouble.

The trial judge personally observed defendant and found him to be a "well-developed young male." The judge also found that defendant's answers were responsive to questions asked by his attorney and that defendant appeared to have no difficulty understanding his attorney's questions, notwithstanding his mild retardation.

While there was competent evidence that defendant is mildly retarded, "a subnormal mental condition standing alone will not render an otherwise voluntary confession inadmissible." *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983). Dr. Rollins testified that defendant is mildly mentally retarded and has a reading level of 3.9 and a mental age of ten or eleven. He testified that he did not believe mental age accurately portrays a person and that with greater life experiences a person may function at a higher intellectual level than his mental age reflects.

After carefully reviewing the record, we conclude that the trial court's conclusion that defendant, after being advised of his *Miranda* rights, voluntarily, knowingly, and intelligently waived his right to have an attorney and voluntarily, knowingly and intelligently made an inculpatory statement to the police is supported by competent evidence in the record. The confession was properly admitted.

[8] Next, defendant contends that his subsequent confession to his father was inadmissible because it was the fruit of the illegally obtained written confession received hours earlier. Subsequent to defendant's and his brother's arrest, the Sheriff of Union County telephoned their father, Robert Massey, and advised him that he could visit his sons in jail if he so desired. Between the hours of 9:30 a.m. and 12:00 noon on 21 December 1983, Mr. Massey went to the Union County jail and was escorted to a conference room where he talked briefly with his sons. At one point, Mr. Massey asked defendant who had shot the victim. Officer Rollins, who was present in the conference room during this visit, testi-

fied that defendant replied that he had done the shooting. At no time did the officer tell defendant that any statements made in his presence could be used against him. Defendant objects to Officer Rollins' testimony on the grounds that defendant's confession to his father was the fruit of the prior illegally obtained confession and thus inadmissible.

Since we have held that defendant's initial confession was not illegally obtained, no presumption arises therefrom that the second confession is tainted. Nor are *Miranda* warnings usually required when the defendant is not being subjected to custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, and *State v. Stephens*, 300 N.C. 321, 266 S.E. 2d 588 (1980). "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda v. Arizona*, 384 U.S. 436, 478, 16 L.Ed. 2d 694, 726.

In the instant case, defendant was not being subjected to custodial interrogation when he told his father that he had shot the victim. Therefore, no *Miranda* warnings, specifically the right to remain silent, were required. Defendant, in the course of conversing with his father, voluntarily stated that he shot the victim. Any compelling influence was exerted by the father's questioning of defendant, not by the officer. Under these circumstances, the confession is admissible as a voluntary statement against his interest freely made by defendant. It also served to corroborate defendant's written confession to the police.

V.

[9] Defendant contends that the trial court erred in denying his motion to dismiss renewed at the close of all the evidence. Defendant argues that without the two statements of confession, which he alleges were illegally obtained, there was insufficient evidence to submit the case to the jury. Having determined that the confessions were properly admitted, it is clear that this assignment of error must be rejected.

Upon a motion for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the charged offenses, and of the defendant being the person who committed the crime. *See State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984); *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649

(1982). If such evidence is present, the motion to dismiss is properly denied. *See State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 160, 322 S.E. 2d at 387.

When ruling on 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 inference to be drawn from that evidence. *See State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370; *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649. Any contradictions and discrepancies in the evidence must be resolved in favor of the State and evidence presented by the defendant is not to be considered unless favorable to the State. *See State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370; *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649.

Applying the cited rules to the facts of the instant case, we do not find error in the trial court's denial of defendant's motion to dismiss. Defendant's voluntary written confession reveals that Al Simpson was killed during the robbery of his store by defendant and his brother. The victim was found shot to death outside his store. The cash register was empty and two empty .22 caliber shells were found at the murder scene. Defendant's car had been seen parked in the vicinity of the victim's store around the time of the shooting. A .22 caliber rifle, later identified as the murder weapon, was found in defendant's home. Defendant admitted to his father that he had shot the victim. When this evidence is considered in a light most favorable to the State, there is substantial evidence that each of the essential elements of armed robbery and murder in the first degree under the felony murder rule were met and that defendant was the perpetrator of the crimes. Therefore, the trial judge correctly denied defendant's motion to dismiss and properly submitted the case to the jury.

VI.

Finally, defendant contends that the trial court abused its discretion in denying his post-trial motions to set aside the verdict based on the insufficiency of the evidence and as being against the greater weight of the evidence.

For the reasons stated in Part V of this opinion, we find no error or abuse of discretion in the trial court's denial of defendant's motion to set aside the verdict based upon the insufficiency of the evidence.

A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the sound discretion of the trial judge, and his decision thereon will not be reviewed on appeal absent an abuse of discretion. *See State v. Freeman*, 313 N.C. 539, 330 S.E. 2d 465 (1985). Defendant has shown no abuse of discretion by the trial court in denying his motion. This contention is without merit.

In the defendant's trial, we find

No error.

STATE OF NORTH CAROLINA v. DONNIE RAY WELCH

No. 112A84

(Filed 6 May 1986)

1. **Constitutional Law § 72; Criminal Law § 74.2— codefendant's statements implicating defendant—testimony by codefendant's wife—admission as harmless error**

Even if the admission of testimony by a codefendant's wife about extrajudicial statements the codefendant made to her regarding defendant's plans to commit a robbery violated defendant's constitutional right to confrontation under the *Bruton* rule and defendant's rights under N.C.G.S. § 15A-927(c)(1), such error was harmless beyond a reasonable doubt where defendant himself testified that he did in fact plan and attempt to commit the robbery in question, and where testimony by the codefendant's wife concerning her husband's extrajudicial statements inculpating defendant added nothing of significance to defendant's own testimony.

2. **Criminal Law § 55; Searches and Seizures § 4— nontestimonial identification order—no authority for defendant in custody**

The trial court was not authorized by Art. 14 of N.C.G.S. Ch. 15A to issue a nontestimonial identification order to obtain a blood sample from a defendant who was in custody at the time the order was issued, since the statute applies only to suspects and accused persons before arrest and persons formally charged and arrested who have been released from custody pending trial.

3. Criminal Law § 84; Searches and Seizures § 4— blood sample drawn without warrant—invalid nontestimonial identification order—violation of constitutional rights—sample admissible under good faith exception

Defendant's right under the Fourth and Fourteenth Amendments to be free from unreasonable searches and seizures was violated when a sample of his blood was drawn without a search warrant where defendant had been indicted and was in custody in the county jail and exigent circumstances did not exist to justify the warrantless search. However, the trial court was not required to exclude the blood sample from evidence under the good faith exception to the exclusionary rule where officers acted in reasonable reliance upon a nontestimonial identification order issued by a superior court judge but subsequently found invalid.

4. Homicide § 21.5— first degree murder—premeditation and deliberation—sufficiency of evidence

There was substantial evidence from which the jury could determine that defendant intentionally killed the victim with premeditation and deliberation so as to support his conviction of first degree murder where the evidence tended to show that defendant armed himself with a borrowed shotgun and planned to rob a certain store; defendant had ample time before the robbery to make sure the shotgun was loaded and operational; defendant burst into the store, pointed the shotgun at the victim and a cashier, warned them not to move, and demanded money; and defendant cocked the gun and shot the victim when he moved toward a gun hidden near the cash register.

Justice BILLINGS concurring.

Justice EXUM concurring.

APPEAL by the defendant from judgments entered on 12 December 1983 by *Beaty, J.*, in the Superior Court, GASTON County.

The defendant was convicted of attempted robbery with a dangerous weapon and first degree murder. He received a sentence of imprisonment for twenty years for the attempted robbery conviction and a life sentence for the first degree murder conviction. The defendant appealed the murder conviction to the Supreme Court as a matter of right under N.C.G.S. § 7A-27(a). On 23 April 1985, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal of the attempted robbery case. Heard in the Supreme Court 20 November 1985.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the State.

Ann B. Petersen for the defendant appellant.

MITCHELL, Justice.

The defendant brings forward assignments of error in which he contends (1) that joinder of his case with that of his codefendant Allison for trial deprived the defendant of his right to confrontation and to a fair trial, (2) that a nontestimonial identification order was unlawfully issued, (3) that taking a sample of defendant's blood without a search warrant violated rights guaranteed by the fourth amendment, (4) that the evidence presented was insufficient to support his conviction, and (5) that "death qualifying" the jury was a violation of his right to due process and to a trial by jury. We conclude that the defendant received a fair trial free of reversible error.

The State's evidence tended to show that on 30 June 1983, the defendant Donnie Ray Welch and his codefendant Joe Allison, an informant for the Gaston County Police Department, drove to Clemmer's Superette which they intended to rob. The defendant had obtained a sawed-off shotgun from William Caudell before the robbery. Caudell testified that he told the defendant that the shotgun was not loaded and would not fire.

Sheila Mullins testified that on 30 June 1983, at about 10:00 p.m., she was straightening up the counter in Clemmer's Superette while Paul Clemmer was at the far end of the counter. A man with a stocking over his head and carrying a gun burst through the door. The man pointed the gun at them and told them to be quiet and to give him all the money. Mullins bent down to get a money bag she thought was under the counter. The man ordered her to get up. As Mullins raised her hands, Clemmer walked toward the cash register with his hands outstretched. When Clemmer reached for a gun that was hidden beside the cash register, the robber cocked and pointed the gun at him and told him to stop. Mullins ducked and ran down the aisle to the back of the store. As she was running, she heard a gunshot and then a moan. The resulting wound to Clemmer's midsection proved fatal.

Joe Allison's wife Barbara had informed the police that the defendant Donnie Ray Welch planned to rob a store that night. A car that was seen at Clemmer's Superette was later stopped by the police. Allison was driving the car with the defendant as a passenger. Before the car was stopped, the defendant leaned out

of the car and threw an object into the weeds on the side of the road. A sawed-off shotgun was later found about ten feet from the road. The defendant and his codefendant Allison were taken into custody. Spots of human blood were found on the jeans that the defendant Welch was wearing. The State's forensic pathologist testified that the blood on the defendant's jeans was consistent with Clemmer's blood type and not consistent with the blood types of the defendant Welch or the codefendant Allison.

The State filed a written motion to consolidate the charges against the defendant for trial with those against Allison. The defendant objected to the consolidation on the ground that testimony about extrajudicial statements which had been made by Allison would implicate the defendant. The State asserted that it would not offer into evidence any inculpatory statements made by Allison. The trial court granted the State's motion to consolidate.

At trial, the codefendant's wife, Barbara Allison, said that the defendant came to the Allison home around 6:00 p.m. on 30 June 1983. She testified that, out of the defendant's presence, Allison told her on that occasion that the defendant wanted to commit a robbery in a store at the edge of Belmont around 10:00 p.m. The defendant objected and the trial court instructed the jury not to consider that testimony against the defendant.

Barbara Allison also testified that the defendant requested a pair of stockings which he later cut. She said that he stated that they had to pick up a gun and get to the store by 10:00 p.m. Joe Allison and the defendant left in Allison's automobile. Barbara Allison testified that she then talked to Detective Ivey and told him about the plans for the robbery. The defendant objected to the testimony regarding Barbara Allison's conversation with Detective Ivey.

At the close of the State's evidence, the defendant filed written motions for severance and for mistrial under N.C.G.S. § 15A-927(c)(2)(b). The motions were denied.

The defendant testified that he did plan and had attempted to commit the robbery at Clemmer's Superette. He said that he had not intended to shoot Mr. Clemmer and had not realized that the gun was loaded. At the close of all evidence, the defendant renewed his previous motions which were again denied by the trial court. The codefendant Allison did not present any evidence.

[1] By his first assignment of error, the defendant contends that the joinder of his case for trial with Allison's resulted in the violation of the dictates of *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968) and N.C.G.S. § 15A-927(c)(1), and that the trial court committed prejudicial error in denying his motions for severance and a mistrial. In *Bruton*, the Supreme Court held that in joint trials, limiting instructions directing the jury to disregard extrajudicial statements of a non-testifying defendant to the extent they tend to inculpate a nondeclarant codefendant are inadequate protection of that codefendant's sixth amendment right to confrontation. The result is that in joint trials such an extrajudicial statement must be excluded unless the portions that implicate the nondeclarant codefendant can be deleted. If deletion of those portions is not possible, the State must choose between not admitting the statement or trying the defendants separately. *State v. Fox*, 274 N.C. 277, 291, 163 S.E. 2d 492, 502 (1968). "If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation." *Id.* If the inculpatory statement for any reason is admissible against the non-declarant codefendant, the *Bruton* choice does not apply. *State v. Hardy*, 293 N.C. 105, 118, 235 S.E. 2d 828, 836 (1977). *See State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984).

Additionally, N.C.G.S. § 15A-927 provides in pertinent part:

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

N.C.G.S. § 15A-927(c)(1) codifies the *Bruton* decision. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985).

In the joint trial of the defendant and Joe Allison, Barbara Allison testified about extrajudicial statements her husband had made to her regarding the defendant Welch's plans to commit a robbery. Upon objection, the trial court gave limiting instructions directing the jury to disregard the statements as to Welch. If these statements were inadmissible against Welch, N.C.G.S. § 15A-927(c)(1) and *Bruton* required the State to select to either not admit the statements, delete all references to Welch, or try the defendants separately. The State did not make any such choice.

Assuming *arguendo* that the hearsay statements were inadmissible as to the defendant Welch and that admitting them violated N.C.G.S. § 15A-927(c)(1) and *Bruton*, we turn to the question of whether the trial court's error in admitting them without proper deletions was prejudicial to Welch. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). *Bruton* involves the defendant's constitutional rights to confrontation and cross-examination. Errors affecting a constitutional right of a defendant are presumed to be prejudicial. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982). Therefore, the defendant will be entitled to a new trial unless the State demonstrates that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982); N.C.G.S. § 15A-1443(b).

Overwhelming evidence of guilt will render even a constitutional error harmless. *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284 (1969) (*Bruton* violation held harmless beyond a reasonable doubt where overwhelming evidence of guilt); *State v. Brown*, 306 N.C. at 164, 293 S.E. 2d at 578. In the present case, the defendant Welch himself testified that he did in fact plan and attempt to commit the robbery at Clemmer's Superette. Under cross-examination the defendant admitted that he went to his codefendant Allison's house and told the codefendant that he "had something set up and it was a store." Welch testified that his codefendant Allison drove him to Clemmer's Superette. Welch entered the store wearing the stocking over his head. His testimony

regarding the attempted robbery corroborated the facts stated by Sheila Mullins, the store's employee.

Barbara Allison's testimony concerning her husband's extrajudicial statements inculpating the defendant Welch added nothing of significance to Welch's own testimony. The defendant's own testimony was overwhelming untainted evidence in this regard. We conclude that any error by the trial court in overruling Welch's objections to such testimony by Barbara Allison or in denying Welch's motion to sever was harmless beyond a reasonable doubt.

By his second assignment of error, the defendant contends that a sample of his blood was improperly drawn in violation of N.C.G.S. § 15A-274 and in violation of his right under the fourth amendment to the Constitution of the United States to be free from unreasonable search and seizure. Specifically, the defendant makes two claims. First, he contends that the nontestimonial identification order for a blood sample gave him only a one hour notice in violation of the seventy-two hour notice requirement of N.C.G.S. § 15A-274. Second, he contends that one's submission to the taking of a blood sample may not be compelled constitutionally without a search warrant.

[2] A nontestimonial identification order authorized by Article 14 of Chapter 15A of the General Statutes of North Carolina is an investigative tool available in cases where there is not sufficient basis for making a lawful arrest. *State v. McDonald*, 32 N.C. App. 457, 232 S.E. 2d 467 (1977). Under N.C.G.S. § 15A-273, a judge may issue a nontestimonial identification order only on an affidavit which establishes that there is probable cause to believe that an offense punishable by imprisonment for more than one year has been committed, that there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense, and that the results will be of material aid in determining whether that particular person committed the offense. However, N.C.G.S. § 15A-274 requires that the order be served at least seventy-two hours before the identification procedure unless the nature of the evidence is such that delay will adversely affect its probative value or it is likely that the evidence will be destroyed, altered or modified.

Although in the case *sub judice* the nontestimonial identification order was issued by Judge Friday in the Superior Court Division only one hour before the identification procedure was to be conducted, we do not consider or decide whether the order complied with the requirements of N.C.G.S. §§ 15A-273 and 274. As held in *State v. Irick*, 291 N.C. 480, 490, 231 S.E. 2d 833, 840 (1977), "Article 14 of Chapter 15A applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused." Since the defendant in this case was in custody at the Gaston County Jail when the nontestimonial identification order was issued upon the State's motion,[1] it was error for the trial court to issue the order. *Id.*

[3] We next must address, then, the defendant's contention that his fourth amendment right to be free from unreasonable searches and seizures was violated when the sample of his blood was drawn in the absence of a search warrant. The withdrawal of a blood sample from a person is a search subject to fourth amendment protection. *Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908 (1966). *See Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed. 2d 676 (1969) (Detention for fingerprints subject to fourth amendment); *Cupp v. Murphy*, 412 U.S. 291, 36 L.Ed. 2d 900 (1973) (Fingernail scrapings). But "the Fourth Amendment precludes only those intrusions into the privacy of the body which are unreasonable under the circumstances." *State v. Cobb*, 295 N.C. 1, 20, 243 S.E. 2d 759, 770 (1978). Since the withdrawal of a blood sample is subject to fourth amendment requirements, a search warrant must be procured before a suspect may be required to submit to such a procedure unless probable cause and exigent circumstances exist that would justify a warrantless search.

As stated in *Schmerber*:

> Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned.

1. *Irick* did not address or decide whether a nontestimonial identification order may be issued on the motion of the defendant in custody, and that issue does not arise in this case. *See* N.C.G.S. 15A-281 (1973).

> The requirement that a warrant be obtained is a requirement that the inferences to support the search "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." *Johnson v. United States*, 333 U.S. 10, 13-14, 92 L Ed 436, 440, 68 S Ct 367; *see also Aguilar v. Texas*, 378 U S 108, 110-111, 12 L Ed 2d 723, 725, 726, 84 S Ct 1509. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

384 U.S. at 770, 16 L.Ed. 2d at 919. In that case the defendant was arrested at a hospital while receiving treatment for injuries suffered in an automobile accident involving the car that he had been driving. Without a warrant, a police officer directed a hospital physician to withdraw a blood sample. The resulting chemical analysis of the alcohol content of the defendant's blood was introduced at trial, and he was convicted of driving while under the influence of intoxicating liquor.

The Supreme Court concluded in *Schmerber* that the withdrawal of blood without a search warrant was reasonable under the specific facts of that case. The Supreme Court reasoned that given the evidence in that case, the officer

> might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant under the circumstances, threatened "the destruction of evidence," *Preston v United States*, 376 US 364, 367, 11 L Ed 2d 777, 780, 84 S Ct 881. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts we conclude that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest.

384 U.S. at 770-71, 16 L.Ed. 2d at 919-20. The Supreme Court further concluded that under the facts of *Schmerber*, the taking of

the sample of the defendant's blood without a search warrant did not violate his rights under the fourth and fourteenth amendments to be free of unreasonable searches and seizures. Although many factors are to be considered in applying the *Schmerber* balancing test, we read that decision as forbidding law enforcement authorities acting without a search warrant from requiring a defendant to submit to the drawing of a blood sample unless probable cause and exigent circumstances exist to justify a warrantless seizure of the blood sample. *See Winston v. Lee*, 470 U.S. 753, 84 L.Ed. 2d 662 (1985).[2]

The case *sub judice* is, of course, very different from the *Schmerber* case. In the present case, the defendant had been indicted for first degree murder and was in custody at the Gaston County Jail. Although probable cause existed to believe that the defendant had committed the crime, exigent circumstances did not exist to justify the warrantless search. The defendant's blood type was not evanescent but would remain constant. There was no threat that the evidence would be destroyed as in *Schmerber* where the alcohol in the blood would dissipate. Therefore, drawing a blood sample from the defendant without first obtaining a search warrant violated the defendant's rights under the fourth and fourteenth amendments to be free from unreasonable searches and seizures. *See Winston v. Lee*, 470 U.S. 753, 84 L.Ed. 2d 662 (1985); *Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908 (1966).

However, our inquiry does not stop at this point. Having determined that the defendant's rights under the fourth and fourteenth amendments have been violated, we must next decide whether the sample of the defendant's blood which came into the State's possession as a result of this violation must be excluded from evidence at his trial. We conclude that the trial court was not required to exclude the blood sample and did not err by admitting it into evidence at the defendant's trial.

2. We do not suggest that any of the procedures for obtaining a nontestimonial identification order under article 14 of chapter 15A are facially unconstitutional. *See generally, e.g.*, Comment, *Criminal Law and Procedure—Nontestimonial Identification Orders Without Probable Cause*, 12 Wake Forest L. Rev. 387 (1976). Article 14 was enacted in response to the dictum contained in *Davis v. Mississippi*, 394 U.S. 721, 728, 22 L.Ed. 2d 676, 681 (1969) inviting the use of "narrowly circumscribed procedures for obtaining the fingerprints of individuals for whom there is no probable cause to arrest."

In *United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677 (1984), the Supreme Court carved out a good faith exception to the exclusionary rule stating that it should not apply when officers acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate but subsequently found invalid. In *Leon* a search was conducted pursuant to a search warrant that was later determined to lack probable cause. In upholding the search, the Supreme Court stated that the exclusionary rule "operates as a 'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved.'" 468 U.S. at 906, 82 L.Ed. 2d at 687. The exclusionary rule was designed to deter police misconduct, not a judge's errors. "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." 468 U.S. at 921, 82 L.Ed. 2d at 697. The Supreme Court concluded in *Leon* that the "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." 468 U.S. at 918, 82 L.Ed. 2d at 695. Since the officer in *Leon* reasonably relied on a warrant issued by a detached and neutral magistrate, the Supreme Court concluded that the exclusionary rule should not be applied and that the evidence obtained pursuant to that warrant should be admissible.

In *Massachusetts v. Sheppard*, 468 U.S. 981, 82 L.Ed. 2d 737 (1984), a police officer presented an affidavit for an arrest warrant and a search warrant in a murder case to a judge who concluded that probable cause had been established to permit the search of the defendant's residence. Unable to find a proper warrant form, the officer modified and used an old form for warrants to search for controlled substances. The officer pointed this out to the judge who made additional corrections on the warrant form. The search warrant was subsequently held invalid because the items to be seized were not particularly described and the evidence obtained was suppressed by the Massachusetts Supreme Judicial Court. The Supreme Court of the United States noted that the officer took every step reasonably expected to comport with fourth amendment requirements. The officer reasonably relied on the judge's assurances that the warrant was valid. The Supreme

Court stated that "we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." 468 U.S. at 989-990, 82 L.Ed. 2d at 744. The search in *Sheppard* was upheld under the application of the good-faith exception established in *Leon*, and the Supreme Court reversed the Massachusetts decision suppressing the evidence.

In the present case the police officer went before a superior court judge, a "detached and neutral magistrate," who issued a nontestimonial identification order based on an affidavit that set forth facts establishing (1) probable cause to believe that an offense punishable by imprisonment for more than one year had been committed, (2) reasonable grounds to suspect that the defendant Welch committed the offense, and (3) the results will materially aid in determining whether the person committed the offense. *See* N.C.G.S. § 15A-273 (1973). In the present case the officer reasonably relied on the order that was issued by the judge. As in *Sheppard* the officer took every reasonable step to comport with the fourth amendment requirements. We decline to apply the exclusionary rule to this good-faith violation of the fourth amendment. To apply the rule here would not serve to discourage police misconduct and would only defeat justice for no good reason. Therefore, on the basis of the *Leon-Sheppard* good-faith exception to the exclusionary rule, we conclude that the trial court did not err on these facts by admitting evidence resulting from the taking of the sample of the defendant's blood.

[4] By his third assignment of error, the defendant contends that the evidence was insufficient to prove the elements of premeditation and deliberation for first degree murder. This assignment is without merit.

To submit a charge of first degree murder to the jury, there must be substantial evidence from which a jury could determine that the defendant intentionally shot and killed Mr. Clemmer with malice, premeditation and deliberation.

> Premeditation has been defined by this Court as thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980);

State v. Reams, 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969). An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation, and in furtherance of a "fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose." *State v. Faust*, 254 N.C. 101, 106-07, 118 S.E. 2d 769, 772 (1961). The intent to kill must arise from "a fixed determination previously formed after weighing the matter." *State v. Exum*, 138 N.C. 599, 618, 50 S.E. 283, 289 (1905). *See also State v. Baggett, supra; State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974).

State v. Corn, 303 N.C. 293, 297, 278 S.E. 2d 221, 223 (1981).

In testing the sufficiency of the evidence to sustain a conviction, the evidence is to 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. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983). The evidence in the present case tended to show that the defendant armed himself with a sawed-off shotgun shortly before the robbery. He had ample time to check the gun to be sure it was loaded and operational. The defendant had previously planned to rob Clemmer's Superette. Armed and masked the defendant burst into the store. As he pointed his gun at the victim and the cashier, he demanded money and warned them not to move. The defendant cocked his gun and shot the victim who had moved toward a gun hidden by the cash register. This was substantial evidence from which the jury could determine that the defendant intentionally killed the victim with premeditation and deliberation.

In his final assignment of error, the defendant contends that use of a "death qualified" jury during the guilt determination phase of his trial denied him due process and his right to trial by jury. This assignment is without merit. *See, e.g., State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983).

No error.

Justice BILLINGS concurring.

I disagree with the statement in the majority opinion that "[s]ince the defendant in this case was in custody at the Gaston

County Jail when the nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order." The conclusion of the majority is based upon a dictum statement in *State v. Irick*, 291 N.C. 480, 490, 231 S.E. 2d 833, 840 (1977). In *Irick*, the question involved the admissibility of fingerprint evidence when fingerprints were obtained without a nontestimonial identification order from a defendant in custody. The Court noted that N.C.G.S. § 15A-272 provides that nothing in the article "shall preclude such additional investigative procedures as are otherwise permitted by law," and that N.C.G.S. § 15A-502(a)(1) allows the police to fingerprint a person when he has been arrested or committed to a detention facility. Therefore, the fingerprints of a person in custody were properly obtained without a need to utilize procedures authorizing nontestimonial identification orders.[1]

Unfortunately, the opinion in *Irick* goes further and says "we hold that Article 14 of Chapter 15A applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused." 291 N.C. at 490, 231 S.E. 2d at 840. That statement by the Court went beyond the interpretation of the statute necessary for decision in that case, and I believe it is an incorrect statement of the law. The majority now compounds the error by applying the statement to hold that the judge in the instant case erred in issuing a nontestimonial identification order because the defendant was in custody.

N.C.G.S. § 15A-272 (1983) specifically and clearly states: "A request for a nontestimonial identification order may be made prior to the arrest of a suspect *or after arrest and prior to trial.* Nothing in this Article shall preclude *such additional investigative procedures* as are otherwise permitted by law." [Emphasis added.]

1. *See also State v. Carson*, 296 N.C. 31, 39, 249 S.E. 2d 417, 422 (1978) where this Court said "[w]e are advertent to the provisions of Article 14 of Chapter 15A of the General Statutes which require that an order for nontestimonial evidence shall contain a statement that the person is entitled to counsel at the procedure and to appointment of counsel if he cannot afford to retain one. In our opinion, the provisions of this article of the General Statutes are not here applicable since defendant was legally arrested on a misdemeanor charge, and under these circumstances, he could be photographed without the aid of the nontestimonial order."

The statute does not limit its post-arrest application to those instances when a defendant has been released pending trial. It clearly provides that the fact that other procedures are otherwise available to obtain the same information from the suspect or defendant does not negate the availability of the procedures provided in Article 14 of Chapter 15A.[2]

I see no point in discouraging, much less precluding, law enforcement personnel from obtaining judicial authorization for identification procedures when a defendant is in custody and thus encouraging them to act without judicial screening.

In most instances when a suspect is in custody, the investigating or prosecuting authorities will likely prefer to use other means to obtain information which do not contain the protections required by N.C.G.S. § 15A-279, such as the requirement for counsel and the prohibition on the use of any statement made in the absence of counsel, or the 72-hour delay required by N.C.G.S. § 15A-277. However, if the State chooses to utilize and be limited by the procedures authorized by Article 14 of Chapter 15A, the issuance of a nontestimonial identification order is not error simply because the person ordered to submit to the procedures is already in custody.

In the instant case, I agree that the nature of the evidence sought did not justify elimination of the 72-hour requirement of N.C.G.S. § 15A-274. I also agree that the involuntary drawing of blood is a more intrusive procedure than fingerprinting and that whether the State can forcibly draw a blood sample in the absence of either probable cause and exigent circumstances or a search warrant finding full probable cause without violating the Fourth Amendment to the United States Constitution may be open to question. *See Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908 (1966). If the nontestimonial identification order is inadequate to authorize the nonconsensual taking of blood samples,

2. Clearly neither the *Irick* case nor this case limits the right of a defendant to obtain a nontestimonial identification order under N.C.G.S. § 15A-281. I also assume that a nontestimonial identification order pursuant to N.C.G.S. § 7A-599 may be obtained for identification procedures applicable to a juvenile alleged to be delinquent who is in custody, since N.C.G.S. § 7A-596 prohibits nontestimonial identification procedures involving such a juvenile without an order, unless the juvenile has been transferred to superior court for trial as an adult.

the defect is not because the defendant is in custody, and it would exist in all nontestimonial identification orders for blood samples issued with less than probable cause.

However, in the instant case, I would hold that even though the nontestimonial identification order was invalid because it did not comply with the 72-hour notice requirement, and even if a nontestimonial identification order issued on less than probable cause may not constitutionally authorize the involuntary drawing of blood from a person, since the *arrest* of the defendant was justified by a determination of probable cause to believe, rather than mere reasonable grounds to suspect, that the defendant committed the murder, the findings justifying the arrest combined with the findings made by the judge in issuing the nontestimonial identification order were sufficient to meet the concerns which underlie the requirement for a search warrant, and that thus the good faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. ---, 82 L.Ed. 2d 677 (1984) and *Massachusetts v. Sheppard*, 468 U.S. ---, 82 L.Ed. 2d 737 (1984) is appropriately applied to the evidence obtained in this case. Therefore I concur in the result reached by the Court on the defendant's second assignment of error. I join in the remainder of the Court's opinion.

Justice EXUM concurring.

I agree that under the decisions of the United States Supreme Court relied on by the majority this Court must apply the "good faith" exception to the exclusionary rule in determining admissibility of evidence unconstitutionally seized under the Fourth and Fourteenth Amendments to the United States Constitution. I concur with the majority's application of these cases to the facts before us.

The parties have not argued whether this exception may sustain admissibility under the North Carolina Constitution. My concurrence in the Court's opinion is based on my understanding that the opinion neither addresses nor answers this question.

I also concur in Justice Billings' concurring opinion insofar as it discusses the applicability of nontestimonial identification orders to persons in custody.

STATE OF NORTH CAROLINA v. FLOYD EDWARD RICHARDSON

No. 615A84

(Filed 6 May 1986)

1. **Criminal Law § 26.5; Burglary and Unlawful Breakings § 1; Larceny § 1— punishment for both breaking or entering and larceny**

A defendant may be convicted and punished for both felonious breaking or entering and felonious larceny pursuant to that breaking or entering.

2. **Criminal Law § 76.5— admissibility of confession—voir dire hearing—necessity for findings**

When making findings of fact on the voluntariness of a defendant's confession, the presiding judge need not make findings other than those which are necessary to resolve conflicts in the evidence. However, it is the better practice for the presiding judge to make findings concerning all evidence material to the issue of voluntariness of the confession even when such evidence is uncontradicted.

3. **Criminal Law § 75.2— statement about habitual criminal prosecution—confession not coerced**

The evidence supported the trial court's determination that Tennessee authorities did not improperly induce defendant to confess to crimes in North Carolina by threatening to prosecute him as an habitual criminal if he did not cooperate where the evidence showed that defendant asked a detective what additional charges might be brought against him, defendant was only told that an habitual criminal prosecution was a possibility, and the assistant district attorney did not ascertain that defendant did not qualify under the habitual criminal statute until later. Furthermore, the fact that Tennessee authorities were unsuccessfully attempting to convince defendant to name his accomplices at the time they informed him of the possible habitual criminal charges is not sufficient to show that the possibility of defendant's being prosecuted as an habitual criminal was used as a threat to coerce him into confessing.

4. **Criminal Law § 75.2— confession—promise in response to solicitation by defendant**

A detective's statement that he would answer a subpoena to appear as a witness to testify to defendant's cooperation in solving crimes did not render defendant's subsequent confession involuntary where defendant had asked what Tennessee authorities were willing to give him in exchange for his cooperation in solving crimes in Tennessee and other states before the detective offered to testify in his behalf, since promises or other statements to an accused that he will receive some benefit if he confesses do not render his confession involuntary when made in response to a solicitation by the accused.

Justice EXUM dissenting in part and concurring in part.

Justices MARTIN and FRYE join in the dissenting and concurring opinion.

State v. Richardson

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of the Court of Appeals reported at 70 N.C. App. 509, 320 S.E. 2d 900 (1984) (*Whichard, J.*, and *Johnson, J.*, concurring; *Vaughn, Chief Judge*, dissenting), reversing the judgment entered by *Howell, J.*, at the 7 February 1983 session of BUNCOMBE County Superior Court. Judgment entered 9 February 1983.

Defendant was convicted of felonious breaking or entering, felonious larceny, safecracking, and attempted safecracking. He was sentenced to ten years for the felonious breaking or entering conviction and ten years for the felonious larceny conviction. He received thirty years for convictions of safecracking and attempted safecracking which were consolidated for judgment.

The Court of Appeals ordered a new trial on the basis that defendant's confession had been procured through the use of threats and promises and was therefore involuntary and inadmissible. Chief Judge Vaughn (later Associate Justice) dissented on the basis that defendant made his confession pursuant to a plea bargain with the Tennessee authorities.

The State appealed based on Judge Vaughn's dissent. Following oral argument on 10 April 1985, we remanded the case to the trial court for additional findings of fact on the following questions:

> (1) What, if anything, did Tennessee authorities promise or offer this defendant?
>
> (2) What threats, if any, did Tennessee authorities make to this defendant?
>
> (3) Did the defendant rely on any such promises or threats, if made, to the extent that they caused his confession to the North Carolina officers to be induced by fear or by hope of reward?
>
> (4) Was the defendant's confession to the North Carolina officers the result of a plea arrangement or plea bargain with Tennessee authorities concerning crimes committed in Tennessee? If so, what were the terms of the plea bargain or plea arrangement, and was it complied with?

State v. Richardson, 313 N.C. 505, 329 S.E. 2d 404 (1985).

Pursuant to our order Judge Forrest A. Ferrell made findings of fact which, along with relevant parts of the record, are summarized as follows:

On 30 September 1981 defendant was arrested while attempting to burglarize a drugstore. At the police station Detective Robert Collins, of the Hendersonville, Tennessee, Police Department, advised defendant of his constitutional rights. Defendant waived his rights and admitted that he was guilty. However, he declined to name his accomplices as that was against his "code" of ethics.

Defendant asked whether he would be charged with any crimes in addition to attempted burglary and possession of burglary tools, and Detective Collins told him that he might be prosecuted as an habitual criminal but that the district attorney would make that decision. Defendant's participation in criminal offenses in other states was also discussed. The disposition of the charges against defendant was not discussed at this interview.

Defendant also spoke with Detective Frank McCoy regarding the specifics of the charges against him, the range of punishment, and the effect of his cooperation. He was informed that the officers had no authority to make any arrangements concerning the charges against him and that the Tennessee authorities had no control over what other states might do concerning crimes committed within their jurisdiction. Defendant was released after he posted bond.

Defendant waived his preliminary hearing in Tennessee. On that same day in the presence of several officers and Assistant District Attorney Dee Gay, defendant asked what would happen in regard to the charges pending in Tennessee if he cooperated. He particularly wanted to know whether the district attorney would prosecute him as an habitual criminal if he cooperated. In Tennessee the punishment for conviction as an habitual criminal is life in prison. Detective Collins stated that it was up to the district attorney to determine what would happen if defendant cooperated. Gay told defendant that he could make no promises and that what happened would depend on his cooperation. He also told defendant that he had no control over what happened in other jurisdictions. Detective McCoy told defendant that he would testify in other states as to his cooperation, but the officers made

it clear to defendant that they had no authority to make any arrangement with him.

Assistant District Attorney Gay and the police officers testified that they did not threaten defendant in any way or promise him any relief in exchange for his confession. Specifically, Dee Gay denied threatening to prosecute defendant as an habitual criminal. He later concluded that the Tennessee offenses were not a sufficient basis for an habitual criminal prosecution. Judge Ferrell concluded that no threats or promises were made to defendant to secure his cooperation.

While defendant was out on bond he resided in Kentucky. After numerous discussions with Detective McCoy, he agreed to meet in Tennessee with McCoy and officers from other jurisdictions, including North Carolina. Defendant voluntarily appeared at the meeting and talked with several officers, including officers Don Babb and Grover Mathews of the Asheville Police Department. After being advised of his rights by Officer Babb defendant waived his rights in writing and confessed to several crimes which he committed in North Carolina including the crimes of which he has been convicted. His tape-recorded confession was admitted at trial over objection.

Judge Ferrell found as a fact that defendant's confession to the North Carolina officers was not the result of a plea bargain by defendant with the Tennessee authorities. Rather, his confession was based "in part, upon his desire to cooperate with the Tennessee authorities, not upon threat or hope of reward as to what would occur in North Carolina, but with the understanding that Tennessee had no authority to influence what would occur in North Carolina."

Lacy H. Thornburg, Attorney General, by Archie W. Anders, Assistant Attorney General, for the State.

Nora Henry Hargrove, Attorney, and J. Robert Hufstader, Public Defender for the 28th Judicial District, for defendant-appellee.

BRANCH, Chief Justice.

Initially, we consider defendant's motion praying that the transcript of the Kentucky hearing to determine whether his wife

should be compelled to attend and testify in his case in North Carolina be stricken from the record of this case. We so order.

[1] The two issues presented in this appeal are whether defendant can be convicted and punished for both breaking or entering and felonious larceny pursuant to a breaking or entering and whether the confession on which his convictions were based was involuntary and thereby obtained in violation of his rights under the fifth and fourteenth amendments to the United States Constitution. Since the first issue has already been decided adversely to defendant in *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986), we turn to the issue of the voluntariness of his confession.

Defendant argues that his confession to the crimes he committed in North Carolina was involuntary because it was obtained through threats and promises giving him hope of benefit. Defendant also contends that several of Judge Ferrell's findings of fact are not supported by the evidence, are incomplete, or are actually conclusions of law, and that Judge Ferrell failed to include in his findings uncontroverted evidence material to the questions this Court ordered answered.

We now turn to the findings of fact to which defendant has objected.

Finding of Fact (4):

> The defendant initiated an inquiry as to whether he would be charged with anything else, and was told that at present he would be charged with attempted burglary and possession of burglary tools; and, that he might be charged with being an habitual offender, but that that wasn't up to Collins but was up to the District Attorney. The defendant was told that it was up to the District Attorney to determine what would happen when someone cooperated, and that he usually responds accordingly, but that the officers could make no promises, it was up to the District Attorney.

Defendant argues that this finding inaccurately characterizes the evidence because he merely asked if he would be charged with anything other than the crimes for which he was arrested.

"Findings of fact made by the trial judge following a *voir dire* hearing on the voluntariness of a defendant's confession are

conclusive on appeal if supported by competent evidence in the record." *State v. Baker*, 312 N.C. 34, 39, 320 S.E. 2d 670, 674 (1984). We fail to see how it matters whether defendant "asked" Detective Collins about what additional crimes he might be charged with or "initiated an inquiry." Judge Ferrell's findings on this point are supported by competent evidence and are conclusive on appeal.

Finding of Fact (11):

> Frank McCoy was a detective with the Hendersonville, Tennessee, Police Department, and presently is a Lieutenant with that department. McCoy first met the defendant the night the Tennessee crimes were committed. Discussions were conducted with the defendant regarding the specifics of the charges against him, the range of punishment, and the effect of his cooperation. The defendant was told that the officers had no authority to make any arrangements.

Defendant argues that this finding is inaccurate and incomplete because Judge Ferrell failed to find that part of the range of punishment discussed was defendant's possible prosecution as an habitual criminal. We hold that this finding is supported by the evidence and is, therefore, binding on appeal.

Finding of Fact (13):

> The defendant lived in Kentucky and was on bond; he met with McCoy and officers from other jurisdictions in Tennessee, after he and McCoy had talked on numerous occasions. They had discussed some twenty-six crimes committed in eleven states. The defendant voluntarily appeared at the meeting in Tennessee with officers from other jurisdictions, including North Carolina. The defendant was free to attend or not, at his option.

According to defendant this finding is inaccurate because Judge Ferrell used the term "numerous times" and did not specify that, in accord with the testimony at trial, Detective McCoy had talked with defendant "twenty or fifty times." We hold that Judge Ferrell's finding that McCoy talked with defendant on "numerous" occasions accurately characterizes the facts and is supported by competent evidence in the record. This argument is without merit.

We next consider defendant's contention that Judge Ferrell failed to include in his findings uncontroverted evidence bearing on the voluntariness of his confession.

[2] The presiding judge at a *voir dire* hearing to determine the admissibility of a defendant's confession *must* make findings of fact resolving any material conflict in the evidence. *State v. Lang*, 309 N.C. 512, 520, 308 S.E. 2d 317, 321 (1983) (trial judge failed to resolve dispute in testimony as to whether the defendant or the police initiated the conversation in which defendant confessed where defendant had earlier asserted his right to silence). When there is no conflict in the evidence on *voir dire* or only immaterial conflicts the presiding judge may admit a confession without making specific findings of fact. *Id.* It follows that when making findings of fact on the voluntariness of a defendant's confession the presiding judge need not make findings other than those which are necessary to resolve conflicts in the evidence. Thus, Judge Ferrell was not compelled to make findings since the evidence was uncontradicted. However, we emphasize that it is the better practice for the presiding judge to make findings concerning all evidence material to the issue of the voluntariness of a confession even when such evidence is uncontradicted.

Defendant has also challenged Judge Ferrell's findings that the investigating officers and the assistant district attorney in Tennessee made no threats or promises to him and that he voluntarily attended the meeting in Tennessee with officers from other jurisdictions. Defendant contends that whether the conduct and language of the investigating officers and the assistant district attorney amounted to threats and promises or influenced him to confess by inducing hope or fear is a question of law, not of fact.

In determining whether a confession is voluntary it is the trial judge's duty to make findings of fact resolving all material conflicts in the evidence as to what the defendant and the investigating officers said and did during the relevant time period preceding the defendant's confession. *State v. Lang*, 309 N.C. 512, 520, 308 S.E. 2d 317, 321; *State v. Fuqua*, 269 N.C. 223, 226-27, 152 S.E. 2d 68, 70-71 (1967). These findings are conclusive on appeal if supported by competent evidence in the record. *State v. Baker*, 312 N.C. 34, 320 S.E. 2d 670; *Fuqua*, 269 N.C. 223, 152 S.E. 2d 68. "[W]hether the conduct and language of the investigating officers

amounted to such threats or promises or influenced the defendant by hope and fear as to render the subsequent confession involuntary is a question of law, . . . reviewable on appeal." *State v. Rook*, 304 N.C. 201, 216, 283 S.E. 2d 732, 742 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982). *Accord Fuqua*, 269 N.C. 223, 226-27, 152 S.E. 2d 68, 71.

Judge Ferrell denominated as a finding of fact his conclusion of law that defendant's confession was voluntary and that no threats or promises had been made to him to secure his confession. This mislabeling was a technical error probably due to our order on remand that "findings of fact" be made as to whether any threats or promises were made to defendant in Tennessee which induced him to confess by fear or by hope of reward. Defendant has not shown that he has been prejudiced by the fact that Judge Ferrell's conclusions of law were incorrectly denominated as findings of fact. *State v. Jackson*, 308 N.C. 549, 580-81, 304 S.E. 2d 134, 152 (1983).

We now turn to the central issue in this case which is whether Judge Ferrell's findings of fact support his conclusion of law that defendant's confession was voluntary and was not the product of threats or promises.

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

State v. Jackson, 308 N.C. 549, 581, 304 S.E. 2d 134, 152. Where the requirements of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), have been met and "the defendant has not asserted the right to have counsel present during questioning, no single circumstance may be viewed in isolation as rendering a confession the product of improperly induced hope or fear and, therefore, involuntary." *State v. Corley*, 310 N.C. 40, 48, 311 S.E. 2d 540, 545 (1984). In such cases the court must determine whether the statements made by the defendant were voluntarily and understandingly made. *Id.* In making this determination "the court must consider the *totality of the circumstances* of the case and may not rely upon any one circumstance standing alone and in isolation." *Id.*

[3] Defendant contends that his confession was involuntary because it was the product of fear induced by threats and of promises of leniency if he cooperated. More specifically, defendant contends that the Tennessee authorities induced him to confess to crimes in North Carolina by threatening to prosecute him as an habitual criminal if he did not cooperate and by promising him that he would not be prosecuted or would receive only probationary sentences for the crimes to which he confessed.

After examining the totality of the circumstances, we hold that Judge Ferrell correctly ruled that defendant's confession was voluntarily and understandingly made.

Defendant argues that he was threatened with prosecution as an habitual criminal in two ways. First, he argues that Detectives Collins and McCoy, while questioning him on the night of his arrest, told him that he could be prosecuted as an habitual criminal. Later, in a meeting following his waiver of his preliminary hearing defendant contends that Assistant District Attorney Dee Gay told him that he would be prosecuted as an habitual criminal if he did not cooperate even though Gay knew that defendant did not meet the statutory requirements for that crime. Defendant also argues that simply by informing him that he could be prosecuted as an habitual criminal after he had refused to name his accomplices the Tennessee authorities were implying that he would be convicted and sentenced to life imprisonment if he did not cooperate.

Assistant District Attorney Gay and the investigating officers testified, and Judge Ferrell found, that defendant was only told that an habitual criminal prosecution was a possibility. Gay did not determine that defendant did not qualify under the habitual criminal statute until later. Judge Ferrell's finding is supported by the evidence and it supports his conclusion that defendant was not threatened with prosecution as an habitual criminal if he did not cooperate. Merely informing a defendant of the crimes for which he might be charged and the range of punishment does not constitute a threat. *Cf. State v. Jackson*, 308 N.C. 549, 572, 304 S.E. 2d 134, 146-47. Defendant had asked Detective Collins what additional charges might be brought against him, and the officers can hardly be faulted for answering his question. The fact that the Tennessee authorities were unsuccessfully

attempting to convince defendant to name his accomplices at the time they informed him of the possible charges against him is not sufficient to show that the possibility of defendant being prosecuted as an habitual criminal was used as a threat to coerce him into cooperating. The facts in this case simply do not reveal the type of implied threats found in other cases in which confessions were held to be involuntary. *See State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975) (confession involuntary when defendant was interrogated in a "police-dominated atmosphere" and was told by police officers that he was lying, they didn't want to fool around, and things would be tougher for him if he did not cooperate); *State v. Stephenson*, 212 N.C. 648, 194 S.E. 81 (1937) (defendant was told while in jail that there was no point in lying because enough evidence existed to convict him).

[4] Defendant next argues that his confession was involuntary because he was promised that he would not be prosecuted or would be given probationary sentences for any crimes to which he confessed.

According to Judge Ferrell's findings, during his interview with the detectives and Assistant District Attorney Dee Gay defendant asked what would happen if he cooperated. He was particularly concerned about whether he would be prosecuted as an habitual criminal if he cooperated.

Detective Collins told defendant that it was up to the district attorney to determine what happened when someone cooperated with the police. He also told defendant that the district attorney usually responds favorably when a defendant cooperates but that he could make no promises. Assistant District Attorney Dee Gay told defendant that he could not tell him at that time what would happen and that it would depend on his cooperation. Dee Gay specifically told defendant that he would be prosecuted for the crimes committed in Tennessee but that he had no control over what happened in other jurisdictions. No one promised defendant that he would receive a lesser sentence because of his cooperation. However, when he was subsequently convicted in Tennessee of third degree burglary and possession of burglary tools the trial judge was informed of his cooperation and defendant was given a suspended sentence.

These findings are supported by the evidence and they in turn support Judge Ferrell's conclusion that defendant was not promised some benefit in exchange for his cooperation.

The only statement made to defendant which could be construed as a promise is Detective McCoy's statement that he would answer a subpoena to appear as a witness to testify to defendant's cooperation in solving crimes. Though it is not explicitly stated in the record when Detective McCoy made this offer our examination of defendant's brief and the record leads us to conclude that it was made during the interview following defendant's waiver of his preliminary hearing and after he inquired about the effect of his cooperation.

A similar statement by a law enforcement officer has been held to be a promise offering hope of benefit which renders a subsequent confession involuntary. *State v. Fuqua*, 269 N.C. 223, 152 S.E. 2d 68 (officer told defendant that if he talked he would be able to testify in court that he was cooperative). This case is distinguishable from *Fuqua* because defendant asked what would happen if he cooperated before Detective McCoy offered to testify in his behalf. In effect, defendant asked the Tennessee officers and Assistant District Attorney Gay what they were willing to give him in exchange for his cooperation in solving crimes in Tennessee and other states. Promises or other statements indicating to an accused that he will receive some benefit if he confesses do not render his confession involuntary when made in response to a solicitation by the accused. *See Taylor v. Commonwealth*, 461 S.W. 2d 920 (1970 Ky.), *cert. denied*, 404 U.S. 837, 30 L.Ed. 2d 70 (1971); *State v. Hutson*, 537 S.W. 2d 809 (1976 Mo. Ct. App.).

Even if it is assumed that Detective McCoy's offer to testify to defendant's cooperation was made before defendant inquired about what would happen if he cooperated, it would not render his confession involuntary. Defendant is a mature adult with considerable experience in the criminal justice system due to his prior felony convictions. He clearly engaged in hard-headed bargaining with the Tennessee authorities to obtain leniency and to avoid prosecution. When the totality of the circumstances is considered, it is clear that defendant's will was not overborne and that his confession to the North Carolina officers was made freely and voluntarily with full knowledge of the consequences.

The decision of the Court of Appeals is reversed.

Reversed.

Justice EXUM dissenting in part and concurring in part.

For the reasons stated in my dissenting opinion in *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986), I dissent from that part of the majority's decision holding that defendant may be convicted and punished for both felonious breaking and felonious larceny pursuant to the felonious breaking.

I concur in the majority's treatment of the admissibility of defendant's confession.

Justices MARTIN and FRYE join in this dissenting and concurring opinion.

STATE OF NORTH CAROLINA v. JOHN EDWARD GARDNER

No. 528A85

(Filed 6 May 1986)

Criminal Law § 102.6— request to read excerpt from opinion to jury—denied—no prejudicial error

There was no prejudicial error in a prosecution for rape, first degree sexual offense, and robbery with a dangerous weapon where the trial court denied defendant's request to read to the jury during closing arguments an excerpt from a Court of Appeals opinion on the hazards of eyewitness identification. Although the whole case may be argued to the jury regardless of whether the trial court's instructions will also relate the law on the issue, the case from which defendant wished to read involved "unconscious transference," an issue which did not arise on the evidence at defendant's trial; the case on which defendant relied had been reversed by the Supreme Court at the time defendant attempted to use it in his closing argument; the excerpt quoted from a dissenting opinion in the District of Columbia Circuit, an article from the *Journal of Applied Psychology*, and a book entitled *Eyewitness Testimony* by a Stanford University professor, sources which could not properly be quoted directly; the excerpt was intended by the Court of Appeals to further explain the court's decision and does not constitute the rule of law in this jurisdiction; and there was no prejudice because defense counsel was allowed to use the argument found in the opinion and to refer to the opinion, the closing

arguments were not recorded, and the evidence against defendant was overwhelming. N.C.G.S. 84-14, N.C.G.S. 15A-1443(a).

Justice EXUM concurring.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Stephens, J.*, at the 7 May 1985 Criminal Session of WAKE County Superior Court. We allowed defendant's motion to bypass the Court of Appeals on the Class D felony on 12 September 1985.

Defendant was charged in separate indictments, proper in form, with first degree rape, first degree sexual offense (fellatio), first degree sexual offense (anal intercourse), and robbery with a dangerous weapon. He was convicted on all charges and sentenced to consecutive life terms for the rape and for one of the sexual offenses. He was further given a forty year sentence for robbery and a life sentence for the remaining sexual offense, both to run concurrently with the sentences imposed for the rape and for the first degree sexual offense.

In brief summary, the evidence produced at trial by the State tended to show that Candace Barnhill was attacked by a black male, whom she later identified as defendant, at approximately 10:25 a.m. on 8 October 1984 as she washed her clothes in the laundry room at Kings Village in Raleigh. Mrs. Barnhill testified that defendant knocked on the laundry room door and stated that he wanted to come in to buy a soda. Mrs. Barnhill recounted that after she had opened the door defendant placed a carton cutter with a small blade to her throat and demanded money. Defendant then pushed her into the laundry bathroom, raped her, and forced her to perform fellatio and to engage in anal intercourse. After the sexual assaults, defendant ordered Mrs. Barnhill to hand over her five rings, including her wedding ring. She complied.

Mrs. Barnhill identified defendant as her assailant in a photographic display, in a live line-up, and at trial. The State also offered the testimony of Joseph M. Ludas, latent print examiner with the City-County Bureau of Identification for Wake County, who stated that a latent fingerprint lifted from the doorknob to the laundry bathroom was made by defendant's left thumb. The State further produced evidence that on 9 October 1984 defendant pawned a wedding ring at Reliable Loan Company on Wilmington

Street and that on 12 October 1984 an employee of the Department of Correction bought three rings from defendant for thirty dollars. Mrs. Barnhill identified these rings as four of the five taken from her by defendant during the robbery and assault.

Defendant did not testify but called two witnesses to support his alibi defense. Ella Mae Duboise and Elizabeth Yates, neighbors of defendant residing at Halifax Court, both testified that they saw defendant at Halifax Court around 10:30 a.m. on 8 October 1984.

Lacy H. Thornburg, Attorney General, by George W. Boylan, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Louis D. Bilionis, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

The sole question presented for our review is whether the trial court committed reversible error by prohibiting defense counsel from reading to the jury an excerpt from a Court of Appeals' opinion during his closing argument. Defendant argues that the trial court's ruling was improper and prejudicial because it prevented him from presenting a complete defense. The burden of showing the trial court's error and its resulting prejudice is on defendant. N.C.G.S. § 15A-1443(a) (1983); *State v. Loren*, 302 N.C. 607, 613, 276 S.E. 2d 365, 369 (1981). We first deal with defendant's contention that the trial court's ruling constituted error.

According to defendant, Mrs. Barnhill's identification of him as her attacker was a central, but vulnerable, feature of the State's case. Defendant contends that her identification was subject to attack on the basis that her original height description of the assailant was 5'8", although defendant is approximately 6'0", and that she noticed no scars on her assailant even though defendant has visible scars above both eyes and in the middle of his forehead. Defendant highlighted these discrepancies between Mrs. Barnhill's identification and defendant's actual physical attributes to bolster his alibi defense.

To shake the jury's confidence in eyewitness identifications in general, defense counsel informed the trial court that during

his closing argument he planned to read the following excerpt from *State v. Smith*, 65 N.C. App. 684, 686-87, 309 S.E. 2d 695, 696-97 (1983), *rev'd*, 311 N.C. 287, 316 S.E. 2d 73 (1984):

> As many judges and psychologists have noted, "convictions based solely on 'one eyewitness' identifications represent 'conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished.' " *United States v. Butler*, 636 F. 2d 727, 732 (D.C. Cir. 1980) (Bazelon, J. dissenting), *cert. denied*, 451 U.S. 1019, 69 L.Ed. 2d 392, 101 S.Ct. 3010 (1981). This, of course, is because the human mind often plays tricks on us. One of the tricks that it sometimes plays is that a person seen briefly before in one place and situation is thought, even by the keenest of us, to be another person, seen in a different context altogether. This common experience of mankind, known to social scientists as "unconscious transference," has been much discussed in their literature, and the likelihood of the experience being repeated under various circumstances has been confirmed by experiments of different kinds. For examples, *see Eyewitness Testimony*, by Stanford University Professor E. Loftus, Harvard University Press (1979), and *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, by Gorenstein and Ellsworth, Journal of Applied Psychology, Volume 65, pp. 616-622 (1980).

The State objected to the use of this excerpt in defense counsel's closing argument on the basis that it did not constitute law but was instead merely one judge's commentary on the hazard of misidentification. The trial judge stated that his grounds for refusing to allow defense counsel to read this passage from the Court of Appeals' opinion was that the law as set forth in *Smith* was adequately covered in the pattern jury charge he intended to give dealing with the identification of a defendant by an eyewitness. Defense counsel then asked in the alternative that he be allowed to argue this passage as the law of North Carolina without actually reading the opinion to the jury. The trial court granted this request and even allowed counsel to refer to the text of the opinion during his argument as long as he did not quote the opinion.

In support of his contention that the trial court's refusal was reversible error, defendant relies first on N.C.G.S. § 84-14 for the

basic proposition that in all superior court jury trials "the whole case as well of law as of fact may be argued to the jury." This right arises regardless of whether the trial court's jury instructions will also relate the law on the issue. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). Therefore, we are of the opinion that the trial court's reasoning for denying counsel's request was erroneous. However, we are not required on this basis alone to hold that the trial court's ruling was prejudicial error.

Defendant also relies on *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, --- U.S. ---, 84 L.Ed. 2d 369 (1985), a case he believes to be indistinguishable. In *Noland*, the defendant raised an insanity defense to the murder charges against him and offered evidence that he suffered from amnesia concerning the events surrounding the shootings. The prosecutor in his closing argument paraphrased, without objection from the defendant, the following passage from *State v. Caddell*, 287 N.C. 266, 286, 215 S.E. 2d 348, 361 (1975):

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

Noland, 312 N.C. at 14, 320 S.E. 2d at 651. The defendant in *Noland* complained that the quoted material was irrelevant to the issues before the jury. This Court disagreed and held that because the issue of amnesia was raised by the evidence the State's argument, including the reading of this passage, did not constitute an impropriety so extreme as to require the trial judge to act *ex mero motu*. *Noland*, 312 N.C. at 15-16, 320 S.E. 2d at 651. Defendant argues that since it was not improper for the prosecutor in *Noland* to read the amnesia passage from *Caddell*, he should have likewise been allowed to read the "unconscious transference" passage from *Smith* in the present case. We disagree.

In the first place, *Noland* is distinguishable from the case before us in several crucial aspects. Although it is well settled that counsel may argue the law as well as the facts, he may not "read to the jury decisions discussing principles of law which are irrelevant to the case and have no application to the facts in evidence." *State v. Crisp*, 244 N.C. 407, 412-13, 94 S.E. 2d 401, 406

(1956). In *Noland*, the issue of amnesia had been raised by the defendant's evidence and was therefore relevant in the determination of his guilt. However, the principles contained in the excerpt selected by defense counsel in the case before us did not arise on the evidence produced at trial. There was no evidence that Candace Barnhill had ever seen defendant prior to the assault. Thus, there were no facts to support an inference that an "unconscious transference" had occurred. Because the victim in *Smith* claimed to have recognized the defendant during the robbery as a man he had previously seen several times in the neighborhood, the "unconscious transference" phenomenon was inferable from the facts and germane to the issue before the Court of Appeals at that time. It would have been equally impermissible for defense counsel in the present case only to have read to the jury the first line of the *Smith* passage which voices a concern for convictions based on one eyewitness's identification. Judge Phillips, writing for the *Smith* court, clearly intended this sentence to be read as a part of the "unconscious tranference" discussion in the paragraph. This sentence, taken out of context, would have conveyed an entirely different and incorrect meaning from that which was desired by the court.

Therefore, assuming *arguendo* that the *Smith* paragraph in question did represent the law of this jurisdiction, we hold that the trial court did not err by refusing to allow defense counsel to read it to the jury since the principles contained therein were irrelevant to the facts and the issues of this case.

A second important aspect which distinguishes *Noland* from the present case is that *Smith*, unlike *Caddell*, had been reversed by this Court at the time defense counsel attempted to use it in his closing argument. This factor alone raises the question of whether the Court of Appeals' *Smith* opinion could be quoted from on the N.C.G.S. § 84-14 basis that it reflected the law of this State.

Defendant argues that under *State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984), *cert. denied*, --- U.S. ---, 85 L.Ed. 2d 324 (1985), language used in an appellate opinion may be utilized in a closing argument even though the actual result in the case has been reversed on other grounds. Yet, both the Court of Appeals and the Supreme Court in their respective *Smith* opinions clearly

stated that only one issue was presented for their review. The sole contention on appeal to both Courts was whether the trial court incorrectly charged the jury regarding the State's identification testimony and incorrectly refused to give similar instructions requested by the defendant. With only one issue raised on appeal, the Supreme Court's reversal of the Court of Appeals' opinion could not have been on any other ground than that which was essential to the decision. Thus, any law which arose from the Court of Appeals' *Smith* opinion was clearly disavowed by the Supreme Court and any other language not essential to the Court of Appeals' holding was dicta, not "law," and outside the purview of N.C.G.S. § 84-14. We conclude therefore that the trial court did not err in prohibiting defense counsel from reading the passage in question to the jury because the Court of Appeals' *Smith* opinion at that time carried no legal precedential value as part of the body of the law of this State.

In order to resolve this issue completely, we feel some discussion is needed on the actual contents of the *Smith* excerpt. As intimated above, we believe there is some question as to whether the substance of the passage expressed North Carolina law.

N.C.G.S. § 84-14 grants counsel the right to argue the law to the jury which includes the authority to read and comment on reported cases and statutes. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). There are, however, limitations on what portions of these cases counsel may relate. For instance, counsel may only read statements of the law in the case which are relevant to the issues before the jury. In other words, "the whole *corpus juris* is not fair game." *State v. McMorris*, 290 N.C. 286, 287, 225 S.E. 2d 553, 554 (1976). Secondly, counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client. *Wilcox v. Motors Co.*, 269 N.C. 473, 153 S.E. 2d 76 (1967). Furthermore, counsel may not read from a dissenting opinion in a reported case. *See Conn v. R.R.*, 201 N.C. 157, 159 S.E. 331 (1931). Consequently, these limitations show that simply because a statement is made in a reported decision does not always give counsel the right to read it to the jury in his closing argument under N.C.G.S. § 84-14.

In reviewing the *Smith* passage in question, we note that Judge Phillips quoted from Judge Bazelon's dissenting opinion in *United States v. Butler*, 636 F. 2d 727, 732 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 1019, 69 L.Ed. 2d 392 (1981), and relied on Professor E. Loftus's book entitled *Eyewitness Testimony* and on an article from the *Journal of Applied Psychology*. Even at first glance, counsel's attempt to read a portion of the *Smith* opinion containing excerpts from these sources is immediately troubling. We have previously related that counsel may not read from a dissenting opinion unless it has later been adopted as the law of this State. The simple rationale behind this rule is that it is not "the law of the particular case, else it would not be a dissenting opinion" and is therefore outside the scope of N.C.G.S. § 84-14. *Conn v. R.R.*, 201 N.C. at 163, 159 S.E. at 335. Furthermore, references from the Loftus book and the psychology magazine article run afoul of the rule prohibiting counsel from reading from "medical books or writings of a scientific nature to the jury. . . [except] '[w]hen an expert has given an opinion and cited a treatise as his authority.' " *Id.* at 159-160, 159 S.E. 2d at 333, *quoting Tilgham v. R.R.*, 171 N.C. 652, 659, 89 S.E. 71, 75 (1916). We believe it would be an improper interpretation of N.C.G.S. § 84-14 to allow counsel to avoid these rules on the basis that he read the material from an appellate reporter rather than from the magazine or book itself, especially in light of the fact that it was contained in an opinion that had been reversed by this Court.

We also find this passage objectionable as material to be read to the jury on the ground that it does not constitute the rule of law promulgated by the Court of Appeals in *Smith* nor was it intended to represent, based on the authorities cited, the law of this jurisdiction. This particular passage in *Smith*, instead, was intended to further explain the court's decision that the trial court erred in refusing defendant's request for a special instruction on the issue of identity. The mere presence of this excerpt in the published opinion, standing alone, is an insufficient justification for holding that the trial court in this case improperly prohibited counsel under N.C.G.S. § 84-14 from reading the excerpt to the jury.

Surely, we recognize the need of appellate court judges to rely on secondary authority in certain cases in order to determine the appropriate result. However, its use does not automatically give

counsel the right under N.C.G.S. § 84-14 to read that portion of the opinion which quotes or paraphrases that particular writing. For counsel's rights under N.C.G.S. § 84-14 to come into play, the excerpt to be read to the jury must reflect the law of that case or at least the law of this jurisdiction. This fact, however, does not prevent the trial court in its discretion from allowing counsel to conduct his closing argument in any manner which has not been expressly disapproved of by this Court in prior decisions. We have merely addressed in this case situations in which the trial court has no discretion under N.C.G.S. § 84-14 to prohibit counsel from arguing the law in his closing statement by reading a portion of a published opinion to the jury. We hold that because the excerpt was not a statement of North Carolina law defense counsel had no right under N.C.G.S. § 84-14 to read it to the jury during his closing argument. Therefore, the trial court did not err or abuse its discretion in prohibiting counsel from reading to the jury a paragraph from an appellate opinion which contained statements from a dissenting opinion and from other writings not admitted into evidence at trial.

Finally, even if we could agree that the trial court's ruling was in error, defendant must nevertheless show that this error was prejudicial. Under N.C.G.S. § 15A-1443(a) the test for prejudicial error in matters not affecting constitutional rights is whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." Assuming for the sake of argument that error occurred, we hold that defendant has failed to show that he was prejudiced. *See generally, State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981).

In the first place, although the trial judge refused to allow defense counsel to actually read from the Court of Appeals' reporter containing *Smith*, he did grant counsel permission to make the same argument found in the *Smith* decision and to use the opinion as a reference during his closing argument. Also, because the closing arguments of counsel were not transcribed nor made a part of the record, we are unable to determine how heavily defense counsel relied on the concerns dealt with in the pertinent *Smith* passage and unable to review how the trial court's ruling actually restricted defense counsel's argument to the jury. Thus,

defendant cannot demonstrate how the trial court's ruling was prejudicial.

More importantly, however, in view of the overwhelming evidence presented by the State, as well as the quality of that evidence, we hold that there is no reasonable possibility that the trial court's ruling preventing defense counsel from citing and quoting from the Court of Appeals' *Smith* decision affected the verdicts returned by the jury. The victim, State's witness Candace Barnhill, clearly identified defendant as the perpetrator of the crimes against her in two different identification procedures prior to trial and identified him again unequivocally at trial. The State also offered evidence that defendant's thumbprint was found on the doorknob of the laundry bathroom where the robbery, rape, and other sexual offenses occurred. Defendant was later found shortly after the incident selling four of the five rings taken from the victim during the robbery. In the face of this evidence, defendant has failed to show prejudicial error.

For reasons stated, defendant received a fair trial free of prejudicial error.

No error.

Justice EXUM concurring.

For *all* the reasons given in the majority opinion taken together, the trial court did not abuse its discretion when it precluded defense counsel from reading the passage from *State v. Smith*, 65 N.C. App. 684, 686-87, 309 S.E. 2d 695, 696-97 (1983), *rev'd*, 311 N.C. 287, 316 S.E. 2d 73 (1985). I would not hold (and it is not clear to me that the majority *does* hold) that any one of the reasons given, standing alone, would have been enough to sustain the action of the trial court. On this basis I concur in the result reached by the majority.

SAM MAFFEI, AND ALL PERSONS SIMILARLY SITUATED v. ALERT CABLE TV OF NORTH CAROLINA, INC.

No. 477PA85

(Filed 6 May 1986)

Rules of Civil Procedure § 23— class action—de minimis damages—refusal to certify as class action

In a class action against a cable television company based on its failure to provide ESPN television programming during its broadcast of ACC basketball games on ESPN only to subscribers of the "Season Ticket" package, the trial court did not exceed its authority when it established what the legal measure of damages would be if plaintiff prevailed upon the claim alleged and then refused to certify a class action because damages recoverable by any one member of the proposed class would be *de minimis*. N.C.G.S. 1A-1, Rule 23.

ON discretionary review, pursuant to N.C.G.S. § 7A-31 of the North Carolina Rules of Appellate Procedure, of a unanimous decision of the Court of Appeals, reported at 75 N.C. App. 473, 331 S.E. 2d 188 (1985), reversing an order entered by *Battle, J.*, on 28 September 1984.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by Martin J. Bernholz and G. Nicholas Herman, for plaintiff-appellee.

Smith, Moore, Smith, Schell & Hunter, by Richard W. Ellis, James L. Gale, and Robert H. Slater, for defendant-appellant.

BILLINGS, Justice.

On 11 January 1984 plaintiff Sam Maffei filed a civil action against Alert Cable TV of North Carolina, Inc. alleging breach of contract. Plaintiff alleged that he had entered into a contract with defendant whereby plaintiff would pay $7.50 plus $3.00 per month to defendant and defendant "would provide to Plaintiff each month seventeen (17) cable viewing channels (including those designated as 'Expanded Services') as shown on the attached rate card." The attached rate card indicates a basic charge of $7.50 per month for eleven (11) channels plus $3.00 per month for Expanded Services, which consists of six additional channels, including "ESPN Sports Satellite (24 hrs)." Plaintiff further alleged that Alert was not going to show certain live ACC basketball games

being broadcast on ESPN (the Entertainment and Sports Programming Network) to ESPN subscribers unless they paid an additional $75.00 for a package called "Season Ticket." Other claims filed in the same complaint against other defendants subsequently were voluntarily dismissed and have no effect upon the questions presented in this review.

In an amendment to the complaint filed 30 January 1984, the plaintiff alleged that the defendant's breach of contract had taken the form of "blacking out" at least eight games unless the subscribers paid $3.00 for each game. The plaintiff asked for damages for himself and all others similarly situated in the amount of $3.00 per subscriber per program blacked out. In its answer the defendant asked, *inter alia*, that the class action allegations be dismissed for failure to state a cause of action that could be a class action and for failure to describe or define a proper class.

As the result of the lawsuit and of an injunction entered against defendants subsequently dismissed, the defendant did not black out all eight games. There is no dispute that approximately twelve hours of ESPN television time was not provided to the plaintiff because of signal scrambling during five ACC basketball games.

On 13 September 1984 the defendant moved, "with the consent of the plaintiff" that the Court "determine as a matter of law the appropriate measure of damages to be applied" to the breach of contract issue.

The motion came on for hearing before Judge Battle on 28 September 1984. After considering the pleadings, depositions, and affidavits presented by the parties, Judge Battle determined that the proper legal measure of damages was the value of twelve hours of missed ESPN regular programming, as argued by the defendant, and not the cost of subscribing to Season Ticket for the twelve hours, as argued by the plaintiff. Calculations to determine the value of the lost ESPN programming based upon the measure of damages found applicable produced total damages per subscriber which ranged from $.008 to $.29. The variations depended on whether one attributed to ESPN the entire $3.00 paid for Expanded Services or only $.50 (one-sixth of the monthly subscription fee for the six extra channels), and whether all 24 hours or only prime-time hours of programming were factored in. Based

upon his determination that the damages recoverable by any one member of the proposed class could not exceed $.29, Judge Battle entered an order as follows:

> Accordingly, the Court determines that certification of this action as a class action would be inadvisable, inefficient and inappropriate, and in its discretion the Court therefore orders that no class action shall be certified.

The court retained jurisdiction of the case to decide the plaintiff's individual claim for damages.

The plaintiff appealed to the Court of Appeals on the ground that the trial judge had used the wrong measure of damages in his decision not to certify the class. Although neither party raised an issue of the trial court's authority to determine the measure of damages and refuse to certify a class action because of *de minimis* damages, the Court of Appeals said that "[w]hether the court may decide the measure of damages, determine that they will probably be minimal, and deny class certification on grounds of efficiency appears to be a question of first impression." 75 N.C. App. at 475, 331 S.E. 2d at 191.

The Court of Appeals held that the trial judge had exceeded his authority by entering what in effect was an advisory opinion establishing a rule of damages. It vacated the order, directing the trial judge to restrict consideration of class certification to the criteria set out in Rule 23 of the North Carolina Rules of Civil Procedure.

We granted the defendant's motion for discretionary review and now reverse the decision of the Court of Appeals. In deciding whether to certify a class, a trial judge has broad discretion and may consider factors not expressly mentioned in N.C.G.S. § 1A-1, Rule 23, the class action statute. *See English v. Realty Corp.*, 41 N.C. App. 1, 9, 254 S.E. 2d 223, 231, *disc. review denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979).

The Court of Appeals quoted the following from *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 40 L.Ed. 2d 732, 748-49 (1974) as supporting its decision to vacate the order of the trial judge:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained.

We do not agree with the Court of Appeals that the trial judge conducted a preliminary inquiry into the merits of the suit. Rather, he determined that, as a matter of law, upon the claim as alleged no class member would be entitled to recover more than the value of twelve hours of ESPN regular programming if the plaintiff prevailed on the merits.

What *Eisen* would preclude in this case is a decision by the trial judge that the defendant had or had not breached the contract. Likewise, if the complaint had alleged and the answer had denied a contract to provide specific coverage of ACC games, the trial judge could not have found that the damages were limited to the value of *general* programming without making a preliminary determination of the contested question of contract coverage, which would amount to a determination on the merits of the suit.

Both parties recognize that in this case the trial judge was not calculating the actual amount of the damages, which is a jury question, but instead was delineating what the proper legal measure of damages would be if the plaintiff prevailed upon the claim alleged. Within this framework, the plaintiff contends that since the contract was for services, the legal measure of damages is the reasonable cost of securing performance by other means, which he claimed would be the Season Ticket cost per game actually carried by ESPN and blacked out on his television screen.

The plaintiff cites *Norwood v. Carter*, 242 N.C. 152, 87 S.E. 2d 2 (1955). *Norwood* concerned a claimed breach of a contract to support the grantor during his lifetime in exchange for a conveyance of land. There the Court said:

> [t]he damages for failure to furnish services in accordance with the contract therefor are measured by the actual loss sustained as a natural and proximate consequence. And when the contract is to perform specific services, this ordinarily means the reasonable cost of securing performance by other means.

242 N.C. at 155, 87 S.E. 2d at 4. Since the specific services to be performed in *Norwood* were not analogous to the general sports programming the plaintiff was deprived of in our case, the general rule of damages, not the rule applicable to the specific personal services in *Norwood*, applies, i.e., "the amount which will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed." *Id.*

If the defendant had provided what it was obligated under the contract to provide, the plaintiff would have had twelve more hours of sports programming. In breaching the contract, the defendant gave the plaintiff twelve hours of "snow." The defendant could have satisfied its contractual obligation by providing any sports programming during the twelve hours; it was not alleged to have had a contractual obligation to provide the ACC basketball games. As noted in the trial judge's order of 28 September 1984: "Plaintiff contends that Alert had contracted to provide specific services, that is, 24 hour ESPN general programming . . . ."

In his deposition, consistent with the allegations of his complaint, the plaintiff admitted that he would have been satisfied if some other programming had been on the ESPN channel during the hours in question. If the defendant had put on a wrestling match instead of the ACC game, the plaintiff would not have had a breach of contract claim. The defendants tried to change the terms of the contract and to attach a much higher price to certain of the hours. The measure of the damages of a breach of the actual contract is governed by the value of the programming contracted for, not by the value of select programming under a new proposed contract. The fact that the Season Ticket price demonstrates what the defendant thought the market would bear for a different contract does not make the Season Ticket price the appropriate measure for breach of the original contract.

Had the plaintiff alleged and been able to provide a forecast of evidence that the defendant had contracted to provide the ACC games, not general sports programming, the plaintiff's argument would be better grounded. If, on the other hand, the plaintiff had alleged and the defendant had denied that the defendant had contracted to provide ACC game coverage, the coverage would be an issue of fact to be resolved in a trial on the merits. In the latter case, the measure of damages could not be determined before the nature of the breach had been decided. The Court of Appeals' opinion is erroneously predicated on the latter situation.

The final issue is whether the decision by the trial judge that, in view of the *de minimis* damages recoverable, class action would be "inadvisable, inefficient and inappropriate," was a proper exercise of his discretion.

We recognize that one of the basic purposes of class actions is to provide a forum whereby claims which might not be economically pursued individually can be aggregated in an efficient and economically reasonable manner. As the United States Supreme Court has said:

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339, 63 L.Ed. 2d 427, 440, *reh'g denied*, 446 U.S. 947, 64 L.Ed. 2d 804 (1980).

However, there is a level at which the costs in pursuing the class action far outweigh any economic good sense and a fair use of judicial resources. One commentator has identified three types of claims which may be presented in the context of a proposed class action:

> the nonviable, the individually nonrecoverable, and the individually recoverable. A claim is nonviable if the expenses an individual would incur in asserting a right to a share of a class judgment would be greater than his expected share of the recovery. A claim is individually nonrecoverable if it would not justify the expense to an individual of independent litigation but would justify the lesser expenditure required to

> obtain a share of a class judgment. A claim is individually recoverable if it warrants the costs of separate litigation; that is, if an action to recover the claim would be economically rational regardless of the availability of class action procedures.

Note, *Developments in the Law-Class Actions*, 89 Harv. L. Rev. 1318, 1356 (1976).

We have here a case in the first category, a nonviable claim. The leading treatise on class actions says that "[t]hough this situation is theoretically possible, its actual existence is quite rare. The more usual situation arises when damages of most individual classes are sufficient to support the cost of distribution, but there are some de minimis claims." 2 H. Newberg, Newberg on Class Actions 372, n. 118 (2d ed. 1985). The nonviable claim is not a description of the merits of the cause of action but of the nature of the damages. In the instant case, the recovery of no more than $.29 per claimant would conceivably not even cover the cost of postage and stationery for a claimant to notify the court of his inclusion within the class, disregarding the cost of notifying potential class members of the existence of the action.

Although rare, there have been other cases which have been found to be not certifiable as class actions, in part because of the damages claimed. *See In re Hotel Telephone Charges*, 500 F. 2d 86 (9th Cir. 1974); *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972).

In *Cotchett*, the court noted:

> While class actions may represent the only available means of redress for consumers whose claims are too small individually to render legal action economically feasible, and while private enforcement of the antitrust laws in consumer transactions may provide an important deterrent to potential violators, such factors must be weighed, along with all other benefits to the class, against the costs of such an action, in terms of convenience and fairness to all involved.

Id. at 552-53. In balancing the costs of litigation against the likely benefits, the judge in *Cotchett* concluded that the "amount of recovery on each allegedly illegal transaction in the instant case would be but a fraction of a dollar, trebled. The costs of ad-

ministration of such a large suit promise to reduce substantially even this recovery." *Id.* at 553. He declined to certify the action as a class action.

We recognize that given this type of case, where an individual suit would be so uneconomical as to be in practice foreclosed, a decision not to certify the class is necessarily a form of death knell for the cause of action.

We hold that the trial judge in the instant case made a reasoned decision that the class action did not serve judicial interests of efficiency. We therefore reverse the decision of the Court of Appeals and remand to that court for further remand to the trial court for reinstatement of the order of the trial judge.

Reversed and remanded.

GEORGE WILBUR BOYD AND WIFE, PEARLINE W. BOYD v. JESSIE EDWARD WATTS

No. 218PA85

(Filed 6 May 1986)

1. **Vendor and Purchaser § 1— contract for sale of land—installment land contract rather than option**

A contract for the sale of land was an installment land contract and not an option contract where defendant agreed to pay and plaintiffs' predecessor in interest agreed to sell the realty; defendant agreed to make monthly payments for the purchase price and to pay the taxes and insurance; plaintiffs' predecessor retained title to the property but agreed to execute and deliver a general warranty deed to defendant upon defendant's payment of the full purchase price, taxes, and insurance; and plaintiffs' predecessor gave defendant the right to live in and use the premises so long as the contract remained in full force and effect.

2. **Vendor and Purchaser § 11— installment land contract—nonpayment—forfeiture of title**

Plaintiffs elected to pursue remedies that were available to them upon defendant's default when they brought an action asking that defendant's rights in an installment land contract be declared forfeited and cancelled and that their title to the real property be quieted.

3. Vendor and Purchaser § 11— installment land contract—action to quiet title—directed verdict proper

A directed verdict for plaintiffs was proper in an action to quiet title under an installment land contract where defendant had clearly defaulted and plaintiffs' rights did not turn upon the credibility of witnesses.

APPEAL by the plaintiffs from a decision of the Court of Appeals, 73 N.C. App. 566, 327 S.E. 2d 46 (1985), affirming in part and vacating and remanding in part the judgment of *Grant, J.*, entered 6 March 1984 in District Court, ROWAN County. The Supreme Court allowed the plaintiffs' petition for discretionary review on 3 July 1985. Heard in the Supreme Court on 10 February 1986.

Griggs, Scarbrough & Rogers, by James E. Scarbrough, for plaintiff appellants.

Larry E. Harris, for defendant appellee.

MITCHELL, Justice.

This case arose from an installment land contract initially entered into between Dayvault Enterprises, Inc. [hereinafter "Dayvault"], the vendor, and Jessie E. Watts, the defendant-vendee. The plaintiffs, George and Pearline Boyd, are successors in interest to Dayvault. The plaintiffs filed a complaint seeking to quiet title and for a declaratory judgment. The defendant-vendee answered and counterclaimed. At the close of all evidence, the trial court entered judgment dismissing the defendant's counterclaim and granting the plaintiffs' motions for directed verdicts in their favor on their claims.

The defendant-vendee appealed to the Court of Appeals. The Court of Appeals affirmed the dismissal of the defendant's counterclaim but vacated the judgment in favor of the plaintiffs on their claims against the defendant and remanded the case for further proceedings. For the reasons stated herein, we reverse that part of the decision of the Court of Appeals which vacated the judgment in favor of the plaintiffs on their claims against the defendant and remand the case to the Court of Appeals with instructions that the judgment of the trial court be reinstated.

The record on appeal discloses the following pertinent facts: On 23 December 1979, Dayvault entered into an installment land

contract with Jessie E. Watts, the defendant-vendee. The contract provided that the defendant agreed to buy and Dayvault agreed to sell the realty in question for a purchase price of $4,976.48, with $10.00 to be paid upon execution of the contract. The defendant agreed to make monthly payments of $75.00 toward principal and interest on the tenth day of each month, beginning on 10 January 1980, and to pay any balance remaining on 10 November 1984 by one final payment. The defendant-vendee also agreed to pay the taxes on the property and to pay for insurance. The contract also contained, *inter alia*, the following pertinent provisions:

> BUYERS' RIGHT TO USE: So long as this Contract remains in full force and effect, the Buyers shall have the right to live in and use said premises.
>
> DEFAULT: Upon default in the payment of any installment as set out herein, including pro-rated taxes and insurance, and should said default remain for a period of thirty (30) days, then said Sellers may take possession of the premises and expel the Buyers therefrom. In such event, all payments made under the terms of this Contract shall be deemed rental payments and said Sellers shall retain all payments for the rent of said premises.
>
> SELLERS TO RETAIN TITLE: As security for the payment in full of the purchase price, the Sellers shall retain title to the property herein. Upon Buyers' payment in full of the purchase price, taxes and insurance premiums as provided herein, Sellers will execute and deliver to Buyers a Deed in fee simple for said premises, with general warranties and free from encumbrances except usual rights-of-way for utilities and streets, and Restrictive Covenants, if any, for the subject property. Sellers shall have thirty (30) days after the completion of all payments in which to deliver said Deed.

The defendant-vendee made the monthly payments under the contract in January, February and March of 1980. He then moved to Florida leaving the contract in arrears and without making any arrangements for payment of any other amounts. Mary Barnhardt and the plaintiff Pearline Boyd, sisters of the defendant-vendee, thereafter made some payments on the property to Dayvault. Thereafter, the plaintiffs alone began giving money for the

monthly payments to Mary Barnhardt who in turn made payments on the property to Dayvault. Dayvault did not act on the default provision in the contract, and in December 1980 the plaintiffs made up all of the arrearages owed under the terms of the contract.

On 23 December 1980, Dayvault conveyed its interest in the property to Harold L. Mills and wife, Audree S. Mills, by a general warranty deed which by its terms was made subject to the contract between Dayvault and the defendant. Dayvault also assigned all its right, title and interest in its contract with the defendant-vendee Watts to the Mills, and the Mills accepted the assignment. The plaintiffs made the payments to the Mills in January and February of 1981 and then ceased making payments.

On 25 May 1981, Harold L. Mills sent a "Notice of Default" to the defendant in care of his sister, Mary Barnhardt, and sent a copy to the defendant's last known address in Florida. Mills also posted a copy of the notice on the property. The notice stated in pertinent part that the defendant Watts had "defaulted in the payment due on April 1, 1981, to Harold L. Mills under the assignment to him of your contract with Dayvault Enterprises, Inc. . . . ." and that "all payments you have made under your contract with Dayvault Enterprises, Inc. shall be deemed rent, UNLESS you present the payments due under your contract on April 1, May 1 and June 1, 1981 . . . on or before June 10, 1981." No payment of these arrearages was ever received.

By a non-warranty deed executed on 12 June 1981 and recorded on 30 June 1981 in Book 597 at page 935, Rowan County Registry, the Mills conveyed their interest in the property to the plaintiffs, George and Pearline Boyd. On 22 June 1981, the Mills executed and the plaintiffs accepted an assignment of all "right, title and interest to and under the contract to sell the property to Jessie E. Watts . . . ." During December 1982, the defendant-vendee Watts refused the plaintiffs' request that he convey any interest he might have in the property to them by a quitclaim deed.

On 4 March 1983, the plaintiffs, George and Pearline Boyd, commenced this action praying that the defendant's rights in the contract "be declared forfeited and cancelled" and that "the plaintiffs' title to the real property . . . be quieted." The defendant

Watts answered alleging that the plaintiffs acquired title and accepted the assignment of the contract in bad faith and with unclean hands. The defendant also counterclaimed alleging that the plaintiffs' conduct amounted to fraud.

A jury trial was had on all issues. At the close of all the evidence, the trial court entered judgment granting the plaintiffs' motions for directed verdicts in their favor on their claims and dismissing the defendant's counterclaim. The defendant gave notice of appeal to the Court of Appeals.

The Court of Appeals affirmed that part of the trial court's judgment dismissing the defendant's counterclaim but vacated that part of the judgment quieting title in the plaintiffs and declaring the contract "forfeited and cancelled." It remanded the case with instructions that the defendant be given six months to exercise an option to purchase the property.

The plaintiffs' petition to this Court for discretionary review was limited solely to the issue of whether the Court of Appeals was correct in concluding that the trial court erred by entering judgment for the plaintiffs on their claims for quiet title and for a declaratory judgment. Although the defendant argued in his brief in the Court of Appeals that the trial court erred by dismissing his counterclaim, he neither presented nor discussed any such questions in his new brief filed with this Court, and they are deemed abandoned. N.C. App. R. 28(a). Therefore, we leave undisturbed that part of the Court of Appeals' opinion affirming the dismissal of the counterclaim. *See Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). The issues before this Court concern the effect the defendant's default had on his interest in the property.

[1] An installment land contract is a "[t]ype of contract by which [a] buyer is required to make periodic payments towards [the] purchase price of land and only on the last payment is the seller required to deliver a deed." Black's Law Dictionary 717 (rev. 5th ed. 1979). Such a contract is "[a]lso called a 'contract for deed' or 'long-term land contract.' " *Id.*

> The long-term contract for the sale of land . . . is a financing device in addition to being a contract dealing with the necessary details of the sale and purchase . . . .

> Although possession of the property remains in the vendor if the long-term contract is silent on the subject, the vast majority of long-term contracts transfer possession to the vendee at the beginning of the payment period. Legal title remains in the vendor as security for payment of the purchase price.

J. Webster, *Real Estate Law in North Carolina* § 138 (Hetrick rev. 1981). Also, "the purchaser generally . . . agrees to pay taxes, insurance, and to maintain the property . . . ." R. Boyer, *Survey of the Law of Property* p. 510 (3d ed. 1981). *See* Narron, *Installment Land Contracts in North Carolina*, 3 Camp. L. Rev. 29 (1981).

The Court of Appeals concluded that the contract in this case was "an option contract." 73 N.C. App. at 571, 327 S.E. 2d at 50. We disagree and conclude that it was an installment land contract. Under the contract the defendant agreed to buy and the plaintiffs' predecessor in interest agreed to sell the realty. The defendant agreed to make monthly payments toward the purchase price, to pay the taxes and to pay for insurance. In turn, the plaintiffs' predecessor retained title to the property but agreed to execute and deliver a general warranty deed to the defendant upon the defendant's payment of the full purchase price, taxes, and insurance. Also, the plaintiffs' predecessor gave the defendant the right to "live in and use said premises" so long as the contract "remains in full force and effect . . . ." The contract was an installment land contract.

[2] The contract contained the default clause previously set out herein. The Court of Appeals correctly determined that all of the evidence supported the trial court's conclusion that the defendant defaulted under the terms of that clause of the contract. However, we disagree with the Court of Appeals as to the effect of the default. Because the Court of Appeals deemed the contract to be an option contract, it stated that upon "default defendant retained the right to purchase by paying the unpaid balance plus contract interest at any time before 10 November 1984." 73 N.C. App. at 571, 327 S.E. 2d at 50. Because the contract in the case *sub judice* was an installment land contract, we deem the default to have had a different effect on the parties' rights.

This Court has "held repeatedly that 'the relation between vendor and vendee in an executory agreement for the sale and purchase of land is substantially that subsisting between mortgagee and mortgagor, and governed by the same rules.' " *Brannock v. Fletcher*, 271 N.C. 65, 70, 155 S.E. 2d 532, 539 (1967). The vendor may treat the default as a breach, thus making available to him various remedies. *Id.* at 73, 155 S.E. 2d at 541; Narron, *Installment Land Contracts in North Carolina*, 3 Camp. L. Rev. 29 at 38-46 (1981). The vendor, *inter alia*, may bring an action to quiet title, accept the noncompliance as a forfeiture of the contract, or bring an action to declare it at an end. *Id.; But see Hicks v. King*, 150 N.C. 370, 64 S.E. 125 (1909) (Court refused to allow forfeiture and ordered a foreclosure sale on the basis of the mortgage analogy). In this case the plaintiffs' complaint asked that "the defendant's rights in the contract . . . be declared forfeited and cancelled" and that "the plaintiffs' title to the real property . . . be quieted." Therefore, the plaintiffs elected to pursue remedies that were available to them upon the defendant's default. *Id.*

[3] A directed verdict is proper only when it appears that the nonmovant fails to show a right of recovery upon any view of the facts that the evidence tends to establish. *West v. Slick*, 313 N.C. 33, 40, 326 S.E. 2d 601, 606 (1985). Ordinarily, it is not permissible to direct a verdict in favor of a party on whom rests the burden of proof. Nevertheless, "[a] directed verdict for the party with the burden of proof, however, is not improper where his right to recover does not depend on the credibility of his witnesses and the pleadings, evidence, and stipulations show that there is no issue of genuine fact for jury consideration." *Financial Corp. v. Harnett Transfer*, 51 N.C. App. 1, 5, 275 S.E. 2d 243, 246, *disc. rev. denied*, 302 N.C. 629, 280 S.E. 2d 441 (1981).

The plaintiffs' rights in this case do not turn upon the credibility of the witnesses. The defendant clearly had defaulted under the terms of the executory installment land contract. Therefore, the plaintiffs properly brought an action to have title quieted in themselves and to have the contract declared to have been forfeited and the defendant's rights under the contract to be at an end. Given the record and briefs before us, we cannot say that the trial court erred when it granted the plaintiffs' motions and entered judgment in their favor as to those claims. The hold-

ing of the Court of Appeals vacating that part of the trial court's judgment must be reversed.

We note that the result we are constrained to reach was also that contemplated by the parties when they entered into this installment land contract. The contract provided that "[s]o long as this contract remains in full force and effect, the buyers shall have the right to live in and use the premises," and that upon "default remain[ing] for a period of thirty (30) days, then said Sellers may take possession . . . and expel the buyers" and "all payments . . . shall be deemed rental payments and said Sellers shall retain all payments for the rent of said premises." It seems clear the parties intended a forfeiture of the defendant's rights under the contract if he defaulted, and that all payments made prior to forfeiture were to be retained by the vendor.

Finally, we note that the contract in this case did not contain any provision for notice in case of default. The record shows that in 1981, the defendant was given notice of his default under the contract or that attempts were made to give him such notice. However, the briefs filed in this Court present no question concerning what if any notice to the defendant was required by law or by the contract or whether the notice given or attempted in this case was sufficient. *See generally* Narron, *Installment Land Contracts in North Carolina*, 3 Camp. L. Rev. 29 (1981). Our review "is limited to questions so presented in the several briefs." N.C. App. R. 28(a). Therefore, the parties are deemed to have abandoned any right to present such questions and we neither reach nor decide them. *Id.*

For the foregoing reasons we do not consider or disturb the holding of the Court of Appeals affirming that part of the trial court's judgment dismissing the defendant's counterclaim. We reverse the holding of the Court of Appeals which vacated that part of the trial court's judgment quieting the plaintiffs' title and declaring the contract forfeited and the defendant's rights ended. We remand the case to the Court of Appeals with instructions that the judgment of the District Court, Rowan County, be reinstated.

Reversed in part and remanded.

STATE OF NORTH CAROLINA v. ARNOLD LORENZO PAIGE AND JAMES BERNARD LOWERY

No. 624A84

(Filed 3 June 1986)

1. **Criminal Law § 15— dismissal of charges—loss of exclusive venue**

A county which has acquired exclusive venue pursuant to N.C.G.S. § 15A-132(a) or (b) loses that exclusive venue when the criminal process upon which the exclusive venue is based is dismissed.

2. **Criminal Law § 13; Indictment and Warrant § 3— crimes in another county—no jurisdiction of grand jury**

The grand jury of Stanly County was without jurisdiction to indict defendants for offenses that occurred in Mecklenburg County where the indictments were returned prior to 1 July 1985, the effective date of N.C.G.S. § 15A-631.

3. **Criminal Law § 13; Indictment and Warrant § 3— allegations that crimes occurred in county—evidence showing crimes in another county**

Judgments for robbery must be arrested where the indictments returned by the grand jury in Stanly County alleged that the offenses occurred in Stanly County but the State's evidence conclusively showed that the offenses occurred in Mecklenburg County.

4. **Criminal Law § 92.1— joint trial—inability to call codefendant as witness—absence of prejudice**

Defendant was not prejudiced by a joint trial with his codefendant in a prosecution for sexual offense, kidnapping, larceny and robbery because he was thus unable to call his codefendant as a witness where the only suggestion that the codefendant could aid defendant in his defense was defense counsel's unsupported assertion that the codefendant had said that defendant was not present during the commission of the crimes.

5. **Criminal Law § 92.1— joint trial—pretrial identification of codefendant—absence of prejudice**

Defendant was not prejudiced by a joint trial with his codefendant because the victim had made a pretrial identification of the codefendant but not of defendant where the victim made in-court identifications of both defendants at trial.

6. **Criminal Law § 92.1— joint trial—evidence relating to only one defendant—limiting jury instruction—absence of prejudice**

A severance was not required because evidence was introduced that the codefendant was wearing a bracelet taken from the victim at the time of his arrest where the trial court instructed the jury that such evidence applied only to the codefendant and not to defendant.

7. Criminal Law § 98.3— trial with ankle weights on defendants

The trial court did not err in allowing defendants to be tried while wearing unobtrusive ankle weights where the trial court found upon supporting evidence that the restraints were necessary to prevent defendants' escape, and where the trial court took measures to prevent the jurors from observing the weights on defendants. N.C.G.S. § 15A-1031.

8. Criminal Law § 98.3— restraints on defendants—reliance on evidence inadmissible at trial

A trial judge may base his findings supporting the use of restraints upon reliable information which would not be admissible evidence at a trial, including hearsay testimony.

9. Criminal Law § 102.2— opening statement by defense counsel—limitation by court

The trial court's limitation of defense counsel's opening statement to the jury to "what you contend your evidence will show" did not sufficiently prejudice defendant's case to require reversal of his conviction. However, defense counsel should have been allowed to state once without interruption that his client would rely on the presumption of innocence and the State's burden to prove defendant's guilt beyond a reasonable doubt since the simple statement that defendant intends to rely on these basic aspects of a criminal prosecution would not amount to an argument on the law and may be necessary in order to apprise the jury of defendant's only defense when he does not plan to offer evidence. N.C.G.S. § 15A-1221(a)(4); Rule 9, General Rules of Practice for the Superior and District Courts.

10. Criminal Law § 99.3— comments by trial judge—no expression of opinion

The trial judge did not express an opinion on the evidence in commenting during cross-examination of the victim that "She said a few seconds," and "She's testified she said she did," or in stating, "That's all right," when the victim began crying during cross-examination.

11. Criminal Law § 99.4— judge's sustaining of own objections

The trial judge's actions in sustaining his own objections to questions by defense counsel did not amount to an abuse of discretion in exercising control over the conduct of the trial where the trial judge was correct in each instance in his determination that the question posed amounted to needless repetition.

12. Criminal Law § 114.1— disparity in stating contentions of the parties

The disparity in the trial court's recitation of the evidence for the State as opposed to evidence for defendants did not violate N.C.G.S. § 15A-1232 where the court's instructions fairly and accurately summarized the evidence and contentions of the parties.

13. Criminal Law § 88— right of cross-examination not denied during voir dire

Defendants were not denied their right of cross-examination during a voir dire hearing on the admissibility of the victim's in-court identification of defendants when the trial court ruled that a question as to how long the victim viewed her abductors in a parking lot when they first accosted her was suffi-

ciently answered by the victim's response of "a few seconds" and when the court refused to allow the victim to answer a question as to who told her to refer to one of her assailants as "Defendant Paige."

14. Criminal Law § 66.19— admissibility of in-court identification—voir dire hearing—refusal to hear another witness

The trial court did not err in refusing to permit defendant to call a witness during a voir dire hearing on the admissibility of the victim's in-court identification of defendants to testify about a lineup and the fact that the victim had not identified one defendant in the lineup where defense counsel had conceded that a pretrial lineup and photographic display had not been impermissibly suggestive, and the victim's testimony concerning her opportunity to observe her abductors showed that her identification of defendants was not inherently incredible, since testimony by another witness which cast doubt on the victim's identification would only have presented a jury question of credibility.

15. Criminal Law § 66.20— admissibility of in-court identification—sufficiency of findings and conclusions

The trial judge made adequate findings of fact and conclusions of law on the admissibility of the victim's identification testimony where no contention was made that pretrial procedures were unlawfully conducted or tainted the in-court identification, and where the trial judge made findings which fully supported his conclusion that the victim's identification of defendants as her assailants was not so inherently incredible as to require the court to suppress it.

16. Criminal Law § 88.5— refusal to allow question for record during recess—no violation of due process

Defendant's due process rights were not violated when the trial court refused to permit defendant's counsel to have the victim answer a question for the record during a recess when the court allowed the codefendant's counsel to have the victim answer for the record a question which the court had disallowed on recross-examination where there is no indication in the record what question defendant's counsel wanted answered, and where nothing in the record indicates that defendant's counsel conducted a recross-examination or asked to be allowed to preserve an answer to any question that he had posed to the victim.

17. Criminal Law §§ 75.2, 75.7; Searches and Seizures § 8— confession to undercover officer—Miranda rules inapplicable—effect of trickery—search incident to arrest

Defendant's right to receive *Miranda* warnings and his right to counsel did not apply to confession to an armed robbery made during a conversation with an undercover officer and a private citizen since defendant was not under arrest and was free to go at any time. Nor was the confession rendered involuntary because of trickery by the undercover officer since defendant testified that he admitted the robbery to make himself look good and not because of any coercion or duress, and since a defendant against whom no criminal proceedings have been initiated does not have a constitutional right to protection

against police tactics which merely amount to trickery. Therefore, the confession was sufficient to establish probable cause for defendant's arrest, and a bracelet in plain view was properly seized from defendant as an incident of his valid arrest.

18. Criminal Law § 34.5— evidence of another crime—competency to show identity

In a prosecution for kidnapping and sexual offense, evidence that one defendant admitted an armed robbery of a theater in a conversation with an undercover officer was admissible to prove identity where there was evidence tending to show that the victim's abductors intended to commit an armed robbery, and the descriptions of the persons who committed the robbery were similar to the victim's description of her abductors. Furthermore, testimony brought out by defendant on recross-examination of the undercover officer cured any error which may have occurred because of the officer's testimony on redirect about defendant's participation in the robbery.

19. Criminal Law § 40— evidence at prior hearing—availability of witness

The trial court did not err in instructing the jury that the victim's testimony at the probable cause hearing could not be considered as substantive evidence where the victim was available and testified.

20. Criminal Law § 111.1— instructions on effects of joinder

When the court's instructions are considered as a whole, the court adequately and in substance gave instructions requested by defendants on the effects of joinder of defendants for trial.

21. Criminal Law § 66— instruction on identification

The trial court did not err in failing to give defendants' requested instruction on identification where the instructions given by the court on the issue of identification informed the jury that the burden of proving the identity of each defendant beyond a reasonable doubt was upon the State and that the jury must be satisfied beyond a reasonable doubt that each defendant was the perpetrator of each of the crimes charged before it could return a verdict of guilty as to that particular crime and that particular defendant.

22. Criminal Law § 112— possession of stolen property—failure to instruct on presumption of ownership

Where the jury in a rape, sexual offense, kidnapping and robbery trial was presented with positive evidence that a bracelet defendant was wearing when he was arrested had been taken from the victim, and where ownership of the bracelet was not the issue before the jury, the trial court did not err in refusing to give defendant's requested instruction that possession of the bracelet by defendant created a presumption that it was his.

23. Criminal Law § 114.3— no expression of opinion in instruction

An instruction that the jury was not to consider evidence of a bracelet worn by defendant "against" the codefendant did not constitute an improper comment on the evidence to the effect that the jury could consider such evidence against defendant. N.C.G.S. §§ 15A-1222 and 1232.

State v. Paige

APPEAL by defendants from judgments entered by *Rousseau, Judge*, at the 11 June 1984 Session of UNION County Superior Court.

The defendants were tried on indictments charging each with first degree sexual offense, first degree kidnapping, felonious larceny of a motor vehicle, and two counts of common law robbery. In addition, defendant Paige was charged with first degree rape. The defendants pleaded not guilty to all charges. At the close of the State's evidence, the court granted a motion to dismiss the first degree kidnapping charges and submitted second degree kidnapping to the jury. The State took a voluntary dismissal of the charges of larceny of an automobile. The jury found the defendants guilty of all the remaining charges. The trial court sentenced Paige to two consecutive sentences of life imprisonment for first degree rape and first degree sexual offense, plus thirty years for second degree kidnapping. He imposed a concurrent sentence of three years for each count of common law robbery. Lowery was sentenced to consecutive sentences of life imprisonment for first degree sexual offense and twenty years for second degree kidnapping, and to a concurrent sentence of three years for each count of common law robbery. Paige appealed the rape conviction and both defendants appealed the sexual offense convictions to this Court as a matter of right under N.C.G.S. § 7A-27(a). On 21 March 1985 this Court allowed the defendants to bypass the Court of Appeals on their appeal from the kidnapping and common law robbery convictions. Heard in the Supreme Court on 14 October 1985.

Lacy H. Thornburg, Attorney General, by Archie W. Anders, Assistant Attorney General, for the State.

Henry T. Drake for defendant-appellant Paige.

Charles Weaver Collini for defendant-appellant Lowery.

BILLINGS, Justice.

The State's evidence tended to show that on 27 January 1984, the defendants kidnapped the victim at approximately 8:00 p.m. in Albemarle, Stanly County, drove her to another location in Stanly County where they robbed her of some jewelry and money, and then drove her to Mecklenburg County where the defend-

ant Paige raped her and where each defendant forced her to have oral sex. The defendants then robbed her of her remaining jewelry and left her in the trunk of her car. She was rescued by law enforcement officers at approximately 10:30 a.m. the next morning.

On appeal the defendants bring forward several assignments of error, most of which we find to be without merit. However, we conclude that because the Stanly County grand jury was without jurisdiction to indict defendant Paige for the rape and the first degree sexual offense and defendant Lowery for the first degree sexual offense, all of which were alleged and proved to have occurred in Mecklenburg County, judgment must be arrested in those cases. In addition, although the indictments alleged that the other offenses occurred in Stanly County, the proof established that one count of common law robbery against each defendant occurred in Mecklenburg County. Judgment must be arrested in those cases as well. We find no error requiring reversal of the remaining convictions.

I. Venue

The first assignment of error raised by the defendants is that their motions for change of venue to Mecklenburg County were improperly denied. The events in this case transpired in Stanly and Mecklenburg Counties on 27 January 1984. On 14 February 1984 warrants were issued in Mecklenburg County against Paige for first degree rape and common law robbery, and against Lowery for first degree sexual offense and common law robbery. Later that same day in Stanly County, warrants were issued against Paige for kidnapping, common law robbery, and felonious larceny of a motor vehicle and against Lowery for kidnapping, common law robbery, and felonious larceny of a motor vehicle. On 12 March 1984 the Stanly County grand jury indicted Paige for kidnapping, felonious larceny, and common law robbery (handbag, money and jewelry) and Lowery for kidnapping, common law robbery (handbag, money and jewelry) and felonious larceny. On 30 March 1984 the district attorney in Mecklenburg County took a voluntary dismissal of all the charges pending in that county against both defendants. On 2 April 1984 the Stanly County grand jury returned additional indictments against Paige charging him with first degree sexual offense, first degree rape, and a second

count of common law robbery (jewelry), and against Lowery for first degree sexual offense and a second count of common law robbery (jewelry).

The defendants twice moved for transfer of venue to Mecklenburg County. The first motions were filed in Stanly County on 19 March 1984. These motions (1) asked for change of venue pursuant to N.C.G.S. § 15A-957 on grounds of extensive pre-trial publicity in Stanly County, and (2) claimed exclusive venue in Mecklenburg County under N.C.G.S. § 15A-132(c). On 2 April 1984 Judge Wood ordered the cases transferred to Union County for trial because of the publicity in Stanly County. The order did not address the exclusive venue claim raised by the defendants. The defendants then moved for transfer from Union County to Mecklenburg County on the ground that Mecklenburg was the place where many of the alleged offenses occurred and was therefore the place of proper venue under N.C.G.S. § 15A-131.

Thereafter the trial judge concluded that Stanly and Mecklenburg Counties had concurrent "jurisdiction" of the offenses and that when the charges filed in Mecklenburg County were dismissed, Stanly County was the county of proper venue. Venue having been transferred from Stanly to Union County because of pre-trial publicity, the court ruled that Union County was a proper venue for trial and denied the motion to transfer.

[1] The defendants' contentions require us to examine and apply N.C.G.S. § 15A-132 (1983) which provides as follows:

> (a) If acts or omissions constituting part of the commission of the charged offense occurred in more than one county, each county has concurrent venue.
>
> (b) If charged offenses which may be joined in a single criminal pleading under G.S. 15A-926 occurred in more than one county, each county has concurrent venue as to all charged offenses.
>
> (c) When counties have concurrent venue, the first county in which a criminal process is issued in the case becomes the county with exclusive venue.

For some of the offenses, venue may have been concurrent in Stanly and Mecklenburg Counties under N.C.G.S. § 15A-132(a). It

is clear that venue for all offenses was concurrent in those counties pursuant to N.C.G.S. § 15A-132(b), for they all were "based on a series of acts or transactions connected together or constituting parts of a single scheme or plan" and thus could be joined in a single criminal pleading according to the joinder rules of N.C.G.S. § 15A-926. The defendants contend that because the first criminal process for an offense arising out of the series of acts or transactions was issued in Mecklenburg County, that county became the county with exclusive venue pursuant to N.C.G.S. § 15A-132(c), and it was error for the trial court to refuse to grant their timely motions to transfer the cases to Mecklenburg for trial. Before the trial judge ruled on the first motion for change of venue, all charges which had been filed in Mecklenburg County had been voluntarily dismissed. Therefore the question becomes whether the exclusive venue acquired pursuant to N.C.G.S. § 15A-132(c) survived that dismissal. For the reasons set forth below, we hold that a county which has acquired exclusive venue pursuant to N.C.G.S. § 15A-132(a) or (b) loses that exclusive venue when the criminal process upon which the exclusive venue is based is dismissed. We base our decision on this Court's treatment of a similar situation involving prosecutions in courts with concurrent jurisdiction under the system that existed in this State prior to establishment of the Unified Court System in 1965. *See State v. Clayton*, 251 N.C. 261, 111 S.E. 2d 299 (1959); *State v. Parrish*, 251 N.C. 274, 111 S.E. 2d 314 (1959); *State v. Rose*, 251 N.C. 281, 111 S.E. 2d 311 (1959); *State v. Moseley*, 251 N.C. 285, 111 S.E. 2d 308 (1959). The concurrent jurisdiction between the two courts in question in these cases was created by N.C.G.S. § 7-64 which was repealed in 1969 when court reform became fully implemented. N.C.G.S. § 7-64 provided:

> In all cases in which by statute original jurisdiction of criminal actions has been, or may hereafter be, taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent *and exercised by the court first taking cognizance thereof.*

(Emphasis added.)

Following a thoughtful analysis of cases on the question cited in 117 A.L.R. 424 (1938), Justice (later Chief Justice) Parker said in *State v. Clayton*:

> It is our opinion, that when before trial a *nolle prosequi* was entered upon the record of the Recorder's Court of Vance County in the cases pending in that Court against the defendant, that Court lost jurisdiction, and that thereafter the State could institute and carry on an indictment and prosecution against the defendant for the same offenses in the Superior Court of Vance County, a Court of concurrent jurisdiction over these offenses with the Recorder's Court of Vance County, which opinion is in accord with the decisions of a large majority of the Courts deciding the same precise question, and with our decision of *S. v. McNeill* [10 N.C. 183 (1824)], and is a sound and better view.

251 N.C. at 272, 111 S.E. 2d at 307.

We believe that the same interpretation should be given to the provisions of N.C.G.S. § 15A-132 relating to concurrent and exclusive venue. The reason for the grant of exclusive venue to the first court in which charges are filed is "to prevent confusion and contentions between different courts, each seeking to exercise jurisdiction, . . . not to shield one accused of crime from prosecution when that court, in which the complaint may have been first lodged, had lost its [exclusive venue] by dismissal of the case." *Epps v. State*, 130 Tex. Crim. 398, 398-99, 94 S.W. 2d 441, 442 (1936).

In the case *sub judice*, because all charges in Mecklenburg County were dismissed prior to the hearing on the defendants' motion for change of venue, the judge did not err in refusing to transfer venue to Mecklenburg County.

This assignment of error is overruled.

II. Jurisdiction

[2] The defendants next contend that the grand jury of Stanly County was without jurisdiction to indict them for the offenses that occurred in Mecklenburg County and that judgments entered upon the convictions for those offenses should be arrested. We agree.

In the recent case of *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984), this Court held that a grand jury in one county has no power to return an indictment for a crime committed in

another county. Although the General Assembly, apparently in response to *Randolph*, has enacted N.C.G.S. § 15A-631 which provides that "the place for returning a presentment or indictment is a matter of venue and not jurisdiction," that statute became effective 1 July 1985 and does not apply to the indictments in this case,[1] which were returned in March and April of 1984.

The indictments charging defendant Lowery with first degree sexual offense and defendant Paige with first degree sexual offense and first degree rape were returned by the Stanly County grand jury but allege that the offenses occurred in Mecklenburg County. Under the authority of *Randolph*, judgments entered on those indictments must be arrested, as the indictments show on their face that the grand jury which returned them lacked jurisdiction over the offenses charged.

[3] Paige and Lowery were each charged with two counts of common law robbery. One bill against each defendant alleged robbery of the victim's handbag, money, and some jewelry; another bill against each defendant alleged robbery of other jewelry. All four indictments alleged that the robberies occurred in Stanly County. However, all of the evidence established and the jury's verdict reflected that the offenses charged in the two indictments alleging that only jewelry was taken occurred in Mecklenburg County.

In *Randolph* we noted that "[s]ince the statement in an indictment of the county where the crime allegedly occurred establishes *prima facie jurisdiction*, a challenge to this statement can be asserted at any time as stated in N.C.G.S. 15A-952(d)." *Id.* at 208, 321 S.E. 2d at 871. The defendants have raised the variance between the allegation of jurisdiction and the proof thereof in their appeal to this Court. We have examined the evidence presented at trial and find that there is no evidence which supports the allegation that these offenses occurred in Stanly County. Rather, the State's evidence conclusively shows that the offenses occurred in Mecklenburg County. Therefore, the State's own evidence rebuts the *prima facie* jurisdiction of the Stanly County

1. 1985 N.C. Sess. Laws Ch. 553, § 2 provides: "This act does not apply to pending prosecutions." 1985 N.C. Sess. Laws Ch. 553, § 4 provides: "This act is effective upon ratification." The act was ratified 1 July 1985.

grand jury to indict the defendants for the charges of common law robbery which occurred in Mecklenburg County, and the judgments entered against defendant Paige for common law robbery in case numbered 84CRS3127 (84CRS1697, Stanly County) and against defendant Lowery for common law robbery in case numbered 84CRS3125 (84CRS1695, Stanly County) must be arrested.

III. Challenge to Jury Panel

The defendants contend that the trial judge erred in failing to discharge the jury panel as being improperly and illegally drawn. Defendant Paige made a motion to quash the jury panel [properly a challenge to the jury panel under N.C.G.S. § 15A-1211(c)] and in his motion adopted the evidence and testimony heard by Judge Rousseau in *State v. Massey*, which was tried in Union County on 7 May 1984. Judge Rousseau presided over both the instant case and *Massey* and adopted his findings of fact and rulings in the *Massey* case to deny Paige's motion to quash the jury panel in the instant case. For the reasons stated in this Court's opinion in *State v. Massey* (No. 552A84, filed 6 May 1986), we find no error in denial of the challenge to the jury panel.

IV. Joint Trial

The defendants contend that the trial judge erred in allowing, over their objection, the State's motion to join the defendants for trial. The State filed a written motion pursuant to N.C.G.S. § 15A-926(b)(2) (1982) which provides:

> Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
>
> a. When each of the defendants is charged with accountability for each offense; or
>
> b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
>
> 2. Were part of the same act or transaction; or
>
> 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

Whether to allow a motion to join defendants for trial as authorized by statute ordinarily is addressed to the sound discretion of the trial judge. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985). "Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed." *State v. Nelson*, 298 N.C. 573, 586, 260 S.E. 2d 629, 640 (1979), *cert. denied*, 446 U.S. 929, 64 L.Ed. 2d 282 (1980).

[4] Defendant Paige's written objection to joinder was based on the allegation that the victim had not identified Paige, and on the unsupported assertion that, in the absence of consolidation, Lowery could testify that Paige was not present during the commission of the crimes.

In oral argument to the trial judge on the motion, counsel for Paige did not rely upon his allegation that Paige would be deprived of his right to call Lowery as a witness if the joinder were allowed. Rather, he argued that because the victim had stated that two black men participated in the crimes but could only identify Lowery, having Paige tried jointly with Lowery would prejudice Paige.

In *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death penalty vacated*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976) we held that the defendant had been prejudiced by a joint trial with his co-defendant in a prosecution for first degree murder because he was not able to call his co-defendant as a witness to bolster his alibi defense. The co-defendant had given a signed statement to the police admitting his own involvement in the crime and naming a person other than Alford as the person who killed the victim. He did not implicate Alford. The State chose not to introduce the co-defendant's statement at the joint trial because it would have weakened the State's case against Alford.

In the instant case, the only suggestion that Lowery could aid Paige in his defense was the unsupported assertion in the objection to joinder, signed by counsel for Paige, that "counsel is informed that suspect Lowery said that Arnold Lorenzo Paige was not present during any crime and could be a witness for Arnold Lorenzo Paige were the joinder not ordered." This is a far cry from a signed, sworn statement by a co-defendant admitting his own guilt and identifying some person other than the defendant

as the other guilty party. At the hearing before Judge Rousseau, no further effort was made to show that co-defendant Paige had made the statement which counsel for Lowery had been "informed" that he made. This bald assertion of hearsay information coupled with the theoretical possibility that Lowery "could be a witness" for Paige in the absence of joinder is insufficient to show that the defendant was in fact deprived of an opportunity to present his defense.

With respect to Paige's assertion that Lowery could exculpate Paige, the State introduced the testimony of a Trailways bus driver that Paige and Lowery rode his bus from Charlotte to Albemarle on the afternoon of 27 January 1984, the date of the alleged offenses, and an acquaintance of Paige's testified that he saw Paige and Lowery together on the streets of Albemarle at about 5:30 p.m. on that day.

[5] Regarding Paige's argument that a joint trial with his co-defendant who had been identified by the witness would constitute prejudice to the defendant who was not so identified, we note that during her testimony on *voir dire* the victim stated that she had selected Paige's photograph from a six-photograph array and had tentatively identified him in a line-up, although she had not made a positive identification at either time. The line-up was comprised of Paige and five black males selected by him from the inmate population in the Mecklenburg County Jail on the basis of their physical similarity to the defendant. The victim made an in-court identification of both defendants at trial. Therefore, the basis for defendant Paige's objection to joinder, that he would be associated in the jury's mind with the co-defendant whom the victim identified even though she was unable to identify the defendant, simply did not materialize.

Defendant Lowery's objection to joinder alleges that

> a piece of physical evidence to wit: a 14-carat white gold serpentine bracelet allegedly belonging to the victim was found in the possession of the codefendant, ARNOLD LORENZO PAIGE, which arguably may be admitted into evidence at trial against the codefendant, PAIGE; that no cautionary instruction by the Court to the jury could cure the prejudicial and detrimental effect that the admission of the afore-mentioned

evidence would have against the defendant, JAMES BERNARD LOWERY.

[6] When he was arrested on a different charge, the defendant Paige was wearing a serpentine bracelet which the victim identified as the one taken from her on the night of 27 January 1984. The bracelet and the circumstances surrounding its seizure from Paige were introduced into evidence, at which time the trial judge instructed the jury:

> Members of the jury, this bracelet is introduced solely as you might find it applies to the defendant Paige. It has nothing to do with the defendant Lowery.

If we were to agree with the defendant Lowery that the introduction of the above-referenced evidence required a severance of the defendants' trials, we would in effect be ruling that co-defendants may not be joined for trial in this state. It would be unusual for all evidence at a joint trial to be admissible against both defendants, and we often rely on the common sense of the jury, aided by appropriate instructions of the trial judge, not to convict one defendant on the basis of evidence which relates only to the other. *See, e.g., State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981).

As this Court said in *State v. Nelson*, 298 N.C. 573, 586, 260 S.E. 2d 629, 639 (1979), *cert. denied*, 446 U.S. 929, 64 L.Ed. 2d 282 (1980), "public policy strongly compels consolidation as the rule rather than the exception" when each defendant is sought to be held accountable for the same crime or crimes. In *Nelson* we recognized that limiting instructions ordinarily eliminate any risk that the jury might have considered evidence competent against one defendant as evidence against the other.

We find that the trial judge did not abuse his discretion in allowing the State's motion to join the defendants for trial.

V. Restraints During Trial

[7] Defendants next argue that the trial judge committed prejudicial error by allowing them to be tried while wearing ankle weights. In *State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976), we held that it was not error for a defendant to be tried in shackles when there was a sufficient showing that under the cir-

cumstances the restraints were necessary. We did emphasize that shackles are inherently prejudicial to the defendant and should not be used without justification. We recommended certain procedures for insuring that, when shackles were used, the record supporting their use would be sufficient to permit appellate review of the trial judge's determination of necessity.

N.C.G.S. § 15A-1031 (1983) incorporates our holding in *Tolley* as follows:

> A trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons. If the judge orders a defendant or witness restrained, he must:
>
> (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
>
> (2) Give the restrained person an opportunity to object; and
>
> (3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.
>
> If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact.

In accordance with the statute, the trial judge informed the defendants and their counsel and made an entry in the record out of the presence of the jury that the restraints were necessary to prevent the defendants' escape. The trial judge conducted a hearing, and Deputy Rollins of the Union County Sheriff's Department testified as follows:

> Information was relayed to me last week that they almost escaped previously en route to the hospital, that one of them purposely told the deputy to look at a woman walking across the yard, and when the deputy turned to look at her, his intention was to get the gun while the other man was getting

> the prescription filled in the drugstore, and their intentions was [sic] to grab a deputy's gun, or officer's gun, while en route to the courtroom to escape.

[8] When asked about the source of his information, Deputy Rollins said it came from the chief jailor. Although Deputy Rollins' testimony would not have been admissible at trial because based upon hearsay, we hold that a judge may base his findings supporting the use of restraints upon reliable information which would not be admissible as evidence at a trial.

The trial judge noted that the defendants' pants legs "about cover up those weights around the ankles of both defendants." He made the following findings of fact which we find justify the use of the unobtrusive ankle weights:

> Let the record show that upon this motion the Chief Deputy Sheriff of this county says he had information that these defendants, if they got a chance, would would [sic] grab a gun and attempt to escape; that the Sheriff this week got a new type of leg weight, apparently has a lock to it, that wraps around the legs, that it is dark in color, looks like it is made of cloth and possibly one leather strap around it; that both defendants are now sitting in the court with those weights around each of their legs; that in the court's opinion based on the Sheriff's information and the fact that these two defendants will be sitting at the counsel table primarily behind counsel and between the State's counsel and the jury, and due to the fact that the court intends to have all persons in the courtroom before the jury comes in and excuse the jury before other persons are excused, I do not think the jury will notice anything around either of the defendant's legs. If they do, without some comment from the attorneys, I do not think a jury would associate that type of wrappings around a person's leg as being shackles or leg chains.
>
> . . . .
>
> Now, in the event one or both of them want to testify, we'll then at that time take some other steps.

The defendants did not testify before the jury and there is no indication in the record that the trial judge did not follow the pro-

cedure which he outlined in his findings to prevent the jurors' observing the defendants' heavy gait caused by the weights.

In their brief to this Court, the defendants argue that the judge failed to instruct the jury in accordance with the statute that the restraint was not to be considered in weighing the evidence and determining guilt. The defendants made no objection at trial to the failure to instruct and did not include in the record on appeal an assignment of error on this point. They have therefore failed to preserve the issue for appellate review. N.C. R. App. P. 10(b)(2).

This assignment of error is overruled.

VI. General conduct of the trial

The defendants next contend that by his interruptions during defendants' opening statements, comments during the course of trial, *sua sponte* rulings preventing answers to defendant's questions on cross-examination of State's witnesses, and disparity in the length of time devoted in his charge to recapitulation of the defendants' evidence as compared with that of the State, the trial judge expressed an opinion regarding the case in violation of N.C.G.S. § 15A-1222 (1983).

[9] The defendants first challenge the manner and extent to which the trial judge limited their opening statements to the jury. Only the opening statement of counsel for defendant Paige is set out in the record, however, and we consider only his assignment of error on this point.

N.C.G.S. § 15A-1221(a)(4) (1983) provides that in a criminal jury trial "[e]ach party must be given the opportunity to make a brief opening statement . . . ." Nothing in the statute defines the scope of the opening statement. The official commentary to N.C.G.S. § 15A-1221 notes that the drafting commission

> determined that the initial speech by the judge telling the jurors about the case, under G.S. 15A-1213, plus opening statements of the parties would be a far superior method of telling the jurors about the case and what to look and listen for [than the previous method of reading the indictment and other pleadings].

Rule 9 of the General Rules of Practice for the Superior and District Courts also provides for an opening statement:

> At any time before the presentation of evidence counsel for each party may make an opening statement setting forth the grounds for his claim or defense.
>
> The parties may elect to waive opening statements.
>
> Opening statements shall be subject to such time and scope limitations as may be imposed by the court.

This rule limits the purpose of the statement to that of "setting forth the grounds" of a claim or defense, which we interpret to mean stating the evidence upon which the claim or defense is based.

The State elected to waive its opening statement.

Prior to the defendants' opening statements, the trial judge limited the statements as follows:

> You may only state what you contend your evidence will show. You may not comment on what the other party's evidence does or does not show. You may not characterize any witness. You may not comment on what the other lawyer may or may not argue. You may not argue the law, solely and simply what you contend your evidence will show. I'll limit it to five minutes per person.

Counsel for defendant Paige introduced himself to the jury and stated: "The fact that Mr. Paige has been accused, the Court will instruct you, is no evidence of guilt." The trial judge interrupted him and admonished him not to "argue the law to them." Thereafter the trial judge interrupted defense counsel after almost every other sentence as defense counsel attempted to argue that the jurors were to decide the case beyond a reasonable doubt and would be required to make some findings of fact, that the defendant had no burden of proof and that the State had the burden of proof on the question of identification.

This Court has not had occasion to construe N.C.G.S. § 15A-1221(a)(4) with respect to the scope of the statement authorized. In *State v. Elliott*, 69 N.C. App. 89, 93, 316 S.E. 2d 632, 636, *disc.*

rev. denied, appeal dismissed, 311 N.C. 765, 321 S.E. 2d 148 (1984), our Court of Appeals said:

> While the exact scope and extent of an opening statement rest largely in the discretion of the trial judge, we believe the proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it. *See generally*, 23 A [sic] C.J.S., *Criminal Law*, § 1086 (1961). It should not be permitted to become an argument on the case or an instruction as to the law of the case.

This statement is consistent with the scope of the opening statement as it is generally understood. *See* Annot. "Prosecutor's Opening Statement," 16 A.L.R. 4th 810 (1982); 75 Am. Jur. 2d, *Trial*, § 204 (1974). Even if the defendant does not intend to offer evidence, he may in his opening statement point out to the jury facts which he reasonably expects to bring out on cross-examination. When counsel for defendant Paige limited his statement to expected testimony that the victim was unable to identify his client in pre-trial identification procedures, he was allowed to fully state his contentions.

We feel that defense counsel should also have been allowed to state once without interruption that his client would rely on the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. While this statement is one of legal presumption and proof, the simple statement that the defendant intends to rely on these basic aspects of a criminal prosecution would not amount to an argument on the law and may be necessary in order to apprise the jury of the defendant's only defense when he does not plan to offer evidence.

While the trial judge in this case may have more strictly supervised the defendant's opening statement than is done in most trials, we are unable to say that the limitations he imposed sufficiently prejudiced the defendant's case to require reversal of his conviction. They were consistent with the trial judge's original admonition, and the number and frequency of the trial judge's interruptions to enforce his stated limitations were the result of counsel's violation of those limitations.

[10] The defendants also argue that the Court's "numerous prejudicial comments" had the effect of "discrediting defense counsel to the prejudice of the defendants." The comments about which the defendants complain are illustrated by the following exchanges which occurred during cross-examination of the victim by defense counsel:

A. I observed them standing there a few seconds out of the corner of my eye.

Q. How long is a few seconds?

OBJECTION.

COURT: She said a few seconds.

SUSTAINED.

. . . .

Q. The truth is, [victim], that you testified under oath in court that you looked at a photo lineup with 6 people in it and that you picked out two individuals, neither one of which was Mr. Paige or Mr. Lowery, is that the truth?

OBJECTION. SUSTAINED.

COURT: She's testified she said she did.

The defendants especially emphasize the following occurrence during cross-examination of the victim as being unduly prejudicial to their case.

Q. [Victim], did Mrs. Taylor also tell you to tell this jury that you were 5 foot 6 inches tall?

A. No, she didn't (witness crying). I'm testifying to the best of my ability, the best I can do, and I'm telling the truth to the best of my ability. I have not been told what to say. I am saying what I know inside of me.

COURT: All right. That's all right.

We fail to see a basis for a claim that these comments or similar ones amounted to a prejudicial comment by the trial judge regarding the evidence in this case. *See State v. Mansell*, 192 N.C. 20, 133 S.E. 190 (1926); *State v. Laxton*, 78 N.C. 564 (1878);

State v. Grant, 19 N.C. App. 401, 199 S.E. 2d 14, *appeal dismissed*, 284 N.C. 256, 200 S.E. 2d 656 (1973).

[11] Defendants next contend that the trial judge injected himself into the prosecution of the case by sustaining objections "on his own initiative." In each instance when the trial judge excluded evidence *sua sponte*, the basis for his action was either that the examiner had already asked the same question and received an answer or that the inquiry was beyond the scope of permissible examination during re-cross. The trial judge has an obligation to see that needless time is not wasted in useless repetition in the presentation of evidence. *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 number of times that a trial judge may find it necessary to prohibit answers without objection depends upon how often repetitious questions are asked and whether opposing counsel voices an objection. Therefore, the determination of prejudice must be made, not by counting occurrences, but by reviewing the record with an awareness of the appropriateness of the ruling and the likelihood that the judge's action created an appearance to the jury of partiality on the trial judge's part. We have reviewed the record and find that in each instance the trial judge was correct in his determination that the question posed amounted to needless repetition and that the trial judge's actions did not amount to an abuse of his discretion in exercising control over the conduct of the trial.

[12] In addition, under this assignment of error defendants contend that the disparity in the recitation of the evidence for the State as opposed to evidence for the defendants violated N.C.G.S. § 15A-1232.[2]

This Court has pointed out that when a defendant offers no evidence or very little evidence at trial, recapitulation of the evidence for the State must necessarily take longer than recapitulation of evidence for the defendant and that such difference does not alone violate the trial judge's obligation under N.C.G.S. § 15A-1232 to "not express an opinion whether a fact has been

2. The statute was amended effective 1 July 1985, to provide that the judge "shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C.G.S. § 15A-1232 (Cum. Supp. 1985).

proved." *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). We have reviewed the instructions of the trial judge and find that they fairly and accurately summarize the evidence and contentions of the parties.

Finally, the defendants claim that the cumulative effect of the trial judge's rulings "leaves but one impression, that is a judicial leaning toward the prosecution and an antagonistic attitude toward the defense."

We have reviewed the entire record and have concluded that, although the trial judge may have ruled against the defense more often than against the prosecution, these rulings were the result of more frequent repetitive questioning on the part of defense counsel and their failure to comply with limitations on the conduct of the trial, limitations which the trial judge had the authority and responsibility to impose in the interest of expediting the trial. *See State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981).

This assignment of error is overruled.

VII. Victim Identification

The defendants next contend that the trial judge erred in refusing to allow cross-examination and the presentation of evidence at the *voir dire* hearing on admissibility of the victim's in-court identification and in failing to make sufficient findings of facts and conclusions of law to support his order allowing the identification.

The basis of defendant Paige's objection to the victim's in-court identification was that she did not have sufficient opportunity to observe her abductors, thereby making her identification inherently unreliable. No claim was made that the in-court identification was tainted by an impermissibly suggestive or unconstitutionally conducted pre-trial identification procedure.

[13] During direct examination by the State at a *voir dire* hearing, the victim said that the only time she "really got a good view" of her abductors was when she saw them coming toward her in the parking lot. In response to a question by the trial judge, she said she was in close proximity to her abductors for 30 to 45 minutes after they put her in the car, but stated that she did not look directly at their faces because of their threats. Later

she stated that she looked at their faces when they put her into the trunk, and she saw their faces when they took her out of the trunk in Charlotte.

On cross-examination of the victim by counsel for defendant Paige, the following exchange occurred regarding the victim's view of the abductors in the parking lot when they first accosted her:

Q. . . . How long did you look toward them?

A. Few seconds.

Q. 10 seconds, 15 seconds, 5 seconds, 2 seconds?

Mr. Lowder: We object to that type of question.

Court: You didn't give her time to answer.

Q. How many seconds?

Court: She said a few seconds.

Later the trial judge did not allow the victim to answer Mr. Drake's question: "By the way, who told you to refer to Mr. Paige as Defendant Paige?"

Both defense counsel conducted extensive cross-examination of the victim on *voir dire*, and they point only to these two rulings as impinging upon the defendants' right of cross-examination. The scope of cross-examination rests largely within the discretion of the trial judge. *State v. Ziglar*, 308 N.C. 747, 304 S.E. 2d 206 (1983). We hold that the trial judge did not abuse his discretion by these two rulings on *voir dire*, nor did the rulings, singly or together, amount to a denial of the right of cross-examination.

[14] Defendant Paige also contends that the trial court committed reversible error by not allowing him to put on evidence relating to the identification. The record discloses that after the defendant Paige had testified and counsel had conceded that a pre-trial lineup and a photographic display had been not impermissibly suggestive, the Court denied counsel's request to call a witness "to testify about the lineup" and the fact that the victim had not identified defendant Paige in the lineup. In support of his ruling, the trial judge concluded that, based upon the victim's testimony regarding her opportunities to observe the defendants,

her identification was not "totally unreliable." This ruling was not error.

As this Court said in *State v. Green*, 296 N.C. 183, 188, 250 S.E. 2d 197, 200-201 (1978):

> The credibility of a witness's identification testimony is a matter for the jury's determination, *State v. Orr*, 260 N.C. 177, 132 S.E. 2d 334 (1963); *State v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107 (1950), and only in rare instances will credibility be a matter for the court's determination.

In *Green*, Justice Moore analyzed the case of *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967) in which this Court had found the identification of the defendant by the sole eyewitness inherently incredible and insufficient to justify submission of the question of defendant's guilt to the jury. The witness in *Miller* testified that he had gotten only a momentary look at the perpetrator, a stranger to him, from 286 feet away, at night, aided by lights around a building and the headlights of a passing automobile. Following his analysis of the cases, Justice Moore said: "[o]nly if there is a finding that the identification testimony 'is inherently incredible because of undisputed facts . . . as to the physical conditions under which the alleged observation occurred,' *State v. Miller, supra*, should defendant's motion to suppress be allowed." 296 N.C. at 189, 250 S.E. 2d at 201.

Given the victim's testimony in this case concerning her opportunity to observe her abductors, her identification of the defendants was not inherently incredible. Thus, even if some other witness had presented evidence which cast doubt on the victim's identification, the only effect would have been to make the facts surrounding her observation disputed, thereby presenting a jury question of credibility.

[15] Finally, defendants contend that the trial judge failed to make adequate findings of facts and conclusions of law on the admissibility of the victim's identification testimony.

Since no contention was made that pre-trial procedures were unlawfully conducted or tainted the in-court identification, findings of facts and conclusions of law regarding the independence of the identification were not required. *State v. Green*, 296 N.C. 183, 250 S.E. 2d 197. Nevertheless, the trial judge made findings which

fully supported his conclusion that "the prosecuting witness' identification of these two defendants as her attackers was not so inherently incredible as to require the court to suppress it."

Objection to the victim's identification of the defendants in court was properly overruled.

VIII. Defendant Lowery's right to preserve testimony

[16] Defendant Lowery contends that his rights under the due process clause of the fourteenth and sixth amendments to the United States Constitution were violated when the trial judge refused a request by Lowery's counsel to be allowed to ask a question of the victim and have her answer made a part of the record.

The victim was called to testify on behalf of the State. Following direct examination she was cross-examined first by Mr. Drake, representing defendant Paige, and then by Mr. Collini, representing defendant Lowery. The State then examined her on redirect and Mr. Drake conducted a recross-examination, during the course of which he asked a question which the trial judge would not allow her to answer because he found the question not to be in rebuttal. Upon request by Mr. Drake, the trial judge allowed the witness to answer the question for the record during a recess. After the witness had answered, Mr. Collini stated that he, too, had a question. The trial judge refused to allow the question on the basis that counsel had not asked to preserve an answer to any question that was disallowed during his examination.

Nowhere is there any indication what question Mr. Collini wanted answered. The record indicates that the recess occurred during cross-examination by Mr. Drake and that the purpose for questioning out of the jury's presence was to comply with Mr. Drake's request to be allowed to have the witness' answer put in the record. At one point during his own cross-examination, Mr. Collini was given an opportunity to be heard out of the jury's presence regarding a ruling on an objection by the State. Nothing in the record indicates that Mr. Collini conducted a recross-examination or asked to be allowed to preserve an answer to any question that he had posed to the witness.

We find this assignment of error to be totally without merit.

IX. Defendant Paige's objection to introduction of bracelet

Although defendant Paige's argument on this issue is poorly focused in his brief, it appears that his objection is to the adequacy of the *voir dire* hearing on admissibility of a bracelet. The bracelet was seized from Paige at the time of his arrest on 10 February 1983 on an unrelated charge of armed robbery.

The testimony of the State's witnesses on *voir dire* supported findings made by the trial judge as follows:

> That on February 10th Officer Garnes got another officer and a private citizen of Stanly County to meet with the defendant Paige; that during this meeting Officer Kearney had a mike and that the conversation was recorded by Officer Garnes; that during the course of the conversation between the undercover agent, the private citizen, and the defendant Paige, by the officer's efforts liquor was obtained, wine was obtained, marijuana was obtained; that the undercover agent and the private citizen stated they had just done a lick, to wit, an armed robbery; that they also talked about having sex with other persons; that at that time the defendant Paige was a suspect in the armed robbery and the alleged rape and kidnapping; that Officer Garnes wanted to obtain information from the defendant Paige and the one that instigated the undercover activity; that during the course of the conversation between the undercover agent and the defendant, the defendant admitted that he had robbed the theater on Saturday night; that this was sometime during the late afternoon of February 10th; that pursuant to this statement by the defendant that he had robbed the theater, Officer Garnes then placed the defendant under arrest; that when the officer told the defendant to place his hands on top of the vehicle, Officer Kearney noticed a gold bracelet on the defendant's wrist, and it appeared to fit the description of the bracelet taken from the victim in this case.

[17] The defendant contends that his arrest was illegal because it was based upon an illegally obtained confession to the armed robbery and that, as a result, the bracelet seized pursuant to the arrest was unlawfully seized. The defendant attempted to introduce into evidence during *voir dire* the tape recording referred

to by Officer Garnes during his testimony. The trial judge excluded the tape, saying:

> I don't see that has one thing to do with your motion to suppress. The officer admitted that they went out and talked to him, they gave your client liquor, they bought marijuana for him. To hear what exact words was said I don't see it has any bearing whatsoever on the motion to suppress.

The defendant Paige testified at the hearing, basically corroborating the account of the events preceding his arrest as related by the State's witnesses. He said that he had not in fact committed the robbery, but that he said he had because:

> I wanted it to seem if [sic] I had committed a robbery because they were making themselves look good as if they was actually outlaws, doing crimes and things, and I had heard the theater had been robbed and I wanted to make myself look good, you know. I wanted to be a big man, just like they were. They didn't prompt me to admit that particular robbery. It was my idea.

The thrust of the defendant's argument at trial and here is that his confession was obtained without *Miranda* warnings, after suspicion had focused on him, and in violation of his right to counsel. The defendant further contends that "[a]ny statement given by the defendant must be freely and intelligently given without coercion, duress or fraud."

We hold that the trial judge did not err in refusing to allow introduction of the tape recording and in denying the defendant Paige's motion to suppress the bracelet.

Given the situation described by all witnesses, including the defendant, neither the defendant's right to receive warnings prior to custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), nor his right to assistance of counsel when the State seeks to elicit incriminating information following arrest, *United States v. Henry*, 447 U.S. 264, 65 L.Ed. 2d 115 (1980), was implicated. The trial judge was correct in concluding that nothing contained in the recording would bear upon any question raised by the defendant regarding the application of *Miranda* or *Henry*, for the State admitted that no warnings were given be-

fore and the defendant did not have counsel at the time of his confession. Neither was required, for, as the trial court concluded:

> [A]t no time during the conversation between the defendant and the undercover agent and the private citizen was the defendant under arrest; . . . he was free to go at any time he wanted to, but . . . the defendant voluntarily remained in the presence of the undercover agent.

On the further question of whether the confession was obtained by "coercion, duress or fraud," we note that the defendant himself testified that he admitted to the robbery to make himself look good, not because of any coercion or duress. Furthermore, a defendant against whom no criminal proceedings have been initiated does not have a constitutional right to protection against police tactics which merely amount to trickery. *Hoffa v. United States*, 385 U.S. 293, 17 L.Ed. 2d 374 (1966). *See also State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). The defendant is not, by the assignments of error directed to this issue, objecting to the introduction of his confession into evidence before the jury. The confession was clearly sufficient to establish probable cause justifying the defendant's arrest. The bracelet was seized in plain view during the course of a valid arrest; therefore, it was admissible against the defendant at his trial upon a showing of its relevancy in the instant case. *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977).

X. Evidence of another criminal act committed by defendant Paige

[18] Following the *voir dire* hearing relating to the admissibility of the bracelet seized from the defendant Paige and after the State completed its direct examination of Officer Garnes, counsel for Paige cross-examined Officer Garnes. In the course of the cross-examination, he elicited testimony about the recorded conversation immediately preceding Paige's arrest. Officer Garnes answered several questions posed by defense counsel regarding statements made by Paige during that conversation about whether Paige had ever had sex with a white woman. Officer Garnes indicated that Paige did not implicate himself in the rape of the victim in this case.

On redirect the district attorney asked: "Would you tell us, please, all that you recall Paige saying on February 10th, 1984 . . . at the time you were listening through the body mike worn by Officer Kearney?" The defendant's objection was overruled after the district attorney observed that "[h]e's opened the door." Officer Garnes responded that Paige admitted to committing a robbery of a theater, the Plaza Theater on Central Avenue.

In his assignment of error, the defendant does not contend that the statement was illegally obtained; he argues that this evidence of another criminal offense was irrelevant and served only to excite prejudice.

These cases were tried at the 11 June 1984 Session of Union County Superior Court and are thus governed by evidentiary rules applicable prior to the 1 July 1984 effective date of the North Carolina Rules of Evidence.[3]

The rule that evidence of other offenses is inadmissible against a criminal defendant to prove his guilt of the crime charged does not prevent use of such evidence if it is relevant for some other purpose. 1 *Brandis on North Carolina Evidence* §§ 91, 92 (1982). One such purpose is to prove identity where there is evidence that the same person committed the charged offense and the other offense. *State v. Perry*, 293 N.C. 97, 235 S.E. 2d 52 (1977). In the case *sub judice* the victim testified that the defendants told her during the time she was in the car with them that they were going to "be in an armed robbery."

On recross-examination of Officer Garnes by counsel for defendant Paige, the witness was questioned extensively about the conversation preceding the defendant's arrest and, among other things, stated:

> The only thing the theater has to do with this case, is that two suspects in the Albemarle rape [the instant case] and the Plaza Theater robbery were similar in description and since they made reference to the rape victim, that they were going to pull a robbery the night that she was kidnapped, checking times and the times that they had left Albe-

3. We note that admissibility of this evidence now would be controlled by N.C.G.S. § 8C-1, Rule 404(b).

marle and checking the time the theater closed, it would have been impossible for them to rob the theater that night, so I started the investigation for the rape and robbery for the same suspects, sir.

Paige was charged with that robbery in Charlotte and I don't know if the charges have been dismissed. We conducted a lineup for the man at the theater and Paige was in that. He picked out Mr. Paige and said that Paige was the person that looked like the robber with the exception of his hair. His hair was different from the robber's.

All of this testimony, brought out by the defendant on recross-examination, was given without objection and cures any error which may have occurred in the witness' mentioning the robbery on redirect. *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984). Further, it established the relevancy of the testimony regarding defendant Paige's participation in the robbery, for there was prior evidence tending to show that the victim's abductors intended to commit an armed robbery, and the description of the persons who committed the robbery was similar to the description by the victim of her abductors. *See State v. Perry*, 293 N.C. 97, 235 S.E. 2d 52.

This assignment of error is overruled.

XI. Instructions

Finally, the defendants contend that the trial judge erred in his instructions to the jury as follows:

A. He instructed the jury that they did not have to consider the truth of prior statements made under oath.

B. He failed to properly instruct the jury on the effect of joinder of the defendants for trial.

C. He failed to give proper instructions on the identification of the defendants.

D. In regard to defendant Paige, he failed to give requested instructions relating to the defendant's possession of the bracelet.

A.

[19] Without citing any authority for their position, the defendants first argue that the trial judge erred when he instructed the jury that they could not consider pre-trial statements of the victim "as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial"; i.e., it could not be used substantively. The victim had been cross-examined about her testimony under oath at the probable cause hearing where she testified about her opportunities to observe her abductors. At that time she admitted that she did not notice anything unusual about their facial features or any distinguishing jewelry. She also related testimony she had given about lighting at the various locations where she was in the presence of her abductors.

No objection to the instruction was made at the time it was given, but the defendant contends that the instruction amounts to plain error. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

The rule regarding the use of testimony of a witness at a former judicial hearing as it existed prior to 1 July 1984[4] is set out in 1 *Brandis on North Carolina Evidence* § 145 (1982). In order for the former testimony to be admissible substantively, the witness must be unavailable. Here, the witness was available and testified. Therefore, unless it satisfied some other exception to the hearsay rule, her former testimony was admissible only for purposes of corroboration or impeachment, and the trial judge's instruction was correct. The defendant points to no other basis for a substantive use of the previous testimony. There being no error in this instruction, it cannot constitute plain error.

B.

[20] The defendants next challenge the trial court's instruction on joinder.

Prior to the jury instructions in this case, the defendants filed written requests for instructions which included the following:

4. N.C.G.S. § 8C-1, Rule 804(b)(1) provides that former testimony meeting certain requirements is an exception to the hearsay rule if the declarant is unavailable as a witness.

I instruct you, members of the jury, that the defendants have been joined for the purpose of trial, and for that purpose, only. The fact that they have been joined for trial is not to be considered by you as having any bearing on their guilt or innocence. You are to consider and evaluate the evidence as that evidence relates to each defendant, individually. During the course of this trial, the State has offered evidence, and you are to use your own recollection of that evidence, which relates solely to one of the defendants and to that defendant, only. You are not to consider such evidence as relating to both the defendants merely because they have been joined for the purpose of trial.

The trial judge instructed the jury on the effect of joinder as follows:

Now, members of the jury, as I have said, defendant Paige has been charged with five separate crimes, and the defendant Lowery with four separate crimes.

Now, each of these defendants is tried individually. You cannot convict one merely because you convict the other. You have to consider separate and apart as to each defendant in each of these charges.

The verdict sheets were submitted to the jury in two groups, and the trial judge instructed the jury: "There are two groups of papers, one applies to the defendant Paige, one to the defendant Lowery."

As his final instruction, the trial judge said:

Now, members of the jury, as I have said, all nine of these are separate cases, each defendant an individual defendant. Those elements I named to you must be applied before you find the defendant guilty to each of those defendants separate and apart. Again just because you find one defendant guilty maybe does not necessarily mean the other defendant is guilty and vice versa. You may find the defendant or any one guilty on any charge, and find not guilty on any other charge. In other words one verdict does not depend on the outcome of the other verdict. Certainly does not apply to the other defendant.

> Also, members of the jury, during the course of the trial some evidence [sic] introduced about a bracelet being found on the defendant Paige. I instructed you at that time and again at this time that you are not to consider that against the defendant Lowery.

During the course of the trial the trial judge gave instructions on the use of evidence admissible against only one of the two defendants when the evidence was received. When the serpentine bracelet seized from defendant Paige was received into evidence, the trial judge instructed the jury:

> Members of the jury, this bracelet is introduced solely as you might find it applies to the defendant Paige. It has nothing to do with the defendant Lowery.

In addition, the trial judge instructed the jury concerning the specific charges against each defendant. He was specific with regard to the facts which the jury would have to find in order to convict each defendant of each crime.

Defendants contend that the trial judge erred in refusing to instruct as they requested and that the instructions as given were erroneous and prejudicial.

It is well established in this jurisdiction that the trial judge is not required to give a requested instruction in the exact language of the request, even if the request is a correct statement of the law and supported by the evidence, if the requested instruction is given in substance. *State v. Corn*, 307 N.C. 79, 296 S.E. 2d 261 (1982). When considered as a whole, the instructions of the trial judge adequately and in substance instructed the jury on the point requested by the defendants and were in every respect correct.

This assignment of error is overruled.

C.

[21] The defendants next assign as error the trial judge's instructions on identification of the defendants and his failure to give their requested instruction on identification.

Defendant Lowery filed a request for instructions which contained the following: "In addition, the defendant requests an in-

struction on eyewitness identification, as attached and as if fully incorporated herein." Attached to the request are pages 558 and 559 from the opinion in *United States v. Telfaire*, 469 F. 2d 552 (D.C. Cir. 1972) which contain "Model Special Instructions on Identification." Written on one page of the attachment is an arrow and the words "Requested Instruction on Eye-witness *Ident.*" The arrow appears to point to a sentence on that page which is set off by vertical marks and which reads: "If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty."

From this record we cannot determine whether the defendant was requesting only the one sentence instruction or the entire model special instruction, and we strongly disapprove this form of request for instructions under N.C.G.S. § 15A-1231(a).

We have examined the instructions given by the trial judge and find that his instruction on the issue of identification informed the jury that the burden of proving the identity of each defendant beyond a reasonable doubt was upon the State and that the jury "must be satisfied beyond a reasonable doubt that the defendant and each defendant was the perpetrator of each of the crimes charged before [they could] return a verdict of guilty as to that particular crime and that particular defendant." Furthermore, the instruction adequately explained the law.

This assignment of error is overruled.

D.

[22] The final exception to the instructions is that of defendant Paige regarding the jury's consideration of the evidence relating to his possession of the serpentine bracelet.

According to the evidence, a serpentine bracelet was taken from the victim in Mecklenburg County. Based on this fact, we have held in this opinion that judgment must be arrested in the common law robbery case. Therefore to the extent that the defendant's requested instruction related to application of the doctrine of recent possession as proof that the possessor stole the property possessed, the defendant's objection has been rendered moot.

However, evidence that the defendant possessed items taken from the victim in Mecklenburg County could have been considered relevant to the jury's finding that the defendant was one of the persons who committed the entire series of offenses, and therefore we will address the issue.

The defendant essentially requested a charge which would be appropriate in a civil case contesting ownership of personal property; i.e., that since the defendant had possession of the bracelet, it was presumed to be his, *Vinson v. Knight*, 137 N.C. 408, 49 S.E. 891 (1905). Such an instruction was not required in this case. The victim identified the bracelet which was introduced at trial as the bracelet which was taken from her by one of her abductors. She was questioned extensively on cross-examination by counsel for defendant Paige about the absence of identifying scratches or initials on the bracelet but steadfastly said that she had worn the bracelet for a long time and could identify it as her bracelet. The same bracelet was identified by Officer Garnes as the one taken from the defendant on the night of his arrest. Thus, the jury was presented with positive evidence that the bracelet which the defendant was wearing when he was arrested was the bracelet which had been taken from the victim. The trial judge did not instruct the jury regarding the doctrine of recent possession but rather instructed them that they had to find from the evidence and beyond a reasonable doubt that Paige "took and carried away a bracelet and ring from the person of [the victim] without her voluntary consent" by violence or putting her in fear, "the defendant Paige knowing that he was not entitled to take the bracelet and ring" before they could convict him of common law robbery. Because ownership of the bracelet was not the issue before the jury, we hold that the trial judge did not err in refusing to instruct the jury regarding the presumption of ownership arising from possession.

[23] Defendant Paige also assigns error to the following instruction:

> Also, members of the jury, during the course of the trial some evidence [sic] introduced about a bracelet being found on the defendant Paige. I instructed you at that time and again at this time that you are not to consider that against the defendant Lowery.

Defendant Paige contends that the instruction was in effect a statement that the jury could consider the evidence regarding the bracelet against him and thus was a prejudicial comment on the evidence in violation of N.C.G.S. § 1-180. We note that N.C.G.S. § 1-180 was repealed effective 1 July 1978, but that the essence of the statute has been carried forward into N.C.G.S. §§ 15A-1222 and 1232.

The instruction followed an explanation to the jury that each case against each defendant was a separate case, requiring individual consideration. In that context, the trial judge's use of the word "against" was not an expression of opinion but a cautionary instruction that the jury should not consider that evidence in considering defendant Lowery's guilt or innocence. This is the type of post-conviction nit-picking that led this Court to adopt Appellate Rule 10(b)(2). The defendant failed to call the allegedly erroneous instruction to the attention of the trial judge at any time. The instruction clearly does not rise to the level of "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

This assignment of error is overruled.

As to Defendant Paige:

Case No. 84CRS3129 (Stanly County 84CRS1699, first degree sexual offense)—Judgment arrested.

Case No. 84CRS3130 (Stanly County 84CRS1700, first degree rape)—Judgment arrested.

Case No. 84CRS3127 (Stanly County 84CRS1697, common law robbery)—Judgment arrested.

Case No. 84CRS3120 (Stanly County 84CRS990, second degree kidnapping)—No error.

Case No. 84CRS3121 (Stanly County 84CRS991, common law robbery)—No error.

As to Defendant Lowery:

Case No. 84CRS3126 (Stanly County 84CRS1696, first degree sexual offense)—Judgment arrested.

Case No. 84CRS3125 (Stanly County 84CRS1695, common law robbery)—Judgment arrested.

Case No. 84CRS3124 (Stanly County 84CRS994, second degree kidnapping)—No error.

Case No. 84CRS3123 (Stanly County 84CRS993, common law robbery)—No error.

STATE OF NORTH CAROLINA v. KEITH BARTS

No. 524A84

(Filed 3 June 1986)

1. **Criminal Law § 75— inculpatory statement—written by SBI agent—signed by defendant—admissible**

The trial court did not err in a prosecution for murder, breaking or entering, robbery, and larceny by denying defendant's motion to suppress his inculpatory statement on the grounds that it was reduced to writing by an SBI agent rather than defendant where the agent testified that he transcribed defendant's statement exactly as it was given, read it back to defendant and asked if any changes needed to be made, defendant indicated one change, defendant then read and signed the statement, defendant did not contest the conclusion that the statement was made freely and voluntarily, and defendant did not challenge the accuracy of the written transcription.

2. **Constitutional Law § 63; Jury § 7.11— death qualified jury—no violation of U.S. Constitution**

The death qualification of a jury is not prohibited by the Sixth and Fourteenth Amendments to the U.S. Constitution. *Lockhart v. McCree*, 90 L.Ed. 2d 137.

3. **Constitutional Law § 63; Jury § 7.11— death qualified jury—no violation of North Carolina Constitution**

The practice of death qualifying the jury does not violate Art. I, Section 19 of the North Carolina Constitution; most of the social science studies cited by defendant as indicating that death qualified juries are more conviction prone than those which are not death qualified were found by the U.S. Supreme Court to contain serious flaws.

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

The trial court did not err in a prosecution for murder, breaking or entering, robbery and larceny by denying defendant's motion for sequestration and individual *voir dire* of prospective jurors where the trial judge inquired during the examination of the first twelve veniremen as to how many had read newspaper articles about the case; four jurors indicated that they had; all potential jurors other than the twelve in the jury box were excused; the four jurors who had read the newspaper articles and one additional juror who subsequently stated that he had read the articles and seen television coverage were ques-

tioned; they were not asked to relate the contents of the articles, but were asked whether they had participated in any discussion in the community; one juror stated that she had formed an opinion and that she did not feel she could be fair to both the State and defendant and was excused for cause; the other four jurors stated that they had not formed an opinion and could be fair to both sides; the only feasible location where jurors could have been individually questioned was in one of the Alamance County District Court courtrooms; and the trial judge stated that he was denying the motion after personally viewing the district court facilities and consulting with the Chief District Court Judge concerning the schedule of the district court. N.C.G.S. § 15A-1214(j).

5. Jury § 7.12— murder prosecution—prospective juror upset over death penalty—excluded—no error

The trial court did not err in a murder prosecution by excluding for cause a prospective juror who first stated that she could vote for the death penalty; stated the next day that she had become very agitated over the prospect of having to decide whether to impose the death penalty; had found it necessary to consult a physician, who had prescribed a sedative; and felt that her emotional condition would detract from her ability to concentrate on the case and that she would be unable to vote to impose the death penalty under any circumstance. N.C.G.S. § 15A-2000(a)(2), N.C.G.S. § 15A-1212(8).

6. Criminal Law §§ 128.2, 101.1— newspaper article appearing during trial—motion for mistrial denied—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for murder, breaking or entering, robbery and larceny by denying defendant's motion for a mistrial based on a newspaper article appearing during the trial in which it was reported that defendant had pled guilty to the charge of conspiracy to commit armed robbery and which recited portions of *voir dire* testimony concerning statements made by defendant's cousin after the robberies. The trial judge reminded the jury that he had given them certain instructions at each recess regarding their duties as jurors and asked if any juror had violated those instructions; one juror replied that she had used the wrong set of stairs when entering the courthouse the previous day; the record was devoid of any evidence that any juror had read or otherwise been exposed to the article in question; and there was no showing that the court's mode of questioning was ineffective in ascertaining whether exposure to the article had occurred.

7. Criminal Law §§ 128.2, 102.5— improper question—asked after objection sustained—jury examined and instructed—mistrial denied

The trial court did not abuse its discretion in a prosecution for murder, breaking or entering, robbery and larceny by denying defendant's motion for a mistrial based on prejudicial testimony where the trial court had ruled on *voir dire* that a witness could only testify about statements made by defendant or a co-conspirator concerning one other break-in; the witness was asked after the jury returned what she had heard the co-conspirator say about defendant; and the witness testified that the co-conspirator had said he had known the defendant for several years and had set him up on three jobs. The judge immediately sustained defendant's motion to strike, instructed the jury to disregard the

testimony, and asked the jurors if they could follow that instruction, and all the jurors indicated that they could.

8. Criminal Law § 34.8— breaking or entering—prior offense—admission erroneous—no prejudice

There was no prejudice in a prosecution for breaking or entering where the trial court erroneously admitted testimony concerning defendant's custodial statement that he and two other men had committed another breaking or entering three years earlier. The plausibility of the existence of an ongoing plan to engage in a scheme to rob others was negated by the remoteness in time between the two offenses, but there was no prejudice in light of the overwhelming evidence of defendant's guilt. N.C.G.S. § 15A-1443(a) (1983 and Cum. Supp. 1985).

9. Homicide § 21.6— first degree murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence to convict defendant of first degree murder based on premeditation and deliberation in that there was no evidence that the victim provoked the attack; defendant went to the victim's residence armed with a baseball bat and a crowbar; defendant told the driver on returning to the car that they had to beat the man; the day after the killing, defendant told two witnesses that he had robbed the victim the previous evening and thought that he had killed him and that he had beaten the victim until the victim stopped moving and until he got tired of beating him. N.C.G.S. § 14-17 (1981 and Cum. Supp. 1985).

10. Homicide § 21.6— murder during perpetration of felony—evidence sufficient

The evidence supported the jury's finding that the killing occurred during the perpetration or attempted perpetration of a felony within the purview of N.C.G.S. § 14-17 where there was plenary evidence that defendant himself killed the victim during the commission of an armed robbery, the trial judge instructed the jury that it could convict under the felony murder rule if it found that defendant acted alone or in concert with Earl Barts, there was plenary evidence that defendant was engaged in a common plan with Earl Barts to perpetrate a felony against the victim and that defendant was present at the scene of the robbery, and there was evidence in defendant's own testimony from which the jury could find that Earl Barts killed the victim in furtherance of a plan to rob him.

11. Robbery § 4.6— armed robbery—evidence sufficient

The evidence was sufficient to convict defendant of robbery with a dangerous weapon where defendant went to the victim's residence armed with a baseball bat and a crowbar; defendant stated after the event that he had beaten and robbed the victim; defendant shared in the proceeds of the taking; the court instructed the jury that it could convict under the doctrine of acting in concert; and there was sufficient evidence to support a finding that Earl Barts perpetrated the robbery in furtherance of a common plan, so that defendant could be convicted even if the jury believed his statement and testimony that he did not participate in the actual robbery.

12. Burglary and Unlawful Breakings § 5— burglary—evidence sufficient

There was sufficient evidence to convict defendant of second degree burglary where defendant admitted that he pried open the door to the victim's house and entered with the intent to steal anything of value he could find and that he stole several items from the residence.

13. Larceny § 7.7— larceny of a pickup truck—truck subsequently abandoned—evidence sufficient

The evidence was sufficient to convict defendant of felonious larceny of the victim's pickup truck where defendant, acting alone or in concert, stole the victim's pickup truck; the truck was subsequently abandoned some distance from the victim's residence; and there was no evidence that defendant ever intended to return the property to the victim.

14. Burglary and Unlawful Breakings § 5.8— breaking or entering—storage shed—evidence sufficient

The evidence was sufficient to convict defendant of felonious breaking or entering even though the victim's storage shed was not completely enclosed where the State produced substantial evidence that defendant entered the shed. N.C.G.S. § 14-54(a).

15. Homicide § 30.3— murder—failure to instruct on voluntary and involuntary manslaughter

The trial court did not err in a murder prosecution by not instructing the jury on voluntary and involuntary manslaughter where there was no evidence of provocation or self-defense, no evidence that the victim died as a result of an unlawful act not rising to a felony or naturally dangerous, and no evidence that death resulted from a culpably negligent act or omission.

16. Criminal Law § 138.24— aggravating factor—victim very old—victim chosen partly for age—no error

The trial court did not err when sentencing defendant for armed robbery by finding in aggravation that the victim was very old where the victim was age seventy-four, five feet eight inches tall and weighed two hundred pounds, did a great deal of gardening and yardwork, was very strong and physically active for his age, was able to inflict a minor injury on one of his assailants, and was selected as a victim because he was old and was known to carry large sums of money on his person. The victim's age made him more vulnerable than he would otherwise have been because his age led to his selection as a victim. N.C.G.S. § 15A-1340.4(a)(1)(j) (1983 and Cum. Supp. 1985).

17. Criminal Law § 138.26— aggravating factor—taking of property of great monetary value—$3,200 divided three ways—no error

The trial court did not err when sentencing defendant for armed robbery by finding in aggravation that the offense involved the taking of property of great monetary value. An element necessary to prove the offense was not used to prove the aggravating factor because armed robbery does not require proof that the property was actually taken, and the fact that the $3,200 was split three ways does not prohibit enhancement of punishment because the factor speaks to the value of the property taken or attempted to be taken and not

to the value of the property ultimately retained or possessed by the defendant. N.C.G.S. § 15A-1340.4(a)(1)(m), N.C.G.S. § 15A-1340.4(a)(1).

18. Criminal Law § 138.29— nonstatutory aggravating factor—defendant also committed larceny of a firearm—not charged—no error

The trial court did not err when sentencing defendant to a greater than presumptive term for second degree burglary by finding as an aggravating factor that defendant admitted that he also committed larceny of a firearm, although he was not charged with that offense. Evidence of the taking of a firearm was not necessary to prove an element of burglary and this nonstatutory aggravating factor was reasonably related to the purposes of sentencing, particularly in view of the possibility that the firearm may have been taken with an eye toward using it against the victim. N.C.G.S. § 15A-1340.3 (1983 and Cum. Supp. 1985).

19. Criminal Law § 140.3— consecutive sentences—no error

The trial court did not err by ordering that defendant's consolidated convictions for breaking or entering and larceny be consecutive with a second degree burglary conviction. The trial court was given express authority by N.C.G.S. § 15A-1354(a) to require that the sentence imposed for a conviction be served consecutive to any sentence served at the same time or any undischarged term to which defendant is already subject.

20. Constitutional Law § 81— consecutive sentences—not constitutionally disproportionate

The imposition of consecutive sentences for conspiracy to commit armed robbery, first degree murder, armed robbery, second degree burglary, breaking or entering, and larceny did not violate any constitutional proportionality requirement where all of the sentences were within the limits prescribed by the General Assembly. Eighth Amendment to the U.S. Constitution.

BEFORE *Hobgood, J.*, at the 16 April 1984 Criminal Session of Superior Court, ALAMANCE County, defendant was convicted of first-degree murder, robbery with a dangerous weapon, second-degree burglary, felonious breaking or entering, and felonious larceny. The defendant also pled guilty to felonious conspiracy to commit 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 life imprisonment for the murder conviction. The trial court entered judgment sentencing the defendant to life imprisonment for the murder conviction, three years imprisonment for the conspiracy conviction, forty years imprisonment for the armed robbery conviction, thirty years imprisonment for the burglary conviction, and three years imprisonment for the consolidated breaking or entering and larceny convictions, all sentences to be served consecutively. The

defendant appeals from the imposition of the life sentence as a matter of right pursuant to N.C.G.S. § 7A-27(a). We allowed the defendant's motion to bypass the Court of Appeals on the other convictions on 26 September 1984. Heard in the Supreme Court 10 March 1986.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Daniel H. Monroe for defendant-appellant.

MEYER, Justice.

The defendant and Charlie Mann were tried jointly for various crimes arising out of events occurring in Alamance County in the fall of 1983. The State's evidence tended to show that in September 1983, Richard Lockamy and his fiancee, Penelope Dawkins, moved into a mobile home in the Shady Grove Mobile Home Park in Mebane, North Carolina. The defendant was the manager of the mobile home park. Around the first of October, Lockamy and Dawkins became acquainted with Charlie Mann, who lived approximately a mile from the mobile home park. Over the next several weeks, they performed various services for Mann, including chopping firewood, painting, mowing his lawn, and cleaning his house. Lockamy and Dawkins saw Mann approximately two or three times per week during this period.

At some point, Mann told Lockamy about an elderly man, Richard Braxton, who lived in the Sutphin Mill Road area. Mann told Lockamy that Braxton generally carried a large sum of money with him, and he was of the opinion that it would be quite easy to rob him. Mann went on to say that two or three people would be needed to carry out the robbery, and he asked Lockamy if he would be interested in participating in such a scheme. Lockamy indicated that he might be willing to participate in such a plan. A few days later, Mann and Lockamy drove out to Braxton's house. At that time, Lockamy told Mann that he would be willing to rob Braxton.

Approximately a week later, Mann told Lockamy that he had previously persuaded the defendant to burglarize the home of one of his (Mann's) former girlfriends. Later, Lockamy told the defendant about Mann's scheme to rob Braxton and asked if he

would like to participate. The defendant answered in the affirmative.

The next day, the defendant introduced Lockamy to John David "Fireball" Holmes. The defendant asked Lockamy if Holmes could join in the scheme. Lockamy replied that he would think about it. The next day, Lockamy, Holmes, the defendant, and the defendant's wife drove out to Braxton's house in order to determine how best to carry out the robbery. The next night, Lockamy, Holmes, and the defendant drove out to Braxton's house to commit the robbery. The defendant and Holmes were to carry out the robbery while Lockamy drove the car. However, when they were alone, the defendant and Holmes decided that they no longer wanted Lockamy as a partner in the scheme. The defendant told Holmes that he was going to tell Lockamy that they had been unable to carry out the robbery due to the fact that Braxton had a visitor. When Lockamy picked them up, the defendant recited this story and they returned home.

The defendant and Holmes then decided to ask Earl Barts, defendant's cousin, to join them in the robbery scheme. On 18 November 1983, the defendant and Holmes met with Earl Barts and told him about the planned robbery. Earl Barts agreed to join them, and they decided to get together the following afternoon.

On the afternoon of 19 November 1983, the three met at a local bar and then proceeded to Earl Barts' mobile home. Once at the mobile home, they discussed how to carry out the robbery. During this discussion, the defendant and Earl Barts were drinking vodka and smoking marijuana. Between 7:00 and 7:30 p.m., they left Earl Barts' residence and drove to Braxton's house in Holmes' 1973 Thunderbird. They took a wooden, rubber-headed mallet and a baseball bat with them. During the drive, the defendant and Earl Barts were drinking beer.

When they arrived in the vicinity of Braxton's house, Holmes let the defendant and Earl Barts out of the car and he drove down the road to a prearranged spot to wait for them. After approximately thirty minutes had passed, Holmes drove back toward the house. Earl Barts came up to the car and stated that they had broken into the house but that Braxton had not yet returned home. Earl Barts showed Holmes a .22-caliber pistol which he said they had found on a bed in the house. Earl Barts in-

structed Holmes to drive back down the road and wait for them. Holmes did so. Approximately two hours later, Holmes saw the defendant and Earl Barts driving Braxton's pick-up truck. They pulled up beside the car, got out, and entered the car. The three then drove off. Holmes asked what had occurred at the house. The defendant replied that they had been forced to beat Braxton but that he was all right. They proceeded back to Earl Barts' mobile home and divided the $3,200 which the defendant and Earl Barts had taken.

The next day, the defendant went over to visit Lockamy and Dawkins. He told them that he had robbed Braxton the previous evening and that he thought he may have killed him. The defendant told them that he jumped Braxton when he arrived home and that he "beat the old motherf--er until I got plumb tired of beating him." The defendant further stated that during the beating, Braxton screamed, "Oh, God, you're gonna kill me." The defendant then warned Lockamy and Dawkins not to tell anyone of his involvement in the crime.

Braxton's body was discovered by a neighbor on the morning of 20 November 1983. The body was found lying on a bench on the porch. Dr. Robert Anthony, the Assistant Chief Medical Examiner with the State Medical Examiner's Office, performed an autopsy on Braxton's body on 21 November 1983. The autopsy revealed at least six large lacerations on the left forehead and a number of other small cuts on the face and scalp. Both eyes were blackened and there were bruises on the face and chest. There was also a long laceration on the second finger of the right hand and an abraded (roughed-up) area on the back of the hand. Dr. Anthony characterized the hand wound as a "defensive wound." The autopsy also showed that the blow or blows to the outside of the scalp had broken the bones of the skull and had driven bone fragments into the brain. Dr. Anthony stated that, in his opinion, Braxton died as a result of blunt trauma to the head.

The defendant was arrested and charged with first-degree murder on 4 December 1983. The defendant was informed of his *Miranda* rights and executed a valid waiver. He then gave a statement in which he acknowledged his involvement in the planning of the robbery. He also admitted in his statement going to Braxton's house on the night of 19 November with Holmes and Earl

Barts. He stated that he used a crowbar to pry open a door and that he and Earl Barts went inside. They searched the house for money but were unable to find any. They then went out and looked in Braxton's shed. They subsequently returned to the house. According to the defendant's statement, Braxton drove up while the defendant was drinking some liquor that he had discovered in the house. The defendant stated that Earl Barts soon yelled for him to come outside. They proceeded to drive off in the truck. At that time, Earl Barts had Braxton's billfold in his hand. The defendant further stated that they drove to the pick-up point, got in the car with Holmes, drove to Earl Barts' residence, and divided up the money.

The State introduced a number of items of physical evidence. Among these were a cloth discovered in Holmes' car which had the presence of blood consistent with that of the victim, a hammer handle and a rubber-headed mallet discovered at Braxton's residence which had on it blood and hairs consistent with the deceased's, and a pocketknife found near Braxton's hand which had blood on it consistent with that of the victim. A baseball bat was also discovered at the victim's residence. Although the bat was found to have human blood on it, the quantity was insufficient to allow blood typing tests to be performed. Also, a boot obtained by the police from the defendant's residence was found to have made an impression discovered in Braxton's storage shed.

The defendant testified in his own behalf. He admitted his involvement in the planning of the robbery, and he acknowledged breaking into and entering Braxton's house and shed (also referred to as the "barn") on 19 November. However, he stated that Earl Barts killed Braxton and that he did not personally attack Braxton on the night in question. He further testified that he did not contemplate or intend that Braxton be killed. The defendant stated that he did talk with Lockamy after the robbery. However, he testified that he told Lockamy that Earl Barts was the one who assaulted Braxton, and he denied telling Lockamy that he beat the victim.

Charles Bowes, an investigator with the Person County Sheriff's Department, testified for the State on rebuttal. He stated that on 13 January 1984, the defendant confessed to having committed a break-in in Person County. Bowes stated that the de-

fendant said that he and two other men committed the break-in and took six to eight firearms. Bowes testified that he had conducted a search of the department's records and determined that the defendant was referring to a break-in which was committed at the home of Virginia Clayton on 4 May 1980.

Based on this and other evidence, the defendant was convicted of first-degree murder, robbery with a dangerous weapon, second-degree burglary, felonious breaking or entering, and felonious larceny.[1] During the course of the trial, the defendant had pled guilty to felonious conspiracy to commit 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 life imprisonment for the first-degree murder. The trial court entered judgment sentencing the defendant as previously indicated.

[1] The defendant initially argues that the trial court erred by denying his motion to suppress the inculpatory statement which he made to the authorities on 4 December 1983. The defendant contends that the statement was inadmissible because it was actually reduced to writing by SBI Agent Terry Johnson rather than himself. This argument is meritless.

It is well established that there is no requirement that a defendant's inculpatory statement be in his handwriting in order to be admissible against him. *State v. Schneider*, 306 N.C. 351, 293 S.E. 2d 157 (1982); *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911, 64 L.Ed. 2d 264 (1980). Where a defendant's statement is reduced to writing by another person, it is admissible if it is shown that the statement was freely and voluntarily given, it was read to or by the accused, and it was signed by him as a correct transcription of the statement. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883, *cert. denied*, 446 U.S. 911, 64 L.Ed. 2d 264. Here, Agent Johnson testified that he transcribed the defendant's statement exactly as it was given, he read it back to the defendant and asked if any changes or corrections needed to be made, the defendant indicated that one change needed to be made (substitution of the word "after" for the word "before" at

1. The defendant's codefendant, Charlie Mann, was convicted of solicitation to commit common law robbery.

one point in the statement), and the defendant then read the statement and signed it. The defendant does not contest the trial court's conclusion that the statement was made freely and voluntarily. Furthermore, he has not challenged the accuracy of the written transcription. Since the defendant signed the statement after it was read to him and after having read it himself, it was properly admissible against him.

[2] The defendant next argues that the trial court erred by denying his pretrial motion to prohibit the prosecution from "death qualifying" the jury. In this motion, the defendant asserted that the practice of "death qualifying" a jury in capital cases violates the sixth and fourteenth amendments to the United States Constitution and Article I, Section 19, of the North Carolina Constitution.

In the recent case of *Lockhart v. McCree*, --- U.S. ---, 90 L.Ed. 2d 137 (1986), the United States Supreme Court held that the federal Constitution does not prohibit the removal for cause, prior to the guilt-innocence determination phase of a capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would substantially impair the performance of their duties as jurors at the sentencing phase of the trial. In reaching this conclusion, the Court initially noted that there were "several serious flaws" in the social science studies presented by the defendant which concluded that "death qualified" juries are more conviction-prone than those which are not "death qualified." *Id.* at ---, 90 L.Ed. 2d at 144-45. These "flaws" included the fact that several of the studies dealt solely with generalized attitudes and beliefs about the death penalty and the criminal justice system; that several of the studies were based on responses of individuals randomly selected from some segment of the population, but who were not actual jurors in a case; and that only one of the studies took into account individuals who, because of their violent opposition to capital punishment, would be unable to decide a capital defendant's guilt or innocence fairly and impartially. *Id.* at ---, 90 L.Ed. 2d at 146-47. The Court went on to hold, however, that assuming *arguendo* that the studies were valid and adequate to show that "death qualified" juries are somewhat more conviction-prone than those which are not, the federal Constitution does not prohibit the states from "death qualifying" juries in capital cases.

In arriving at this conclusion, the Court stated that "death qualification" of the jury does not violate the defendant's sixth amendment right to a jury selected from a fair cross-section of the community because this requirement does not extend to petit juries and because those who would refuse to impose the death penalty do not constitute a "distinctive group" for fair cross-section purposes. *Id.* at ---, 90 L.Ed. 2d at 148. The Court also held that the practice of "death qualification" does not violate a defendant's right to an impartial jury. *Id.* at ---, 90 L.Ed. 2d 149. The Court further stated that the practice of "death qualification" served the state's (in that case, Arkansas) "entirely proper interest" in obtaining a single jury which could impartially decide all of the issues in a capital case. *Id.* at ---, 90 L.Ed. 2d at 152.

[3] The *McCree* decision controls the disposition of the defendant's claim that his rights under the United States Constitution were violated by the "death qualification" of his jury. However, in his brief, the defendant states that the right to trial by a fair and impartial jury is a right secured not only by the United States Constitution but also "[g]uaranteed by the Constitution of the State of North Carolina." The defendant further states in his brief:

> Prior to trial, Defendant filed a "Motion to Prohibit Death Qualification of Jury" and a "Motion to Deny Prosecutor's Challenges for Cause of Jurors Unequivocally Opposed to the Death Penalty." The attention of this Honorable Court is directed to those pages of the Record on Appeal for further argument on this point and reasoning in support of these motions.

In his motion to prohibit "death qualification" of the jury, the defendant argued that permitting the prosecution to examine prospective jurors concerning their views on capital punishment violates a defendant's right to an impartial jury "under the Sixth and Fourteenth Amendments to the United States Constitution *and Article I, Section 19, of the North Carolina Constitution.*" (Emphasis added.) We are therefore squarely presented with the issue of whether "death qualification" of juries in capital trials is prohibited by the North Carolina Constitution. We hold that it is not.

Article I, Section 19, of the North Carolina Constitution provides, in pertinent part, that "[n]o person shall be . . . deprived of life, liberty, or property, but by the law of the land." Initially, we note that we have previously expressly held that the practice of "death qualifying" the jury in a capital case does not violate Article I, *Section 19*, of the North Carolina Constitution. *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982). The defendant has presented no argument which convinces us that this case was wrongly decided. The defendant contends that the social science studies cited in *Grigsby v. Mabry*, 758 F. 2d 226 (8th Cir. 1985), *rev'd sub nom. Lockhart v. McCree*, --- U.S. ---, 90 L.Ed. 2d 137, and *Keeten v. Garrison*, 578 F. Supp. 1164 (W.D.N.C. 1984), *rev'd*, 742 F. 2d 129 (4th Cir. 1984), indicate that "death qualified" juries are more conviction-prone than those which are not "death qualified." However, most of these same studies were before the United States Supreme Court in *McCree* and were found to contain "serious flaws."

We hold that the practice of "death qualifying" juries in capital cases violates neither the United States Constitution nor Article I, Section 19, of the North Carolina Constitution. This assignment of error is overruled.

[4] The defendant next argues that the trial court erred in denying his motion for the sequestration and individual *voir dire* of the prospective jurors. The defendant points out that ten of the first twelve veniremen questioned indicated that they had some prior knowledge concerning the case. He argues that this shows that pretrial publicity concerning the case was so widespread that the sequestration and individual *voir dire* of the jurors was necessary in order to avoid exposing the entire jury panel to the prior knowledge of individual jurors.

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. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985). The decision of 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. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). 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); *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985).

The record indicates that during the examination of the first twelve veniremen, the trial judge inquired as to how many had read newspaper articles about the case. Four jurors indicated that they had read such articles. The trial judge then ordered that all potential jurors other than the twelve in the jury box leave the courtroom. The four jurors who indicated that they had read newspaper articles about the case, as well as one other juror who subsequently stated that he had read newspaper articles and seen news stories on television concerning the case, were then questioned. They were asked how many articles they had seen, how closely they had read them, whether they had participated in any discussion in the community about the case, and whether they had formed any opinion as to the defendant's guilt or innocence. They were not asked to relate the contents of any of the news stories. One juror stated that, based on what she had read, she had formed an opinion as to the guilt or innocence of the defendant, and she said that she did not feel she could be fair to both the State and the defendant. She was excused for cause. The other four jurors stated that the articles had not caused them to form an opinion about the case, that they would be able to ignore the articles and decide the case strictly on the facts, and that they could be fair to both sides. It is therefore clear that those four jurors who had indicated that they had some prior knowledge of the case unequivocally stated that they could ignore this prior knowledge and could be fair and impartial. More importantly for purposes of this issue, the record clearly shows that no juror was asked to recite the contents of the newspaper articles. Therefore, it cannot be said that those jurors who had read the articles exposed those who had not to any prejudicial pretrial publicity.

Furthermore, the record appears to indicate that the only feasible location where the jurors could have been individually questioned would have been in one of the Alamance County Dis-

trict Court courtrooms. However, the trial judge stated that "after personally viewing the facilities in the District Court House [sic], and after consulting with the Chief District Court Judge concerning the schedule of the District Court, the Court in its discretion denies the motion [for sequestration and individual *voir dire*]." The trial judge clearly intimated that the district court facilities and trial schedule would not permit the sequestration and individual *voir dire* of prospective jurors. This, coupled with the fact that the defendant has failed to establish that the jury selection process resulted in the "contamination" of other jurors by information from jurors previously exposed to such pretrial publicity, leads us to conclude that the defendant has failed to show that the trial court abused its discretion by denying the motion for sequestration and individual *voir dire*. This assignment of error is overruled.

[5] The defendant next argues that the trial court erroneously excluded a prospective juror for cause. The record shows that Ms. Robin Mitchell was called as a prospective juror and was questioned by both the prosecution and the defendant. She stated that she could vote to impose the death penalty and was subsequently passed by both sides. While *voir dire* questioning was continuing the next day, Ms. Mitchell asked to address the court. She stated that she had become very agitated and upset as a result of contemplating the possibility of having to decide whether to impose the death penalty. She had found it necessary to consult with a physician about this, and he had prescribed a sedative for her. Upon further questioning by both the prosecution and the defendant, Ms. Mitchell stated that she felt her emotional condition would detract from her ability to concentrate on the case. She also said that she had come to the conclusion that she would be unable under any circumstance to vote to impose the death penalty. The trial court thereupon excused Ms. Mitchell for cause based on her emotional condition and the fact that she had stated that she would be unable to vote for the imposition of the death penalty.

The decision of whether to reopen examination of a juror previously accepted by both parties is a matter within the discretion of the trial court. *State v. Freeman*, 314 N.C. 432, 333 S.E. 2d 743 (1985). Once the trial court has exercised its discretion to reopen the examination of any juror, the trial court may excuse the

juror for cause, *see, e.g., State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980); *State v. Kirkman*, 293 N.C. 447, 238 S.E. 2d 456 (1977), and either party may exercise any remaining peremptory challenges to remove the juror. *State v. Freeman*, 314 N.C. 432, 333 S.E. 2d 743.

The record indicates that Ms. Mitchell emphatically stated that there were no circumstances under which she would be able to vote for the imposition of the death penalty. She was therefore properly excused for cause. N.C.G.S. § 15A-1212(8) (1983 and Cum. Supp. 1985); *Wainwright v. Witt*, --- U.S. ---, 83 L.Ed. 2d 841 (1985); *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808. The defendant contends, however, that there was no showing that Ms. Mitchell could not sit as a juror during the guilt-innocence determination phase of the trial and then be replaced by a "death-qualified" juror during the sentencing phase of the trial. We have held that allowing jurors opposed to capital punishment to serve during the guilt-innocence determination phase and then replacing them at the sentencing phase would violate N.C.G.S. § 15A-2000 (a)(2), which contemplates that the same jury which determines guilt will also recommend the sentence to be imposed. *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983). Furthermore, the evidence regarding Ms. Mitchell's emotional state also justified her excusal for cause. This assignment of error is overruled.

[6] The defendant's next argument concerns the trial court's denial of his motion for a mistrial based on a newspaper article appearing in a local paper. During the course of the trial, the trial judge repeatedly instructed the jury not to read any newspapers or listen to any radio or television news broadcasts. As noted earlier, during the course of the trial, the defendant pled guilty to the charge of conspiracy to commit armed robbery. As a result of this plea, *voir dire* testimony given by Robert Holmes concerning statements made by Earl Barts after the robbery were ruled to be inadmissible against the defendant. A local newspaper reported the fact that the defendant had pled guilty to the conspiracy charge and recited portions of Holmes' *voir dire* testimony. The next day, the defendant moved for a mistrial based on the publication of the article. The trial judge proceeded to question the jury. He reminded them that at each recess, he had given them certain instructions to follow regarding their duties as jurors. He then asked if any juror had violated any of those in-

structions. One juror responded that she had used the wrong set of stairs when coming into the courthouse the previous day. No other violations were reported. The trial judge found that there had been no showing that any juror had violated any term or condition of responsibility of jury duty and that the jurors had affirmatively stated that they had followed the duties of jurors as instructed by the court. The trial judge therefore denied the motion for a mistrial.

It is well settled that the decision of whether to grant a mistrial rests in the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Primes*, 314 N.C. 202, 333 S.E. 2d 278 (1985). As noted earlier, 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. We detect no abuse of discretion here. The trial court had given the jury various instructions at each recess. Included among these was the instruction that they were not to read any newspapers nor listen to any radio or television news broadcasts. When questioned as to whether they had violated any of the various instructions, only one juror answered in the affirmative. That transgression did not involve a violation of the order to avoid exposure to the news media. The record is completely devoid of evidence that any juror had read or otherwise been exposed to the article in question. Absent such evidence, it cannot be said that the trial court abused its discretion in denying the motion for a mistrial. *State v. McVay*, 279 N.C. 428, 183 S.E. 2d 652 (1971); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967).

The defendant, however, contends that the trial court failed to conduct an adequate inquiry as to the possible prejudicial effect of the article. He argues that the trial judge was required to specifically question each juror as to whether he or she had read or otherwise been exposed to the article. In support of this contention, the defendant points to *Kirkpatrick v. Rogers and Edmisten*, No. C-78-374-G (1979), a federal *habeas corpus* petition filed in the United States District Court for the Middle District of North Carolina. The defendant there was tried in state court for various property crimes. During the jury *voir dire*, the prosecution asked a prospective juror if he knew the defendant. The juror answered

affirmatively, stating that the defendant had previously attempted to steal a power saw from him. The juror was excused for cause, but the trial court did not question the other jurors as to whether they had been prejudiced by the remark and the court denied the defendant's motion for a mistrial. The defendant was convicted and appealed. The Court of Appeals held that although the statement was prejudicial to the defendant, the trial court did not err in denying the motion for a mistrial. *State v. McAdoo*, 35 N.C. App. 364, 241 S.E. 2d 336 (1978). This Court denied the defendant's petition for discretionary review. *State v. McAdoo*, 295 N.C. 93, 244 S.E. 2d 262 (1978). The federal *habeas corpus* petition was allowed based upon the fact that the trial judge failed to conduct any inquiry into the prejudicial effect that the statement had on the other jurors. The defendant argues that *Kirkpatrick* compels a finding that the trial court erred by not making a specific inquiry of the jurors concerning the article. We do not agree.

When there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial. *Aston v. Warden, Powhatan Correctional Center*, 574 F. 2d 1169 (4th Cir. 1978); *United States v. Pomponio*, 517 F. 2d 460 (4th Cir.), *cert. denied*, 423 U.S. 1015, 46 L.Ed. 2d 386 (1975). Such an inquiry was conducted in this case. The trial judge questioned the jury as to whether any of his instructions, which included the repeated command to avoid exposure to the news media, had been violated. There has been no showing that this mode of questioning was ineffective in ascertaining whether exposure to the article had occurred. Indeed, since one juror immediately indicated that she had inadvertently violated an instruction concerning entry into the courthouse, we conclude that the trial court's inquiry was sufficient to prod the jurors into divulging whether they had violated any aspect of the instructions, including reading the newspaper article.

We hold that the trial court's manner of inquiry was adequate, and as there was no evidence that any juror had read or otherwise been exposed to the article in question, the Court properly denied the defendant's motion for a mistrial.

[7] The defendant next argues that the trial court erred by denying his motion for a mistrial based on certain prejudicial testimony by Penelope Dawkins. During her direct testimony, Dawkins began to testify about statements made by the defendant to the effect that Charlie Mann had "set him up on three jobs." The defendant objected, and the witness was then questioned out of the presence of the jury. Following the *voir dire* examination, the trial court ruled that although Dawkins could testify as to statements made by the defendant or Mann concerning a "job" (i.e., a break-in) committed against Mann's former girlfriend, she could not testify as to other breaking or enterings due to the fact that the evidence was inadequate to show that Dawkins had sufficient knowledge of the "jobs." After the jury returned, Dawkins was asked what she had heard Charlie Mann say about the defendant. She testified that Mann stated that he had known the defendant for several years and had set him up on "three jobs." The defendant immediately objected and made a motion to strike the testimony. The judge sustained the objection and allowed the motion to strike, instructing the jury to disregard Dawkins' testimony concerning the "three jobs." The judge then asked the jury if they could follow that instruction, and all the jurors indicated that they could. The defendant then moved for a mistrial based on that testimony. The motion was denied.

As stated previously, the decision of whether to grant a motion for a mistrial is addressed to the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion. *State v. Primes*, 314 N.C. 202, 333 S.E. 2d 278. Where a trial court sustains an objection to incompetent evidence and instructs the jury to disregard it, the refusal to grant a mistrial based on the introduction of the evidence will ordinarily not constitute an abuse of discretion. *See State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980); *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). The trial court took such action in this case. Furthermore, we note that the trial judge expressly inquired as to whether the jurors could follow his instruction to disregard the evidence. All of the jurors indicated that they could do so. In light of the immediate and thorough curative action taken by the trial court, we hold that there was no abuse of discretion in the trial court's failure to declare a mistrial on this ground.

[8] The defendant next argues that the trial court erred by allowing Investigator Bowes to testify on rebuttal as to the defendant's custodial statement that he and two other men had committed a breaking and entering in Person County. The defendant argues that this testimony was irrelevant. We agree. The State contends that this evidence was clearly admissible to corroborate the testimony of Lockamy and Dawkins that the defendant had told them that he had committed a break-in at the home of a woman and had taken several firearms. However, the defendant objected to this testimony, and we conclude that the objections should have been sustained.

The testimony of Lockamy and Dawkins that the defendant had told them that he had committed a break-in at the home of a woman at the instigation of Charlie Mann constituted the admission of evidence of other crimes committed by the defendant. The same is true of Bowes' testimony as to the defendant's statement that he had committed a breaking and entering in Person County. 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 prior to the effective date of the evidence code, we must analyze this issue in light of the law existing at that time. At common law, the general rule was that the State may not introduce evidence tending to show that a defendant had committed an independent offense even though it is of the same nature as the charged offense. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). In *McClain*, the Court enumerated eight exceptions to this general rule. The sixth exception is as follows:

> Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.

Id. at 176, 81 S.E. 2d at 367. Evidence offered to show the existence of a plan or scheme must be carefully examined to ensure that it is relevant to show a common design and not merely to show the defendant's propensity to commit the offense charged. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983). There must

be some unusual facts present in both crimes or especially similar acts which would indicate that the same individual perpetrated both crimes. *State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983).

The State argues that Bowes' testimony, as well as that of Lockamy and Dawkins, was admissible to show that the defendant and Mann were engaged in a common scheme to rob others. We do not agree. The events occurring at Braxton's residence took place in November 1983. The Person County break-in took place in May 1980. The remoteness in time between the alleged offense in 1980 and the crimes allegedly committed by the defendant in 1983 negated the plausibility of the existence of an ongoing plan to engage in a scheme to rob others. *See State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982). We hold that the trial court erred by allowing Lockamy, Dawkins, and Bowes to testify concerning the defendant's statements as to a prior break-in which he allegedly committed.

However, in light of the overwhelming evidence of the defendant's guilt, including his inculpatory pretrial statement and trial testimony, we conclude that there is no reasonable possibility that had the error not been committed, a different result would have been reached at trial—in other words, the admission of this testimony was clearly harmless. N.C.G.S. § 15A-1443(a) (1983 and Cum. Supp. 1985).

The defendant next contends that the trial court erred by denying his motions to dismiss the charges against him. He argues that the State failed to present sufficient evidence to support any of the convictions.

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. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (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. *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). 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. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837; *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808; *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114. We will proceed to review each of the defendant's convictions.

[9] The defendant was convicted of first-degree murder. A murder perpetrated by premeditation and deliberation or committed during the perpetration or attempted perpetration of any arson, rape or sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon is deemed first-degree murder. N.C.G.S. § 14-17 (1981 and Cum. Supp. 1985). The jury convicted the defendant of first-degree murder under both the theory of premeditation and deliberation and the felony-murder rule.

With regard to premeditation and deliberation, 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. Brown*, 315 N.C. 40, 337 S.E. 2d 808; *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, suddenly aroused by lawful or just cause or legal provocation. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837; *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 his reason. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768.

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 had been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808; *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. 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 that there was substantial evidence that the killing was premeditated and deliberate and that the court did not err in submitting to the jury the question of the defendant's guilt of first-degree murder based on premeditation and deliberation. There was no evidence that Mr. Braxton in any way provoked the attack. Holmes testified that the defendant went to Braxton's residence armed with a baseball bat and a crowbar. Upon returning to the car, the defendant told Holmes that they "had to beat the man." The day after the killing, the defendant told Lockamy and Dawkins that he had robbed Braxton the previous evening and that he thought he may have killed him. He told them that he had beaten Braxton until he stopped moving and that he "beat the old motherf--er until I got plumb tired of beating him." The victim was brutally beaten to death. Taken in the light most favorable to the State, this evidence was clearly sufficient to support a finding of premeditation and deliberation.

[10] In addition, the evidence supports the jury's finding that the killing occurred during the perpetration or attempted perpetration of a felony within the purview of N.C.G.S. § 14-17. There was plenary evidence that the defendant himself killed Braxton during the commission of the armed robbery. Moreover, the trial judge instructed the jury that it could convict the defendant of first-degree murder under the felony-murder rule if it found that while committing the robbery, the defendant, acting either alone or in concert with Earl Barts, killed Braxton. Under the doctrine of acting in concert, if two or more persons are acting together in pursuance of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any

of the others in pursuance of the common plan. *E.g., State v. Woods*, 311 N.C. 80, 316 S.E. 2d 229 (1984); *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). There is plenary evidence tending to show that the defendant was engaged in a common plan with Earl Barts to perpetrate a robbery against Braxton and that the defendant was present at the scene of the robbery. There was also evidence—specifically, the defendant's own testimony—from which the jury could find that Earl Barts killed Braxton in furtherance of the plan to rob him. Therefore, there was sufficient evidence for the jury to find the defendant guilty of first-degree murder under the felony-murder rule, notwithstanding the fact that it might conclude that he did not participate in the actual killing. We hold that the trial court did not err in denying the defendant's motion to dismiss the first-degree murder charge.

[11] The evidence also supports the defendant's conviction for robbery with a dangerous weapon. There is substantial evidence tending to show that the defendant used a deadly weapon to facilitate the taking of personal property from Braxton's person. The defendant went to Braxton's residence armed with a baseball bat and a crowbar. After the event, he stated that he had beaten and robbed Braxton. He also shared in the proceeds of the taking. Furthermore, the trial court instructed the jury that it could find the defendant guilty of this offense under the doctrine of acting in concert. The evidence was also sufficient to support a finding that Earl Barts perpetrated the robbery in furtherance of the common plan to rob Braxton. The defendant could therefore be properly convicted of armed robbery, notwithstanding the fact that the jury might believe his statement and testimony to the effect that he did not participate in the actual robbery. *E.g., State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390; *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L.Ed. 2d 761 (1972).

[12] The defendant was also convicted of second-degree burglary. The constituent elements of second-degree burglary are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or sleeping apartment (5) of another (6) with the intent to commit a felony therein. *See* N.C.G.S. § 14-51 (1981 and Cum. Supp. 1985); *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979). During cross-examination, the defendant admitted that on the night in question, he pried open the door to Braxton's house and en-

tered with the intent to steal anything of value that he could find and that he, in fact, stole several items from the residence. This candid admission, coupled with the other evidence presented, provided sufficient evidence to justify the submission of the charge of second-degree burglary and to support the jury's finding of guilt.

[13] With regard to his conviction for felonious larceny of Braxton's pick-up truck, the defendant contends that the evidence showing that he and Earl Barts abandoned the vehicle after arriving at the location where Holmes was waiting shows that he had no intention to permanently deprive Braxton of the truck. He appears to argue that the evidence only indicates an intention to temporarily deprive Braxton of the vehicle.

It is well established that an intent to permanently deprive the owner of the property is a necessary element of the crime of larceny. *E.g., State v. Green*, 310 N.C. 466, 312 S.E. 2d 434 (1984); *State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577 (1982). In *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966), we indicated that the intent to permanently deprive an owner of his property could be inferred where there was no evidence that the defendant ever intended to return the property, but instead showed a complete lack of concern as to whether the owner ever recovered the property. We went on to say in *Smith* that when a thief abandons property which has been stolen, he puts it beyond his power to return the property and shows a total indifference as to whether the owner ever recovers it. Here, the defendant, either alone or acting in concert with Earl Barts, stole the pick-up truck. It was subsequently abandoned some distance from Braxton's residence. There is no evidence that the defendant ever intended to return the property to Braxton. We hold that the defendant's taking and subsequent abandonment of the vehicle put it beyond his power to return and indicated a complete lack of concern as to whether the owner ever recovered the truck. This constituted sufficient evidence of an intent to permanently deprive the owner of the property. *Id.*; *In re Ashby*, 37 N.C. App. 436, 246 S.E. 2d 31 (1978). Therefore, the trial court did not err in denying the defendant's motion to dismiss this charge.

[14] Finally, the defendant argues that the evidence was insufficient to sustain a conviction for the felonious breaking or entering

of Braxton's storage shed, as all of the evidence showed that the shed was not enclosed but had an opening in the rear through which one could walk into the storage area. The defendant appears to be implicitly arguing that since the shed was not completely enclosed, there could not have been a "breaking" and therefore his conviction may not stand. This contention is without merit.

The defendant was convicted of felonious breaking *or* entering, a violation of N.C.G.S. § 14-54(a). We have previously held that this provision requires the State to come forward with proof that the defendant "broke" *or* "entered" the building with the requisite unlawful intent. *State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577. The State need not show both a breaking *and* an entering. *Id.* In this case, the State produced substantial evidence tending to show that the defendant entered the storage shed. A boot obtained by the police from the defendant's residence was found to have made an impression discovered in the storage shed. A crowbar was also found in the shed. Also, in both his statement to the police and his trial testimony, the defendant admitted going into the shed. The trial court did not err in denying the defendant's motion to dismiss the breaking or entering charge.

In summary, we conclude that the State presented substantial evidence tending to prove each essential element of all five offenses charged and that the defendant was the perpetrator of each. Accordingly, we hold that the trial court did not err in denying the defendant's motions to dismiss the charges against him.

The defendant next argues that the evidence was insufficient to support a finding that the murder was committed with premeditation and deliberation, and therefore the trial court erred by instructing the jury that it could convict the defendant of first-degree murder on this basis. As noted previously, we are of the opinion that when taken in the light most favorable to the State, the evidence was sufficient to support a finding of premeditation and deliberation. This assignment of error is overruled.

[15] The defendant next argues that the trial court erred by failing to instruct the jury on the offenses of voluntary and involuntary manslaughter. This argument is without merit.

Voluntary manslaughter is a lesser-included offense of murder. *State v. Brown*, 300 N.C. 731, 268 S.E. 2d 201 (1980); *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899 (1979). Involuntary manslaughter is also a lesser-included offense of murder. *State v. Greene*, 314 N.C. 649, 336 S.E. 2d 87 (1985); *State v. Mercado*, 314 N.C. 659, 336 S.E. 2d 87 (1985). However, a defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it. *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983); *State v. Shaw*, 305 N.C. 327, 289 S.E. 2d 325 (1982); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971).

Voluntary manslaughter has been defined as the unlawful killing of another without malice and without premeditation and deliberation. *E.g., State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981); *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981). Generally, voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is utilized or the defendant is the aggressor. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). There is no evidence whatsoever that the defendant or Earl Barts was acting in self-defense when Braxton was killed. Furthermore, the defendant has failed to point to any evidence which would tend to show that Braxton took any action which would constitute the required level of adequate provocation. The trial court did not err in refusing to instruct the jury on voluntary manslaughter.

Also, the trial court did not err in denying the defendant's request to instruct the jury on the lesser-included offense of involuntary manslaughter. Involuntary manslaughter is the unlawful and unintentional killing of another without malice which proximately results from an unlawful act not amounting to a felony nor naturally dangerous to human life, or by an act or omission constituting culpable negligence. *E.g., State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170. There is no evidence that Braxton died as a result of an unlawful act not rising to the level of a felony or naturally dangerous to human life. Also, there is no evidence that his death resulted from a culpably negligent act or omission. This assignment of error is overruled.

[16] The defendant's next argument centers on the sentence which he received for the armed robbery conviction. He received the maximum term of forty years imprisonment for that offense. The defendant contends that the trial court erred in finding certain factors in aggravation of the armed robbery conviction and that he is therefore entitled to a new sentencing hearing on that conviction.

The defendant first argues that the trial court erred in finding as an aggravating factor that the victim was very old. N.C.G.S. § 15A-1340.4(a)(1)(j) (1983 and Cum. Supp. 1985). He argues that although there was evidence that Braxton was seventy-four years old at the time of his death, several witnesses testified to the effect that he was five feet eight inches tall and weighed approximately two hundred pounds, that he did a great deal of gardening and yardwork, and that he was very strong and physically active for his age. The defendant contends that this testimony, coupled with evidence tending to show that Braxton was able to inflict a minor injury on Earl Barts during the assault, compels the conclusion that there was an insufficient showing that the victim's age increased his vulnerability to the crime committed. We do not agree.

In *State v. Hines*, 314 N.C. 522, 335 S.E. 2d 6 (1985), we stated that the age of the victim could not be considered as an aggravating factor in sentencing unless it made the defendant more blameworthy than he already was. We went on to hold that:

> A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, *or otherwise avoiding being victimized.*

Id. at 525, 335 S.E. 2d at 8 (emphasis added). Although, as recognized in *Hines*, a victim's vulnerability to the particular harm that the crime entails is the *concern* that this aggravating factor addresses, one of the underlying *purposes* of the factor is to deter wrongdoers from taking advantage of a victim because of his youth or extreme age. *State v. Mitchell*, 62 N.C. App. 21, 302 S.E. 2d 265 (1983).

The evidence in this case clearly shows that Braxton was selected as a robbery victim because he was known to carry large sums of money on his person and because he was old. In his statement to the police, the defendant said, "According to Rick [Lockamy], Charlie Mann had told him the old man carried a lot of money in the pockets of his bib overalls. *Rick said the old man was real old and it would be easy to rob him.*" (Emphasis added.) John Holmes testified that the defendant told him "he knew where there was a lot of money *on an old man.*" (Emphasis added.) The evidence clearly indicates that Braxton was singled out for the robbery because of his propensity for carrying large sums of money and because of his advanced age. Where a defendant decides to perpetrate a crime against an individual based in part on the likelihood that the crime will be successfully completed because of the intended victim's advanced age, we feel that the victim's age has indeed made him more vulnerable than otherwise would be the case because it was the very fact of his advanced age which led to his selection as the victim, and the trial court may properly find this aggravating factor. Such a finding responds to the requirements in *Hines* that the age of the victim must increase his vulnerability, while at the same time furthering the deterrence purpose of the factor. Since the evidence clearly shows that Braxton was singled out for the robbery, in part because of his advanced age, we hold that the trial court did not err in finding this factor in aggravation of the armed robbery.

[17] The trial court also found as a factor in aggravation of the robbery that the offense involved the actual taking of property of great monetary value. N.C.G.S. § 15A-1340.4(a)(1)(m) (1983 and Cum. Supp. 1985). The defendant initially argues that this violates the prohibition contained in N.C.G.S. § 15A-1340.4(a)(1) that evidence necessary to prove an element of the offense may not be used to prove any aggravating factor. This contention is meritless. The appellate courts of this state have previously held that since the crime of armed robbery does not require proof that property was actually taken—the mere *attempt* to take property by use of a firearm or other deadly weapon is sufficient—this aggravating factor may be properly found in armed robbery cases. *E.g., State v. Thompson*, 64 N.C. App. 485, 307 S.E. 2d 838 (1983), *cert. denied*, 313 N.C. 513, 329 S.E. 2d 399 (1985).

The defendant also contends that the trial court erred in finding this aggravating factor because $3,200—the amount of money the evidence indicated was taken from Braxton—divided three ways does not qualify as "property of great monetary value." The defendant implicitly argues that the court must look at the value of the property which a defendant ultimately receives in order to decide whether this aggravating factor may be properly found. We do not agree.

Language in *State v. Aldridge*, 76 N.C. App. 638, 334 S.E. 2d 107 (1985), would appear to lend some support to the defendant's contention. There, the Court of Appeals in discussing this aggravating factor, stated, "The gist of G.S. 15A-1340.4(a)(1)(m) is the value of the property and not whether there was a taking or attempted taking of the property. The aspect of the designated aggravating factor which permits enhancing the punishment is the great value of the personal property *in possession of the defendant.*" *Id.* at 642, 334 S.E. 2d at 109 (emphasis added). However, we do not feel that this aggravating factor should be read to limit the trial court to an examination of the value of the property which the defendant ultimately possessed. The factor speaks of the value of the property *taken*—or attempted to be taken—not the value of the property which is ultimately retained or possessed by a particular defendant. Since the evidence tended to show that the defendant, acting alone or in concert with Earl Barts, *took* $3,200 from Braxton during the armed robbery, the court could properly find this aggravating factor if $3,200 constitutes "property of great monetary value." We hold that it does. Property valued at less than $3,200 has been found to be of "sufficiently great monetary value" to support a finding of this aggravating factor. *See, e.g., State v. Simmons*, 65 N.C. App. 804, 310 S.E. 2d 139 (1984) (taking of billfold containing $2,500 was sufficient to support this finding). We hold that the trial court properly found as a factor in aggravation of the armed robbery that it involved the actual taking of property of great monetary value.

[18] The defendant's next argument relates to the sentence imposed for his conviction for second-degree burglary, a term which exceeded the presumptive sentence of twelve years. The trial judge found as a nonstatutory aggravating factor for this offense that "[a]t the time the defendant committed this second degree burglary he also committed larceny of a firearm which was not

charged in this case but which the defendant admitted performing the actions which constituted the elements of larceny of a firearm when he testified at trial." The defendant contends that the trial judge erred in finding this nonstatutory aggravating factor, because it was an inherent part of the crime for which he was convicted, it constituted evidence necessary to prove an element of the offense, and it was not reasonably related to the purposes of sentencing. We do not agree.

Initially, it is clear that evidence of the taking of the firearm did not constitute evidence necessary to prove an element of the offense. In order to achieve a conviction for second-degree burglary, it is not necessary for the prosecution to show that the accused committed a felony in the home or sleeping apartment which was broken into. It is sufficient if the State establishes that the accused possessed the intent to commit such a crime, all other elements of second-degree burglary being present. *See, e.g., State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). Since the State was not required to show that the defendant committed any larceny, it cannot be said that the evidence of the larceny of the firearm was evidence necessary to prove an element of the offense of second-degree burglary. Furthermore, the taking of the firearm was not an inherent part of the burglary. The evidence shows that the defendant and Earl Barts broke into the house in order to rob Braxton and/or look for money in the house. The taking of the firearm was in no way "inherent" in the burglary.

The claim that the finding of this aggravating factor was not reasonably related to the purposes of sentencing is equally meritless. One of the primary purposes of sentencing is to impose a punishment commensurate with the injury the offense has caused, taking into consideration factors which may diminish or enhance the offender's culpability. N.C.G.S. § 15A-1340.3 (1983 and Cum. Supp. 1985). The theft of this firearm, particularly in view of the possibility that it may have been taken with an eye toward using it against the victim, clearly increases the defendant's culpability. This assignment of error is overruled.

[19] The defendant next argues that the trial court erred by ordering that the three-year term of imprisonment for the consolidated convictions for breaking or entering and larceny be made to

run consecutive to the sentence imposed for the second-degree burglary conviction. We reject this contention. A trial court is given express authority by N.C.G.S. § 15A-1354(a) to require that the sentence imposed for a conviction be served consecutive to any sentence imposed at the same time or any undischarged term of imprisonment to which the defendant is already subject. We have held that there is nothing inherent in consecutive sentencing which violates the Fair Sentencing Act. *State v. Ysaguire*, 309 N.C. 780, 309 S.E. 2d 436 (1983). The defendant's argument that the sentence imposed for these offenses should have been ordered to run concurrent with one of the other terms of imprisonment which were imposed is devoid of merit.

[20] Finally, the defendant argues that the cumulative effect of the sentences imposed constitutes a violation of the requirement contained in the eighth and fourteenth amendments that a criminal sentence be proportionate to the crime for which a defendant has been convicted. *See Solem v. Helm*, 463 U.S. 277, 77 L.Ed. 2d 637 (1983); *State v. Ysaguire*, 309 N.C. 780, 309 S.E. 2d 436. We do not agree.

We have said that "only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. at 786, 309 S.E. 2d at 441. We also stated that the imposition of consecutive sentences, standing alone, does not constitute cruel and unusual punishment. *Id.*

We have no hesitation in holding that the imposition of consecutive sentences for conspiracy to commit armed robbery, first-degree murder, armed robbery, second-degree burglary, and breaking or entering and larceny does not violate any constitutional proportionality requirement. All of the sentences were within the limits prescribed by the General Assembly. A review of multiple offense cases in which a first-degree murder was committed indicates that consecutive sentences are frequently imposed. *See, e.g., State v. Miller*, 315 N.C. 773, 340 S.E. 2d 290 (1986); *State v. Riddick*, 315 N.C. 749, 340 S.E. 2d 55 (1986); *State v. Parker*, 315 N.C. 222, 337 S.E. 2d 487 (1985); *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741. Considering the gravity of the offenses for which he was convicted, we cannot say that the defendant's

consecutive sentences represent an unusual punishment in North Carolina.

The defendant received a fair trial, free from prejudicial error.

No error.

IN THE MATTER OF THE ESTATE OF VIRGINIA DUNCAN EDWARDS, DECEASED

No. 701A85

(Filed 3 June 1986)

Descent and Distribution § 1.2; Adoption § 5— adopted children—lineal descendants of second marriage

Two natural children of a testatrix, born of a previous marriage and adopted with the testatrix's consent by her second spouse, were considered lineal descendants of the second marriage for the purpose of determining the second spouse's distributive share upon his dissent from the testatrix's will pursuant to N.C.G.S. § 30-3(b). The failure of the biological parent to join in her second spouse's petition to adopt her children did not prevent the children from becoming lineal descendants of the second marriage because such a joinder is rendered unnecessary by carefully integrated statutory provisions; a new bloodline was created by law upon entry of the final order of adoption and the children became the lineal descendants of the biological parent and the adopted parent. There is no indication of legislative intent to create a special exception to the well-settled law and public policy that adopted children be afforded the same legal status as natural children born of that marriage, and the apparent intent in enacting N.C.G.S. § 30-3(b), to protect a testator's children by a former spouse against a fortune-hunting successive spouse, does not exist here because the second spouse caused himself to become legally bound to provide for the children. N.C.G.S. 48-4, N.C.G.S. 29-17(e), N.C.G.S. 48-7(d), N.C.G.S. 48-11(a), N.C.G.S. 29-2(4).

Justice EXUM dissenting.

Justices FRYE and BILLINGS join in the dissenting opinion.

FROM a decision of a divided panel of the Court of Appeals, 77 N.C. App. 302, 335 S.E. 2d 39 (1985), respondents appeal as a matter of right pursuant to N.C.G.S. § 7A-30. Heard in the Supreme Court 13 March 1986.

W. Y. Manson and Samuel Roberti for petitioner-appellee.

Nye & Mitchell, by R. Roy Mitchell, Jr., and Edmund D. Milam, Jr., for respondent-appellants.

MEYER, Justice.

We are presented on this appeal with a single question of first impression: whether two natural children of a testatrix, born of a previous marriage and adopted with her consent by her second spouse, are considered her lineal descendants by the second marriage for the purpose of determining the second spouse's distributive share upon his dissent from testatrix's will pursuant to N.C.G.S. § 30-3(b). The majority of the panel below answered this question in the affirmative, and we affirm.

Virginia Duncan Edwards (Virginia) died testate on 14 October 1983. She was survived by her husband, Daniel K. Edwards, and five children, all of whom had been born to her during her previous marriage to Harmon Duncan, deceased. From the date of their marriage in 1968 until Virginia's death in 1983, no natural children were born to Virginia and Daniel. However, in November 1970, Daniel adopted the two minor children of Virginia born to her during her marriage to Mr. Duncan. Daniel did not adopt his wife's three adult children from her previous marriage.

Virginia's will was admitted to probate, in common form, on 18 October 1983. Her will made no provision for her husband, Daniel. One week after Virginia's death, Daniel, the surviving spouse, filed his dissent from her will. The parties do not contest Daniel's right to dissent nor his timely notice of dissent. Only the matter of his distributive share is at issue here.

N.C.G.S. § 30-3, "Effect of dissent," provides in pertinent part:

> (b) Whenever the surviving spouse is a second or successive spouse, he or she shall take only one half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no lineal descendants surviving him by the second or successive marriage.

N.C.G.S. § 30-3(b) (1984).

If the two adopted children are considered to be lineal descendants of Virginia by the second marriage to Daniel, Daniel's distributive share of the personal property would be the same as that provided by the Intestate Succession Act (the first $15,000 plus one-third of the balance). N.C.G.S. §§ 29-14(b)(2), 30-3(a) (1984). If, instead, the adopted children are considered to be Virginia's lineal descendants by her first marriage, then Daniel's distributive share would be only one-half of the amount provided by the Intestate Succession Act (the first $7,500 plus one-sixth of the balance of the personal property). N.C.G.S. §§ 29-14(b)(2), 30-3(b).

On 30 April 1984, Daniel, petitioner, commenced this action by petition and motion to the Clerk of Superior Court, Durham County, to establish and define the proper distribution of Virginia's estate as a result of a disagreement that had arisen between himself and respondents, the co-executors of the estate. James Leo Carr, Durham County Clerk of Superior Court, entered judgment on 10 August 1984, finding, *inter alia*:

> 12. That G.S. § 30-3(b) does not apply to reduce the intestate share of Daniel K. Edwards because . . . [the two minor children) were lineal descendants by the successive marriage between Virginia D. Edwards and Daniel K. Edwards, and they survived and still survive their mother, Virginia D. Edwards, the testatrix, being lineal descendants because of their adoption by Daniel K. Edwards—said adoption being consented to by Virginia D. Edwards;

and ordering:

> IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that under the provisions of G.S. § 30-3(a) and (b) Daniel K. Edwards, a successive spouse, by reason of his dissent is entitled to take the full intestate share of the estate of Virginia D. Edwards—that is, a one-third undivided interest in the real property left by the deceased and the first $15,000 plus one-third of the balance of the personal property left by the deceased; this being the share to which he is entitled and which vested in him by reason of the dissent and by reason of the fact that . . . [the two minor children] survived their

mother, the testatrix, and are lineal descendants to Daniel K. Edwards and Virginia D. Edwards.

Respondents appealed entry of this judgment to the Superior Court, Durham County. Judge Robert L. Farmer conducted a hearing in the matter and entered his judgment on 5 November 1984 in which he adopted the findings of the clerk of superior court, made additional findings, and "confirmed, approved and adopted" the 10 August 1984 judgment of the clerk. Respondents gave notice of appeal to the Court of Appeals. The majority of the panel below in turn affirmed the order of the superior court; Judge Johnson filed a dissenting opinion. We affirm the decision of the majority of the panel below.

N.C.G.S. § 30-3(b) provides that a second spouse who dissents from the will of his spouse, the testatrix, will take only one-half of his intestate share if "the testat[rix] has surviving [her] lineal descendants by a former marriage but there are no lineal descendants surviving [her] by the second . . . marriage." The Court construed this provision in *Vinson v. Chappell*, 275 N.C. 234, 166 S.E. 2d 686 (1969), in which former Chief Justice Bobbitt wrote:

> G.S. 30-3(b) applies only when these facts concur: (1) A married person, husband or wife, dies testate, survived by his (her) spouse. (2) The surviving spouse, being entitled under G.S. 30-1 to do so, dissents. (3) The surviving spouse is a "second or successive spouse." (4) No lineal descendants "by the second or successive marriage" survive the testator (testatrix). (5) The testator (testatrix) is survived by lineal descendants by his (her) former marriage.

Id. at 238, 166 S.E. 2d at 689-90 (emphasis omitted).

In the instant case (enumerating as in *Vinson*), the parties do not dispute that: (1) Virginia died testate, survived by her spouse, Daniel; (2) Daniel, being entitled to do so under N.C.G.S. § 30-1, filed a timely dissent; (3) Daniel is Virginia's second spouse; and (5) Virginia is survived by lineal descendants by her former marriage (at least the three adult children not adopted by Daniel). The parties are in sharp disagreement as to whether element (4) exists in this case.

Daniel contends that the two minor children born of Virginia's former marriage became her lineal descendants by her marriage

to him by virtue of the final order of adoption entered in 1970. Respondents argue that, although the final order of adoption changed *Daniel's* relationship with his wife's minor children from her former marriage, the adoption, to which Virginia "consented" but in which she did not "join," did not alter *her* relationship vis-a-vis her natural children who are, therefore, her lineal descendants by her *first* marriage. Respondents contend that N.C.G.S. § 30-3(b) focuses on whether the testatrix has lineal descendants surviving *her by* the second marriage, and not on whether the surviving spouse has lineal descendants surviving *him by* that marriage.

Respondents argue that because Virginia did not *join* in Daniel's petition to adopt the two minor children in 1970, the adoption was ineffective to alter the children's status as lineal descendants of her first marriage. As to Virginia, respondents argue, the minor children born during her marriage to Mr. Duncan have at all times remained among those lineal descendants described by element (5) of the *Vinson* test. As such, respondents contend, these children cannot *also* be lineal descendants of Virginia by her marriage to Daniel. Therefore, say respondents, there are no lineal descendants by her marriage to Daniel, thus satisfying the fourth *Vinson* element.

In support of this argument, respondents refer to N.C.G.S. § 48-7(d), which provides:

> When a stepparent petitions to adopt a stepchild, consent to the adoption must be given by the spouse of the petitioner, and this adoption shall not affect the relationship of parent and child between such spouse and the child.

N.C.G.S. § 48-7(d) (1984). Respondents construe this provision to mean that when the biological parent gives the statutorily required written consent to the adoption by her spouse of her children from a former marriage, the children remain "lineal descendants" of the biological parent by her former marriage. Respondents believe that only if the biological parent "joins" in her second spouse's petition to adopt her children could the status of the children as "lineal descendants" of the second marriage *possibly* arise *by* her marriage to the adoptive parent/spouse. This reasoning is flawed in several respects.

First, as Daniel points out, at the time that the adoption took place in 1970, with the consent of the biological mother, Virginia, there was no other recognized proceeding whereby her husband, Daniel, could adopt her natural children born of her previous marriage to Mr. Duncan. N.C.G.S. § 48-4, entitled, "Who may adopt children," provides in pertinent part:

> (a) Any person over 18 years of age may petition in a special proceeding in the superior court to adopt a minor child and may also petition for a change of the name of such child. *If the petitioner has a husband or wife living, competent to join in the petition, such spouse shall join in the petition.*
>
> (b) Provided, *however*, that *if the spouse* of the petitioner *is a biological parent* of the child to be adopted, such spouse *need not join* in the petition but *need only to give consent* as provided in G.S. 48-7(d).

N.C.G.S. § 48-4(a), (b) (1984) (emphasis added).

The use of the word "however" in subsection (b) indicates that the petitioner's spouse referred to in (a) who "shall join in the petition" is *not* the biological parent. This is because subsection (b) makes a specific provision for cases in which the petitioner's spouse is the biological parent of the child to be adopted. The ratified bill, later codified as N.C.G.S. § 48-4, as published in the 1949 Session Laws, indicates in the margin next to the text of subsection (b) that it is an "Exception," obviously to the immediately preceding provision, subsection (a). 1949 N.C. Sess. Laws ch. 300. Moreover, it has been suggested that the reason for requiring the joinder of the spouse of the petitioner is that "a child should not be brought into a home where it is unwanted by the husband or wife" of the petitioner. *A Survey of Statutory Changes in North Carolina in 1947*, 25 N.C. L. Rev. 376, 409 (1947). Such a reason clearly will not exist when the spouse of a petitioner is the child's biological parent who, by law, *must* consent to the adoption. N.C.G.S. § 48-7(a), (d) (1984). *See also* Fairley, *Inheritance Rights Consequent to Adoptions*, 29 N.C. L. Rev. 227, 237 (1951) ("[I]n the case of a stepparent . . . joinder of the natural parent is obviously unnecessary.").

Moreover, respondents have failed to point out a statutory provision in effect in 1970 which provided for the joinder of a biological parent in her spouse's petition to adopt the children of the parent's former marriage, nor have respondents offered a plausible reason for the parent's doing so when, as here, the children to be adopted were born *in* wedlock. Indeed, such joinder is also rendered unnecessary by other carefully integrated statutory provisions.

The general rules regarding the relationship between adopted children and their biological parents are found in Chapters 29 (Intestate Succession) and 48 (Adoptions). N.C.G.S. § 29-17(b) provides, "An adopted child is not entitled by succession to any property, by, through, or from his natural parents or their heirs except as provided in subsection (e) of this section." N.C.G.S. § 29-17(d) provides, "The natural parents and the heirs of the natural parents are not entitled by succession to any property, by, through or from an adopted child, except as provided in subsection (e) of this section." Thus, Chapter 29 provides that upon adoption, children are legally severed from their natural parents for all purposes of intestate succession. The exception referred to is found at N.C.G.S. § 29-17(e), which provides, "If a natural parent has previously married, is married to, or shall marry an adoptive parent, the adopted child is considered the child of such natural parent for all purposes of intestate succession." The purpose, therefore, of subsection (e) is to make it clear that, in a situation such as the one at bar, the relationship of parent and child is *not* severed when the child is adopted by the spouse of the biological parent.

Likewise, in Chapter 48, N.C.G.S. § 48-23(2) clearly restates the principle that adopted children are legally severed from their biological parents, and vice versa: "The biological parents of the person adopted, if living, shall, from and after the entry of the final order of adoption, be relieved of all legal duties and obligations due from them to the person adopted, and shall be divested of all rights with respect to such person." Again, however, special provision is made for adopted children whose biological parent is married to the adoptive parent. N.C.G.S. § 48-7(d) provides: "When a stepparent petitions to adopt a stepchild, consent to the adoption must be given by the spouse of the petitioner, and this

adoption shall not affect the relationship of parent and child between such spouse and the child."

Therefore, it becomes clear that N.C.G.S. §§ 29-17(e) and 48-7(d) were enacted, not, as respondents argue, to retain adopted children's status as "lineal descendants" by the former marriage, but instead to provide that the parent-child relationship between adopted children and their biological parent is *not* severed by the parent's spouse's adoption of her children from a former marriage. Since the relationship remains intact in this limited situation, it is not necessary for such a biological parent to become a co-petitioner in her husband's adoption of her legitimate children of a former marriage. This biological parent, however, must consent to the adoption, as must any biological parent who does not come within the ambit of N.C.G.S. § 48-6, "When consent of parents is not necessary."

Finally, N.C.G.S. § 48-11(a) provides in part that "[w]hen the consent of any person . . . is required under the provisions of this Chapter, the filing of such consent with the petition shall be sufficient to make the consenting person . . . *a party* of record to the proceeding . . . ." Thus, the apparent basis for Judge Johnson's dissent below ("testatrix was *not a party* to her dissenting spouse's adoption . . . ." *In re Edwards*, 77 N.C. App. 302, 308, 335 S.E. 2d 39, 44 (Johnson, J., dissenting) (emphasis added)) is without support in law.

Therefore, we hold that Virginia's failure to "join" in her husband's petition for the adoption of her two minor children in no way affects her relationship with the children and is immaterial to a determination of her husband's distributive share under N.C.G.S. § 30-3(d). Virginia did as much as she was directed to do by statute in order to effectuate the couple's apparent desire that Virginia, Daniel, and the two minor children would be a family, legally as well as emotionally.

Respondents further contend that the decisions of the clerk of superior court, the superior court, and the Court of Appeals erroneously focused on Daniel's relationship with his adopted children rather than on Virginia's relationship with her natural children. We believe that the focus of N.C.G.S. § 30-3(b) in the instant case is on the "lineal descendants" and not on either the testatrix or her second spouse. The question here is: From what

marriage (or bloodline) will these children of the testatrix be considered to have "descended"? The answer to this question would have been simple had Daniel not adopted the two minor children: The children would unquestionably have been considered lineal descendants of Virginia's first marriage—*Vinson* element (5) descendants. But because Daniel *did* adopt these children, the analysis is somewhat more complex.

When Virginia consented to her husband's adoption of her two minor children and the final order of adoption was filed, the children were removed from the "bloodline" which was created by the union of their natural mother and father. *See Crumpton v. Mitchell*, 303 N.C. 657, 665, 281 S.E. 2d 1, 6 (1981). No longer could these children, adopted out of the Duncan family, inherit through their natural father. Upon entry of the final order of adoption, a new bloodline was created by law as surely as it would have been created by nature had Virginia given birth to natural children of her union with her husband, Daniel. New birth certificates were required by statute, N.C.G.S. § 48-29, to be issued, showing Daniel as the father and Virginia as the mother of the two children. A new family came into being on the date of adoption. Daniel and Virginia became the ancestors of these children who became lineal descendants of the union of Daniel and Virginia. Adoption effects a complete substitution of *families* and makes the child legally a stranger to the *bloodline* of his natural parents. *Crumpton v. Mitchell*, 303 N.C. 657, 665, 281 S.E. 2d 1, 6. *See also Pittman v. Pittman*, 73 N.C. App. 584, 586, 327 S.E. 2d 8, 10 (1985); McCall, *North Carolina's New Intestate Succession Act—Its History and Philosophy*, 39 N.C. L. Rev. 1, 14 (1960).

Respondents further argue that the term "lineal descendants" does not expressly include adopted children. The "lineal descendants of a person means all children of such person and successive generations of children of such children." N.C.G.S. § 29-2(4) (1984). There is no question but that these children are Virginia's children and therefore are her "lineal descendants." They became lineal descendants of Daniel upon adoption because they became in law his children. If Daniel had predeceased Virginia and Virginia had duly dissented from his will, there is no doubt but that Virginia would have received her full intestate share. Daniel, like Virginia, had lineal descendants surviving him by his first marriage (his natural children not adopted by Vir-

ginia). Yet, he would have been survived also by lineal descendants *by* his second marriage (the two minor children he adopted with his wife's consent). These same two children who are lineal descendants by the marriage of Virginia and Daniel cannot also be lineal descendants by the marriage of Virginia and Mr. Duncan by the fortuitous event of Virginia's predeceasing Daniel rather than vice versa. Respondents concede that the children must be lineal descendants *of one marriage or the other.*

The oft-quoted passage below again bears repeating:

> Here is a simple and clear rule which eliminates all doubt as to the standing and rights of an adopted child. For all legal purposes he is in the same position as if he had been born to his adoptive parents at the time of the adoption. There is no need for any learned and complicated interpretations. Whatever the problem is concerning an adopted child, his standing and his legal rights can be measured by this clear test: "What would his standing and his rights be if he had been born to his adoptive parents at the time of the adoption?" If lawyers and courts will look to this plain language of the statute, and avoid making exceptions not made in this statutory statement, persons adopting children in North Carolina can legally realize what they have hoped for, namely that the child they adopt will become their child, theirs fully, just as if he had been born to them, and without any exceptions and qualifications imposed by law to thwart their purpose.

A Survey of Statutory Changes in North Carolina in 1955, 33 N.C. L. Rev. 513, 522 (1955) (footnote omitted).

Both parties recognize the import of the role of public policy and a determination of legislative intent in reaching a decision in this case. We find no indication of legislative intent to carve out a special exception to the well-settled law and public policy of this state that adopted children of a marriage be afforded the same legal status as natural children born of that marriage. Moreover, we would question the propriety of respondents' position that the legislature intended to treat couples who choose to have the stepparent adopt the stepchildren differently from those couples who decide to parent their own natural children.

In considering the constitutionality of N.C.G.S. § 30-3(b), this Court noted that "[t]he reasons that impelled the inclusion of this unusual provision in the 1959 Act are unclear." *Vinson v. Chappell*, 275 N.C. 234, 239, 166 S.E. 2d 686, 690. The Court noted, however, that "[u]ndoubtedly, by reason of G.S. 30-3(b), a testator (testatrix) who has a child or lineal descendant by a former marriage has greater freedom of testation *as against* a childless 'second or successive spouse.'" *Id.* at 240, 166 S.E. 2d at 691 (emphasis in original). The Court went on to say that "the legislative intent was *to enable* a person who has a child or lineal descendant by a former marriage to make greater provision for such child or lineal descendant." *Id.* (emphasis in original). The couple in *Vinson* had no children of their own, natural or adopted, but the husband was survived by two daughters from his former marriage. The fact that the Vinsons had *no* children of their own, coupled with the provision of § 30-3(b), operated to give Mr. Vinson greater testamentary freedom to make provisions for his children from his former marriage without the threat of his successive wife's dissenting from his will and effectively depleting his estate intended to provide comfort and support for his children from the previous marriage—the only children he ever had.

The greater freedom of testamentary disposition, recognized in *Vinson* as intended by § 30-3(b), is curtailed when the testator remarries and "lineal descendants" are produced by that union. In the instant case, Virginia's voluntary choice in consenting to the adoption by her husband of her two minor children was tantamount to the couple's producing their own offspring. Had Virginia intended to reduce Daniel's distributive share upon his inevitable dissent from her will, she could have withheld her consent to the adoption petition. "'In making a will a husband (or wife) is presumed to have knowledge of and to have taken into consideration the statutory right of his widow to dissent from the will. G.S. 30-1.'" *Vinson v. Chappell*, 275 N.C. 234, 238, 166 S.E. 2d 686, 690 (quoting *Keesler v. Bank*, 256 N.C. 12, 18, 122 S.E. 2d 807, 812 (1961)).

A further explanation for the legislative intent in enacting N.C.G.S. § 30-3(b) was offered in *Phillips v. Phillips*, 296 N.C. 590, 252 S.E. 2d 761 (1979), in which then Chief Justice Sharp wrote, "Apparently this statute was passed to protect a testator's children by a former spouse against a 'fortune-hunting' second or suc-

cessive spouse." *Id.* at 606, 252 S.E. 2d at 771. Consistent with this Court's observations in *Vinson* and *Phillips*, we believe that N.C.G.S. § 30-3(b) was enacted for the protection of a testator's children by a former spouse on the assumption that a second or successive spouse would not feel as compelled to provide for the stepchildren upon testator's death as would the testator in his will. Indeed, the surviving spouse could not be compelled by law to provide for children who are not his own from funds received by that spouse upon dissent from the testator's will. The situation upon which this assumption, correct in many cases, is based does not exist in the instant case. The surviving second spouse, Daniel, not only *felt* compelled to provide for his wife's minor children of a previous marriage, he caused himself to become legally *bound* to do so by adopting the children with their mother's consent. Virginia's concern for the well-being of her young children and her desire that they be provided for and raised by a father—her husband—was undoubtedly a central factor in her decision to consent to the adoption.

In *Crumpton v. Mitchell*, 303 N.C. 657, 281 S.E. 2d 1, this Court held that children who are "adopted out of" a family do not take as "issue" of their biological grandmother in the absence of a contrary intent plainly appearing by the terms of a deed. We find the following passage from *Crumpton* particularly appropriate here. Justice Exum wrote:

> Given the legislative intent that the legal effect of a final order of adoption shall be *substitution of the adoptive [family] in place of the natural family* and severance of legal ties with the child's natural family, the implication is clear that the legislature intended that *children adopted out of a family would, for all legal purposes, no longer be a part of that family.* We are convinced the *severance of legal ties with the child's natural family was not intended to be partial. It is most unlikely that in enacting G.S. 48-23 the legislature intended the child would for some purposes remain legally in its natural bloodline.* Such a construction violates the spirit of the act and thwarts that which the act seeks to accomplish.
>
> Instead, we view G.S. 48-23 to mean that upon a final order of adoption the severance of legal ties with the child's

> natural family is total. *The child acquires full status as a member of his adoptive family* and in so doing is *for all legal purposes removed from his natural bloodline.*

Id. at 664-65, 281 S.E. 2d at 6 (emphasis added).

We therefore hold that the natural children of a testatrix, born of a previous marriage and duly adopted by her second husband, are considered to be her lineal descendants by the second marriage for purposes of determining the second spouse's distributive share upon his dissent from the testatrix's will pursuant to N.C.G.S. § 30-3(b). The decision of the Court of Appeals is affirmed.

Affirmed.

Justice EXUM dissenting.

I do not agree with the Court's conclusion that by reason of the adoption of the two children by the second spouse of their natural mother their previous relationship to their mother is changed and they become lineal descendants of their mother by her second marriage. Of this *marriage* there are no lineal descendants. The statute on dissents, N.C.G.S. § 30-3(b), reduces the intestate's share of the dissenting second surviving spouse if, among other things, the testator has no lineal descendants of the marriage to the second spouse. There being no question in the case about other conditions of this statute having been met, the surviving spouse's share should be reduced in accordance with the statute's terms.

I would hold, for purposes of determining Daniel Edwards' dissenting share, that the children of testator whom he adopted remained testator's lineal descendants from her first marriage. This seems to me the most principled result under the plain language of the pertinent statutes and the factual peculiarities of this case.

The majority errs first in its interpretation and application of the dissenting second spouse statute, N.C.G.S. § 30-3, and second in its analysis of testator's relationship to her two children whom Edwards, petitioner herein, adopted. The majority has circumvented the plain language of the dissenting second spouse

statute, N.C.G.S. § 30-3, and this Court's five-part construction of that statute as enunciated in *Vinson v. Chappell*, 275 N.C. 234, 166 S.E. 2d 686 (1969). The statute and *Vinson* focus on the relationship of testator and *his* or *her* lineal descendants by the first or second marriage. What the statute deems important is the testator's relationship to the children, not the surviving second spouse's relationship to them. I acknowledge Richard and Lucile became Daniel Edwards' lineal descendants when he adopted them. This, however, is not the determinative relationship for calculating his dissenting share. The majority circumvents N.C.G.S. § 30-3 by wrongly focusing on the "marriage" or "bloodline" from which Richard and Lucile are considered to have descended. We must determine whether they became *testator's* lineal descendants during her second marriage.

Second, the majority errs in asserting the two children became testator's lineal descendants by her second marriage because Edwards adopted them. It arrives at this mistaken conclusion by confusing the ramifications of simultaneous adoption by both a husband and wife of a child who previously was a legal stranger to them, and the singular adoption by a stepparent of his or her spouse's child(ren). These are different events which call for different results.

Adoption is a personal, singular process. Chapter 48 of our General Statutes, which deals with adoption, discusses "petitioner" in the singular and never, as the majority seems to assert, mentions adoption by a family. *See, e.g.*, N.C.G.S. § 48-4(a), (b) (1984). Perhaps the more common perception of adoption is where a husband and wife simultaneously adopt a child who was born to others (the biological mother and father) and was related to neither adoptive parent before adoption. The majority correctly states the result under our statutes and cases in that instance: all ties with the biological father, mother and relatives are extinguished, thereby preventing, for example, biological parents and children from inheriting through or from one another. But the majority misapplies that doctrine to the case at hand, where only one adoptive parent replaces only one corresponding biological parent. Thus, the authority cited in support of the majority opinion, notably the opinion I authored in *Crumpton v. Mitchell*, 303 N.C. 657, 281 S.E. 2d 1 (1981), is inapposite.

Neither a "family" nor a "couple" adopted Virginia Edwards' two youngest children; one man, their stepfather Daniel Edwards, did. Testator and her five children constituted a family before Edwards adopted the two youngest children of his second wife. A truer rendition of the facts would be that Richard and Lucile, the children Edwards adopted, gained a new father. They had and continue to have a biological family composed of their mother and their siblings. Their adoptive father replaced only their biological father and extinguished the adopted children's ties only with their biological father and *his* bloodline.

N.C.G.S. § 48-7(d) dictates "this adoption [notwithstanding the consent of the biological parent] shall not affect the relationship of parent and child between such spouse [here, testator] and the child." Although the majority strains to reach a different result by saying the relationship remains intact "in this limited situation," I read "shall not affect" to mean exactly that, without limitation. The relationship between testator and her natural children remained unchanged despite the children's acquisition of a new father and the resulting obliteration of any relationship with their biological father and his blood relatives.

In summary, the principle the majority fails to apprehend is that adoption is an act by an individual, and a new relationship results only to the extent a new parent replaces a biological or previous adoptive one. Thus, testator did not *become* the mother and ancestor of Richard and Lucile upon their adoption by Edwards.

Nor does my position undermine what the majority correctly perceives to be the legislature's intent to have adopted children treated legally in all respects as natural children. Richard and Lucile will under my view of the case enjoy the same legal status and rights vis-a-vis Edwards as Edwards' biological children. The only party whose rights are in question in this case is Edwards. My view carves out no special exception regarding the rights of adoptive children; under it Richard and Lucile's rights would be unaffected. On the other hand the majority's position seriously undermines the testator's testamentary intent to the detriment of all her children, an intent which, under the circumstances here, the dissenting second spouse statute was designed to protect.

The Court's argument that it promotes the policies underlying our adoption statute to consider an adoption by one of the parties to a marriage to be an adoption by the marriage has disturbing ramifications. That the General Assembly did not intend this result is clear when the second proviso of N.C.G.S. § 48-4(b) is considered:

> Provided further that if the petitioner is the biological parent of the child to be adopted and the other biological parent [not the spouse of the adopting parent] of the child is living, the spouse of the petitioner may choose not to join in the petition but shall indicate agreement to the proposed adoption by affidavit which shall be incorporated into the adoption proceeding.

Suppose two children were born to the marriage of mother *A* and father *B*. *B* thereafter died and *A* married *C*, who subsequently became the father of an illegitimate child by a woman other than his spouse. *C* adopted the illegitimate child with *A*'s consent but not joinder. Clearly the child's natural mother would continue to be its mother for all purposes, and her relationship to the child would be unchanged. If *A* and *C* together produced no natural children, upon *A*'s death, *C* should not be able to claim under the second surviving spouse statute that *A* was survived by lineal descendants of the second marriage simply because *C* adopted his own natural child during that marriage. The two provisos of N.C.G.S. § 48-4(b), if properly construed, militate clearly against such a result. Yet under the Court's "adoption by marriage" approach, *C*'s argument would prevail.

Finally I disagree with the majority's conclusion that testator somehow "joined in" the adoption by virtue of her consent to it and this "was tantamount to the couple's producing their own offspring." The majority concludes testator could not have joined in the adoption under the law as it existed when the adoption took place; therefore having done all she was legally permitted to do she should be considered as actually having joined in the adoption. I disagree. N.C.G.S. § 48-4(b), enacted in 1949, states a spouse in testator's position "need not join in the petition," thus implying testator, had she desired, could have joined in the 1970 adoption of the children by Edwards. Further, by stating "the spouse of the petitioner may choose not to join in the petition, but

shall indicate agreement to the proposed adoption," *id.*, the legislature distinguished between joining in and consenting to an adoption and signaled its intent to be that consent is not tantamount to joining in an adoption. It is certainly, therefore, not tantamount to the biological mother and adoptive second husband father producing their own offspring.

For all of the foregoing reasons I vote to reverse the Court of Appeals.

Justices FRYE and BIELLINGS join in this dissenting opinion.

STATE OF NORTH CAROLINA v. JAMES WALTER SLOAN, JR.

No. 349A85

(Filed 3 June 1986)

1. **Criminal Law § 42.6— swabs and slides taken from victim—chain of custody**

The State established a sufficient chain of custody of rectal swabs and slides taken from the victim to permit the admission of such exhibits and certain related testimony where, based on the detailed and documented chain of custody presented by the State, the possibility that the real evidence involved was confused or tampered with is too remote to require exclusion of the evidence, and where any weaknesses in the chain of custody relate only to the weight and not the admissibility of the evidence.

2. **Rape and Allied Offenses § 4— rectal slides—relevancy to prove penetration**

Rectal slides taken from the victim were relevant to prove that penetration of the rectum did occur where a doctor's testimony that material collected on a rectal swab came from within one centimeter length of the victim's rectum created an inference that spermatozoa detected on the slides were removed from inside the rectum. This inference was not destroyed by the fact that the doctor could not conclusively state that the swab did not also collect material from the rectal opening.

3. **Rape and Allied Offenses § 5— sufficient evidence of corpus delicti of rape**

The State produced sufficient *evidence aliunde* defendant's admissions to satisfy requirements of the *corpus delicti* rule and, when considered with defendant's first statement that he "did it" and his second attempted exculpatory statement that he had consensual sexual intercourse with the victim, such evidence was sufficient to permit a reasonable inference that the charged crime of rape occurred where it tended to show that after defendant had beaten the victim to the floor, he began removing her shorts and panties as she attempted to push her baby into the next room; the victim then lost consciousness, and when she was found after the crime, she was naked from the

waist down and her shorts and panties were lying on the kitchen floor; tests performed by a forensic serologist indicated the presence of semen and spermatozoa on the shorts and panties; and semen and spermatozoa could not be detected on a vaginal swab or slides because of the extreme amount of blood present in the vaginal tract.

4. Rape and Allied Offenses § 5— sexual offense—sufficient evidence of rectal penetration

The State produced sufficient evidence of rectal penetration to support defendant's conviction of a sexual offense where a doctor testified that material on a slide came from within one centimeter length of the victim's rectum and a forensic serologist testified that spermatozoa were detected on the rectal slide, notwithstanding the doctor also testified that spermatozoa found on the rectal swab used to prepare the slide could have been collected from deposits at the rectal opening rather than from inside the rectum.

Justice BILLINGS concurring in part and dissenting in part.

Justices EXUM and FRYE join in this concurring and dissenting opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Clark, J.*, at the 14 January 1984 Criminal Session of STANLY County Superior Court. We allowed defendant's motion to bypass the Court of Appeals on the Class H felony on 18 November 1985.

Defendant was charged in separate indictments, proper in form, with first degree rape, first degree sexual offense, felonious breaking or entering, and assault with a deadly weapon inflicting serious injury.

At trial, the State's evidence tended to show that on 9 August 1984 at approximately 2:30 p.m. Mrs. Sharon Shelton was at home with her fourteen-month old son in the James Creek Subdivision of Southern Pines. As she was cleaning the lunch dishes, Mrs. Shelton observed defendant walk through the yard and by her kitchen window. Mrs. Shelton recognized defendant because he had helped his brother, who operated a lawn company, work on her yard in July. She assumed he had returned to do other yard work that they had agreed upon.

Defendant went to the Sheltons' kitchen door and knocked. Mrs. Shelton, holding her young son, went to the door and unlocked the dead bolt with its key, leaving the key in the lock. She opened the door and asked defendant what work he would be doing. He did not reply but asked for a glass of water. Mrs. Shelton

went to the refrigerator in the kitchen, got some ice, put it in a glass with some water and handed it to defendant who was standing on the stoop outside the door.

Defendant then stated that he was not working for his brother anymore and asked for a ride home or to Pinehurst. Mrs. Shelton replied that she could not leave because she was expecting a man to come and look at her driveway. At that point, Mrs. Shelton became fearful because her conversation with defendant was not making sense. She told defendant that if he wanted more water he could use the outside faucet at the end of the house. With her baby beginning to cry, Mrs. Shelton started to shut the door. Defendant then moved towards the door and pressed against it to keep it open. As they struggled with the door, Mrs. Shelton, with the baby in her arms, tried to bolt lock the door, but in her panic engaged the lock too soon causing it to hit the wood of the door molding which prevented the door from closing.

Defendant finally burst into the kitchen, swinging a big long stick in his hands. Mrs. Shelton moved away from the door as defendant approached. She turned her back and pulled her child close to her to protect him from the stick. As she hunched over her child, defendant began to beat her in the head with the stick. Defendant finally beat them to the floor. Lying face down on the floor with her feet towards defendant, Mrs. Shelton tried to push her baby who continued to reach for her into the next room. As she pushed the child away, Mrs. Shelton felt defendant pull down her shorts and panties to the bottom of her legs. At that point in the attack, Mrs. Shelton became unconscious. She did not regain consciousness until after she had been taken to the hospital.

At approximately 3:00 p.m. that afternoon, George Denning arrived at the Shelton home with Paul Barbour to give a price estimate for paving their driveway. As they pulled into the driveway, Denning observed that the Sheltons' back door was open. Denning went to this door and heard a baby crying. He rang the bell and then told Barbour to get out the measuring wheel to measure the driveway. Denning continued to hear the baby cry and watched a small dog run in and out of the house, barking and acting strangely. Sensing that something was wrong, Denning entered the kitchen. He testified that "I never saw so much blood." Denning followed the trail of blood down the hallway to

the den where he found Mrs. Shelton wrapped in a quilt sitting behind the door facing frontward with her head propped up against the wall. Denning testified: "When we found Mrs. Shelton she looked horrified. I have never saw [sic] a look like that in my life on anything." The crying child was eight to ten feet away covered in blood. Denning examined the child and determined that he was unharmed. To help stop the blood which was gushing from Mrs. Shelton's head, Denning and Barbour placed a towel and washcloth on her head. Denning noticed that Mrs. Shelton had on no clothes from the waist down. Later when Denning walked into the kitchen, he saw her shorts and panties lying on the floor.

Mrs. Shelton who was in a dazed condition asked Denning and Barbour who they were and to call her husband. Denning called Yow Construction where Mr. Shelton worked. He instructed the woman who answered the telephone to call the rescue squad and to inform Mr. Shelton of his wife's condition. Denning then heard Mrs. Shelton tell Barbour that she knew who had assaulted her. Denning and Barbour remained at the Shelton home until after the rescue squad had transported Mrs. Shelton to the hospital, the police had arrived, and Mr. Shelton's parents had come to care for the child.

Between 3:15 and 3:30 p.m. that day, Steve Loomis was driving home from work. He noticed defendant hitchhiking and stopped to pick him up. As defendant entered the car, he told Loomis that he appreciated the ride because "he had just been in a fight and he didn't want the police to see him like that." Loomis testified:

> At that time I looked over at the defendant and noticed the blood. He was just covered with blood, had a white shirt and it was red colored, soaked with blood, blood on his arms, over his watch and he said that he had been in a fight with this guy. . . . He said that he used a club or a pipe or something, he struck the guy over the head with . . . a club or pipe.

Following defendant's directions, Loomis drove defendant to his home on Iowa Avenue. Although defendant asked him to wait for him to change clothes, Loomis stated that he was nearly out of gas and drove away. After reading about Mrs. Shelton's attack in

the local newspaper, Loomis contacted the police and showed them where he had taken defendant on that day.

The State's other evidence tended to show that on 10 August 1984 defendant was located at his uncle's house in Red Springs by local authorities and taken to the Red Springs Police Department. Detective Lanny Patterson and Captain Whitaker of the Moore County Sheriff's Department and Special SBI Agents Leroy Allen and Ken Snead arrived from Southern Pines, approximately twenty-five miles away, at 9:15 a.m. After being informed of his *Miranda* rights, defendant indicated that he wanted to exercise his right to remain silent and his right to an attorney. However, during his ride back to Southern Pines with the officers, defendant, on his own initiative, made the following statement:

> I did it. . . . I should have beat the bitch too [sic] death. If I get out, I'll kill her. I didn't cut her with a knife. Tell the bitch this is not over. Her husband will be next. I was going to kill her but I didn't because of the little boy. I went to talk to her about the lies she had told and I walked from my house to her's yesterday. I could have killed her if I wanted to. I worked around the house. She didn't take the warrants out because she won't [sic] able. It must have been her husband. I worked there with my brother. I went to talk to her. She had the kid in her arms when I went to the door. I hit her. When I realized it, I went home and changed clothes and came down here. I was looking for a prison dude's wife. If I had found her, I wouldn't have made it over there. If she explains what the reason is I won't get 20 years.

Upon finishing this statement, defendant said that he would talk to Special Agent Snead about the incident. Agent Snead told him to wait until they had reached Southern Pines. Other than that comment, nothing else was said to defendant.

When defendant and the officers arrived at the Southern Pines Police Department, Special Agents Allen and Snead once again advised defendant of his *Miranda* rights. At that time defendant agreed to waive his rights and signed the form indicating that he wished to make a statement. Defendant then proceeded to tell his side of the story as follows:

I, Walter Sloan, Jr., of 1190 West Iowa Avenue, Southern Pines, do willingly give the following statement to V. L. Allen and K. R. Snead of the SBI on August 10, 1984 at 10:45 am, Southern Pines Police Department. I first went to her house and knocked on the door and when she opened the door, she said, 'Hello Sloan. I am glad to see you.' She, Mrs. Shelton, said that its been about two months since you were last over here. Then I asked her for a glass of water because I had just walked over there from my house because I was hot and exhausted. She then told me to come on in the house. I told her that no, it would not be nice to come in there because your husband was not there. Then she grabbed me by the arm and told me to come on in, that her husband didn't care about you coming in here. I told her that I don't like to come in people's houses when their husbands are not there. Then she told me come on in that I want you. When I got inside, she pulled down her shorts and panties and she then grabbed me by the arm and pulled me to her and that's when we started having sex, intercourse with each other. That made the third time that I had had sex with her, that's one reason I did not want to go into the house to start with. The first two times that I had sex with her was when I was over there cleaning the land for her and her husband. When I got ready to go, I got to the kitchen door, she grabbed me by the arms and told me that she loved me. I kept asking her to let me go but she would not so I had to hit her two times to get loose from her. After I hit her that time, I got loose and she ran after me outside and grabbed me again and that is when I pushed her to the ground, because she had blood on her hands because her head was bleeding and she had had her hands on the back of her head. And she grabbed me and that is when I got blood on my shirt. Then I ran out the driveway to the road in front of the house and that's all. I, Walter Sloan, Jr. have made this statement. No promises or threats have been made to me and no pressure has been used against me to make this statement.

Defendant's statement was taken down by Agent Allen. It was read and signed by defendant who added "I, Walter Sloan, Jr., also had a wood handle with a metal end. I throwed it in the bushes on the road coming to Southern Pines as you leave Mrs.

Shelton's house." Defendant later went with the agents and found the stick which was described as a broken shovel handle.

The State's medical evidence tended to show that Mrs. Shelton received severe head injuries during the attack. Dr. Seibert Harold Jacobson testified that there were multiple lacerations to the right posterior and right side of her head and multiple bone fractures in the right parietooccipital area. Dr. Jacobson stated:

> It was a patchwork of putting the skull back together because it had been lacerated in so many directions. I took out the bone fragments that needed to come out. There was a tear in the thick covering that is about the brain inside the skull. That was lacerated. There was a definite but small bruise to the brain with a small hematoma. The thick covering was repaired, the bone fragments that appeared to be viable were maintained. Those that did not appear to be viable were removed, and the scalp was sutured back together.

As a result of the attack, Mrs. Shelton was permanently injured. Dr. Jacobson testified that due to the damage to the right parietooccipital area of her brain Mrs. Shelton's ability to gather images in the left field of vision of both eyes has been impaired. In addition, she has residual scars in the scalp, a skull defect in those areas where bone skull fragments were removed, and a jaw disorder which may require a rebreaking of the jaw and braces.

Dr. Clifford James Long testified that he examined Mrs. Shelton on 9 August 1984 in the hospital operating room to determine whether she had been raped or sexually assaulted. Using swabs from a rape kit, Dr. Long took samples of the vaginal pool and the rectum and made slides. Joanna Medlin, a forensic serologist with the SBI, examined the rectal slides and determined the presence of spermatozoa. Agent Medlin testified that spermatozoa were not detected on the vaginal slides due to "an extreme amount of red blood cells and white blood cells which were present on these slides." She stated that "[h]ad spermatozoa been present, it very easily could have been washed out of the vaginal tract." Ms. Medlin further noted that she did not detect any semen on the vaginal swab for the same reason. Finally, Scott Warsham, a forensic chemist with the SBI, made comparisons of hair samples from defendant and from the Shelton home and found the samples to be "microscopically consistent."

Mrs. Shelton was recalled to the stand and testified that she did not consent to any sexual relations with defendant.

Defendant offered no evidence.

The jury returned verdicts of guilty of first degree rape, first degree sexual offense, felonious breaking or entering, and assault with a deadly weapon inflicting serious injury. Defendant was sentenced to consecutive life terms for the rape and sexual offense. The trial court imposed a ten-year sentence for defendant's conviction of felonious breaking or entering and arrested judgment on his conviction for assault with a deadly weapon inflicting serious injury on the ground that felonious assault is an element of the offenses of first degree rape and first degree sexual offense.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

Benny S. Sharpe, for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant contends that the trial court improperly allowed into evidence the rectal swab and slides taken from the victim and certain related testimony. Defendant argues that the State failed to establish a sufficient chain of custody to adequately identify these items as the ones taken from the victim.

The State's chain of custody evidence with regard to the rectal slides is as follows:

> (1) Dr. Clifford James Long testified that he brought the rape kit, State's Exhibit 12, into the operating room with Mrs. Shelton. With cotton swabs taken from the kit, he sampled the victim's vaginal pool and rectum. From the swabs, he made slides which were appropriately identified by him or at his direction. Dr. Long stated that he actually sealed the rectal and vaginal slides and their respective swabs in separate containers, but that the rape kit box itself was sealed by the nurse. He indicated that the box was not sealed at that time because hair samples from Mrs. Shelton remained to be submitted by the nurse who was shaving her

head for her craniotomy. Dr. Long stated that he left the operating room before the rape kit box was sealed. Dr. Long identified State's Exhibit 12A as the rectal smears taken from Mrs. Shelton.

(2) Operating Room Nurse Marilyn Rogers testified that she observed Dr. Long use the swabs as indicated and make slides. She stated that she closed the rape kit box, State's Exhibit 12, and handed it to Deputy Sheriff Timmy Monroe who was waiting outside the operating room.

(3) Deputy Sheriff Monroe testified that he observed Mrs. Shelton in the operating room and received the rape kit box, State's Exhibit 12, from Nurse Rogers. He stated that he placed his identification marks on the box and that it remained in his presence until he gave it to Detective Lanny Patterson.

(4) Detective Patterson testified that he obtained the sealed rape kit box from Deputy Monroe, that he placed his identification marks on the box, and that it remained continuously in his possession until he delivered it to SBI Agent Pamela Tulley.

(5) Agent Tulley testified that she received the rape kit box, State's Exhibit 12, from Detective Patterson, and placed her identification marks on the box which remained in her custody until she delivered it to SBI forensic serologist Joanna Medlin.

(6) Agent Medlin stated that she received the rape kit box from Agent Tulley, placed her identification marks on the box, and removed from it State's Exhibit 12A, identified as "rectal smears collected from the rectum of Sharon Shelton." Agent Medlin further testified that she performed various tests on the rectal slides to determine the presence of spermatozoa.

Defendant argues in particular that the State's chain of custody with regard to the rectal swab and slides is insufficient because Dr. Long testified that he left the operating room before the rape kit box was sealed, that some of the writing on one of the rectal slides was not his, and that Nurse Rogers failed to

specifically testify that she observed Dr. Long take a rectal sample or make slides from the rectal swab.

We disagree that these alleged lapses in the rectal swab and slides chain of custody require that this evidence be excluded. The particular problems with the chain mentioned by defendant are easily solved by the testimony of other witnesses. For instance, although Dr. Long admitted that he left the operating room before the rape kit box was sealed, Nurse Rogers testified that she was in the operating room the entire time with the box and that items placed inside the box by Dr. Long were in the same condition when she observed the placement of other items into the box immediately before she closed it and handed the box to Deputy Monroe. Moreover, although Dr. Long stated that some of the writing on one of the rectal slides was not his, he testified that he gave the slides to the nurse who would have written the identification on the slides. He further indicated that State's Exhibits 12A were in fact the slides he made from Mrs. Shelton's rectum. Finally, even though Nurse Rogers failed to state that she observed Dr. Long take a rectal sample and make slides from this sample, Dr. Long specifically testified that he placed a cotton swab into Mrs. Shelton's rectum and prepared two slides from the swab which he sealed in a cardboard container and placed into the rape kit box.

In determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition, the trial court must exercise sound discretion. *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E. 2d 391, 392 (1984). We hold that the trial court did not abuse its discretion by allowing the rectal swab, slides, and related testimony into evidence. In the first place, defendant has provided no reason for believing that this evidence was altered. Based on the detailed and documented chain of custody presented by the State, the possibility that the real evidence involved was confused or tampered with "is simply too remote to require exclusion of this evidence." *State v. Grier*, 307 N.C. 628, 633, 300 S.E. 2d 351, 354 (1983). Furthermore, any weaknesses in the chain of custody relate only to the weight of the evidence, and not to its admissibility. *Id.*

[2] Also, defendant argues under this assignment of error that even if the chain of custody was sufficiently established by the State, the rectal slides should, nevertheless, have been excluded. Defendant asserts that these slides were irrelevant for any purpose except to show penetration. Dr. Long testified that he inserted the swab into the rectum a centimeter, or one-half inch. According to defendant, because Dr. Long stated that the swab would gather anything it touched from outside the rectum to a centimeter inside the rectum, the slides did not establish that penetration had occurred and should not have been admitted into evidence.

Again, we disagree that this evidence should have been excluded. Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. *State v. Hannah*, 312 N.C. 286, 294, 322 S.E. 2d 148, 154 (1984). *See also* N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985). Dr. Long's testimony that the material collected on the rectal swab "came within that one centimeter length of rectum" surely created an inference that the spermatozoa detected on the slides were removed from inside the rectum. This inference was not destroyed by the fact that Dr. Long could not conclusively state that the swab did not also collect material from the rectal opening. Rather, his testimony logically tends to prove that penetration of the rectum did occur. We hold, therefore, that this evidence was relevant and properly admitted by the trial court.

Defendant similarly assigns as error the admission of evidence relating to the vaginal swab and slides made from the victim. However, since this particular vaginal swab and slides showed no evidence of sperm or semen, defendant concedes that he was not prejudiced by the introduction of this evidence. Consequently, this assignment of error is overruled.

Defendant's remaining three assignments of error deal with the sufficiency of the evidence. Defendant contends that the trial court improperly denied his motions to dismiss the charges of first degree rape and sexual offense at the close of the State's evidence and at the close of all the evidence, and his motion to set aside the verdicts as being against the greater weight of the evidence.

[3] With regard to his rape conviction, defendant argues that the State produced no evidence, apart from his statement, that he raped or specifically engaged in vaginal intercourse with the victim. Defendant is correct in his assertion that a naked extrajudicial confession, uncorroborated by other evidence, is not sufficient to support a criminal conviction. *State v. Franklin*, 308 N.C. 682, 304 S.E. 2d 579 (1983). According to the law of this jurisdiction, the State must at least produce corroborative evidence, independent of defendant's confession, which tends to prove the commission of the charged crime. *Id.* In *State v. Parker*, 315 N.C. 222, 337 S.E. 2d 487 (1985), this Court expanded the type of corroboration which may be sufficient to establish the trustworthiness of the confession in cases in which independent proof is lacking but where there is substantial independent evidence tending to establish the trustworthiness of the confession. *State v. Trexler*, 316 N.C. 528, 342 S.E. 2d 878 (1986). In *Trexler*, we reasoned that the pre-*Parker* rule is "still fully applicable in cases in which there is some *evidence aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred." *Id.*, Slip. op. at 5. Thus, our *corpus delicti* rule in such cases only requires *evidence aliunde* the confession which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred. It does not require that the *evidence aliunde* the confession prove any element of the crime. *Id.*

In the present case, we must apply the pre-*Parker* rule because there is some *evidence aliunde* the confession which tends to support a finding that the rape occurred. In the first place, Mrs. Shelton testified that after being beaten to the floor, defendant began removing her shorts and panties as she attempted to push her baby into the next room. Next, George Denning testified that after entering the Shelton home and rendering what first aid he could, he noticed that Mrs. Shelton was naked from the waist down and later spotted her shorts and panties lying on the kitchen floor as if they had been "stripped off her." Furthermore, SBI forensic serologist Medlin testified that she performed a series of tests on Mrs. Shelton's shorts and panties which indicated the presence of semen and spermatozoa on the clothing. Agent Medlin also explained that spermatozoa or semen could not

be detected on the vaginal slides or swab prepared by Dr. Long due to the extreme amount of blood present in the vaginal tract.

This evidence in conjunction with defendant's first inculpatory statement that "[he] did it" and his second attempted exculpatory statement that he had consensual sexual intercourse with Mrs. Shelton certainly permits a reasonable inference that the charged crime of rape, including the element of vaginal penetration, occurred. We hold that the State produced sufficient *evidence aliunde* defendant's admissions to satisfy the requirements of our *corpus delicti* rule and when considered with defendant's confession is sufficient to survive defendant's various motions to dismiss the rape charge against him.

[4] Defendant further contends that his motions to dismiss the sexual offense charge should have been granted. He argues that because Dr. Long stated on cross-examination that the spermatozoa found on the rectal swab could have been collected from deposits at the rectal opening, rather than from inside the rectum, the State failed to produce evidence that rectal penetration occurred. We disagree.

On a motion to dismiss, the evidence must be taken in the light most favorable to the State, and the State must be given the benefit of every reasonable inference deducible therefrom. *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980). Based on Dr. Long's testimony that the material on the slide came from within one centimeter length of the rectum and Agent Medlin's testimony that spermatozoa were detected on the rectal slide, we hold that the State produced substantial evidence of the element of rectal penetration. *See generally State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). Thus, the trial court properly denied defendant's motions to dismiss the sexual offense charge against him.

For reasons stated, defendant received a fair trial free of prejudicial error.

No error.

Justice BILLINGS concurring in part and dissenting in part.

I dissent from the majority opinion insofar as it holds that the evidence was sufficient to support the jury's verdict of first degree sexual offense.

The only evidence relating to the commission of a sexual act (as opposed to sexual intercourse) by the defendant upon the victim was the testimony of SBI Agent Joanna Medlin that one of the two slides prepared by Dr. Long from material collected on a rectal swab contained spermatozoa. Dr. Long, the obstetrician-gynecologist who examined the victim on 9 August 1984, testified as follows about the collection of the material on the rectal swab:

Q. What did you do with the swab with reference to the rectum?

A. I took a cotton swab and introduced it into the rectum about a centimeter, then took it out and made two slides and then put the cotton swab itself into a separate package and submitted them both.

. . . .

Q. When you take a rectal swab, you insert the swab into the opening; is that correct?

A. Yes.

Q. And you just go how far in?

A. About a centimeter.

Q. And would you give us that in—Convert that into inches?

A. About ½ an inch.

Q. Of course, that swab would gather anything it touched from the outside of the rectum down into the area of the depth of the rectum that you went?

A. That's right.

Q. And any collected material would have been collected from the outside of the rectum or the opening of the rectum down to the depth of the centimeter; is that right?

A. Yes.

Q. And you did two of those?

A. Yes.

Q. And so there is no way to determine on a slide where that material on the slide actually came from, is that correct, what portion of the examination area?

A. It came within that one centimeter length of rectum.

Q. From the outside to one centimeter depth?

A. That's correct.

There was evidence that semen was found on the victim's clothing. Although she was unable to detect sperm or semen on slides made from swabs of the victim's vaginal tract, Agent Medlin testified that "[h]ad spermatozoa been present, it very easily could have been washed out of the vaginal tract." The rectal slides were not tested for semen. Dr. Long did not testify that he took any measures, such as cleaning the rectal opening before inserting the swab, which would have prevented any sperm located on the outside of the rectum from being picked up by the swab. Therefore, the fact that sperm was picked up by the cotton swab does not establish that the sperm was located inside the rectum. The conviction of sexual offense is based solely on an inference of penetration resulting from the presence of sperm on the rectal slide. If that sperm necessarily came from inside the rectum, that inference would be justified. However, since the evidence shows that it is equally as likely that the sperm picked up by the swab and placed on the rectal slide came from outside the rectum as from inside, there is insufficient evidence to support a finding of the premise upon which the inference is based, i.e., that sperm was located inside the victim's rectum. "A resort to a choice of possibilities is guesswork not decision." *Boyd v. Harper*, 250 N.C. 334, 339, 108 S.E. 2d 598, 602 (1959).

Although there was no direct evidence of vaginal penetration other than the defendant's confession that he and the victim "started having sex, intercourse with each other," the majority has relied upon that statement as an admission of vaginal penetration in support of the rape charge. I agree that the confession to "sex, intercourse" may reasonably be understood to refer to vaginal intercourse. The statement cannot reasonably be used, and the majority does not attempt to use it, to also support a finding of anal intercourse.

I would therefore hold that the evidence of first degree sexual offense was insufficient to support the conviction.

I concur in the remainder of the majority opinion.

Justices EXUM and FRYE join in this concurring and dissenting opinion.

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

ABBOTT v. BLUE CROSS & BLUE SHIELD

No. 150P86.

Case below: 79 N.C. App. 176.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

ABSHER v. VANNOY-LANKFORD PLUMBING CO.

No. 88P86.

Case below: 78 N.C. App. 620.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

AMES v. CONTINENTAL CASUALTY CO.

No. 230P86.

Case below: 79 N.C. App. 530.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

ANDREWS v. ANDREWS

No. 148P86.

Case below: 79 N.C. App. 228.

Petition by defendant (Lee D. Andrews) for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

BERICO FUELS, INC. v. ROYAL VILLA, INC.

No. 119P86.

Case below: 78 N.C. App. 807.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

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

CROW v. CITICORP ACCEPTANCE CO.

No. 200PA86.

Case below: 79 N.C. App. 447.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1986.

CROWDER v. N.C. FARM BUREAU MUT. INS. CO.

No. 226P86.

Case below: 79 N.C. App. 551.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

DAIL PLUMBING, INC. v. ROGER BAKER & ASSOC.

No. 93P86.

Case below: 78 N.C. App. 664.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

DUNN v. DUNN

No. 317P86.

Case below: 80 N.C. App. 559.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986. Petition by defendants for writ of supersedeas and temporary stay denied 3 June 1986.

IN RE APPLICATION OF WALSH

No. 229PA86.

Case below: 79 N.C. App. 611.

Petition by appellant for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1986.

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

JONES v. BRIAN CENTER OF NURSING CARE

No. 184P86.

Case below: 79 N.C. App. 176.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

LOWDER v. DOBY

No. 236P86.

Case below: 79 N.C. App. 501.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

LYNCH v. STROTHER

No. 271P86.

Case below: 80 N.C. App. 166.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

McCUBBINS v. FIELDCREST MILLS, INC.

No. 162P86.

Case below: 79 N.C. App. 409.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

MILLER v. PARLOR FURNITURE

No. 216P86.

Case below: 79 N.C. App. 639.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986. Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 3 June 1986.

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

MORRIS v. MORRIS

No. 232P86.

Case below: 79 N.C. App. 386.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

NEWTON v. BURLINGTON INDUSTRIES

No. 194P86.

Case below: 79 N.C. App. 370.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986. Notice of appeal by plaintiff pursuant to G.S. 7A-30 dismissed 3 June 1986.

NORTHWESTERN BANK v. BARBER

No. 238P86.

Case below: 79 N.C. App. 425.

Petition by defendant (Tom Kinley) for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

PECK v. PECK

No. 258P86.

Case below: 79 N.C. App. 755.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 June 1986.

PITTMAN v. NATIONWIDE MUTUAL FIRE INS. CO.

No. 201P86.

Case below: 79 N.C. App. 431.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

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

RAINBOW SPRINGS PARTNERSHIP v. COUNTY OF MACON

No. 197P86.

Case below: 79 N.C. App. 335.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

RARITAN RIVER STEEL CO. v.
CHERRY, BEKAERT & HOLLAND

No. 123PA86.

Case below: 79 N.C. App. 81.

Petition by defendants (Cherry, Bekaert & Holland) for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1986 solely for review of issues arising from the plaintiffs' claims for negligent misrepresentation.

STATE v. ALLISON

No. 206PA86.

Case below: 73 N.C. App. 334.

Petition by defendant (Allison) for writ of certiorari to the North Carolina Court of Appeals allowed 3 June 1986. Petition by defendant (Allison) for writ of supersedeas denied 3 June 1986.

STATE v. BROWN

No. 803P85.

Case below: 77 N.C. App. 845.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

STATE v. BRYANT

No. 290A86.

Case below: 77 N.C. App. 459.

Petition by defendant for discretionary review of additional issues pursuant to G.S. 7A-31 and Appellate Rule 16(b) denied 3 June 1986.

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

STATE v. COMBS

No. 235P86.

Case below: 79 N.C. App. 571.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

STATE v. CONNELLY

No. 146P86.

Case below: 79 N.C. App. 176.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

STATE v. COSTNER

No. 360P86.

Case below: 80 N.C. App. 666.

Petition by defendant for writ of supersedeas and temporary stay denied 16 June 1986.

STATE v. FORTE

No. 352P86.

Case below: 80 N.C. App. 701.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 June 1986. Petition by defendant for writ of supersedeas and temporary stay denied 11 June 1986.

STATE v. GRADY

No. 198P86.

Case below: 79 N.C. App. 471.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

STATE v. HEAD

No. 133P86.

Case below: 79 N.C. App. 1.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

STATE v. HOOPER

No. 103A86.

Case below: 79 N.C. App. 93.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

STATE v. MASON

No. 193P86.

Case below: 79 N.C. App. 477.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

STATE v. MORRIS

No. 245A86.

Case below: 79 N.C. App. 659.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 6 May 1986. Motion by the State to dismiss appeal under Appellate Rules 14(a) and (b) allowed 6 May 1986.

STATE v. MUNCY

No. 203P86.

Case below: 79 N.C. App. 356.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

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

STATE v. SESSOMS

No. 204P86.

Case below: 79 N.C. App. 444.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

STATE v. TRANSEAU

No. 242PA86.

Case below: 79 N.C. App. 666.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1986 to consider only the issues of validity of search; admissibility of evidence seized in search; and trial court's summary of evidence in its jury instruction. Petition by defendant for writ of supersedeas allowed 6 May 1986.

STATE v. VAUGHT

No. 351P86.

Case below: 80 N.C. App. 486.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 11 June 1986.

TOWN OF EMERALD ISLE v. STATE OF N. C.

No. 111A86.

Case below: 78 N.C. App. 736.

Petition by defendants for discretionary review as to additional issues pursuant to G.S. 7A-31 and Appellate Rule 16(b) allowed 6 May 1986.

TOWN OF WINTON v. SCOTT

No. 320A86.

Case below: 80 N.C. App. 409.

Petition filed by defendants (John A. Scott and Mrs. John A. Scott) for writ of supersedeas and temporary stay dismissed 5 June 1986.

WEISS v. WOODY

No. 293P86.

Case below: 80 N.C. App. 86.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 3 June 1986.

WELLS v. BULOW

No. 120P86.

Case below: 78 N.C. App. 808.

Petition by defendant (Bulow) for discretionary review pursuant to G.S. 7A-31 denied 3 June 1986.

APPENDIX

GUIDELINES FOR RESOLVING SCHEDULING CONFLICTS

GUIDELINES FOR RESOLVING SCHEDULING CONFLICTS

IN ORDER TO PROVIDE A UNIFORM STANDARD FOR THE RESOLUTION OF SCHEDULING CONFLICTS BETWEEN AND AMONG THE STATE AND FEDERAL TRIAL AND APPELLATE COURTS OF NORTH CAROLINA THE FOLLOWING GUIDELINES ARE HEREBY ESTABLISHED:

1. It shall be the duty of counsel, other than solo practitioners, to have another member of the firm reasonably well acquainted with the case to the end that, where practicable, substitution of counsel may be made in order to avoid conflict.

2. In resolving scheduling conflicts the following priorities should ordinarily prevail:

a. Appellate cases should prevail over trial cases;

b. The case in which the trial date has been first set (by published calendar, order or notice) should take precedence;

c. Criminal felony trials should prevail over civil trials;

d. Trials should prevail over motion hearings.

e. In resolving conflicts between the several divisions of the North Carolina General Court of Justice, the provisions of Rule 3, General Rules of Practice for the Superior and District Courts, shall control.

3. In addition to the above priorities, consideration should be given to the comparative age of the cases, their complexity, the estimated trial time, the number of attorneys and parties involved, whether the trial involves a jury, and the difficulty or ease of rescheduling.

4. It shall be the duty of an attorney promptly upon learning of a scheduling conflict to give written notice to opposing counsel, the clerk of all courts and the presiding judges, if known, in all cases, stating therein the circumstances relevant to a resolution of the conflict under these guidelines.

5. The judges of the courts involved in a scheduling conflict shall promptly confer, resolve the conflict, and notify counsel of the resolution.

6. If the judges of the courts involved are unable to resolve the conflict they shall so notify the chairman of the State-Federal

Judicial Council of North Carolina. The chairman and vice-chairman of the State-Federal Judicial Council of North Carolina shall then resolve the conflict.

7. Nothing in these guidelines is intended to prevent courts from voluntarily yielding a favorable scheduling position, and judges of all courts are urged to communicate with each other in an effort to lessen the impact of conflicts and continuances on all courts.

ADOPTED by the State-Federal Judicial Council of North Carolina on this the 20th day of June 1985.

J. RICH LEONARD
Secretary

Approved by the respective courts on the dates indicated.

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

July 8, 1985 — HARRISON L. WINTER
Chief Judge

THE SUPREME COURT OF NORTH CAROLINA

July 26, 1985 — JOSEPH BRANCH
Chief Justice

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

June 27, 1985 — W. EARL BRITT
Chief Judge

THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

July 16, 1985 — HIRAM H. WARD
Chief Judge

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

July 17, 1985 — ROBERT D. POTTER
Chief Judge

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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Officers had probable cause for their warrantless arrest of defendant for drug offenses so that the trial court was not required to suppress defendant's admissions made to officers in the course of the arrest. *S. v. Perry*, 87.

§ 9.2. Bail after Trial

The trial judge did not err by increasing defendant's bond during the course of the trial. *S. v. Perry*, 87.

ASSAULT AND BATTERY

§ 14. Sufficiency of Evidence Generally

The State's evidence was insufficient to support defendant's conviction of attempted malicious throwing of acid. *S. v. Riddick*, 127.

§ 14.4. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill where Weapon Is Firearm

The trial court did not err by failing to dismiss charges of assault where the eyewitness testimony was sufficient for the jury to reasonably infer that defendants committed the assault. *S. v. Rogers*, 203.

§ 15.2. Instruction on Assault with Deadly Weapon with Intent to Kill

The trial court in a felonious assault case did not err in instructing the jury that a knife capable of cutting a person's throat, going into the windpipe and going four inches into the stomach was a deadly weapon. *S. v. Kuplen*, 387.

ASSAULT AND BATTERY — Continued

§ 15.3. Instructions on Assault with Deadly Weapon with Intent to Kill; Definition of Serious Injury

The court's instruction that an injury going into the windpipe and four inches deep into the stomach is a serious injury was not plain error. *S. v. Kuplen*, 387.

ATTORNEYS AT LAW

§ 1.1. Regulation of Attorneys

The superior court's inherent power to deal with its attorneys provides jurisdiction to decide whether a licensed attorney who was a full-time employee of an insurance company could ethically represent an insured. *Gardner v. N. C. State Bar*, 285.

Insurance company attorneys appearing in court for an insured would fall within the ban of N.C.G.S. 84-5. *Ibid.*

AUTOMOBILES AND OTHER VEHICLES

§ 120. Driving While Impaired Generally

G.S. 20-138.1(a)(2) and 20-4.01(33a) are not unconstitutionally vague. *S. v. Denning*, 523.

§ 130. Driving While Impaired; Punishment Generally

The aggravating factors for driving while impaired are not elements of the offense and their consideration for purposes of sentencing is a function of the judge. *S. v. Denning*, 523.

BILLS OF DISCOVERY

§ 6. Compelling Discovery

Testimony by a fellow jail inmate concerning statements made to him by defendant was not inadmissible under G.S. 15A-903 where notice of the substance of the statements relevant to the subject matter of the case was timely given to defendant, and statements for which no notice was given related only to an explanation of why the witness came forward with the evidence. *S. v. Kuplen*, 387.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1. Definition

The conviction and punishment of defendant in a single trial for both felonious breaking or entering and felonious larceny based upon the same breaking or entering does not violate defendant's right against double jeopardy. *S. v. Edmondson*, 187.

§ 4.1. Competency of Physical Evidence

A wallet and its contents found in a Connecticut mailbox six weeks before the burglaries in question were relevant on the issue of defendant's identity as the perpetrator of the crimes charged. *S. v. Riddick*, 127.

§ 5. Sufficiency of Evidence

There was sufficient evidence to convict defendant of second degree burglary. *S. v. Barts*, 666.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 5.4. Sufficiency of Evidence; Presumption from Possession of Recently Stolen Property

The State failed to show that possession of stolen property by defendant thirty days after the theft was so recent as to support a presumption of his guilt of breaking or entering and larceny. *S. v. Hamlet*, 41.

§ 5.8. Sufficiency of Evidence of Breaking or Entering and Larceny of Residential Premises

The evidence was sufficient to convict defendant of felonious breaking or entering even though the victim's storage shed was not completely enclosed. *S. v. Barts*, 666.

CONSTITUTIONAL LAW

§ 23.4. Due Process; Actions Affecting Professions

An attorney who was employed full time by an insurance company was not unconstitutionally prevented from practicing law when he was not allowed to appear in court representing an insured. *Gardner v. N. C. State Bar*, 285.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not abuse its discretion in a prosecution for assault and rape by denying defendant's motion for the appointment of a juristic psychologist. *S. v. Artis*, 507.

The trial court did not abuse its discretion in a first degree murder prosecution by denying defendant's motion to hire a private investigator. *S. v. Massey*, 558.

The trial court did not abuse its discretion in a first degree murder prosecution by denying defendant's motion for funds to employ a statistician to review the jury venire. *Ibid.*

The trial court did not abuse its discretion in a first degree murder prosecution by denying defendant's motion for the appointment of an assistant counsel. *Ibid.*

The trial court did not abuse its discretion by denying defendant's motions to hire a social psychologist and a private clinical psychiatrist. *Ibid.*

§ 34. Double Jeopardy

The conviction and punishment of defendant in a single trial for both felony breaking or entering and felonious larceny based upon the same breaking or entering does not violate defendant's right against double jeopardy. *S. v. Edmondson*, 187.

Defendant was placed in double jeopardy by being convicted of first degree kidnapping based on removal of the victim to facilitate a sexual assault as well as being convicted of first degree rape and first degree sexual offense. *S. v. Freeland*, 13.

A second trial for robbery, rape and kidnapping did not violate double jeopardy. *S. v. Odom*, 306.

§ 46. Removal or Withdrawal of Appointed Counsel

Defendant was not denied the effective assistance of counsel, due process and equal protection by the trial court's refusal to appoint new counsel when defendant requested that his court-appointed counsel be discharged. *S. v. Kuplen*, 387.

CONSTITUTIONAL LAW — Continued

§ 49. Waiver of Right to Counsel

Where defendant consented to withdrawal of his retained counsel only four days before trial and was warned by the court that the case would be tried as scheduled, and defendant stated on the day of the trial that he had been unable to obtain new counsel because of the inadequate preparation time, the trial court erred in failing to make the inquiry required of G.S. 15A-1242 as to voluntary waiver of counsel notwithstanding the trial court's knowledge that defendant was a Durham County Magistrate. *S. v. Bullock*, 180.

§ 63. Exclusion from Jury for Opposition to Death Penalty

The trial court did not err in allowing the State to death qualify the jury. *S. v. Woods*, 344; *S. v. Rogers*, 203.

The practice of death qualifying the jury in a first degree murder case is not unconstitutional. *S. v. King*, 78.

The death qualification of a jury is not prohibited by the Sixth and Fourteenth Amendments to the U.S. Constitution or by Art. I, § 19 of the N.C. Constitution. *S. v. Barts*, 666.

§ 68. Right of Confrontation; Continuances

The trial court's denial of defendant's motion for a continuance when his subpoena of a defense witness was not served because the witness had left the state did not violate defendant's right to compulsory process guaranteed by the Sixth Amendment to the U.S. Constitution or his right of confrontation guaranteed by Art. I, § 23 of the N.C. Constitution. *S. v. Kuplen*, 387.

§ 70. Cross-examination of Witnesses

The right of confrontation of a defendant represented by an assistant public defender was not violated by the denial of his motion for a mistrial on the ground that a conflict of interest existed because a State's witness was represented for charges pending against him by another member of the public defender's staff and this conflict limited defense counsel's ability to cross-examine the witness. *S. v. Kuplen*, 387.

§ 72. Use of Confession or Inculpatory Statement of Codefendant

Even if the admission of testimony by a codefendant's wife about extrajudicial statements the codefendant made to her regarding defendant's plans to commit a robbery violated defendant's constitutional and statutory rights to confrontation, such error was harmless beyond a reasonable doubt where defendant testified that he did in fact plan and attempt to commit the robbery in question. *S. v. Welch*, 578.

§ 76. Self-incrimination; Nontestimonial Disclosures

The trial court's curative instruction rendered harmless testimony by a detective that defendant requested a lawyer and asserted his right to silence after being arrested and informed of his constitutional rights. *S. v. Freeland*, 13.

Though the prosecutor's cross-examination of defendant concerning his silence about an alibi after he was arrested and advised of his constitutional rights violated the implicit assurance contained in the Miranda warnings that silence will carry no penalty, such questioning did not amount to plain error. *S. v. Walker*, 33.

Evidence that defendant did not provide a blood sample did not violate defendant's constitutional privilege against self-incrimination or his right under G.S. 15A-279(d) against the use of statements made in the absence of counsel during nontestimonial identification procedures. *S. v. Kuplen*, 387.

CONSTITUTIONAL LAW — Continued

§ 83. Equal Protection As Applied to Punishment

The statute providing for more severe punishment for the possession of a small amount of heroin when mixed with a large amount of legal materials than possession of a smaller amount of pure heroin, G.S. 90-95(h)(4), has a rational relation to a valid State objective and is constitutional. *S. v. Perry*, 87.

CRIMINAL LAW

§ 5. Mental Capacity in General; Insanity

Good cause existed as a matter of law for allowing late filing of the notice of defense of insanity after private counsel was substituted for court-appointed counsel. *S. v. Nelson*, 350.

§ 13. Jurisdiction in General

The grand jury of Stanly County was without jurisdiction to indict defendants for offenses that occurred in Mecklenburg County. *S. v. Paige*, 630.

§ 15. Venue

The trial court did not err in a prosecution for rape and assault by failing to set a time certain for the presentation of evidence on defendant's motion for a change of venue or a special venire. *S. v. Artis*, 507.

A county which has acquired exclusive venue under G.S. 15A-132(a) or (b) loses that exclusive venue when the criminal process upon which the exclusive venue is based is dismissed. *S. v. Paige*, 630.

§ 26.5. Double Jeopardy; Same Acts Violating Different Statutes

Defendant was placed in double jeopardy by being convicted of first degree kidnapping based on removal of the victim to facilitate a sexual assault as well as being convicted of first degree rape and first degree sexual offense. *S. v. Freeland*, 13.

A defendant may be convicted and punished for both felonious breaking or entering and felonious larceny pursuant to that breaking or entering. *S. v. Richardson*, 594.

§ 33.3. Evidence as to Collateral Matters

The trial court did not err by allowing an officer to testify that he had unsuccessfully searched for the alleged intended victim to serve a subpoena or by allowing another witness to testify that the alleged intended victim had not returned for work. *S. v. Rogers*, 203.

§ 34.5. Admissibility of Evidence of Other Offenses to Show Identity of Defendant

The trial court in a first degree burglary case properly admitted evidence concerning burglaries committed by defendant in 1977 in Connecticut where the modus operandi in the Connecticut crimes was so similar to that in the North Carolina crimes that evidence of the earlier crimes was admissible on the issue of defendant's identity in the North Carolina crimes. *S. v. Riddick*, 127.

Evidence in a kidnapping and sexual offense case that one defendant admitted an armed robbery in a conversation with an undercover officer was admissible to prove identity. *S. v. Paige*, 630.

CRIMINAL LAW — Continued

§ 34.8. Admissibility of Evidence of Other Offenses to Show Common Plan or Scheme

In a prosecution of defendant for the rape of his six-year-old stepdaughter, testimony that defendant had told the witness that he had engaged in sexual intercourse with his three-year-old daughter was admissible under Evidence Rule 404(b) to show a common scheme or plan. *S. v. Gordon*, 497.

There was no prejudice in a prosecution for breaking or entering where the trial court erroneously admitted testimony concerning defendant's custodial statement that he had committed another breaking or entering three years earlier. *S. v. Barts*, 666.

§ 40. Evidence and Record at Former Proceeding

The trial court did not err in instructing the jury that the victim's testimony at the probable cause hearing could not be considered as substantive evidence. *S. v. Paige*, 630.

§ 42.4. Articles Connected with Crime; Identification and Connection with Crime; Weapons

The trial court did not err by allowing the witness to testify that he had seen one defendant with the kind of pistol used in the shooting several times in the months before the shooting. *S. v. Rogers*, 203.

The trial court did not err by sustaining the State's objections to one defendant's question concerning whether the witness had ever seen the alleged intended victim with the gun. *Ibid.*

§ 42.6. Articles Connected with Crime; Chain of Custody

The State established a sufficient chain of custody of rectal swabs and slides taken from the victim to permit the admission of such exhibits and certain related testimony. *S. v. Sloan*, 714.

§ 43.2. Authentication of Photographs

The trial court did not err by admitting photographs offered by the State where a witness testified that the photographs fairly and accurately represented the crime scene on the night of the murder. *S. v. Rogers*, 203.

§ 48.1. Silence of Defendant Incompetent

The trial court's curative instruction rendered harmless testimony by a detective that defendant requested a lawyer and asserted his right to silence after being arrested and informed of his constitutional rights. *S. v. Freeland*, 13.

Though the prosecutor's cross-examination of defendant concerning his silence about an alibi after he was arrested and advised of his constitutional rights violated the implicit assurance contained in the Miranda warnings that silence will carry no penalty, such questioning did not amount to plain error. *S. v. Walker*, 33.

§ 55. Blood Tests Generally

Testimony that defendant did not provide a sample of his blood was relevant to explain why no comparison of his blood with certain State's exhibits was performed. *S. v. Kuplen*, 387.

The trial court was not authorized by Art. 14 of G.S. Ch. 15A to issue a nontestimonial identification order to obtain a blood sample from a defendant who was in custody at the time the order was issued. *S. v. Welch*, 578.

CRIMINAL LAW — Continued

§ 66. Evidence of Identity by Sight

The trial court did not err by allowing an in-court identification even though the witness had made a contrary statement prior to trial. *S. v. Rogers*, 203.

The trial court did not err in failing to give defendants' requested instruction on identification. *S. v. Paige*, 630.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

A rape and assault victim's in-court identification of defendant was of independent origin and not tainted by a lone display of defendant's photograph to the victim. *S. v. Kuplen*, 387.

§ 66.19. Voir Dire to Determine Admissibility of In-Court Identification; Conduct of Hearing; Questions and Evidence Permitted

The trial court did not err in refusing to permit defendant to call a witness during a voir dire hearing on the admissibility of the victim's in-court identification of defendants to testify about a lineup and the fact that the victim had not identified one defendant in the lineup. *S. v. Paige*, 630.

§ 66.20. Voir Dire to Determine Admissibility of In-Court Identification; Findings of Court

The trial court's findings fully supported its conclusion that the victim's identification of defendants as her assailants was not so inherently incredible as to require the court to suppress it. *S. v. Paige*, 630.

§ 67.1. Voice Demonstrations and Confrontations

The trial court in a rape case did not err in allowing the State to recall the victim following the close of defendant's evidence to testify that, after hearing defendant's voice in court, she recognized it as being the voice of the man who attacked her eight months earlier. *S. v. Torain*, 111.

§ 73.1. Admission of Hearsay Statement as Prejudicial Error

The trial court in a prosecution for first degree rape and armed robbery erred in the admission of testimony by a detective that defendant's father, in response to an inquiry, showed the police the drawer where a knife was supposedly kept, since the conduct of defendant's father was the equivalent of a statement, and the detective's testimony constituted hearsay evidence. *S. v. Satterfield*, 55.

§ 73.2. Statements not within Hearsay Rule

An accomplice's confession did not contain equivalent circumstantial guarantees of trustworthiness so as to be admissible as an exception to the hearsay rule pursuant to Rule of Evidence 804(b)(5). *S. v. McLaughlin*, 175.

In the exercise of its supervisory jurisdiction, the Supreme Court adopts guidelines for the admission of hearsay testimony under Rule of Evidence 804(b)(5) which parallel those guidelines adopted by the Court for the admission of hearsay testimony under the "catchall" or "residual" hearsay exception of Rule 803(24). *S. v. Triplett*, 1.

Statements by a murder victim to two witnesses concerning defendant's threats and attacks against her possessed equivalent circumstantial guarantees of trustworthiness to permit admission of hearsay testimony by the witnesses concerning such statements. *Ibid.*

The trial court could reasonably conclude that written notice on the day defendant's trial began of the State's intent to offer hearsay statements of the murder

victim, when considered in light of prior oral notice, provided defendant a fair opportunity to prepare to meet the statements and to contest their use as required under Rule 804(b)(5). *Ibid.*

The trial court did not err by admitting identification testimony of a witness who saw one defendant several times the night of the murder and who was told that defendant was the man who was supposed to have shot the victim. *S. v. Rogers*, 203.

§ 73.4. Hearsay Statement as Part of Res Gestae

The trial court did not err in a prosecution for robbery, kidnapping and rape by allowing a police officer to testify to the content of a statement given to him by an eyewitness to the abduction who died before trial. *S. v. Odom*, 306.

Testimony concerning statements made by defendant about what would happen to snitches was not hearsay. *S. v. Kuplen*, 387.

§ 74.2. Confession by Codefendant

Even if the admission of testimony by a codefendant's wife about extrajudicial statements the codefendant made to her regarding defendant's plans to commit a robbery violated defendant's constitutional and statutory rights to confrontation, such error was harmless beyond a reasonable doubt where defendant testified that he did in fact plan and attempt to commit the robbery in question. *S. v. Welch*, 578.

§ 75. Admissibility of Confession in General

The trial court did not err by denying defendant's motion to suppress an inculpatory statement on the grounds that it was reduced to writing by an SBI agent rather than defendant. *S. v. Barts*, 666.

§ 75.1. Admissibility of Confession; Effect of Fact that Defendant Is under Arrest

Officers had probable cause for their warrantless arrest of defendant for drug offenses so that the trial court was not required to suppress defendant's admissions made to officers in the course of the arrest. *S. v. Perry*, 87.

§ 75.2. Admissibility of Confession; Effect of Promises, Threats, or other Statements of Officers

Defendant's confession was not rendered involuntary because of trickery by an undercover officer to whom it was made. *S. v. Paige*, 630.

The evidence supported the trial court's determination that Tennessee authorities did not improperly induce defendant to confess to crimes in North Carolina by threatening to prosecute him as an habitual criminal if he did not cooperate. *S. v. Richardson*, 594.

A detective's statement in response to defendant's solicitation that he would testify to defendant's cooperation in solving crimes did not render defendant's subsequent confession involuntary. *Ibid.*

§ 75.3. Admissibility of Confession; Effect of Confronting Defendant with Statements of Others or with Evidence

A confession by a first degree murder defendant to his father while an officer was present was not the fruit of a prior illegal confession. *S. v. Massey*, 558.

§ 75.4. Admissibility of Confession Obtained Prior to Appointment of or in Absence of Counsel

The trial court did not err by denying defendant's motion to suppress statements made to FBI agents after her arrest. *S. v. Rogers*, 203.

CRIMINAL LAW — Continued

§ 75.7. Confession; When Warning about Constitutional Rights Is Required

Defendant's right to receive Miranda warnings and his right to counsel did not apply to a confession to an armed robbery made during a conversation with an undercover officer and a private citizen. *S. v. Paige*, 630.

§ 75.14. Defendant's Mental Capacity to Confess

A confession in a first degree murder prosecution was properly admitted where defendant's waiver of his rights was knowing, voluntary, and intelligent. *S. v. Massey*, 558.

§ 79.1. Acts or Declarations of Codefendant Subsequent to Commission of Crime

There was prejudicial error where a detective was allowed to testify that a codefendant had pled guilty but the codefendant did not testify. *S. v. Odom*, 306.

§ 84. Evidence Obtained by Unlawful Means

Defendant's right to be free from unreasonable searches and seizures was violated when a sample of his blood was drawn without a search warrant, but the trial court was not required to exclude the blood sample from evidence under the good faith exception to the exclusionary rule where officers acted in reasonable reliance upon a nontestimonial identification order subsequently found invalid. *S. v. Welch*, 578.

§ 85.3. Character Evidence Relating to Defendant; State's Cross-examination of Defendant

Where defendant in a rape and incest case testified he had tried to prevent his daughter from seeing two of her friends on the ground that they were not "decent" people, the prosecutor's question to defendant that ". . . you beat your wife, and you tried to cheat on your wife, and you are calling these people not decent?" did not constitute plain error. *S. v. Riddle*, 152.

In a prosecution of defendant for rape of his stepdaughter, the prosecutor's cross-examination of defendant about sexual advances he allegedly made toward his sister-in-law was improper under Evidence Rule 608(b), but such error was not prejudicial. *S. v. Gordon*, 497.

§ 88.5. Recross-examination

Defendant's due process rights were not violated when the trial court refused to permit defendant's counsel to have the victim answer a question for the record during a recess when the court allowed the codefendant's counsel to have the victim answer for the record a question which the court had disallowed on recross-examination. *S. v. Paige*, 630.

§ 89. Credibility of Witnesses

The trial court did not err by not striking ex mero motu the entire testimony of the only eyewitness on the grounds that it lacked credibility. *S. v. Rogers*, 203.

§ 89.1. Evidence of Character Bearing on Credibility

The trial court in a rape case erred in allowing the child victim's mother to give opinion testimony vouching for the veracity of her daughter and to testify to specific acts by the victim as indicative of her character, but the admission of such evidence was not prejudicial error. *S. v. Freeland*, 13.

The trial court erred in a prosecution for second degree rape by permitting the prosecutor to ask an expert in clinical psychology whether the victim had a mental condition which would cause her to fabricate a story about the sexual assault. *S. v. Heath*, 337.

CRIMINAL LAW — Continued

§ 89.2. Credibility of Witnesses; Corroboration

In a rape and incest prosecution, testimony by a protective services worker concerning the victim's statement to her that her sister had asked her to say that she had made up the accusation against defendant was admissible to corroborate the victim's earlier testimony. *S. v. Riddle*, 152.

§ 89.4. Corroboration of Witnesses; Prior Statements

The trial court did not err in a prosecution for murder and assault by refusing a defendant's pretrial motion requesting an internal investigation of whether a detective had caused the only eyewitness to fabricate his account of the murder. *S. v. Rogers*, 203.

§ 91. Speedy Trial

The trial court did not err in finding that superseding indictments were appropriate and obtained in good faith, and the 120-day speedy trial period thus began to run at the time the superseding indictments were returned. *S. v. Parker*, 295.

§ 91.1. Continuance

The trial court did not err in a prosecution for murder by denying defendant's motion for a continuance so that a recently hired clinical psychologist could further evaluate defendant's mental condition. *S. v. Massey*, 558.

§ 91.7. Continuance on Ground of Absence of Witness

The trial court's denial of defendant's motion for a continuance when his subpoena of a defense witness was not served because the witness had left the state did not violate defendant's right to compulsory process guaranteed by the Sixth Amendment to the U.S. Constitution or his right of confrontation guaranteed by Art. I, § 23, of the N.C. Constitution. *S. v. Kuplen*, 387.

§ 92.1. Consolidation of Charges Against Multiple Defendants Proper; Same Offense

Defendant was not prejudiced by a joint trial with his codefendant because he was unable to call his codefendant as a witness or because the victim had made a pretrial identification of the codefendant but not of defendant. *S. v. Paige*, 630.

A severance was not required because evidence was introduced that the codefendant was wearing a bracelet taken from the victim at the time of his arrest. *Ibid.*

§ 95.1. Admission of Evidence Competent for Restricted Purpose; Request for Limiting Instruction

The trial court did not err in refusing to give an instruction limiting the use of photographs and a diagram introduced by the State to illustrative purposes. *S. v. Kuplen*, 387.

§ 98.3. Custody of Defendant during Trial

The trial court did not err in denying defendant's motion for a mistrial because a juror or jurors saw him in handcuffs or in the custody of an officer after he failed to post the increased bond ordered by the trial judge. *S. v. Perry*, 87.

The trial court did not err in allowing defendants to be tried while wearing ankle weights. *S. v. Paige*, 630.

CRIMINAL LAW — Continued

§ 99.2. Expression of Opinion by Court; Questions during Trial Generally

The trial court did not err during a voir dire to determine the admissibility of identification by directing a series of questions to the witness. *S. v. Rogers*, 203.

§ 99.3. Expression of Opinion by Court; Remarks and other Conduct in Connection with Admission of Evidence

The trial judge did not express an opinion on the evidence by comments during cross-examination of the victim or by sustaining his own objections to repetitious questions by defense counsel. *S. v. Paige*, 630.

§ 99.7. Court's Admonitions to Witnesses

The trial court did not err by not instructing an officer not to make jokes on the witness stand. *S. v. Rogers*, 203.

§ 101.1. Statements of Prospective Jurors

The trial court did not err in permitting the State to peremptorily challenge a black juror who had already been passed by the State and defendant. *S. v. Rogers*, 203.

§ 102.2. Control of Jury Argument by Court

The trial court's limitation of defense counsel's opening statement to the jury to "what you contend your evidence will show" did not sufficiently prejudice defendant's case to require reversal of his conviction. *S. v. Paige*, 630.

§ 102.4. Prosecutor's Conduct during Trial

The trial court did not err by failing to instruct the jury about a prosecutor's comment that the court was free to sustain defendant's objection because he had already made his point by asking a question. *S. v. Rogers*, 203.

§ 102.5. Prosecutor's and Counsel's Conduct in Examining Witnesses

The trial court did not abuse its discretion by denying defendant's motion for a mistrial where a witness testified to matters which had been excluded after a voir dire. *S. v. Barts*, 666.

§ 102.6. Particular Comments in Jury Argument

The trial court did not err by sustaining the State's objection to defense counsel asking the jury during closing argument if they would like to be convicted on the eyewitness's testimony. *S. v. Rogers*, 203.

There was no prejudicial error where the trial court denied defendant's request to read to the jury during closing arguments an excerpt from a Court of Appeals opinion on the hazards of eyewitness identification. *S. v. Gardner*, 605.

§ 103. Function of Court and Jury

The trial court did not err in a murder and assault prosecution by allowing a police captain to testify that the eyewitness's car was parked at the murder scene even though the State's other witnesses did not remember seeing the car since contradictions in the evidence are for the jury to resolve. *S. v. Rogers*, 203.

§ 106.4. Proof of Corpus Delicti

The corpus delicti rule applies with equal force to confessions and admissions. *S. v. Trexler*, 528.

The State presented sufficient evidence of the corpus delicti to support defendant's conviction of the crime of driving while impaired. *Ibid.*

CRIMINAL LAW — Continued

§ 111.1. Particular Miscellaneous Instructions

The court adequately and in substance gave instructions requested by defendants on the effects of joinder of defendants for trial. *S. v. Paige*, 630.

§ 112. Instructions on Presumptions

The trial court did not err in refusing to give defendant's requested instruction that possession of a bracelet by defendant created a presumption that it was his. *S. v. Paige*, 630.

§ 112.4. Charge on Circumstantial Evidence

The court properly refused to instruct on circumstantial evidence where the court had given a correct instruction on reasonable doubt. *S. v. Kuplen*, 387.

§ 113.1. Recapitulation or Summary of Evidence

The trial court did not err by not instructing the jury to disregard portions of the State's closing argument. *S. v. Rogers*, 203.

§ 113.6. Charge Where There Are Several Defendants

The trial court did not improperly express an opinion where the court instructed the jury that some of the evidence should be considered against one defendant and not the other, but then corrected the instruction. *S. v. Rogers*, 203.

§ 114.1. Disparity in Time Consumed in Stating Evidence for Parties

The disparity in the court's recitation of the evidence for the State as opposed to evidence for defendants did not violate G.S. 15A-1232. *S. v. Paige*, 630.

§ 114.3. No Expression of Opinion in Jury Charge

An instruction that the jury was not to consider evidence of a bracelet worn by defendant "against" the codefendant did not constitute an improper comment on the evidence. *S. v. Paige*, 630.

§ 117.5. Charge on Character Evidence and Credibility of Defense Witnesses

Defendant in a rape prosecution did not object at trial to an incomplete instruction on character evidence and there was no plain error. *S. v. Hannah*, 362.

§ 128.2. Mistrial; Particular Grounds

The trial court did not abuse its discretion by denying defendant's motion for a mistrial based on a newspaper article appearing during the trial which reported that defendant had pled guilty to another charge and which recited portions of voir dire testimony. *S. v. Barts*, 666.

§ 135. Judgment and Sentence in Capital Cases

The trial court did not abuse its discretion during the sentencing portion of a capital case by not correcting the State's argument. *S. v. Rogers*, 203.

§ 135.8. Sentence in Capital Cases; Aggravating Circumstances

The trial court in a murder prosecution properly submitted the course of conduct aggravating factor to the jury during sentencing. *S. v. Rogers*, 203.

§ 135.10. Sentence in Capital Cases; Review

A death sentence imposed in a first degree murder prosecution was excessive and disproportionate. *S. v. Rogers*, 203.

CRIMINAL LAW — Continued

§ 138. Severity of Sentence

The trial court did not err by failing to find that defendant voluntarily acknowledged wrongdoing at an early stage. *S. v. Long*, 60.

Any error in the aggravating factors found was harmless where the sentence was less than the presumptive term and the judge found no mitigating factors. *Ibid.*

The trial judge erred when sentencing defendant for felonious assault by finding as an aggravating factor that the child victims, ages eleven and fourteen, were very young. *Ibid.*

The trial court did not improperly consider the effect of good time and gain time on the length of the sentence in imposing a sentence in excess of the presumptive term. *S. v. Swimm*, 24.

A trial judge may consider defendant's conduct while in prison between his initial incarceration and resentencing in setting the new term of imprisonment. *Ibid.*

The trial court did not err when resentencing defendant by failing to consider his good conduct in prison where the only evidence presented was defense counsel's statement that he had been informed that defendant had not incurred any violations of prison conduct rules. *Ibid.*

Where a statute mandates that an offender be punished as a felon of one of the classifications of G.S. 15A-1340.4(f) but sets a minimum sentence greater than the presumptive sentence established for the appropriate class of felony in subsection (4), the minimum sentence set out in the criminal statute becomes the presumptive sentence for purposes of sentencing under the Fair Sentencing Act. *S. v. Perry*, 87.

The trial court could properly find as aggravating factors for possessing, transporting and manufacturing 28 grams or more of heroin that defendant had the specific intent to sell the heroin which he possessed and that defendant had a bad character and reputation for trafficking in drugs and handling stolen goods. *Ibid.*

The evidence was sufficient to show that the victims endured psychological and physical suffering beyond that normally present in a second degree murder so as to support the trial court's finding as an aggravating factor that the killings were especially heinous, atrocious or cruel. *S. v. Miller*, 273.

When cases are consolidated for judgment and the trial judge finds aggravating and mitigating factors for the most serious offense for which defendant is being sentenced, defendant is not prejudiced by the judge's failure to make findings as to the lesser offenses consolidated. *Ibid.*

The trial court erred when sentencing defendant for assault with a deadly weapon with intent to kill by finding in aggravation that defendant had committed perjury and had entered into a conspiracy. *S. v. Rogers*, 203.

The trial court did not err in a prosecution for assault and rape by finding as a non-statutory aggravating factor that the victim was eight months pregnant at the time of the assault. *S. v. Artis*, 507.

If the evidence establishes that the infliction of serious injury was done in an especially heinous, atrocious or cruel manner, the trial court is not prohibited from finding that aggravating factor merely because infliction of a serious injury is an element of the offense. *S. v. Kuplen*, 387.

The evidence in a prosecution for assault with a deadly weapon with intent to kill resulting in serious injury supported a finding of the aggravating factor that the offense was especially heinous, atrocious or cruel. *Ibid.*

The evidence did not require the trial judge to find the mitigating factor that defendant has been a person of good character. *Ibid.*

CRIMINAL LAW — Continued

The trial court did not err when sentencing defendant for armed robbery by finding in aggravation that the victim was very old where the victim was seventy-four and very strong and physically active for his age because his age led to his selection as a victim. *S. v. Barts*, 666.

The trial court did not err when sentencing defendant for armed robbery by finding in aggravation that the offense involved the taking of property of great monetary value even though the $3,200 taken from the victim was split three ways. *Ibid.*

The trial court did not err when sentencing defendant to a greater than presumptive term for second degree burglary by finding as an aggravating factor that defendant admitted that he also committed larceny of a firearm although he was not charged with that offense. *Ibid.*

The trial court did not err by ordering that defendant's consolidated convictions for breaking or entering and larceny be consecutive with a second degree burglary conviction. *Ibid.*

The imposition of consecutive sentences for conspiracy to commit armed robbery, first degree burglary, armed robbery, second degree burglary, breaking or entering, and larceny did not violate any constitutional proportionality requirement. *Ibid.*

§ 138.7. Severity of Sentence; Particular Matters and Evidence Considered

The district attorney could properly question a witness at defendant's sentencing hearing about defendant's assaultive conduct on a previous occasion. *S. v. Kuplen*, 387.

§ 142.3. Particular Conditions of Probation; Conditions Held Proper

A court has the inherent power to suspend a judgment upon just and reasonable conditions and need not rely on its additional statutory authority to dictate the conditions of probation. *S. v. Stallings*, 535.

Restitution of drug purchase money as a condition of probation was reasonably related to the rehabilitative objectives of probation and was reasonable and just under the circumstances of the case. *Ibid.*

§ 146.2. Grounds for Appellate Jurisdiction; Defects on Face of Record

A sentence of life imprisonment for first degree burglary was fatally flawed where the trial judge was clearly acting under a misapprehension of law. *S. v. Long*, 60.

§ 148. Judgments Appealable

A prayer for judgment continued without conditions was not appealable to the Supreme Court. *S. v. Perry*, 87.

§ 154.1. Case on Appeal; Effect of Unavailability of Transcript

Defendant's right to meaningful appellate review was not denied because the court reporter's tape recording of the judge's charge to the jury was lost. *S. v. Wrenn*, 141.

DESCENT AND DISTRIBUTION

§ 1.2. Descent Generally with Respect to Rights of Surviving Spouses

Two natural children of a testatrix, born of a previous marriage and adopted with the testatrix's consent by her second spouse, were considered lineal descend-

HIGHWAYS AND CARTWAYS

§ 7.2. Construction of Highways; Liability of Contractor for Property Damage

The trial court erred in an action arising from the disposal of rock waste from a highway construction project by failing to enter summary judgment in favor of DOT. *Clark v. Asheville Contracting Co., Inc.*, 475.

The contractor immunity rule did not apply in an action arising from the disposal of rock waste from a highway construction project because the acts complained of did not constitute a taking for public use. *Ibid.*

Summary judgments against a contractor and its president in an action arising from the disposal of rock waste from a highway construction project were reversed where there were genuine issues of material fact. *Ibid.*

HOMICIDE

§ 4.2. Felony Murder

The crime of discharging a firearm into occupied property may properly serve as the underlying felony supporting a first degree murder conviction under the felony-murder rule. *S. v. King*, 78.

§ 21.1. Sufficiency of Evidence Generally

The trial court did not err by failing to dismiss charges of murder where the eyewitness testimony provided sufficient evidence. *S. v. Rogers*, 203.

§ 21.4. Sufficiency of Evidence of Identity of Defendant

The State's evidence was sufficient to support a reasonable inference that defendant murdered his mother. *S. v. Triplett*, 1.

§ 21.5. Sufficiency of Evidence of First Degree Murder

There was substantial evidence from which the jury could determine that defendant intentionally killed the victim with premeditation and deliberation during a robbery so as to support his conviction of first degree murder. *S. v. Welch*, 578.

§ 21.6. Sufficiency of Evidence of Felony Murder

There was sufficient evidence to convict defendant of first degree murder based on premeditation and deliberation and on a finding that the killing occurred in the perpetration of a felony. *S. v. Barts*, 666.

Defendant's motion to dismiss a murder charge for insufficient evidence was properly denied. *S. v. Massey*, 558.

§ 28.1. Duty to Instruct on Self-defense

The trial court did not err by refusing to submit self-defense to the jury where defendant was the aggressor with murderous intent in the fatal confrontation. *S. v. Mize*, 48.

§ 30.3. Submission of Guilt of Manslaughter

The trial court did not err in a murder prosecution by not instructing the jury on voluntary and involuntary manslaughter. *S. v. Barts*, 666.

§ 32.1. Appeal and Review; Harmless Error and Cure by Verdict

Any error in the failure of the trial court in a first degree murder case to instruct on involuntary manslaughter was harmless where the jury found that the underlying felony of kidnapping was committed, which supports defendant's conviction of first degree murder on the basis of felony murder. *S. v. Woods*, 344.

INDICTMENT AND WARRANT

§ 3. Jurisdiction of Grand Jury

The grand jury of Stanly County was without jurisdiction to indict defendants for offenses that occurred in Mecklenburg County. *S. v. Paige*, 630.

INSURANCE

§ 8. Modification, Waiver and Estoppel

The trial court did not err in an action arising from an accidental death rider to a life insurance policy on an Air Force flyer by refusing to instruct the jury on ratification. *Pearce v. American Defender Life Ins. Co.*, 461.

§ 14. Provisions Excluding Liability if Death Results from Stipulated Causes

The trial court correctly granted defendant's motion for judgment n.o.v. as to a breach of contract claim arising from an accidental death rider to a life insurance policy on an Air Force flyer. *Pearce v. American Defender Life Ins. Co.*, 461.

The trial court did not err by directing verdict against plaintiff's claim based on fraud in an action arising from an exclusion to an accidental death rider to a life insurance policy for aircraft crew members. *Ibid.*

§ 75.2. Automobile Collision Insurance; Subrogation

Summary judgment was improperly granted in an action in which one insurance company sought to recover payments made to its insured for property damage to an automobile owned by its insured but driven by the insured of the second company. *Aetna Cas. and Surety Co. v. Penn. Nat. Mut. Cas. Ins. Co.*, 368.

JURY

§ 5.1. Selection Generally

The trial court did not err in a murder prosecution by denying defendant's motion to quash the petit jury and the indictment against him where the jury lists were not prepared in strict compliance with statutory requirements. *S. v. Massey*, 558.

§ 6. Voir Dire Examination Generally; Practice and Procedure

The trial court did not abuse its discretion by denying defendant's motion for an individual voir dire and separation of potential jurors. *S. v. Rogers*, 203.

Defendant was not denied her right to examine a full panel of prospective jurors where her voir dire examination followed the State's and the codefendant's examinations. *Ibid.*

There was no showing that the trial judge abused his discretion by denying defendant's motion for an individual voir dire. *S. v. Artis*, 507; *S. v. Barts*, 666.

§ 6.2. Voir Dire; Form of Questions

The trial court properly overruled defendant's objection to the State using "fully satisfied and entirely convinced" instead of "reasonable doubt" in its questions to prospective jurors. *S. v. Rogers*, 203.

§ 6.3. Propriety and Scope of Examination on Voir Dire

The trial court did not err by sustaining objections to defendant's questions asking prospective jurors whether the fact that she called fewer witnesses than the State would make a difference in their decision. *S. v. Rogers*, 203.

JURY — Continued

§ 6.4. Voir Dire; Questions as to Belief in Capital Punishment

The trial court did not improperly question a potential juror where the court's questions were an attempt to clarify the juror's position on capital punishment. *S. v. Rogers*, 203.

§ 7.11. Challenges for Cause; Scruples against or Belief in Capital Punishment

The practice of death qualifying the jury in a first degree murder case is not unconstitutional. *S. v. King*, 78.

The trial court did not abuse its discretion by refusing to ask prospective jurors non-death qualifying questions. *S. v. Rogers*, 203.

The trial court did not err in allowing the State to death qualify the jury. *S. v. Woods*, 344.

§ 7.12. Scruples against or Belief in Capital Punishment; What Constitutes Disqualifying Scruples or Beliefs

The trial court did not err in a murder prosecution by excluding for cause a prospective juror who first stated that she could vote for the death penalty and stated the next day that she would be unable to vote for the death penalty under any circumstance. *S. v. Barts*, 666.

§ 7.14. Manner, Order and Time of Exercising Peremptory Challenges

The trial court did not err in a first degree murder prosecution by denying defendants' motions to prohibit the State from peremptorily challenging black jurors. *S. v. Rogers*, 203.

There was no error in the denial of defendant's motion for an additional peremptory challenge. *Ibid.*

KIDNAPPING

§ 1. Elements of Offense

An indictment was insufficient to charge first degree kidnapping where it failed to allege that the victim was sexually assaulted, seriously injured, or not released in a safe place. *S. v. Moore*, 328.

§ 1.2. Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction for kidnapping to facilitate attempted second degree rape although defendant made a statement to the victim alluding to cunnilingus and not vaginal intercourse. *S. v. Whitaker*, 515.

§ 1.3. Instructions

The trial court erred by instructing the jury on kidnapping for the purpose of facilitating flight where the indictment only alleged kidnapping to facilitate rape. *S. v. Odom*, 306.

The trial court in a kidnapping prosecution erred in refusing to instruct on the lesser-included offense of false imprisonment. *S. v. Whitaker*, 515.

LABORERS' AND MATERIALMEN'S LIENS

§ 3.2. Timeliness of Notice

The effective date of plaintiff's action to enforce a laborer's and materialman's lien was the date he filed his motion to amend his complaint to allege such an action rather than the date that the trial court ruled on his motion to amend, and

MASTER AND SERVANT — Continued

§ 69. Workers' Compensation; Amount of Recovery Generally

Where defendants accepted plaintiff's injury as compensable and began making disability payments, those payments were "due and payable" and were not deductible under G.S. 97-42 from an award for permanent disability. *Moretz v. Richards & Associates*, 539.

§ 72. Workers' Compensation; Partial Disability

When plaintiff reached his maximum recovery in December 1977, his compensation for temporary total disability ended and his compensation for permanent disability began, and plaintiff has been fully compensated for his injury where he was entitled to 180 weeks of permanent disability payments and has received 255 weeks of disability payments since December 1977. *Moretz v. Richards & Associates*, 539.

NARCOTICS

§ 1.3. Elements of Statutory Offenses Relating to Narcotics

A defendant may be convicted and punished separately for trafficking in heroin by possessing 28 grams or more, trafficking in heroin by manufacturing 28 grams or more, and trafficking in heroin by transporting 28 grams or more even when the contraband in each separate offense is the same heroin. *S. v. Perry*, 87.

§ 4. Sufficiency of Evidence

Evidence that defendant was in control of an apartment where heroin and implements of manufacturing heroin were found was sufficient to support defendant's conviction of trafficking in heroin by manufacturing heroin. *S. v. Perry*, 87.

Testimony of an expert witness in forensic drug chemistry supported a reasonable inference that more than 28 grams of heroin were involved based upon his analysis of the white powdery substance found in a portion of the 390 glassine packets possessed by defendant. *Ibid.*

§ 4.3. Sufficiency of Evidence of Constructive Possession

Evidence of defendant's control of an apartment where heroin and implements of manufacturing heroin were found, when considered with evidence of defendant's transportation of 82.9 grams of a heroin mixture, was sufficient to support defendant's conviction of trafficking in heroin by possessing and transporting 28 grams or more of heroin. *S. v. Perry*, 87.

§ 5. Punishment

The statute providing for more severe punishment for the possession of a small amount of heroin when mixed with a large amount of legal materials than possession of a smaller amount of pure heroin, G.S. 90-95(h)(4), has a rational relation to a valid State objective and is constitutional. *S. v. Perry*, 87.

In order to impose a sentence in excess of the minimum prescribed by G.S. 90-95(h)(4)(c) of 45 years and $500,000 for offenses involving more than 28 grams of heroin, it is necessary that the trial judge make proper findings of factors in aggravation and mitigation and find that the aggravating factors outweigh any mitigating factors. *Ibid.*

The trial court could properly find as aggravating factors for possessing, transporting and manufacturing 28 grams or more of heroin that defendant had the specific intent to sell the heroin which he possessed and that defendant had a bad character and reputation for trafficking in drugs and handling stolen goods. *Ibid.*

NEGLIGENCE

§ 20. Limitation of Actions

Summary judgments entered for defendants in an asbestosis action were reversed. *Leonard v. Johns-Manville Sales Corp.*, 84.

PARENT AND CHILD

§ 2.1. Liability of Parent for Injury to Child

In an action against the manufacturer of a lawn mower to recover for injuries received by the minor plaintiff when she was struck by the blade of a riding lawn mower operated by her father, the doctrine of parent-child immunity barred the manufacturer's third-party action against the father for contribution. *Lee v. Mowett Sales Co.*, 489.

§ 2.2. Child Abuse

The State's evidence was sufficient to support an inference that defendant intentionally inflicted serious injury on a two-year-old child by holding her hands under hot water so as to support his conviction for felonious child abuse. *S. v. Campbell*, 168.

RAPE AND ALLIED OFFENSES

§ 4. Competency of Evidence

The trial court did not abuse its discretion by permitting the prosecution to ask a six-year-old rape victim leading questions which referred to statements made by the victim during pretrial conferences with the prosecutor. *S. v. Hannah*, 362.

In a prosecution for first degree rape and vaginal intercourse by a substitute parent, a letter written by defendant to the victim's mother when defendant was in prison for unrelated offenses in which he promised "that I will never, as long as I live, bother [the victim] any more if she stays with us" was relevant to show defendant's commission of the offenses with which he was charged. *S. v. Moses*, 356.

Rectal slides taken from the victim were relevant to prove that penetration of the rectum did occur. *S. v. Sloan*, 714.

§ 4.3. Evidence of Character or Reputation of Prosecutrix

The trial court did not err in prohibiting defendant's attempt to elicit testimony from a sexual assault victim that she had received psychiatric treatment subsequent to a prior unrelated sexual assault in which she was the prosecuting witness. *S. v. Wrenn*, 141.

§ 5. Sufficiency of Evidence

The State produced sufficient evidence aliunde defendant's admissions which, when considered with the admissions, was sufficient to permit a reasonable inference that the charged crime of rape had occurred. *S. v. Sloan*, 714.

The State produced sufficient evidence of rectal penetration to support defendant's conviction of a sexual offense although a doctor testified that spermatozoa found on a rectal swab could have been collected from deposits at the rectal opening rather than from inside the rectum. *Ibid.*

§ 6. Instructions

The trial court in a first degree rape case did not err in instructing the jury that a utility knife is a dangerous or deadly weapon. *S. v. Torain*, 111.

RULES OF CIVIL PROCEDURE — Continued

refused to certify a class action because damages recoverable by any one member of the proposed class would be de minimis. *Maffei v. Alert Cable TV*, 615.

§ 41.1. Voluntary Dismissal

A complaint filed by plaintiff for the sole purpose of tolling the statute of limitations and voluntarily dismissed two minutes later was a sham pleading subject to being stricken and disregarded pursuant to Rule 11(a) and could not provide a basis for the action to be refiled within one year after such dismissal pursuant to Rule 41(a)(1). *Estrada v. Burnham*, 318.

SEARCHES AND SEIZURES

§ 4. Particular Methods of Search; Physical Examination or Tests

The trial court was not authorized by Art. 14 of G.S. Ch. 15A to issue a nontestimonial identification order to obtain a blood sample from a defendant who was in custody at the time the order was issued. *S. v. Welch*, 578.

Defendant's right to be free from unreasonable searches and seizures was violated when a sample of his blood was drawn without a search warrant, but the trial court was not required to exclude the blood sample from evidence under the good faith exception to the exclusionary rule where officers acted in reasonable reliance upon a nontestimonial identification order subsequently found invalid. *Ibid.*

§ 8. Search and Seizure Incident to Warrantless Arrest

Officers had probable cause to arrest defendant for burglary and a sexual offense, and the trial court thus properly denied defendant's motion to suppress the physical evidence seized from his automobile and the victim's subsequent identification of him as being fruits of an illegal arrest. *S. v. Wrenn*, 141.

Defendant's confession was sufficient to establish probable cause for defendant's arrest, and a bracelet in plain view was properly seized from defendant as an incident of his valid arrest. *S. v. Paige*, 630.

§ 16. Search and Seizure by Consent; Consent Given by Members of Household

The evidence supported the trial court's finding that defendant's mother consented to a warrantless search of defendant's bedroom in a residence which she owned even though the printed name on the consent to search form incorrectly stated the first name of defendant's mother. *S. v. Moore*, 328.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

A violation of G.S. 58-54.4 as a matter of law constitutes an unfair or deceptive trade practice in violation of G.S. 75-1.1. *Pearce v. American Defender Life Ins. Co.*, 461.

There was sufficient evidence of an unfair trade practice to survive a motion for a directed verdict in an action arising from an exclusion to an accidental death rider for aircraft crewmen. *Ibid.*

UTILITIES COMMISSION

§ 34. Property Included in Rate Base; Property not in Use at End of Test Period

Evidence that the inclusion of additional construction work in progress in a power company's rate base was necessary to stabilize the company at its A bond

UTILITIES COMMISSION — Continued

rating level supported a finding by the Utilities Commission that the inclusion of the additional construction work in progress was necessary to the financial stability of the utility. *State ex rel. Utilities Comm. v. Thornburg, Atty. Gen.*, 238.

§ 38. Establishment of Rate Base; Current and Operating Expenses

The Utilities Commission did not err in "normalizing" the nuclear capacity factor component of a power company's test-period generation mix in ascertaining the company's cost of fuel by utilizing the national average capacity factor for each type of nuclear plant computed by the North American Electric Reliability Council and adjusting those national averages by taking into account planned outages at two of the power company's nuclear plants. *State ex rel. Utilities Comm. v. Thornburg, Atty. Gen.*, 238.

§ 56. Review of Findings; Rate Orders

The Utilities Commission did not err in ordering a power company to refund to its customers the funds in the deferred fuel account which the Commission ordered the company to establish in a prior general rate case. *State ex rel. Utilities Comm. v. Thornburg, Atty. Gen.*, 238.

VENDOR AND PURCHASER

§ 1. Requisites of Contracts to Convey and Options

A contract for the sale of land was an installment land contract and not an option contract. *Boyd v. Watts*, 622.

§ 11. Abandonment and Cancellation of Contracts

Plaintiffs elected to pursue remedies that were available to them upon defendant's default when they brought an action asking that defendant's rights in an installment land contract be declared forfeited and cancelled and that their title to the real property be quieted. *Boyd v. Watts*, 622.

A directed verdict for plaintiffs was proper in an action to quiet title under an installment land contract. *Ibid.*

WITNESSES

§ 1.2. Children as Witnesses

The trial court did not err in finding that a six-year-old child was competent to testify in a rape trial. *S. v. Gordon*, 497.

WORD AND PHRASE INDEX

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