NORTH CAROLINA REPORTS

VOLUME 317

SUPREME COURT OF NORTH CAROLINA

---

3 JUNE 1986

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12 AUGUST 1986

RALEIGH
1988

CITE THIS VOLUME
317 N.C.

TABLE OF CONTENTS

Justices of the Supreme Court v

Superior Court Judges vi

District Court Judges viii

Attorney General xii

District Attorneys xiii

Public Defenders xiv

Table of Cases Reported xv

Petitions for Discretionary Review xvii

General Statutes Cited and Construed xix

Rules of Evidence Cited and Construed xxii

Rules of Civil Procedure Cited and Construed xxiii

U. S. Constitution Cited and Construed xxiii

N. C. Constitution Cited and Construed xxiii

Rules of Appellate Procedure Cited and Construed xxiii

Licensed Attorneys xxiv

Opinions of the Supreme Court 1-715

Revised Rules for Court-Ordered Arbitration 719

Discipline and Disbarment Rules 738

Client Security Fund 740

Analytical Index 743

Word and Phrase Index 762

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CASES REPORTED

	PAGE
Acklin, S. v.	677
Allen, S. v.	119
Allen, S. v.	329
Barber, S. v.	502
Beaver, S. v.	643
Blake, S. v.	632
Bolton Corp. v. T. A. Loving Co.	623
Brittain, Taylor v.	146
Brown v. Walnut Cove Vol. Fire Dept.	147
Carroll, S. v.	136
Cavenaugh v. Cavenaugh	652
Chavis v. State Farm Fire and Casualty Co.	683
Cooper, S. v.	141
Covington, S. v.	127
Cumberland County Hosp. System, Watts v.	110
Cumberland County Hosp. System, Watts v.	321
Davis, S. v.	315
Davis, Vick v.	328
Dayco Corp., Gunter v.	670
Diaz, S. v.	545
Div. of Social Services, Forsyth County Bd. of Social Services v.	689
Eury, S. v.	511
Evans, S. v.	326
Forsyth County Bd. of Social Services v. Div. of Social Services	689
Freeman, Peerless Ins. Co. v.	145
Gilliam, S. v.	293
Glidden, S. v.	557
Godfrey v. Zoning Bd. of Adjustment	51
Gunter v. Dayco Corp.	670
Hendrix v. Linn-Corriher Corp.	179
Hickey, S. v.	457
Hope, S. v.	302
Howard, S. v.	140
In re Terry	132
Jackson, S. v.	1
Johnson v. Johnson	437
Johnson, S. v.	193
Johnson, S. v.	343
Johnson, S. v.	417
Jones, S. v.	487
Kirkland, McCombs v.	331
Lachat, S. v.	73
Lea Company v. N. C. Bd. of Transportation	254
Linn-Corriher Corp., Hendrix v.	179
Little v. Penn Ventilator Co.	206
McCombs v. Kirkland	331
McKoy, S. v.	519
Mann, S. v.	164
Mason, S. v.	283
Mercer, S. v.	87
Mitchell, S. v.	661
Moore, S. v.	144
Moore, S. v.	275
Mutakbbic, S. v.	264
N. C. Bd. of Transportation, Lea Company v.	254
Park Newspapers of Lumberton, Sharpe v.	579
Peerless Ins. Co. v. Freeman	145
Penn Ventilator Co., Little v.	206
Piedmont Bank and Trust Co. v. Stevenson	330
Prevette, S. v.	148
Sams, S. v.	230
Sanders, S. v.	602
Saunders, S. v.	308
Sharp v. Wyse	694
Sharpe v. Park Newspapers of Lumberton	579

CASES REPORTED

	Page
Smith v. Starnes	613
Smith, S. v.	100
Stafford, S. v.	568
Starnes, Smith v.	613
S. v. Acklin	677
S. v. Allen	119
S. v. Allen	329
S. v. Barber	502
S. v. Beaver	643
S. v. Blake	632
S. v. Carroll	136
S. v. Cooper	141
S. v. Covington	127
S. v. Davis	315
S. v. Diaz	545
S. v. Eury	511
S. v. Evans	326
S. v. Gilliam	293
S. v. Glidden	557
S. v. Hickey	457
S. v. Hope	302
S. v. Howard	140
S. v. Jackson	1
S. v. Johnson	193
S. v. Johnson	343
S. v. Johnson	417
S. v. Jones	487
S. v. Lachat	73
S. v. McKoy	519
S. v. Mann	164
S. v. Mason	283
S. v. Mercer	87
S. v. Mitchell	661
S. v. Moore	144
S. v. Moore	275
S. v. Mutakbbic	264
S. v. Prevette	148
S. v. Sams	230
S. v. Sanders	602
S. v. Saunders	308
S. v. Smith	100
S. v. Stafford	568
S. v. Tucker	532
S. v. Vines	242
S. v. West	219
S. v. Williams	474
S. v. Wingard	590
S. v. Woods	143
S. v. Young	396
State ex rel. Utilities Comm. v. The Public Staff	26
State Farm Fire and Casualty Co., Chavis v.	683
Stevenson, Piedmont Bank and Trust Co. v.	330
T. A. Loving Co., Bolton Corp. v.	623
Taylor v. Brittain	146
Terry, In re	132
The Public Staff, State ex rel. Utilities Comm. v.	26
Tucker, S. v.	532
Vick v. Davis	328
Vines, S. v.	242
Walnut Cove Vol. Fire Dept., Brown v.	147
Watts v. Cumberland County Hosp. System	110
Watts v. Cumberland County Hosp. System	321
West, S. v.	219
Williams, S. v.	474
Wingard, S. v.	590
Woods, S. v.	143
Wyse, Sharp v.	694
Young, S. v.	396
Zoning Bd. of Adjustment, Godfrey v.	51

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

PAGE

Allen v. Murray 700
Anchor Paper Corp. v. Anchor Converting Co. 332
Andrews v. Andrews 700
Athey v. Athey 700

Backer v. Gomez 700
Barna v. Evans Construction Co., Inc. of Raleigh 700
Black v. Carlton Yarn Mills 332
Brown v. Brown 332
Bruce v. Bruce 701
Bryant v. Carson 701
Bryant v. Pitt 701
Burch v. Burch 332
Burnette Industries, Inc. v. Dunbar of Winston-Salem, Inc. 701

Central Carolina Bank & Trust Co. v. Fawn Vendors, Inc. 332
Central Carolina Bank & Trust Co. v. Fawn Vendors, Inc. 701
Concrete Service Corp. v. Investors Group, Inc. 333
Cooper v. Cooper 702
Cox v. Jefferson-Pilot Fire and Casualty Co. 702
Crump v. Bd. of Education 333

Davis v. Sellers Enterprises, Inc. 702
Dellinger v. Lamb 702
Dunn v. Harris 702
During v. Service Systems Corp. 333

Ellis v. Williams 703

F. Ray Moore Oil Co., Inc. v. State of N.C. 333
Freeman v. Spinnaker Point, Ltd. 333

Ghidorzi Construction, Inc. v. Town of Chapel Hill 703

Harton v. Harton 703
Hinson v. Hinson 703
Hogan v. Forsyth Country Club Co. 334

PAGE

In re Appeal from Environmental Management Comm. 334
In re Appeal of K-Mart Corp. 334
In re Badzinski 703
In re Computer Technology Corp. 334
In re Digital Dynamics Corp. and Carphonics, Inc. 334
In re Estate of Edwards 704
In re Will of King 704

Joyce v. Cloverbrook Homes, Inc. 335
Joyce v. Cloverbrook Homes, Inc. 704

Kendrick v. City of Greensboro 335

Lewis v. Lewis Nursery, Inc. 704
Love v. Mewborn 704

Mainor v. K-Mart Corp. 335
Merritt v. Kewaunee Scientific Equip. 705
Moffett v. Daniels 705
Morrison v. Sears, Roebuck & Co. 705

Nationwide Mutual Ins. Co. v. Land 335
Nelson v. Chang 335
N. C. Department of Transportation v. Kaplan 705

Olivetti Corp. v. Ames Business Systems, Inc. 336
Olivetti Corp. v. Ames Business Systems, Inc. 705

Park Avenue Partners v. Johnson 706
Parker Marking Systems, Inc. v. Diagraph-Bradley Industries, Inc. 336
Pee Dee Oil Co. v. Quality Oil Co. 706
Perry v. Perry 336
Philbeck v. Morrow 706

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

	Page
Rice v. Rice	706
Roanoke Chowan Housing Authority v. Vaughan	336
Roanoke Chowan Housing Authority v. Vaughan	706
Rosi v. McCoy	707
Smith v. Spence & Spence	707
S. v. Allen	707
S. v. Alston	707
S. v. Bailey	336
S. v. Ball	707
S. v. Blackmon	337
S. v. Blackwell	708
S. v. Boone	708
S. v. Brewington	708
S. v. Britt	337
S. v. Brown	708
S. v. Carawan	337
S. v. Chesson	337
S. v. Childers	337
S. v. Clayton	708
S. v. Coen	709
S. v. Costner	709
S. v. Dalton	709
S. v. Davis	709
S. v. Dye	338
S. v. Dye	709
S. v. Epps	338
S. v. Farrow	338
S. v. Fie	710
S. v. Freeman	338
S. v. Gladney	338
S. v. Hamby and Shoun	710
S. v. Harverson	710
S. v. Hines	710
S. v. Isleib	711
S. v. Johnson	339
S. v. Little	339
S. v. McGill	711
S. v. McLaurin	339
S. v. Martin	711
S. v. Mason	711
S. v. Miller	711
S. v. Moore	712
S. v. Norris	708
S. v. Norwood	712
S. v. Oliver	712
S. v. Raines	339
S. v. Raines	712
S. v. Ransom	712
S. v. Rawls	713
S. v. Roark	713
S. v. Shea	713
S. v. Shields	339
S. v. Shoemaker	340
S. v. Sweatt	340
S. v. Taylor	340
S. v. Taylor	713
S. v. Thompson	337
S. v. Thompson	713
S. v. Tice	714
S. v. Vaught	340
S. v. Williams	340
S. v. Williams	341
S. v. Williams	714
S. v. Woodard	714
S. v. Wortham	341
Stegall v. Robinson	714
Stevens v. Setzer	341
Turner v. Nicholson Properties, Inc.	714
Uzzell v. Integon Life Ins. Corp.	341
Va. Electric and Power Co. v. Tillett	715
Vick v. Vick	341
Wee One's Paradise Day Care Center, Inc. v. Maryland Casualty Company	715

PETITION TO REHEAR

Davidson v. U. S. Fidelity and Guar. Co.	342

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-254	Sharpe v. Park Newspapers of Lumberton, 579
1A-1	See Rules of Civil Procedure infra
7A-395(a)(3)	State v. Smith, 100
7A-450(b)	Johnson v. Johnson, 437
	State v. Hickey, 457
	State v. Johnson, 193
7A-454	State v. Hickey, 457
7A-544	State v. Mutakbbic, 264
8-53.2	State v. Barber, 502
	State v. West, 219
8C-1	See Rules of Evidence infra
9-1	State v. Johnson, 343
9-2	State v. Young, 396
9-2(c)	State v. Johnson, 343
14-3	State v. Mann, 164
14-3(b)	State v. Glidden, 557
14-17	State v. Hickey, 457
	State v. Vines, 242
14-27.2	State v. Howard, 140
	State v. Johnson, 417
14-39	State v. Tucker, 532
14-39(a)	State v. Tucker, 532
14-87(a)	State v. Allen, 119
	State v. Hope, 302
14-394	State v. Glidden, 557
15A-132(c)	State v. Vines, 242
15A-279(d)	State v. Young, 396
15A-701	State v. Johnson, 343
15A-701(b)	State v. Sams, 230
15A-702	State v. Johnson, 343
15A-703	State v. Johnson, 343

G.S.	
15A-704	State v. Johnson, 343
15A-903	State v. Wingard, 590
15A-951	State v. Sams, 230
15A-972	State v. Sanders, 602
15A-1001(a)	State v. Carroll, 136
15A-1064	State v. Lachat, 73
15A-1212(8) and (9)	State v. Johnson, 343
15A-1214(h)	State v. Sanders, 602
15A-1214(h)(2), (i)(1) and (2)	State v. Johnson, 417
15A-1214(j)	State v. Wingard, 590
15A-1221	State v. Mason, 283
15A-1226(b)	State v. Davis, 315
15A-1232	State v. Covington, 127
	State v. Johnson, 343
15A-1235(b)	State v. Mann, 164
15A-1237	State v. Diaz, 545
15A-1240(a)	State v. Mutakbbic, 264
15A-1340.4(a)	State v. Moore, 275
15A-1340.4(a)(2)(e)	State v. Moore, 275
15A-1414(j)	State v. Wingard, 590
15A-1443	State v. Tucker, 532
15A-1443(a)	State v. Acklin, 677
	State v. Johnson, 343
	State v. Mason, 283
	State v. West, 219
	State v. Wingard, 590
15A-1443(b)	State v. Barber, 502
	State v. Johnson, 343
15A-2000(b)	State v. Johnson, 343
15A-2000(f)(7)	State v. Johnson, 343

G.S.	
15A-2000 to 2003	State v. Johnson, 343
48-11	In re Terry, 132
50-20	Johnson v. Johnson, 437
52-4	Johnson v. Johnson, 437
58-176	Chavis v. State Farm Fire and Casualty Co., 683
62-79(a)	State ex rel. Utilities Comm. v. The Public Staff, 26
62-94	State ex rel. Utilities Comm. v. The Public Staff, 26
62-94(b)(4)	State ex rel. Utilities Comm. v. The Public Staff, 26
62-131	State ex rel. Utilities Comm. v. The Public Staff, 26
62-133(c)	State ex rel. Utilities Comm. v. The Public Staff, 26
84-14	State v. Eury, 511
97-2(9)	Hendrix v. Linn-Corriher Corp., 179
97-25	Little v. Penn Ventilator Co., 206
97-31(24)	Little v. Penn Ventilator Co., 206
97-47	Hendrix v. Linn-Corriher Corp., 179
108A-71	Forsyth County Bd. of Social Services v. Div. of Social Services, 689
108A-79(k)	Forsyth County Bd. of Social Services v. Div. of Social Services, 689
108A-79(l)	Forsyth County Bd. of Social Services v. Div. of Social Services, 689
136-113	Lea Company v. N. C. Bd. of Transportation, 254

RULES OF EVIDENCE CITED AND CONSTRUED

Rule No.	
401	State v. Gilliam, 293
	State v. Mercer, 87
	State v. Prevette, 148
	State v. West, 219
	State v. Wingard, 590
402	State v. Mercer, 87
403	State v. Mercer, 87
404	State v. Tucker, 532
	State v. West, 219
404(b)	State v. Gilliam, 293
	State v. McKoy, 519
	State v. Young, 396
609(a)	State v. Tucker, 532
611(c)	State v. Mitchell, 661
704	State v. Saunders, 308
803	State v. Hickey, 457
803(2)	State v. Beaver, 643
	State v. Wingard, 590
803(4)	State v. Stafford, 568
803(8)(c)	State v. Acklin, 677
804	State v. Hickey, 457
1002	State v. Wingard, 590

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4	Smith v. Starnes, 613
4(d)(2)	Smith v. Starnes, 613
12(b)(6)	Sharpe v. Park Newspapers of Lumberton, 579

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

Amendment VI	State v. Johnson, 343
Amendment XIV	State v. Gilliam, 293

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 19	State v. Gilliam, 293
Art. I, § 24	State v. Diaz, 545
	State v. Gilliam, 293

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
10(b)(2)	State v. Sams, 230
	State v. Tucker, 532

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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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ROBERT S. PIERCE .... Winston-Salem, applied from the State of New York 2nd Department
PATRICIA A. MOYLAN .... Raleigh, applied from the State of Ohio
CHARLES EDISON SMITH .... Durham, applied from the District of Columbia
DESIREE PARK DENTON .... Chapel Hill, applied from the States of Tennessee and Illinois

Given over my hand and Seal of the Board of Law Examiners this 30th day of July, 1987.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 22nd day of August, 1987, and said persons have been issued certificates of this Board:

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Given over my hand and Seal of the Board of Law Examiners this the 9th day of September, 1987.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 11th day of September, 1987 and said persons have been issued certificates of this Board.

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REBECCA S. CHESTEEN . . . . Charlotte
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SUSAN COMPERNOLLE . . . . Raleigh
WILLIAM RANKIN CRAIG . . . . Charlotte
DEBORAH L. DARTER . . . . Raleigh
SHARON HOLLEY DAVENPORT . . . . Durham
MARCIA M. DEANS . . . . Raleigh
JAMES H. DICKEY . . . . Hartsville, South Carolina
JOSEPH RANDALL FOWLER . . . . Kannapolis
MARK J. GRIFFITH . . . . Gouverneur, New York

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ANTHONY DILLON .... Greensboro
SHARRON ROBERTS EDWARDS .... Greensboro
SARA VERMELLE FIELDING .... Winston-Salem
RICHARD GARY GWIZDZ .... Ann Arbor, Michigan
SUZANNE EBELEIN HARLEY .... Greenville, South Carolina
DAVID HAMPTON HASTY .... Fayetteville
MARIAN RITCHIE HILL .... Raleigh
LEIGH ANN HOBGOOD .... Chapel Hill
MAURY ALBON HUBBARD III .... Durham
STEVEN J. HULTQUIST .... Raleigh
MARY ELIZABETH HUNT .... Wilmington
EUGENE GRIFFIN JENKINS .... Kinston
ROBERT M. JESSUP, JR. .... Goshen, New York
LEWIS JAMES KARESH .... Greensboro
J. RAY KERSEY .... Chapel Hill
THOMAS EUGENE LAYTON .... Raleigh
DAVID PAUL LAZENSKI, SR. .... Charlotte
MARY ELLEN MAHONEY .... Boston, Massachusetts
JOHN KINNEY MASHBURN .... Raleigh
ROBERT STEVEN MCDOWELL .... Durham
RICHARD MICHAEL MILLER .... Fayetteville
EDWARD CARTWRIGHT MOORE .... Greensboro
KAY MURRAY .... Chapel Hill

JEFFREY E. OLEYNIK .... Dallas, Texas
PAMELA MORRIS PATRICK .... Gastonia
THEODORE P. PEARCE .... Charlotte
BRANSON ANDREW PETHEL .... Salisbury
GEORGE C. PIEMONTE .... Sunrise, Florida
DAVID W. POPICK .... Coral Gables, Florida
H. JEFFERSON POWELL .... New Haven, Connecticut
SUZAYNE REEVES .... Asheville
LAURA CHANDLER RUBLEE .... Asheville
DOUGLAS AVERY RULEY .... Parkersburg, West Virginia
ROBERT WALTER SAUNDERS .... High Point
JORDAN BREAULT SHIELDS .... Fairview
MICHAEL G. TAKAC .... Candler
V. RANDALL TINSLEY .... Charlottesville, Virginia
ANN ARNOLD WATKINS .... Matthews
SCOTT LARISON WILKINSON .... Raleigh

Given over my hand and Seal of the Board of Law Examiners this the 22nd day of September, 1987.

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

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

On October 2, 1987, the following individuals were admitted:

N. VICTOR FARAH .... Raleigh, applied from the State of Michigan
RICHARD EARL FAY .... Charlotte, applied from the State of Virginia
JAMES PHILLIP GRIFFIN, JR. .... Durham, applied from the State of Kentucky
RICHARD C. HATCH .... Cary, applied from the State of New York 1st Department
RANDALL ROBERT KAPLAN .... Greensboro, applied from the District of Columbia
JOHNSON A. SALISBURY .... Charlotte, applied from the District of Columbia

---

TIMOTHY JOHN WILLIAMS .... Durham, applied from the State of Minnesota
GRAY WESTGATE WILSON .... Asheville, applied from the State of Virginia

Given over my hand and Seal of the Board of Law Examiners this the 5th day of October, 1987.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 2nd day of October, 1987 and said person has been issued a certificate of this Board:

W. DAVID LLOYD .... Chapel Hill

Given over my hand and Seal of the Board of Law Examiners this the 12th day of October, 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. JAMES WALLACE JACKSON

No. 351A84

(Filed 3 June 1986)

1. Criminal Law § 178— admissibility of confession—law of the case

The Supreme Court's decision in a prior appeal that defendant's confession was admissible was conclusive on this issue under the doctrine of the "law of the case" where the evidence relating to the admissibility of the confession was virtually identical to the evidence before the Supreme Court on the prior appeal.

2. Jury § 7.13— death penalty not sought by State—number of peremptory challenges

A defendant tried for first degree murder was entitled to only six rather than fourteen peremptory challenges where the case lost its capital nature when the prosecution announced prior to the commencement of jury selection that it would not seek the death penalty due to a lack of any aggravating circumstances.

3. Constitutional Law § 60; Jury § 7.14— peremptory challenges of blacks—nonretroactivity of U. S. Supreme Court decision

The decision of *Batson v. Kentucky*, 476 U.S. ---, 90 L.Ed. 2d 69, holding that a defendant can establish a *prima facie* case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at his trial, will not be applied retroactively even as to cases not finally determined on direct appeal as of the date of the filing of that opinion. Rather, the ruling in *Batson* will be applicable only to those cases in which the jury selection took place after that decision was rendered.

4. Constitutional Law § 60; Jury § 7.14— peremptory challenges of blacks—no denial of fair cross-section of community

The prosecution's use of peremptory challenges to exclude blacks from the jury did not violate defendant's right to a jury drawn from a fair cross-section of the community since the Sixth Amendment fair cross-section requirement

applies only to the pool from which petit jurors are selected and imposes no requirement that the petit jurors actually chosen must mirror the community and reflect the various distinctive groups in the population.

5. **Homicide § 21.5— first degree murder—premeditation and deliberation—sufficiency of evidence**

There was sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder where the evidence tended to show that defendant thrust a knife into the victim's back with such force that it went completely through her body; the victim did not in any way provoke defendant into attacking her; following the killing, defendant callously remarked to another person that "somebody [had] messed her up bad"; and defendant admitted that he attempted to cover up his involvement in the crime by placing a steel file in an empty space in a knife rack and by disposing of the knife used as the murder weapon. Furthermore, the jury could have inferred from the evidence that the fatal stab was not inflicted until the time of the victim's second scream some thirty to forty-five seconds after her initial scream, and such inference would support a finding that the killing was premeditated and deliberate.

Justice EXUM dissenting in part.

Justice FRYE joins in this dissenting opinion.

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

BEFORE *Ellis, J.*, at the 20 February 1984 Criminal Session of Superior Court, WAKE County, defendant was convicted of first-degree murder. Prior to trial, the prosecution had announced that the evidence did not support the existence of any of the aggravating factors listed in N.C.G.S. § 15A-2000(e) upon which the jury could recommend the imposition of the death penalty. Therefore, upon defendant's conviction, the trial court entered judgment sentencing him 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 13 March 1985.

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

Gerald L. Bass for the defendant-appellant.

MEYER, Justice.

The State presented evidence which tended to show that on 15 March 1981, Leslie Hall Kennedy, a student at North Carolina State University, was living in a house located at 207 Cox Ave-

nue in Raleigh. The house was divided into three separate apartments, and Mrs. Kennedy occupied the one which was across the front of the house. Mrs. Kennedy's husband was working in Florida at the time, and she was living alone. Mr. Kennedy testified that the lock on the front door often failed to catch and that Mrs. Kennedy usually neglected to close the door's bolt lock.

One of the other two apartments was occupied by two North Carolina State students, Ron Riggan and Ivan Dickey. Riggan returned to the apartment from spring vacation at approximately 7:00 p.m. on 15 March 1981. His girlfriend, Jamie Morehead, subsequently came over for a visit. At some point between 8:00 and 8:30 p.m., Riggan saw Mrs. Kennedy's car drive up to the house. Although he did not see Mrs. Kennedy, Riggan heard only one car door being shut. He did not hear any conversation or other sound which would indicate that anyone was with Mrs. Kennedy. At approximately 9:00 p.m., Ivan Dickey returned to the apartment. Riggan, Dickey, and Morehead proceeded to watch television and talk.

At approximately 9:00 p.m., Mrs. Kennedy made a phone call to her husband. They spoke for approximately twenty-five minutes. Near the end of the conversation, Mrs. Kennedy told her husband that she was going to sit in bed and read for a little while.

At approximately 10:35 p.m., Riggan, Dickey, and Morehead heard two loud, piercing screams coming from Mrs. Kennedy's apartment. Riggan went to a common wall adjoining the two apartments and called out to Mrs. Kennedy. After failing to hear a response, all three went around to the front of the house. They observed that the front door was open and that there was blood on the front porch around the door. Riggan decided to go back to his apartment to arm himself. At that point, they heard a loud laugh emanating from the vicinity of Pullen Park. Dickey decided to walk up the street to investigate the laugh. Riggan, accompanied by Morehead, went back to his apartment and got a weight lifting bar to use as a club. Dickey soon returned, and they walked back around to the front of the house.

As they neared the front of the house, a man, subsequently identified as the defendant, walked up and stated that a girl had told him that she had heard someone in the area scream. Riggan

confirmed this, and he, Dickey, and the defendant went up on the porch and looked through the bedroom window. They could not see whether anyone was on the bed. However, they did notice a steel hand file on a chair in front of the window. The three then proceeded into the apartment. Riggan soon discovered Mrs. Kennedy lying on a bed with blood beneath her arm. She appeared to be dead.

At that point, Riggan and Dickey left the apartment and, along with Morehead, started back to their apartment to call the police. Riggan, however, noticed that the defendant was not with them, and he asked Dickey to go back and watch the defendant. Riggan proceeded to call the police. Dickey went back to Kennedy's apartment and called out for the defendant. Approximately one minute later, the defendant came out the door and remarked that "somebody messed her up bad." Dickey and the defendant then went back to the apartment shared by Dickey and Riggan. Shortly thereafter, the police arrived. All four were instructed to "stay around" the apartment so that their statements could be obtained. The police then entered the house. Within a few moments, Morehead observed the defendant walking away from the apartment.

Mrs. Kennedy was dead at the time the officers entered the house. Dr. Dana Copeland, a pathologist, testified that he performed an autopsy on the deceased on 16 March 1981. The autopsy revealed a stab wound extending from a point in the middle of the back eleven inches from the top of the head completely through the body to a point slightly above the left breast. He stated that, in his opinion, the wound could have been caused by a ten-inch butcher knife. Dr. Copeland also testified that, in his opinion, the deceased died as a result of the loss of blood through the wound into the left side of the chest.

The day after the killing, Mr. Kennedy returned to Raleigh and walked through the apartment with a detective of the Raleigh Police Department. While in the apartment, Kennedy noticed that a ten-inch butcher knife was missing from the knife rack which was located in the kitchen. On 31 March 1981, the police discovered a butcher knife of the same brand as the one missing from the Kennedy apartment near a railroad track a short distance from the apartment on Cox Avenue.

On three separate occasions, 26 March 1981, 27 March 1981, and 8 April 1981, the police questioned the defendant about the killing. The factual circumstances surrounding those interviews are set out in detail in this Court's opinion in *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). We deem it unnecessary to repeat those facts here. On the evening of 8 April 1981, the defendant made a statement in which he said that he had met Mrs. Kennedy on 13 March 1981 and that she had invited him to come over to her apartment on 15 March. After he arrived at the apartment, they went into the bedroom and Mrs. Kennedy got in bed. At first, the defendant sat on the bed and talked with her. However, the defendant stated that he believed Mrs. Kennedy wanted to engage in sexual activity, and he soon began to touch and feel her. After a few minutes of such activity, Mrs. Kennedy began screaming. The defendant stated that he became very frightened. He said he panicked, picked up a knife that was on a table beside the bed, and stabbed her in the back. He then ran out of the house and down the street toward Pullen Park.

The defendant further stated that he was afraid that he had killed the woman and decided to go back to the apartment to see if she was still alive. He placed the knife beside a tree and walked back to the apartment. When he returned, there were other people standing in the yard. He told them that a girl had said that she heard someone scream. He and two other men then entered the house. After one of the men saw the body, they left to call the police. The defendant stated that he went back inside the house, picked up the steel file that was on a chair in the bedroom, and placed it in the knife rack in the kitchen. He said that after the police arrived and went inside the house to investigate, he left the scene and walked back down the street. He stated that he retrieved the knife and threw it away near some railroad tracks and then went home.

The defendant presented no evidence.

Based on this and other evidence, the jury found the defendant guilty of first-degree murder. The court entered judgment sentencing the defendant to a term of life imprisonment.

[1] The defendant initially contends that the trial court erred by allowing the prosecution to introduce his 8 April 1981 statement into evidence. He argues that the factual circumstances surround-

ing the various interview sessions show that he was in custody at the time the statement was made, and since the officers did not have probable cause to take him into custody, the confession is inadmissible under *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824 (1979). He also contends that the facts surrounding the interview sessions show that the confession was involuntary.

On 18 February 1982, a superior court judge granted the defendant's motion to suppress the confession. The State appealed from this order. We reversed the trial court and held the statement to be admissible in *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134. In that case, we carefully examined the factual circumstances surrounding the three interview sessions and determined that the defendant was not in custody prior to the time he gave the statement and therefore the confession's exclusion was not required by *Dunaway*. We also concluded that the statement was voluntarily made by the defendant.

The defendant acknowledges that these issues have already been decided adversely to him. He contends, however, that there is additional evidence which was not previously before this Court which mandates the reversal of our prior decision. We do not agree. The defendant has failed to point to any evidence produced at trial which was not previously before this Court that tends to strengthen his argument that he was in custody at the time the statement was made. The defendant has likewise failed to point to any new evidence which strengthens his assertion that the statement was not voluntarily made. Since the evidence relating to the admissibility of the inculpatory statement made by the defendant is virtually identical to the evidence which was previously before us, the doctrine of "the law of the case" applies to make our prior ruling on this issue conclusive. *State v. Wright*, 275 N.C. 242, 166 S.E. 2d 681, *cert. denied*, 396 U.S. 934, 24 L.Ed. 2d 232 (1969). *See also State v. Hill*, 281 N.C. 312, 188 S.E. 2d 288 (1972); *State v. Stone*, 226 N.C. 97, 36 S.E. 2d 704 (1946); *State v. Lee*, 213 N.C. 319, 195 S.E. 785 (1938). This assignment of error is overruled.

[2] The defendant next argues that the trial court erred by limiting him to only six peremptory challenges. He argues that since he was being tried for first-degree murder, he was entitled to fourteen challenges. We do not agree.

N.C.G.S. § 15A-1217(a) provides that in a "capital case," a defendant is allowed fourteen peremptory challenges. N.C.G.S. § 15A-1217(b) states that in a "noncapital case," a defendant is entitled to six challenges. A "capital case" has been defined as one in which the death penalty may, but need not necessarily, be imposed. *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978). *See also* N.C.G.S. § 15A-2000(a)(1), which defines "capital felony" as "one which may be punishable by death." A case loses its "capital" nature if it is determined that while the death penalty is a possible punishment for *the crime charged*, it may not be imposed in *that particular case*. *E.g.*, *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985) (prosecution announced that it would not seek the death penalty due to a lack of any aggravating circumstances); *State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984) (judge determined that there were no aggravating factors applicable upon which the jury could base a recommendation that the defendant be sentenced to death); *State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978) (prosecution announced at the beginning of the trial that the State would not seek the death penalty); *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (death penalty could not be imposed because the murder occurred during the interval between the invalidation of North Carolina's mandatory death penalty law by the United States Supreme Court in *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944 (1976), and the effective date of the act reinstating the death penalty).

In this case, the prosecution announced prior to the commencement of jury selection that there was no evidence which would support a reasonable inference of any aggravating factor upon which the jury could recommend a sentence of death should the defendant be convicted of first-degree murder. The case therefore lost its capital nature. We have previously held that when a capital case loses its capital nature, the defendant is not entitled to fourteen peremptory challenges. *State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853; *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380. The defendant, however, argues that *Leonard* and *Barbour* are not controlling because the murders in those cases were committed during a period when North Carolina did not have a valid death penalty statute. Therefore, he argues, the death penalty would not have been applicable to those defendants. That fact, however, is completely irrelevant to the holdings in those

cases to the effect that, when a case loses its capital nature, a defendant is no longer entitled to fourteen peremptory challenges. Since the State announced in open court that it would not seek the death penalty against the defendant, the case lost its capital nature and the defendant was entitled to only six peremptory challenges. This assignment of error is overruled.

[3] Next, the defendant argues that the trial court erred by denying his motion for a mistrial upon the basis that the prosecution used its peremptory challenges to improperly exclude blacks from the jury.

Initially, we note that although the transcript of the jury voir dire was not made a part of the record before this Court, the following transpired just before the jury was empaneled:

> MR. BASS: Your Honor, I would like to address the court if I could very briefly on a matter that I would like to put into the record.
>
> COURT: All right. Now, I will hear you, Mr. Bass.
>
> MR. BASS: Your Honor, we would like to put a motion in the record at this time for a mistrial because of the automatic exclusion by the State of all black jurors which came up here with the exception of one. We would like to review for the record what transpired. The State used five challenges. The first one was Sandra Jackson. They exercised a peremptory instruction [sic] there. She was juror number ten on the front row in the first group. Let the record show that she was black. The next in the second group was number nine on the front row, Kenneth Stewart, who identified himself as a UNC law student at Chapel Hill. He was black. He was likewise dismissed, excused in [sic] the peremptory instruction [sic]. And the next group that come on [sic], we had juror number three on the back, Shannon Keck. I would like the record to show that likewise she was black. She was a student at Enloe High School. The Court in its discretion excused that juror and upon motion of the State.
>
> The next juror the Court excused for cause was Michael Vann, juror number eight, sitting on the front row who identified himself as an IBM employee. He was black. He identified himself as a Jehovah's Witness and he was excused for

cause without inquiring as to how his views as a member of that church may conflict with the law. Let the record show that he was likewise black.

The next group that came on was juror number twelve, Iris Riddick, who was peremptorily challenged by the State without any reason given for it other than they excused her. Like the record to show that she was black.

The next one was Margaret Hunter, juror number eight, on the front row, peremptory challenge was used. Like the record to reflect that Mrs. Hunter was black. The only other peremptory challenge used by the State in their five was a student out at NC State University. And, Your Honor, we believe that the systematic exclusion of blacks on the jury, the defendant being black—we are left with one black juror up there—is a denial of this man's right to a fair trial under the Constitution and ask the Court to declare a mistrial in the case.

MR. STEPHENS: Your Honor, I would note for the record that the defendant systematically excluded whites from the jury. So he took no blacks at all and took all of his peremptory challenges [to] white[s] as members of the jury.

The record should also reflect certainly the State did not intentionally eliminate systematically blacks from this jury for that, for any purpose and did not systematically eliminate black jurors. There is one black juror sitting on the jury now. The State also challenged peremptorily one white juror. There were sufficient reasons to counsel for the State concerning the background, family situation of each of the jurors that we challenged to satisfy us that that was not the type of juror we were looking for. For that reason and no other reason. Not based on any rational [sic] background or makeup. We peremptorily challenged the jurors that we did. Therefore, I do not think the record will bear out the State having systematically excluded blacks. Also, eliminated whites, a white person as well and left sitting on the jury one black person. That they, that blacks were systematically excluded, certianly [sic] did not intend to.

MS. BYERS: Your Honor, we would like for the record to show that the final jury of twelve, as selected, includes one black.

COURT: All right. Anything else, gentlemen?

MR. STEPHENS: No, sir.

COURT: I will deny the motion of the defendant. Sheriff, we will take a recess until 2:30.

[Def.'s Exception No. 2]

[RECESSED FOR LUNCH.]

P. M. SESSION. COURT: Madam Clerk, if you would, empanel the jury.

[JURY DULY EMPANELED.]

The record thus indicates that the jury finally empaneled consisted of eleven whites and one black and that the State peremptorily excused four prospective black jurors. The record further indicates that the jury which convicted the defendant included one black juror. Also, the prosecution peremptorily excused one prospective white juror. In response to the defendant's motion, the prosecution stated that the prospective black jurors were not challenged on the basis of their race, but were excluded because it was felt that their backgrounds and family situations made them "not the type of juror we were looking for." The prosecutor did not elaborate further. The trial court denied the defendant's motion for a mistrial.

The historic starting point for a discussion of this issue had been *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, *reh'g denied*, 381 U.S. 921, 14 L.Ed. 2d 442 (1965). In *Swain*, the United States Supreme Court held that, in light of the purposes and functions of peremptory challenges, the Constitution did not mandate an examination of the prosecutor's reasons for exercising the challenges in any particular case. Instead, the presumption in any given case was that the prosecution utilized its peremptory challenges to obtain a fair and impartial jury. The Supreme Court went on to say that in order for a defendant to prevail on a claim that the prosecutor had unconstitutionally excluded blacks from his jury, he was required to establish that the prosecutor had

engaged in case after case in a pattern of systematic use of peremptory challenges to exclude blacks from the petit jury. This Court consistently followed the *Swain* standard. *E.g.*, *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980); *State v. Shaw*, 284 N.C. 366, 200 S.E. 2d 585 (1973). The defendant did not meet the *Swain* standard.

However, in the recent case of *Batson v. Kentucky*, 476 U.S. ---, 90 L.Ed. 2d 69 (1986), the United States Supreme Court overruled the evidentiary standard established in *Swain*. In *Batson*, the petitioner, a black man, was tried on charges of burglary and receipt of stolen goods. During the jury voir dire, the prosecutor used peremptory challenges to strike all four blacks on the venire, and a jury composed only of whites was selected. The defendant made a motion to discharge the jury before it was sworn on the basis that the prosecutor's removal of the black veniremen violated his rights under the sixth and fourteenth amendments to a jury drawn from a cross-section of the community, and under the fourteenth amendment to equal protection of the laws. The trial judge denied the motion. The petitioner was subsequently convicted and the Supreme Court of Kentucky affirmed the conviction. *Id.* at ---, 90 L.Ed. 2d at 78-79.

In *Batson*, the Supreme Court reaffirmed the principle, recognized in *Swain*, that the equal protection clause is violated by the purposeful or deliberate exclusion of blacks from jury participation. However, the Court went on to reject the *Swain* requirement that a defendant show a history of systematic use of peremptory challenges to exclude blacks in order to prevail on an equal protection challenge. The Court held that a defendant could establish a *prima facie* case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at his trial. *Id.* at ---, 90 L.Ed. 2d at 87. The Court stated that in order to establish such a *prima facie* case, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that lends itself to potential abuse; and third, the defendant must show that these facts and any other relevant

circumstances (e.g., a pattern of strikes against black jurors in a particular voir dire, questions and statements by the prosecutor during voir dire, etc.) raise an inference that the prosecutor used peremptory challenges to exclude prospective jurors on the basis of race. *Id.* Once the defendant has made a *prima facie* showing, the State has the burden to come forward with a neutral explanation for challenging the black jurors. The explanation need not rise to the level justifying excusal for cause. However, the prosecutor's mere denial that he had a discriminatory motive is insufficient to rebut a *prima facie* showing of purposeful discrimination. *Id.* Because the trial court had not required the prosecutor to explain his reasons for exercising the peremptory challenges, the Supreme Court remanded the case to the trial court for a determination of whether the facts established a *prima facie* showing of purposeful discrimination and, if so, whether the prosecution could articulate a racially neutral explanation for the action. *Id.* at ---, 90 L.Ed. 2d at 90.

In his opinion for the Court, Justice Powell did not, however, decide the question of whether *Batson* would apply retroactively. Justices White and O'Connor, in concurring opinions, and Chief Justice Burger, in a dissenting opinion joined by Justice Rehnquist, expressed the view that the decision should not apply retroactively. After careful consideration, we believe that previous decisions by the Supreme Court lead to the conclusion that *Batson* is not to be accorded retroactive effect, even as to cases, such as this, which were not finally determined on direct appeal as of the date of the filing of the opinion in *Batson*.

Any analysis of this issue must begin with *Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed. 2d 601 (1965). In that case, the Supreme Court was faced with the question of whether the ruling in *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081 (1961) (requiring the exclusion in state trials of evidence seized in violation of the fourth amendment) applied retroactively to the state court convictions which had become final prior to the rendering of the decision.[1] After a review of previous decisions, the Court concluded

1. The Court defined "final" as meaning that the judgment of conviction had been rendered, the availability of appeal exhausted, and the time for filing a petition for certiorari had elapsed.

that the retroactive application of any particular case was neither required nor prohibited by the Constitution. Instead, it was necessary to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation" to determine whether retroactive application was called for. *Linkletter v. Walker*, 381 U.S. at 629, 14 L.Ed. 2d at 608. The Court held that retroactive application of *Mapp* in *habeas corpus* cases was not mandated. In reaching this conclusion, the Court stated that since police misconduct had already occurred, the goal of *Mapp* to deter such misconduct would not be furthered by retroactive application of the ruling. The Court also noted that retroactive application of *Mapp* would place a severe strain on the administration of justice, i.e., the nation's judicial machinery.

In *Johnson v. New Jersey*, 384 U.S. 719, 16 L.Ed. 2d 882, *reh'g denied*, 385 U.S. 890, 17 L.Ed. 2d 121 (1966), the Supreme Court denied retroactive application to *Escobedo v. Illinois*, 378 U.S. 478, 12 L.Ed. 2d 977 (1964), and *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966). The Court emphasized that the argument in favor of retroactive application was stronger where the new ruling "affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent.' " *Johnson v. New Jersey*, 384 U.S. at 727-28, 16 L.Ed. 2d at 889 (quoting *Linkletter v. Walker*, 381 U.S. at 639, 14 L.Ed. 2d at 614, and *Tehan v. Shott*, 382 U.S. 406, 416, 15 L.Ed. 2d 453, 460 (1966)). The Court ruled that because of the fact that law enforcement agencies had relied on cases prior to *Escobedo* and *Miranda* and in light of the disruption to the administration of justice that retroactive application would cause, the decisions would not apply retroactively. The Court also found that there was no valid justification for distinguishing, for purposes of retroactive application of these cases, convictions which had become final and those still pending on direct appeal at the time the decisions were announced. Consequently, *Escobedo*, and *Miranda* were held to be applicable only to trials begun after the date the decisions were rendered.

In *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967), the Supreme Court expressly stated for the first time that, in determining whether to give a ruling retroactive effect, three factors were to be considered and weighed: (1) the purpose to be served

by the new rule, (2) the extent of the reliance by law enforcement officials on the prior rule, and (3) the effect that a retroactive application of the rule would have on the administration of justice. Again, the Court noted that the extent to which a new rule enhanced the reliability and integrity of the fact-finding process at trial was an important consideration under the first factor. Furthermore, the Court again said that with regard to the retroactive application of the ruling in question—the right to counsel at post-indictment lineups established in *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149 (1967)—it could perceive of no justification for distinguishing between convictions which had become final and those which were at various stages of trial and direct review when the ruling was announced. After applying the three-prong test, the Court concluded that the ruling was not to be given retroactive effect.

In *Desist v. United States*, 394 U.S. 244, 22 L.Ed. 2d 248 (1969), the Court was required to consider whether *Katz v. United States*, 389 U.S. 347, 19 L.Ed. 2d 576 (1967) (which held that the fourth amendment encompassed nontrespassory electronic surveillance), should be applicable retroactively. At the outset, the Court seemed to accept the proposition that the decision to not apply a ruling retroactively can only be justified where the ruling is a "clear break with the past" as opposed to being a "foreshadowed" decision. *Desist v. United States*, 394 U.S. at 247-48, 22 L.Ed. 2d at 254. The Court went on to say that the most important of the three *Stovall* criteria was the purpose to be served by the rule. In discussing the second *Stovall* factor—the extent of reliance of law enforcement officials on the prior rule—the Court stated that its periodic restatements of prior case law rejecting application of the fourth amendment to such situations fully justified reliance by the police and courts of their continuing validity. The Court ultimately held that *Katz* was not to be applied retroactively.

Over the next decade, the Supreme Court applied the *Stovall* test in a number of cases involving the question of retroactive application of a new constitutional criminal procedure ruling. *See* 1 W. LaFave and J. Israel, *Criminal Procedure* § 2.9 (1984). Some of the decisions held that prior rulings were to be accorded retroactive effect. *E.g.*, *Brown v. Louisiana*, 447 U.S. 323, 65 L.Ed. 2d 159 (1980) (made retroactive the decision in *Burch v. Louisiana*, 441

U.S. 130, 60 L.Ed. 2d 96 (1979), which held that conviction of a non-petty criminal offense by a non-unanimous six-person jury violates the defendant's sixth and fourteenth amendment right to trial by jury). Other decisions held that previous rulings were not retroactive. *E.g., Gosa v. Mayden*, 413 U.S. 665, 37 L.Ed. 2d 873 (1973) (held nonretroactive the ruling in *O'Callahan v. Parker*, 395 U.S. 258, 23 L.Ed. 2d 291 (1969), which held that military personnel are entitled to a civilian trial for charged offenses that are not service related); *Adams v. Illinois*, 405 U.S. 278, 31 L.Ed. 2d 202 (1972) (held nonretroactive the ruling in *Coleman v. Alabama*, 399 U.S. 1, 26 L.Ed. 2d 387 (1970), that an accused is entitled to assistance of counsel at a preliminary hearing).

The case of *United States v. Johnson*, 457 U.S. 537, 73 L.Ed. 2d 202 (1982), marked a new chapter in this area. *Johnson* involved the question of whether the ruling in *Payton v. New York*, 445 U.S. 573, 63 L.Ed. 2d 639 (1980) (holding that the fourth amendment prohibits the police from making a warrantless, nonconsensual entry into a suspect's home to make a routine felony arrest), was to be applied retroactively to a case which was on direct appeal at the time *Payton* was decided. After reviewing the history of *Linkletter* and its progeny, noting the apparent inconsistent results engendered by application of the *Stovall* criteria and calling attention to the fact that several members of the Court had indicated that all defendants whose cases were on direct appeal at the time of a law-changing decision should be entitled to invoke the new rule, the Court announced that " '[r]etroactivity must be rethought.' " *United States v. Johnson*, 457 U.S. at 548, 73 L.Ed. 2d at 213 (quoting *Desist v. United States*, 394 U.S. at 258, 22 L.Ed. 2d at 260 (Harlan, J., dissenting)).

The Court stated that an analysis of post-*Linkletter* cases established that in three narrow categories of cases, the answer to the retroactivity question was not determined by application of the *Stovall* criteria, but was instead decided through the application of a "threshold test." First, when a decision merely applied settled precedents to new and different factual situations, the rule will be retroactive. Second, when the Court had expressly declared a new ruling to be a "clear break with the past," it would not be retroactive. The Court said that a "clear break" occurred in three circumstances: (1) when a decision explicitly overrules a past precedent of the Court, (2) when a decision disap-

proves a practice that the Court had arguably sanctioned in previous cases, and (3) when a decision overturns a longstanding and widespread practice to which the Court had not spoken, but which a near-unanimous body of lower court authority had expressly approved. Third, full retroactivity was considered inherent in a ruling that a trial court lacked the basic authority to convict or punish a defendant for the charged offense.

The Court found that *Payton* did not fall into any of these three categories. Without applying the *Stovall* criteria, the Court held that a decision by the Court construing the fourth amendment is to be retroactively applied to all convictions that were not yet final at the time the decision was rendered. The Court went on to say that the holding would not affect those cases which would be clearly controlled by existing retroactivity precedents (e.g., "clear break" cases), that it would not address the question of the retroactive reach of fourth amendment decisions to those cases that may raise fourth amendment issues on collateral attack, and that it would express no view on the retroactive application of decisions construing any constitutional provision other than the fourth amendment.

However, two years later, in *Solem v. Stumes*, 465 U.S. 638, 79 L.Ed. 2d 579 (1984), the Court returned to application of the *Stovall* criteria in determining the retroactivity of a non-fourth amendment claim. In *Stumes*, the Court was faced with the question of whether to apply the ruling in *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981) (which held that once a suspect invoked the right to counsel, any subsequent conversation must be initiated by him), retroactively to *habeas corpus* cases. The opinion's primary discussion of *Johnson* was contained in a footnote where it was said that in that case, "a majority of the Court has recently adopted a slightly different approach in the Fourth Amendment area." *Solem v. Stumes*, 465 U.S. at 643, 79 L.Ed. 2d at 587. However, the Court went on to say that the *Johnson* approach was inapplicable to this case since it was controlled by prior precedent, arose on collateral review, and did not involve the fourth amendment.

While not expressly utilizing the *Johnson* approach, the *Stumes* decision did recognize the importance that attaches to "clear break" cases as alluded to in *Johnson*. The Court stated

that when a "clear break"—as defined in *Johnson*—occurs, the reliance and effect prongs of the *Stovall* test " 'have virtually compelled a finding of nonretroactivity.' " *Solem v. Stumes*, 465 U.S. at 646, 79 L.Ed. 2d at 589 (quoting *United States v. Johnson*, 457 U.S. at 549-50, 73 L.Ed. 2d at 214). The Court concluded that although *Edwards* did establish a new rule, it was not a "clear break" case. After applying the *Stovall* criteria, the Court concluded that *Edwards* should not be applied retroactively to *habeas corpus* proceedings.

In *Shea v. Louisiana*, 470 U.S. 51, 84 L.Ed. 2d 38 (1985), the Supreme Court held that the ruling in *Edwards* was to apply retroactively to cases pending on direct appeal in state court at the time the opinion was rendered. In reaching this conclusion, the Court reviewed the decisions in *Johnson* and *Stumes*. The Court noted that in *Johnson*, it had expressly declined to address the implications of the holding in situations other than fourth amendment issues raised on direct review. However, the Court stated that it saw no reason to reach a result in *Shea* different from that in *Johnson*, saying, "There is nothing about a Fourth Amendment rule that suggests that in this context it should be given greater retroactive effect than a Fifth Amendment rule." *Shea v. Louisiana*, 470 U.S. at 59, 84 L.Ed. 2d at 46. In response to the argument that it is unfair to treat litigants differently based on whether their claim was brought on direct appeal or was presented on collateral review, the Court stated, "The distinction, however, properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere, the closing must come." *Id.* at 59-60, 84 L.Ed. 2d at 47. Although *Shea* dealt with a fifth amendment ruling, there is nothing in the opinion to suggest that its analysis would not be applicable to other constitutional rulings as well.

In dissent, Justice White argued that the Court was drawing an arbitrary and artificial line for determining the retroactive effect of prior rulings. Furthermore, he argued that the majority was not being consistent, as *Shea*—as well as *Johnson*—left open the possibility that "clear break" rulings would not be retroactive to cases pending on direct review at the time the new decision was rendered. The majority responded to this argument by say-

ing that the question of a different retroactivity rule for "clear break" cases was not raised in *Shea*, as *Stumes* had previously recognized that *Edwards* was not a "clear break" case.

This brief discussion of the issue of the retroactive application of constitutional criminal procedure rulings indicates that the Supreme Court has not been completely consistent in its approach to the question. Indeed, as early as 1971, it had been said that the Court's decisions in this area "became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *Mackey v. United States*, 401 U.S. 667, 676, 28 L.Ed. 2d 404, 411 (1971) (Harlan, J., separate opinion). The recent cases of *Johnson*, *Stumes*, and *Shea* have failed to provide a complete clarification of the issue. *See* 1 W. LaFave and J. Israel, *Criminal Procedure* § 2.9 (1986 Supp.). Specifically, it is now somewhat unclear what standard is to be employed in analyzing whether a ruling is to be applied retroactively. In their treatise on criminal procedure, Professors LaFave and Israel state their opinion as to the current state of the law and the method of analysis which is to be utilized. They feel that if a new ruling is simply a foreshadowed decision which falls in the category of an analogous application of a well-settled constitutional principle or if it is a truly new rule which denies the state's basic authority to try and convict the defendant, the ruling will be accorded full retroactive application. If the ruling does not fall into one of these categories, the stage at which the litigant's case rested at the time of the new ruling must be considered. If the litigant's case was no longer pending on appeal at the time of the new ruling, the Court will employ the *Stovall* criteria to ascertain whether retroactive application is appropriate. If the case was pending on direct review at the time of the new ruling, *Shea* appears to indicate that it will be given full retroactive effect. If the new ruling constitutes a "clear break" case, however, *Johnson* and *Shea* suggest that it will not be applied retroactively even to cases pending on direct review at the time it was rendered. However, it is arguable that if a "clear break" case bears substantially on the truth-finding process, it may be accorded retroactive application. 1 W. LaFave and J. Israel, *Criminal Procedure* § 2.9 (1986 Supp.).

We agree that the mode of analysis suggested by Professors LaFave and Israel appears to reflect the current state of the law in this area as articulated by the Supreme Court in *Johnson*,

Stumes, and *Shea*. Application of this method of analysis clearly shows that *Batson* should not be accorded retroactive application even as to cases, such as this, which were pending on direct review at the time *Batson* was rendered.

Initially, it is readily apparent that *Batson* was not a foreshadowed decision which fell in the category of an analogous application of a well-established constitutional principle. It cannot be said that *Batson* involved the application of settled precedents to a new factual situation. *See United States v. Johnson*, 457 U.S. 537, 73 L.Ed. 2d 202. Also, *Batson* did not reject the state's basic authority to try and convict the defendant for the crime charged. Since *Batson* fell into neither of the two "threshold" categories which would mandate automatic retroactive application, we must proceed to consider the stage at which the defendant's case rested when it was rendered.

Since the defendant's case was pending on direct review at the time *Batson* was rendered, *Johnson* and *Shea* would tend to suggest that the ruling would be applicable to him unless it constituted a "clear break" case. As noted previously, the Supreme Court has said that "clear break" cases occur when a ruling expressly overrules a prior precedent of the Court, disapproves a practice the Court has arguably sanctioned, or overturns a longstanding and widespread practice to which the Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. *United States v. Johnson*, 457 U.S. 537, 73 L.Ed. 2d 202. We believe that *Batson* clearly falls into the first category of "clear break" cases. Although *Batson* reaffirmed the well-established principle recognized in *Swain* that the equal protection clause is violated by the state's purposeful or deliberate exclusion of blacks as jurors, it went on to explicitly reject the *Swain* requirement that a defendant show a history of systematic use of peremptory challenges to exclude blacks in order to prevail on an equal protection challenge. Furthermore, a footnote at the conclusion of the opinion for the Court states, "To the extent that anything in *Swain v. Alabama*, 380 U.S. 202 (1965), is contrary to the principles we articulate today, *that decision is overruled.*" *Batson v. Kentucky*, 476 U.S. at ---, 90 L.Ed. 2d at 90 (emphasis added). We conclude that *Batson* explicitly rejected the prior *Swain* requirement and unequivocally overruled *Swain*. Therefore, *Batson* constitutes a "clear break" case which is normally

not accorded retroactive effect, even as to cases pending on direct appeal at the time of the new ruling. *See United States v. Johnson*, 457 U.S. 537, 73 L.Ed. 2d 202.

However, *Johnson* appears to intimate, and Professors LaFave and Israel suggest, that those "clear break" cases bearing substantially on the truth-finding process may nevertheless be accorded full retroactive application. Assuming, *arguendo*, that this proposition is correct, *Batson* is not such a case. The Court has said that "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.'" *Stovall v. Denno*, 388 U.S. at 298, 18 L.Ed. 2d at 1204 (quoting *Johnson v. New Jersey*, 384 U.S. at 729, 16 L.Ed. 2d at 890). Those rulings which can be said to substantially affect the basic truth-finding process have generally been those which either gave an accused the ability to effectively present his case, *e.g.*, *Arsenault v. Massachusetts*, 393 U.S. 5, 21 L.Ed. 2d 5 (1968) (holding retroactive the ruling in *White v. Maryland*, 373 U.S. 59, 10 L.Ed. 2d 193 (1963), that an accused is entitled to counsel at a preliminary hearing); *McConnell v. Rhay*, 393 U.S. 2, 21 L.Ed. 2d 2 (1968) (holding retroactive the ruling in *Mempa v. Rhay*, 389 U.S. 128, 19 L.Ed. 2d 336 (1967), that counsel must be provided at a hearing concerning the revocation of probation), or those which placed restrictions on the prosecution's ability to present improper evidence against an accused, *e.g.*, *Berger v. California*, 393 U.S. 314, 21 L.Ed. 2d 508 (1969) (holding retroactive the ruling in *Barber v. Page*, 390 U.S. 719, 20 L.Ed. 2d 255 (1968), that the absence of a witness from the jurisdiction did not justify the use at trial of preliminary hearing testimony unless the state had made a good faith effort to secure the witness' presence); *Roberts v. Russell*, 392 U.S. 293, 20 L.Ed. 2d 1100, *reh'g denied*, 393 U.S. 899, 21 L.Ed. 2d 191 (1968) (holding retroactive the ruling in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968), which restricted the use of a confession by a codefendant which implicated the accused). We conclude that while the ruling in *Batson* may tend to incidentally avoid unfairness in the trial, it is not one which bears substantially on the truth-finding process. We note that in *De Stefano v. Woods*, 392 U.S. 631, 20 L.Ed. 2d 1308 (1968), the Supreme Court held that the ruling in *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 491 (1968) (that the fourteenth amendment guarantees a right to a jury trial in some state court

cases), was not to be applied retroactively. Also, the ruling in *Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed. 2d 690 (1975) (that exclusion of women from jury venires deprives a state criminal defendant of his constitutional right to trial by an impartial jury drawn from a fair cross-section of the community), was held to be nonretroactive in *Daniel v. Louisiana*, 420 U.S. 31, 42 L.Ed. 2d 790 (1975). If the Supreme Court did not feel that action taken to enforce the right to trial by jury and to prevent the exclusion of women from jury venires did not bear substantially on the truth-finding process, we think it can be safely said that the ruling in *Batson* does not do so either.

In summary, we hold that the ruling in *Batson* is not to be applied retroactively. The ruling will only be applicable to those cases where the jury selection took place after the *Batson* decision was rendered. Since the jury selection in this case took place before *Batson* was decided, we overrule the defendant's argument that the prosecution violated his equal protection rights through the use of its peremptory challenges.

[4] The defendant also contends that the prosecution's use of peremptory challenges violated his sixth and fourteenth amendment right to have the jury drawn from a fair cross-section of the community. The United States Supreme Court has recently held, in the context of a "death qualification" case, that the sixth amendment fair cross-section requirement applies only to the pool from which the petit jurors are selected and imposes no requirement that the petit jurors actually chosen must mirror the community and reflect the various distinctive groups in the population.

> The Eighth Circuit ruled that "death qualification" violated McCree's right under the Sixth Amendment . . . to a jury selected from a representative cross-section of the community. But we do not believe that the fair cross-section requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. . . . The limited scope of the fair cross-section requirement is a direct and in-

> evitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury . . . . *Pope v. United States,* 372 F. 2d 710, 725 (CA8 1967) (Blackmun, J.) ("The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn"), vacated on other grounds, 392 U.S. 651 (1968). We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension.

Lockhart v. McCree, 476 U.S. 162, ---, 90 L.Ed. 2d 137, 147-48 (1986) (citations omitted); *Taylor v. Louisiana,* 419 U.S. 522, 42 L.Ed. 2d 690 (1975). *See also State v. Elkerson,* 304 N.C. 658, 285 S.E. 2d 784 (1982); *State v. Avery,* 299 N.C. 126, 261 S.E. 2d 803 (1980). The defendant has presented no evidence, nor does he contend, that the make-up of the venire panel from which the petit jury was selected violated the fair cross-section requirement. This assignment of error is overruled.

Finally, the defendant argues that the trial court erred by failing to grant his motion to dismiss the charge of first-degree murder. He claims that the State failed to present sufficient evidence of premeditation and deliberation to justify the submission of this charge to the jury. We do not agree.

Before the issue of a defendant's guilt may be submitted to the jury, the trial court must be satisfied that substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator. *State v. 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 (1985); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114.

First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); N.C.G.S. § 14-17 (1981 and Cum. Supp. 1985). 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 has 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).

[5] We conclude in the present case that there was substantial evidence that the killing was premeditated and deliberate and that the trial court did not err in submitting to the jury the question of defendant's guilt of first-degree murder based on premeditation and deliberation. There was no evidence that Mrs. Kennedy in any way provoked the defendant into attacking her. Following the killing, the defendant callously remarked to Dickey that "somebody [had] messed her up bad." Furthermore, in his statement, the defendant admitted that he had attempted to cover up his involvement in the crime by placing the steel file in the knife rack and by disposing of the murder weapon. The nature of the wound also tends to show that the killing was premeditated and deliberate, as the knife was thrust into Mrs. Kennedy's back with such force that it went completely through her body.

The defendant appears to argue that because his confession was introduced into evidence, the prosecution was bound by that portion of the statement tending to show that the killing occurred in a moment of panic and was not premeditated and deliberate. An unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time, unless such anger or emotion was such as to disturb the faculties and reason. *State v. Whitley*, 311 N.C. 656, 319 S.E. 2d 584 (1984); *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768. There was absolutely no evidence that the defendant's mental faculties were impaired to this extent.

Furthermore, it is well established that the State is not bound by the exculpatory portions of a confession which it introduces if other evidence is presented that tends to rebut or contradict the exculpatory portions of the statement. *E.g.*, *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928, 54 L.Ed. 2d 288 (1977). The defendant implicitly asserts that the stabbing immediately followed the first scream. The State presented evidence which tended to show that as much as thirty to forty-five seconds may have elapsed between Kennedy's initial scream and her final scream. In addition, the physical layout of the crime scene would tend to rebut the notion that the stabbing occurred immediately after the initial scream. Even under defendant's version of the incident, in order to stab the victim, the

defendant would have had to get off the bed; go to the night table, which was some distance from the bed; pick up the knife; and then return to the bed and stab the victim. This would tend to show that some period of time elapsed from the initial scream until the fatal wound was inflicted. The jury could have inferred from the evidence, taken in the light most favorable to the State, that the fatal stab was not inflicted until the time of the second scream, and such inference would support a finding that the killing was premeditated and deliberate. This assignment of error is overruled.

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

No error.

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

Justice EXUM dissenting in part.

For the reasons stated in my dissenting opinion, in which Chief Justice Branch and Justice Frye joined, on the first appeal of this issue, I dissent from that portion of the majority opinion which concludes defendant's confession was admissible. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983) (Exum, J., dissenting). I join in all other aspects of the Court's opinion.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND GLENDALE WATER, INC. v. THE PUBLIC STAFF, NORTH CAROLINA UTILITIES COMMISSION AND LACY H. THORNBURG, ATTORNEY GENERAL

No. 536A85

(Filed 3 June 1986)

1. **Utilities Commission §§ 31, 57— water company—findings sufficient for appellate review**

The Utilities Commission's findings in a water utility case were sufficient to allow appellate review where the Commission failed to find that the interim rate of return of 14.56% was just and reasonable but found that that rate as the utility's permanent rate was appropriate; it was apparent that this rate was viewed as only appropriate because the Commission would have authorized a 15.42% rate of return had the utility's service been adequate; that determination was supported by competent and material evidence; there was evidence that the utility would continue to survive on the interim rate and would make a small profit on the 15.42% rate of return; the revenue increase granted was necessary not only to keep the utility financially afloat, but also to implement ordered improvements; the determination to penalize the utility was entirely proper; and the reasoning for finding the interim rate only appropriate was clearly and specifically set out in the order. N.C.G.S. § 62-94, N.C.G.S. § 62-79(a), N.C.G.S. § 62-131.

2. **Utilities Commission § 38— water company—operating expenses—legal fees for contesting fine—inclusion improper**

The Utilities Commission in a water utility case improperly included legal fees in the utility's operating expenses where the fees were incurred contesting a penalty assessed for failure to notify the Division of Health Services and affected customers of maximum microbiological contaminant level violations. These legal fees were not incurred as an expense associated with providing water, but were the result of failure to provide adequate service. N.C.G.S. 62-94(b)(4).

3. **Utilities Commission § 27— water company—annual operating revenues and expenses—partial use of post-test year data—no error**

The Utilities Commission did not improperly apply N.C.G.S. § 62-133(c) in calculating a water utility's annual operating revenues and expenses by refusing to adjust its figure for revenue based on evidence of post-test year growth although it increased the utility's operating expenses based on post-test year salaries. The Commission's order reflects its consideration of all pertinent data and the increase in operating expenses for salaries did not require any offsetting change in revenue because there was no correlation between the use of post-test year salary expenses and the utility's increase in customers.

4. **Utilities Commission § 19— water company—approval of transfer of stock—no error**

The Utilities Commission's approval of the transfer of 52% of the stock in a water utility to the son-in-law of the present owner was supported by the

evidence where the son-in-law had been elected president and general manager of the utility; he was a licensed C and B class well operator and a licensed electrician with a number of years experience in operating water systems and related businesses; he had been the utility's only licensed operator from April to October 1984; the son-in-law had indicated to the Commission his decision to improve the company's service and his willingness to invest his own time, energy, and money in the company, including assumption of corporate debts; the father-in-law was not currently involved in the management of the company; the son-in-law testified that he would not allow his personal relationship with his father-in-law to interfere with the proper management of the company; and, in light of the woefully inadequate service under the father-in-law, it could not be said that the Commission's determination that the company had a better chance of making improvements under the son-in-law was arbitrary and capricious.

5. **Utilities Commission § 35— water company truck—two-thirds of costs excluded from rate base—supported by evidence**

The Utilities Commission's conclusion that two-thirds of a water utility's investment in a 3/4-ton truck should be excluded from the rate base was supported by evidence that the utility did not perform major repairs to its water systems which required the use of the heavier truck but contracted those repairs to a nonregulated, affiliated company, and the president and general manager of the company testified that two lighter trucks were in use and were adequate.

6. **Utilities Commission § 38— water company—cost of unsuccessful expansion attempt excluded—no error**

The Utilities Commission's decision to exclude from a water utility's cost of service expenditures related to its unsuccessful attempt to expand its service area was supported by substantial evidence and was neither arbitrary nor capricious.

Justice MARTIN dissenting in part and concurring in part.

APPEAL by intervenors, Lacy H. Thornburg, Attorney General, and the Public Staff, North Carolina Utilities Commission, pursuant to N.C.G.S. § 7A-29(b) from the final order of the Utilities Commission entered 12 April 1985 in Docket No. W-691, Sub. 25. Intervenor-appellants' motion to bypass the Court of Appeals with respect to Docket No. W-691, Subs. 26 and 27 was allowed on 16 August 1985. The applicant, Glendale Water, Inc., has cross-appealed.

Glendale Water, Inc. (hereinafter Glendale) is a duly franchised public utility which provides water service to twenty-one[1]

1. This figure includes the Woodbrook subdivision which was included in Glendale's service area first by a temporary order issued on 18 October 1984 and later by the Commission's 12 April 1985 final order.

subdivisions in Wake County. On 6 August 1984, it filed an application with the North Carolina Utilities Commission seeking authority to increase its rates in all service areas. (W-691, Sub. 25). Glendale also filed a verified motion for emergency relief requesting that the proposed rates be put into effect immediately as interim rates subject to refund if not approved by the Commission. On 16 August 1984, Glendale applied for a Certificate of Public Convenience and Necessity to furnish water utility service in Woodbrook Subdivision in Wake County and for approval of rates. (W-691, Sub. 26). Glendale later filed an application on 26 November 1984 for permission to sell and transfer 52% of its stock owned by John G. Blankenship to E. Ray Vernon, Jr. (W-691, Sub. 27).

The Commission issued an order finding that Glendale's application in W-691, Sub. 25, constituted a general rate case, that the proposed new rates be suspended pending investigation, that the matter be scheduled for public hearing, that Glendale's suggested interim rates be approved, and that Glendale be restricted from applying for any new franchises until further notice. The Commission consolidated the three dockets for hearing and decision and the matter was heard by a Commission panel on 4-5 December 1984 and 14-16 January 1985. The Attorney General and the Public Staff intervened.

At the consolidated hearings, approximately forty-three Glendale customers representing nine of the subdivisions served testified as public witnesses. These witnesses, expressing opposition to the proposed rate increase, described their past and present problems with water quality and service, including water outages, water discoloration, fixture staining, pressure problems, strong chlorine odor, no chlorine in the water, poorly maintained electrical wiring, inconsistent billing practices, inaccurate billing, slow response to customer complaints, and late "boil notices" to warn of contaminated water.

In addition, Don Williams, an Environmental Protection Technician with the North Carolina Division of Health Services (DHS), and Andy Lee, a Utilities Engineer with the Public Staff's Water Division, testified concerning Glendale's extensive service and water quality problems. Mr. Williams stated that DHS had issued "boil notices" to customers in six of Glendale's service subdivi-

sions due to the detection of bacteria contamination. Williams indicated that had Glendale chlorinated the water as required by DHS regulations, the contamination could most likely have been avoided. Public Staff Engineer Lee testified that Glendale either had no chlorination equipment or inoperative chlorination equipment in fifteen of the subdivisions it served. Lee further stated that during the test year, a twelve-month period ending on 31 December 1983, Glendale had been assessed a $13,000 penalty by DHS for failing to notify the agency and the affected customers of maximum microbiological contaminant violations. After the test year, but prior to the hearings, Glendale was given two additional administrative penalties.

The testimony offered by the public witnesses, Mr. Williams and Mr. Lee, was not contested by Glendale. E. Ray Vernon, current Glendale president seeking to purchase 52% of the company's stock from John Blankenship, testified that he was aware of the existing water quality and service problems. However, he outlined the corrective measures he would implement if the Commission approved the stock transfer.

With regard to the rate increase, Glendale and the Public Staff presented evidence to support their respective contentions as to what increase, if any, the Commission should grant Glendale. By its application, Glendale requested an increase in its annual revenues of $52,511. In granting Glendale's petition for emergency relief, the Commission had authorized an interim rate increase in annual revenues of $34,883, a 14.56% rate of return. The Public Staff recommended that due to Glendale's grossly inadequate service no increase in revenues was justified.

The Commission, in its 12 April 1985 order, found and concluded that if Glendale's service had been adequate, it would have been entitled to an increase of $36,208 on the basis that a 15.42% rate of return on operating expenses would be fair and reasonable to both the company and its customers. However, in light of Glendale's inadequate service, the Commission concluded that the interim rate of return, previously imposed, constituted the appropriate increase to which Glendale was entitled. In effect, Glendale was penalized by the Commission $1,325 in annual revenues for its poor water service.

Johnson, Gamble, Hearn & Vinegar, by M. Blen Gee, Jr., attorneys for plaintiff-appellee Glendale Water, Inc.

Public Staff, Robert P. Gruber, Executive Director, by Paul L. Lassiter and Lorinzo L. Joyner, Staff Attorneys for defendant-appellant Public Staff.

Lacy H. Thornburg, Attorney General, by Angeline M. Maletto, Associate Attorney, for defendant-appellant Lacy H. Thornburg, Attorney General.

BRANCH, Chief Justice.

The first assignment of error presented by the Attorney General and the Public Staff states that the Commission erred in granting Glendale a $34,883 annual increase in revenues when it found as a fact that Glendale has failed to provide adequate water service. The Commission's order contains these findings in pertinent part:

> 6. Under present rates, the Applicant's annualized level of operating revenue is $111,348. Under the Applicant's proposed rates, the annualized level of operating revenue would be $163,859. Under the Commission's approved rates, the annualized level of operating revenue is $146,231.
>
> . . . .
>
> 8. The reasonable level of test year operating revenue deductions for the Company after accounting, pro forma, and end-of-period adjustments is $123,192.
>
> 9. The operating ratio methodology is appropriate for fixing rates in this proceeding as the Company's level of original cost rate base is lower than its level of operating revenue deductions under present rates.
>
> 10. Under present rates after accounting, pro forma, and end-of-period adjustments, the Applicant will experience a negative 9.97% rate of return on operating expenses requiring a return.
>
> 11. Under the approved rates, after accounting, pro forma, and end-of-period adjustments, the Applicant will experience a 14.56% rate of return on operating expenses

> requiring a return. The interim rates which became effective on September 10, 1984, are appropriate and hereby approved.

The order also contains these findings concerning Glendale's inadequate water quality and service:

> 14. The Applicant has been required to issue "Boil Notices" for some of its systems due to bacteria contamination.
>
> 15. The Applicant has not provided adequate water utility service to its customers as it has failed to maintain continuous disinfection (chlorination) of drinking water on its community water systems to safeguard public health as required by G.S. 130A-311.
>
> 16. The Applicant has been assessed three administrative penalties within the past 15 months by the North Carolina Department of Human Resources Division of Health Services for violation of rules and regulations concerning the operation of its community water systems.
>
> 17. The Applicant has not provided adequate water utility service to customers residing in A Country Place. These customers have experienced continual problems of discolored water, sediments in the water, low water pressure, staining of plumbing fixtures and appliances, water outages, improper chlorination of the water, unsafe exposed electrical wiring at the well house, and billing irregularities.
>
> 18. The Applicant has not provided adequate water utility service to customers residing in Glendale, Burnside, Chari Heights, Belmont, and Rollingwood subdivisions. These customers have experienced continual problems of discolored water, sediment in the water, low water pressure, staining of plumbing fixtures and appliances, improper chlorination of the water, bacteria contamination of the water, and billing irregularities.
>
> 19. The Applicant has failed to provide adequate water utility service in Woodscreek Subdivision. Woodscreek residents have experienced prolonged outages, low pressure problems, residue and staining problems, and contaminated water.

20. The Applicant has failed to provided adequate water utility service to the customers residing in Lynnhaven, Crowsdale, Englewood, Orchard Knolls, and Surry Point subdivisions. These customers have experienced continual problems of discolored water, low pressure, air in lines, staining of plumbing fixtures, and billing irregularities.

21. The Applicant has failed to accurately read its customers' meters and render correct bills on a consistent basis.

22. The Applicant has failed to maintain good customer relations with its customers.

23. There is a need for the Applicant to make substantial improvements in its accounting procedures, including the setting up of an on-site set of accounting records.

In a later section of the order, entitled "Evidence and Conclusions for Findings of Fact 9, 10, 11," the Commission provides as follows:

The evidence supporting this finding of fact is included in the affidavit of Public Staff witness Bowerman and the testimony of Company witness Vernon. Witness Bowerman states that because the Company's rate base is small in relation to its operating expenses, the operating ratio method provides a more reasonable level of revenue.

In the absence of any evidence to the contrary and based upon the Commission's determination of original cost rate base and operating revenue deductions, as hereinafter shown, the Commission concludes that the operating ratio method is the proper procedure to be used for the determination of the revenue requirement in the proceeding.

Witness Bowerman recommended that Glendale should be granted a 15.42% margin on expenses which relates to an operating ratio of 91.70% (including taxes and interest) or 86.64% (excluding taxes and interest). However, the Public Staff recommends that the Company not be given any revenue increase at this time due to inadequacy of service and deficiency in accounting procedures. The Company agreed that the 15.42% margin in operating revenue deductions recommended by the Public Staff would generate an adequate rate of return.

[The Commission concludes that a 15.42% rate of return on operating expenses requiring a return would be fair and reasonable to both the Company and its customers.

(Based upon a 15.42% rate of return, the Commission finds that an annual revenue increase of $36,208 over present rates is appropriate.

However, the Company's interim rates currently in effect will yield an annual revenue increase of $34,883 over present rates and according to witness Vernon the Company will survive if it is granted the interim rates now in effect. Therefore in consideration of the Company's inadequate service, the Commission concludes that the interim rates, which became effective on September 10, 1984, are appropriate for use in this proceeding.)

These rates produce a 14.56% rate of return on operating expenses requiring a return.]

The Commission then includes two schedules summarizing the gross revenues and the rate of return the Company should be able to achieve based on other determinations and calculations within the order.

The Attorney General and the Public Staff contest the Commission's order granting Glendale a rate increase on three grounds. First, they contend that the Commission's finding that had Glendale's water service been adequate a $36,208 annual increase in revenues would have been appropriate is not supported by competent, material, and substantial evidence. Secondly, they argue that the Commission's imposition of the interim rate as a penalty for Glendale's inadequate service is arbitrary and capricious. They assert that in light of the Commission's extensive findings, reflecting the overwhelming and uncontradicted evidence of Glendale's inadequate service, the penalty of $1,325, the difference between $36,208, the increase that would have been granted, and $34,883, the increase under the interim rate, is insufficient. Thirdly, the Attorney General and the Public Staff contend that the Commission failed to make the necessary findings that the interim rate constituted a "just and reasonable" increase and that the $1,325 penalty was adequate under the circumstances. Essentially, these parties argue that the Commission

erred in granting the $34,883 increase and erred in failing to make specific findings that would allow a court to properly review its decision.

[1] The scope of our review of an order of the Utilities Commission is clearly provided in N.C.G.S. § 62-94. We are expressly authorized to affirm or reverse the decision of the Commission, or remand the case for further proceedings, if the Commission's findings or conclusions are, *inter alia:*

(4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

N.C.G.S. § 62-94(b)(4), (5), (6) (1982). In accordance with this limited right of review, all findings of fact made by the Commission, which are supported by competent, material and substantial evidence, are conclusive. The authority to determine the adequacy of the utility's service and the rates to be charged lies with the Commission and a reviewing court may not modify or reverse its determination merely because the court would have reached a different finding based on the evidence. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). In order to enable the court on appeal to determine the controverted questions presented in the proceedings, N.C.G.S. § 62-79(a) requires that all final orders of the Commission contain "[f]indings and conclusions and the reasons or bases therefor upon all material issues of fact. . . ." The failure to include all the necessary findings of fact is an error of law and a basis for remand upon N.C.G.S. § 62-94(b)(4) because it frustrates appellate review. *State ex rel. Utilities Comm. v. Conservation Council,* 66 N.C. App. 456, 311 S.E. 2d 617, *aff'd* in part and *rev'd* in part on other grounds, 312 N.C. 59, 320 S.E. 2d 679 (1984). *See also Utilities Commission v. Membership Corporation,* 260 N.C. 59, 131 S.E. 2d 865 (1963). We disagree with the Attorney General and the Public Staff that the Commission has failed to make sufficient findings of fact to allow us to adequately review its decision.

First, we acknowledge that the Commission technically failed to find that the interim rate of return of 14.56% was "just and reasonable" to the Company and its customers as required under

N.C.G.S. § 62-131. Finding of Fact No. 11 merely states that this rate as Glendale's permanent rate is "appropriate." Yet, it is apparent that this rate was viewed by the Commission as only "appropriate" because had Glendale's service been adequate the Commission would have authorized a 15.42% rate of return. This determination is supported by competent and material evidence. Public Staff witness Bowerman and Glendale agreed that, if an increase were granted, a 15.42% margin in operating revenue deductions would generate an adequate rate of return. The interim rate of 14.56%, an annual revenue increase of $34,883, had been previously approved in the Commission's interlocutory order establishing these proceedings as a general rate case due to the fact that Glendale had "shown that it is experiencing a degree of financial difficulty sufficient to justify interim rate relief." Similarly, in these proceedings to determine Glendale's permanent rate, there was evidence presented by Company witness Vernon that Glendale could continue to survive on the interim rate. Thus, if the Company had been granted the 15.42% rate of return, an annual revenue increase of $36,208, Glendale would have been allowed a small profit. Yet, because of its inadequate service record, the Commission refused to include in the rate increase any provision for a company profit, but merely granted Glendale an increase which would permit it to stay in business. Based on the evidence presented, the Commission's determination to penalize Glendale by deleting its profit from the rate increase was clearly proper.

Furthermore, in *Utilities Comm. v. Morgan, Attorney General,* 277 N.C. 255, 266, 177 S.E. 2d 405, 412-13 (1970), *reaffirmed,* 278 N.C. 235, 179 S.E. 2d 419 (1971), this Court stated that it is not unlawful for the Commission, in the exercise of its discretion, to grant an increase in rates, notwithstanding existing service inadequacy, as an appropriate step in the improvement of the service. In the present case, the Commission ordered Glendale to make extensive and specific improvements in upgrading its existing water systems and in its business practices. The Commission's order requires:

> 4. That the Applicant shall set up and maintain an onsite set of accounting records, adequately document all cash receipts and disbursements, and take all other steps necessary to adequately control its cash inflows and outflows.

5. That the Applicant shall not acquire nor add on any additional water systems nor extend its mains outside the boundaries of its platted subdivision until upgrading of the existing systems is completed and upon certification to the Commission that all existing systems are constructed in accordance with plans approved by the Division of Health Services, and then only after further Order by the Commission.

6. That the Applicant, within 60 days after the effective date of this Order, shall file a report with this Commission as to the progress it is making toward completing the improvements needed to bring each of its water systems into complete compliance with all the Division of Health Services Rules and Regulations. Said report shall describe the improvements made since the effective date of this Order, the location of each improvement, the amount of expenditure for each improvement, the vendor to whom each expenditure was made, and the improvement remaining to be made before each system is brought into complete compliance with the Division of Health Services Rules and Regulations. Once said report is filed, the Applicant shall begin filing a similar report on a bimonthly basis.

Thus, the revenue increase was necessary not only to keep Glendale financially afloat due to its present difficulties, but also to implement these ordered improvements.

We, therefore, hold that the Commission's finding and conclusion granting Glendale a 14.52% rate of return (in effect continuing the interim rate) are supported by competent, material, and substantial evidence. Likewise, based on the intended improvements outlined by Glendale's new president and proposed owner, E. Ray Vernon, Jr., and those improvements ordered by the Commission, we fail to see how the Commission's order can be considered arbitrary and capricious. We further hold that the Commission committed no error of law by failing to expressly find the interim rate to be "just and reasonable."

In *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 208 S.E. 2d 681 (1974), this Court affirmed an order of the Commission denying the utility a rate increase on the basis of inadequate service. The Court of Appeals had ordered the case remanded to the

Commission for its failure to find facts with respect to the effect it gave the factor of inadequate service. This Court agreed that the Commission should have found these particular facts but held under the circumstances of the case that remand would serve no useful purpose. We reasoned that

> [t]he effect given by the Commission to inadequacy of service due to management is shown clearly and precisely. It is apparent from consideration of the order of the Commission, in its entirety, that the denial of the request for an increase in rates for service was due to the Commission's finding of gross inadequacies of service due to management and personnel deficiencies rather than to plant deficiencies.

Id. at 688, 208 S.E. 2d at 692. In the present case, such a determination by the Commission is just as apparent. Because its reasoning for finding the interim rate only "appropriate" is clearly and specifically set out in the order, appellate review which normally suffers due to the lack of proper findings was not frustrated in this case.

[2] By their second assignment of error, the Public Staff and the Attorney General contend that the Commission improperly included as operating expenses legal fees incurred by Glendale in contesting the amount of a penalty assessed against it for a violation of administrative regulations. This $13,000 penalty was imposed for Glendale's failure to notify the Division of Health Services of maximum microbiological contaminant level violations and for its failure to notify affected customers of these violations. Glendale did not contest the assessment of the penalty itself, but only disputed the reasonableness of the penalty amount. In calculating the reasonable level of Glendale's operating revenue deductions or expenses, the Company included $1,938 in legal fees spent in challenging the amount of the penalty. At the time of the public hearings, the penalty assessment dispute was still in litigation. The Public Staff argued to the Commission that if the dispute was resolved against the Company, it would not be properly included as an expense to be recovered from the ratepayers. Therefore, it would also be improper to require the ratepayers to pay for any of the cost prior to the determination of liability.

Under the heading, "Evidence and Conclusions For Finding of Fact No. 8," the Commission recited the following:

[The Commission concludes that the legal expense incurred by the Company in the good faith defense of the penalty assessment by the Division of Health Services is a reasonable and necessary expenditure of Glendale.

Every person is entitled to due process of law and to representation of counsel. If the Company feels that the penalty assessed was too high, it has a right to be heard, to present evidence, and to try to prove the unfairness of the penalty. There was no suggestion that the Company's challenge to the administrative penalty was being made by the Company in bad faith. The Commission concludes that the legal expense should be included; but because such expense is unusual and nonrecurring, the Commission is of the opinion that the expense should be amortized over a period of three years. Therefore, the Commission concludes that $646 ($1,938/3) should be included in expenses to reflect the amortization of the legal costs related to the penalty assessment by the Division of Health Services.]

Although this particular issue has not been considered, the question of whether other types of legal fees are includable as operating expenses has been previously addressed by the Commission. In 1980, the Commission concluded that it would be unreasonable and against public policy to require Southern Bell customers to pay for the company's legal expenses incurred in defending against a sex discrimination suit brought by a group of female employees. The Commission reasoned that since the Company's expenditures, including attorney's and witness's fees, were incurred only because Southern Bell had been found to have violated federal statutes, these expenses should be excluded from the cost of service. *In re Southern Bell Teleph. & Teleg. Co.*, Docket No. P-55, Sub. 777, Feb. 7, 1980. In 1981 and 1982, the Commission found that costs incurred by the Company in defending the Justice Department's antitrust suits were reasonable and proper costs associated with providing public utility service and could be recovered from the ratepayers. *In re Southern Bell Teleph. & Teleg.*, 46 PUR 4th 285 (N.C. 1982); *In re Southern Bell Teleph. & Teleg.*, 42 PUR 4th 18 (N.C. 1981).

A survey of decisions by utilities commissions from other jurisdictions reveals, as is apparent from the North Carolina deci-

sions, that whether legal expenses may be considered as operating expenses and legitimately recovered from the ratepayers depends on the type of legal dispute or service involved. For instance, legal fees incurred in connection with antitrust suits are generally allowed as operating expenses. (Calif.—*In re Pacific Teleph. & Teleg. Co.* Decision No. 83-12-025, Dec. 7, 1983; Ohio—*In re Cleveland Electric Illum. Co.*, 46 PUR 4th 63 (1982); Ala.—*In re South Central Bell Teleph. Co.* Docket Nos. 18075, 18076, Sept. 4, 1981; Wash.—*Washington Utilities & Transp. Comm. v. Pacific Northwest Bell Teleph. Co.*, 39 PUR 4th 126 (1980)). Legal expenses incurred in contesting tax assessments are most often denied as an operating expense. (Ill.—attorney's fees in payment for seeking a reduction of personal property tax excluded, *In re Prestwick Utilities Co.*, 58983 March 19, 1975; Pa.—moneys for legal proceedings concerning real estate taxes excluded, *Garber v. Philadelphia Suburban Water Co.*, 87 PUR 3d 250 (1971)). Legal fees incurred in discrimination suits against the utility are generally denied. (Pa.—*Penn. Pub. Utility Comm. v. Equitable Gas Co.*, 54 PUR 4th 406 (1983); Calif.—*In re Pacific Gas & Elec. Co.*, Decision 93887, Dec. 30, 1981).

It is also instructive to review decisions in which legal fees for civil actions alleging some fault on the part of the utility were sought to be included as operating expenses. In *In re Citizens Utilities Co. of California*, 58 PUR 3d 155 (1965), the California Utilities Commission ruled that legal expenses incurred by a water company primarily as a result of errors and omissions in the design and construction of a water reservoir would not be charged against the company's customers. The New Jersey Utilities Commission found legal expenses incurred by a water and sewer company in connection with a civil suit for alleged pollution of the Metedeconk River improper as operating expenses. *In re Lakewood Water Co.*, 13 PUR 3d 571 (1956). In Pennsylvania, a claim by a water company for the inclusion of costs incurred in defending a service complaint, where the utility was found to be at fault, was denied. *Township of Spring v. Citizens Utilities Water Co. of Pa.*, 65 PUR 3d 134 (1966).

It is evident that whether certain legal costs are considered to be operating expenses is determined by utilities commissions on a case-by-case basis and according to several general guidelines. Several commissions, including North Carolina, look to see

if the legal fees are a reasonable and necessary expense for the utility in providing its services. *Pa. Public Utility Comm. v. Duquesne Light Co.*, 51 PUR 4th 198 (Pa. 1983); *In re Cleveland Electric Illum. Co.*, 46 PUR 4th 63 (Ohio 1982); *In re Southern Bell Teleph. & Teleg.*, 46 PUR 4th 285 (N.C. 1982). Other utilities commissions measure the specific benefit the underlying legal proceeding will provide the ratepayers. *In re Columbia Gas of Kentucky, Inc.*, 55 PUR 4th 156 (Ky. 1983); *In re Chesapeake & Potomac Teleph. Co.*, 43 PUR 4th 169 (D.C. 1981); *In re Northwestern Bell Teleph. Co.*, 37 PUR 4th 1 (Minn. 1980); *Washington Utilities & Transportation Comm. v. Pacific Northwest Bell Teleph. Co.*, 26 PUR 4th 495 (Wash. 1978); *In re Citizens Water-Supply Co. of Newtown*, 3 PUR 4th 82 (N.Y. 1973). Furthermore, utilities commissions often determine whether litigation expenses may be included as operating expenses depending on whether they are incurred in good faith. *In re Pa. Pub. Utility Commission v. Freeport Water Co.*, 56 Pa. PUC 513 (Pa. 12/3/82); *In re Lake Spring Water Co.*, 70 Md. PSC 259, Case No. 7244 (Md. 8/29/79); *In re Fitchburg Gas & Electric Light Co.*, D.P.U. 19084 (Mass. 8/31/77). Finally, some commissions consider the actual outcome of the litigation and whether the legal expenses could have been avoided through prudent management. *In re Oklahoma Gas & Elec. Co.*, 58 PUR 4th 414 (Okla. 1984) (prudent management rewarded with inclusion of legal fees as operating expenses); *In re Boston Gas Co.*, 49 PUR 4th 1 (Mass. 1982) (outcome irrelevant); *In re Citizens Water-Supply Co. of Newtown*, Case 27557, Opinion No. 80-12 (N.Y. 3/31/80) (outcome irrelevant); *In re Texas Electric Service Co.*, Docket No. 2606 (Tex. 10/16/79) (disallowed since could have been avoided by prudent management); *Township of Spring v. Citizens Utilities Water Co. of Pa.*, 65 PUR 3d 134 (Pa. 1966) (outcome matters).

In the present case, our Commission found that Glendale's legal fees which were incurred in contesting the amount of the administrative penalty were recoverable as part of its operating expenses. The Commission found that the legal fees were "a reasonable and necessary expenditure" of Glendale which was associated with its water service to its customers. Based on the evidence presented, this conclusion is incorrect and constitutes an error of law under N.C.G.S. § 62-94(b)(4). In the first place, these legal fees were not incurred as an expense "associated" with

Glendale's task of providing water to its customers. Rather, these legal fees were incurred as a result of Glendale's failure to provide adequate water service. It is important to note that Glendale did not contest the imposition of the penalty itself, but only disagreed with the amount of the penalty assessed against it. Glendale was penalized for violating serious administrative regulations, including its failure to notify its customers of contaminants in the water. It would be improper to require the very class of people the DHS sought to protect in assessing the penalty against Glendale to indirectly pay for the penalty through the inclusion of related legal fees into Glendale's operating expenses. Furthermore, since these legal fees could have been avoided had Glendale initially carried out its responsibility of providing adequate water service to its subdivisions, this expense cannot properly be considered reasonable or necessary. We, therefore, hold that the Commission improperly included as part of Glendale's operating expenses the $1,938 in legal fees.

[3] The third assignment of error, raised by the Public Staff, concerns whether the Commission correctly applied N.C.G.S. § 62-133(c) in calculating Glendale's annual operating revenues and expenses. The Public Staff contends that the Commission's determination in this regard is erroneous for two reasons. First, the Commission used 1985 estimated data to determine a component of Glendale's expenses, but used the 1983 test year data to determine the Company's revenues. According to the Public Staff, this "mismatch" improperly distorts the ratio of expenses to revenue and the test year concept of N.C.G.S. § 62-133(c). Secondly, the Public Staff argues that once the Commission used the 1985 data in calculating expenses, it was required under N.C.G.S. § 62-133(c) to examine other post-test year changes in evidence to determine whether similar adjustments were appropriate to offset expenses by revenues.

N.C.G.S. § 62-133(c) provides in pertinent part:

> The original cost of the public utility's property . . . 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 pro-*

> *posed 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 . . . which is based upon circumstances and events occurring up to the time the hearing is closed.

(Emphasis added.) N.C.G.S. § 62-133(d) further states that "[t]he Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates."

The component of Glendale's expenses based on the 1985 estimated data in question was salaries. The Company proposed that its actual salary expenditure for the 1983 test year, $41,263, be adopted by the Commission. The Public Staff recommended that Glendale's current salaries be annualized for a total of $35,010 because the Company had fewer employees at the time of its 1984 audit. The Commission, on the other hand, concluded that the Company's 1985 estimated salary expenditure of $43,544 was the appropriate salary expense to be included. The Commission reasoned as follows:

1983—Company's Actual Expenditures	
Salaries other than owner—bookkeeper/receptionist and meter reader/maintenance	$18,733
Subcontract—Ray Vernon	10,530
Owner salary	12,000
Total	$41,263

. . . .

1985—Company's Estimated Expenditures	
Salaries other than owner:	
Maintenance person	$11,044
Bookkeeper/receptionist/ computer operator	14,000
Estimated overtime	1,500
Estimated subcontract ($5,000 to $7,000)	5,000
Owner salary	12,000
Total	43,544

As the figures above indicate, Glendale will have similar salary expenses for 1985 to those actually incurred in 1983, even though Glendale will have fewer full-time employees. Especially important to note is the overtime expense estimated for 1985. By having an additional employee in 1983, Glendale avoided paying time and one-half for overtime. Glendale made a management decision concerning the number of employees it would have and how much they would be paid in 1983 which was different from the management decision Glendale made in 1985. However, there is nothing in the record to suggest that either management decision is unreasonable.

Based upon the evidence presented and in view of the extensive improvements that Glendale is herein ordered to make and the substantial amount of routine maintenance which will be necessary to keep the Glendale water systems operating properly, the Commission concludes that the Company's 1985 estimated salary expenditure of $43,544 is the appropriate level of salary expense to be included in this proceeding. The Commission finds that this salary level of $43,544 will enable the Company to adequately pay its personnel to properly maintain the system and correct the problems discussed herein. Furthermore, the Commission acknowledges that the salary level of the owner (Ray Vernon), which is $12,000, has been agreed to by the parties, but the Commission considers it to be too low considering the size of the Glendale operations, the extensive maintenance required by the system and the testimony of witness Vernon that he works days, nights, and weekends and that in the most current week he had worked 105 hours for Glendale. Witness Vernon further testified that he works solely for Glendale Water, Inc., as "there are not enough hours in the day" to do any other independent contract work on the side. The Commission concludes that $43,544 is the appropriate salary level.

. . .

In a nutshell, the Public Staff contends that since the Commission used Glendale's 1985 estimated salary expenditures to calculate its expenses, it should have been required to adjust Glendale's revenues based on the Company's continuing customer growth. The Public Staff asserts that there was uncontradicted

evidence that Glendale's customer base in the 1983 test year increased 30.1%, from 449 to 584. In the twelve months following the test year, calendar year 1984, Glendale's customer base increased approximately another 22%, from 584 to 712. Moreover, Company witness Ray Vernon testified that at the time of the hearings, construction of new homes was in progress in fifteen subdivisions served by Glendale. The Public Staff argues that in light of the Commission's findings that Glendale had experienced post-test year growth, it improperly failed to adjust revenues to reflect the increase in annual operating revenues that Glendale would experience due to that growth.

We reject this argument. In the first place, the Public Staff admits in its brief that "the Commission's decision falls within the letter of the statutory requirements." The Commission is required under N.C.G.S. § 62-133(c) to determine probable future revenues and expenses and to consider such relevant, material and competent evidence as may be offered which tends to show actual changes in costs or revenues. The Commission's order reflects that it considered all pertinent data.

Secondly, these statutory tasks are required in order to help the Commission arrive at the reasonable rate the utility may charge for its services. This determination is solely for the Commission and must be upheld by this Court if based on adequate findings of fact supported by competent evidence. *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 N.C. 786 (1982). We find that the Commission did not improperly refuse to adjust its figure for revenues based on evidence of post-test year growth although it increased Glendale's operating expenses based on other post-test year evidence. Contrary to the Public Staff's contention, there is no correlation between the use of post-test year salary expenses and Glendale's increase in customers. The Commission in its order explains that the use of 1985 estimated salary expenditures was appropriate because it had ordered additional improvements and increased routine maintenance. Thus, the increased allowance in operating expenses for salaries did not require any offsetting change in revenue. The Public Staff's reliance therefore on *Utilities Commission v. Public Staff*, 52 N.C. App. 275, 278 S.E. 2d 599 (1981), is misplaced because in that case the expenses included and the revenues excluded were necessarily related.

We therefore hold that the Commission's conclusion that 1985 estimated expenditures were the appropriate allowance for salary expenses is supported by competent, material, and substantial evidence. Further, we hold that the Public Staff has failed to show that the Commission's refusal to increase revenues by post-year customer growth was arbitrary or capricious or contributed to the adoption of a rate which was unjust.

[4] The fourth assignment of error, raised by the Attorney General, involves the Commission's approval of the transfer of 52% of the Company's stock to E. Ray Vernon, Jr. The Attorney General contends that the Commission's finding that the transfer is in the best interest of the customers is not supported by any evidence and is arbitrary and capricious.

The Attorney General argues that the Commission failed to consider the evidence presented by several Glendale customers at the public hearing concerning their doubts as to Mr. Vernon's ability to manage a utility. These customers were also concerned with the transfer on the basis that Vernon was the son-in-law of the previous owner John Blankenship. They felt that Blankenship, who in their opinion had failed to provide adequate service, would still exert important influence upon the Company's operations due to this personal relationship.

As previously stated, the Commission's findings, if supported by competent, material, and substantial evidence in view of the record as a whole, are binding upon this Court. *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966). The Commission's determination may not be reversed or modified by a reviewing court merely because that court might have reached a different determination upon the same evidence. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972).

We hold that the Commission's finding that the stock transfer was in the best interest of the customers is supported by competent, material, and substantial evidence. Vernon testified that as of November 1984 he was elected President and General Manager of Glendale and that he is a licensed C and B class well operator and licensed electrician with a number of years experience in operating water systems and related business. In fact, except for the months of April through October 1984, Vernon was Glendale's only licensed operator. Vernon further indicated to the

Commission his desire to improve the Company's service and his willingness to invest his own time, energy, and money in the Company, including the assumption of $53,000 of Glendale's corporate debts. There was also evidence presented that Mr. Blankenship was not currently involved in the management of the Company. Vernon testified that he would not allow his personal relationship with Blankenship to interfere with the proper management of the Company. Since there is substantial evidence to support the Commission's determination, it would be inappropriate for this Court to substitute its judgment for that of the Commission's.

Furthermore, in light of the overwhelming evidence presented concerning Glendale's woefully inadequate services under Blankenship's management, we cannot say that the Commission's determination that the Company had a better chance of making improvements under Vernon's control is arbitrary and capricious.

[5] In its cross-appeal, Glendale first assigns as error the Commission's exclusion of two-thirds of its investment in the 3/4-ton Ford truck for computing its rate base and depreciation, and related expenses. The Commission concluded that while there are times it is cost justified for Glendale to have this heavy truck available, it would be inappropriate to allow the entire amount in the rate base.

The evidence showed that Glendale owned three trucks, the Ford truck in question and two lighter vehicles. All parties agreed that two of the vehicles were appropriately included in the Company's rate base. Public Staff Engineer Lee recommended that the Ford truck be entirely removed from the rate base on the ground that Glendale does not perform the major repairs to its water systems required for the use of this heavier truck, but contracted this service to Pipeline Utilities, Inc., a nonregulated, affiliated company. Glendale witness, Ray Vernon, testified that only two trucks are currently in use and that these trucks are adequate to service the Company's systems. Former Company President, John Blankenship, on the other hand, testified that the ownership of the large Ford truck, with its large truck bed, was advantageous to Glendale.

When there is contradictory evidence on an issue, the weighing of the evidence and the resolution of the conflict is the sole prerogative of the Commission and a reviewing court may not

substitute its judgment. *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 208 S.E. 2d 681 (1974). We hold that the Commission's conclusion to include only one-third of the cost of the truck, or $3,583, is supported by findings based on substantial evidence. In fact, the Commission's recognition that there may be times when it is cost justified for the Company to have this truck available is quite fair in light of the evidence presented.

[6] In its second assignment of error, Glendale excepts to the Commission's conclusion that expenditures related to its unsuccessful attempt to expand its service area should be excluded from its cost of service. In our opinion, the Company has failed to specify the manner in which the Commission's exclusion of expenses related to its expansion attempt was unreasonable or unlawful.

These are the pertinent facts: The Company included in its operating expenses $8,730 related to a failed attempt to construct a water system in the Oak Ridge subdivision. Company witness Blankenship opined that the project failed because of the inexperience of the developer. Glendale's nonregulated affiliate, Pipeline Utilities, installs and constructs water systems for the Company. David Moser, vice-president of Pipeline, testified that Pipeline, not Glendale, makes a profit from the construction of these water systems. The cost of construction is paid by the developer of each subdivision. Thus, any profits earned or losses incurred in the construction of water systems such as Oak Ridge, accrue to the developer or some other nonregulated entity, not to the utility. Once the system is operational, the service is contributed to the utility.

Glendale contended that it suffered a substantial financial loss in a contractual dispute with the Oak Ridge developers which led it to seek the abandonment of its franchise in that area. The Company further argued that this loss should be included in its operating expenses on the basis that every expansion indirectly benefits all customers by spreading overhead expenses over a greater number of customers.

Public Staff Accountant, Mike Maness, testified, however, that only after the system is operational and new customers are added are existing customers benefited by the new water system. He further stated that since no profits from the construction of

the water systems flow back to the ratepayers, they should not be required to bear any construction losses.

Based on this evidence, the Commission concluded that

> The construction of the water system in Oak Ridge Subdivision is similar in all respects to the construction of the Company's other water systems, except that it failed. Had it succeeded, the system would have been contributed to the Company. The Commission concludes that the failure of this project does not provide adequate justification for placing the burden of these construction losses upon the ratepayers.
>
> The Commission also notes that if Pipeline Utilities, Inc., had completed construction of the Oak Ridge system and had incurred a loss upon that construction, the loss would have been borne by Pipeline Utilities, Inc., not by Glendale Water, Inc. The fact that the project was not completed and that a loss was realized does not justify passing the loss on to Glendale and to Glendale's ratepayers.

We hold that the Commission's decision to exclude the $8,730 associated with the Oak Ridge water system construction is supported by substantial evidence and is neither arbitrary nor capricious.

In conclusion, we remand this matter to the Commission with instructions for it to exclude the $1,938 in legal fees, previously included, as a part of Glendale's operating expenses. Although the amount involved might be considered *de minimus*, we feel remand is justified in order to avoid setting incorrect precedent on this important issue concerning the inclusion of legal fees in the rate base calculation of operating expenses. In all other respects, the order of the Commission is affirmed.

Reversed and remanded in part; affirmed in part.

Justice MARTIN dissenting in part and concurring in part.

I dissent as to the majority's holding on the first issue. The Commission found that the service of Glendale was inadequate, both as to water quality and service provided. The litany of Glendale's transgressions against its consumers is set forth in the majority opinion. Not only has Glendale failed to provide proper

service, in at least fifteen of its service areas it does not have the necessary water treatment equipment to render proper service if it were inclined to do so. The evidence concerning the inadequacy of Glendale's service and the danger to the health of its consumers is both overwhelming and uncontradicted. There is no evidence in this record that Glendale has done anything to correct these problems, except to have a witness testify that he was aware of the existing water quality and service problems and that if he were allowed to purchase the controlling stock in the company, he would take corrective measures. There is no evidence that Glendale has acquired a single piece of chlorination equipment for use in the fifteen subdivisions that it serves which have no such equipment. There is no evidence that Glendale has taken any steps to protect the water quality, to improve the water quality, to reduce water outages, to clear the water discoloration, to prevent the staining of fixtures, to provide proper pressure, to reduce the odor of chlorine, to put chlorine in the water when required, to properly maintain the electric wiring, to improve its billing practices, to respond to the customer needs and complaints, and to provide consumers with prompt "boil notices" to warn of contaminated water. In short, Glendale comes before the Commission and this Court asking for the approval of a 14.56 percent increase in rates without any corresponding effort on its part to improve the services to its consumers, who are now being asked to pay additional amounts for the same poor, inadequate service.

I do not find that upon the whole record test the findings of the Commission are adequate or are supported by competent, material, and substantial evidence. N.C.G.S. § 62-94(b)(4), (5), (6) (1982). It is apparent to me that upon this record the decision of the Utilities Commission was arbitrary or capricious.

Prior to the present application, the Commission had established rates for Glendale which were sufficient to enable it to maintain its properties, render proper and adequate service to its consumers, and, in addition, earn a fair return. Glendale must accept responsibility for its actions in allowing its properties to deteriorate and in failing to provide adequate service and water of acceptable quality. Having been granted a monopoly in its franchise area, Glendale is under a duty to render reasonably adequate service. *Utilities Comm. v. Morgan, Attorney General,* 277

N.C. 255, 177 S.E. 2d 405 (1970), *aff'd on reh'g*, 278 N.C. 235, 179 S.E. 2d 419 (1971).

Rates charged by a utility and service rendered go hand in hand:

> (a) Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable.
>
> (b) Every public utility shall furnish adequate, efficient and reasonable service.

N.C.G.S. § 62-131 (1982). The quality of service rendered is a necessary factor to be considered in fixing just and reasonable rates. *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 208 S.E. 2d 681 (1974). When the Commission found that Glendale's service was inadequate, it was required to make specific findings showing the effect of this inadequacy upon its decision to fix rates fair to both Glendale and the consumer. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). I find no such specific findings. Without such findings the decision of the Commission is arbitrary or capricious. The agency decision does not indicate a fair and careful consideration of the issue, nor does it indicate a course of reasoning and the exercise of judgment. The award of the Commission must be based upon reasoned decision making. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547, *reh'g denied*, 301 N.C. 107 (1980).

The Commission had the authority, upon the filing of the application by Glendale, to suspend the hearing pending the improvement of service by Glendale to its consumers. Upon such performance by Glendale, the Commission could then hear and determine the proper rate of return based upon such improved service. In the light of the history of Glendale's performance of its duties as a public utility and its abject failure to provide its consumers with a reliable, potable source of drinking water, the Commission acted arbitrarily or capriciously in relying upon the promises of a witness who was not even the owner of the company but only a person interested in acquiring the company. I find that the Commission erred in granting the increase in rates and vote to have the case remanded to the Commission on this issue, with instructions to vacate the order approving the increased

rates and hold the proceedings of the Commission in suspension until the new owner demonstrates his ability to carry out his promises for improved water quality and service; or, at the very least, for additional findings of fact necessary to support the conclusions of the Commission as being the product of reasoned decision making. Upon this record, the consuming public is entitled to a reliable source of potable drinking water before there should be additional increases in the consumers' costs.

I concur in the remainder of the majority opinion.

FRANK B. GODFREY, JOE N. SUTTON, O. FRED HOWEY AND BILLIPS HOOD v. THE ZONING BOARD OF ADJUSTMENT OF UNION COUNTY, NORTH CAROLINA

No. 182PA85

(Filed 3 June 1986)

1. **Municipal Corporations § 30.16— grain facility not nonconforming situation**

   A grain storage facility was not a "nonconforming situation" which could legally be permitted to be continued following a judicial determination that a purported rezoning under which the facility was constructed constituted unlawful "spot zoning" because it was not in existence at the time of either the date of the zoning ordinance or the date of the purported rezoning amendment.

2. **Municipal Corporations § 30.16— nonconforming use—judicial declaration not amendment of zoning ordinance**

   A judicial declaration that a purported rezoning constituted unlawful spot zoning did not constitute an "amendment" to the zoning ordinance so as to permit a grain storage facility built in reliance upon the rezoning prior to the date of the judicial action to constitute a "nonconforming situation" which could be continued under the ordinance.

3. **Municipal Corporations § 30.15— nonconforming use—arbitrary and capricious action by zoning board of adjustment**

   A zoning board of adjustment acted arbitrarily and capriciously in reaching its conclusion allowing a grain storage facility to continue as a "nonconforming situation" where that conclusion was wholly unsupported by the facts found by the board.

4. **Municipal Corporations § 30.17— vested right to continue nonconforming use—issue not before appellate court**

   The Court of Appeals erred in addressing the issue of whether landowners acquired a "vested right" to continue a grain storage facility as a noncon-

forming use after rezoning which permitted the facility was judicially declared to constitute unlawful spot zoning since the "vested rights" issue was not considered by the county zoning board of adjustment or by the superior court on review by writ of certiorari; a determination of the "vested rights" issue requires resolution of questions of fact, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures, and fact-finding is not a function of an appellate court; and the landowners are not parties to this proceeding.

5. **Municipal Corporations § 31— challenge to zoning amendment—declaratory judgment—injunction not required**

Plaintiffs were not required to attempt to obtain injunctive relief in order to protect their property interests against unlawful actions of a zoning board but could properly elect to challenge a zoning amendment through a declaratory judgment action.

Justice EXUM concurring in result.

Chief Justice BRANCH joins in this concurring opinion.

Justice MARTIN dissenting.

ON discretionary review of a unanimous decision of a panel of the Court of Appeals, 73 N.C. App. 299, 326 S.E. 2d 113 (1985), affirming a judgment entered by *Hal H. Walker, J.*, at the 14 November 1983 Civil Session of Superior Court, UNION County. Heard in the Supreme Court 14 October 1985.

Joe P. McCollum, Jr., for plaintiff-appellants.

Love & Milliken, by John R. Milliken, for defendant-appellee.

MEYER, Justice.

James Dennis Rape came into ownership and possession of a 17.45-acre tract of land in Union County in 1973. The Union County Board of Commissioners adopted a comprehensive zoning ordinance on 14 April 1975, effective 2 June 1975. On the effective date of the ordinance, Mr. Rape's 17.45-acre tract was being farmed; no business other than farming was operated on this tract prior to 1980. The Rape tract and the surrounding area were zoned low density residential, R-20, by the 1975 ordinance.

On 12 September 1980, Mr. Rape petitioned the county to rezone his tract from R-20 to H-I, "heavy industrial." Mr. Rape's purpose in requesting the zone change was to enable him to construct a grain storage facility and office space on a portion of his

tract. The Union County Planning Board voted to recommend the rezoning request, and on 23 November 1980, the County Commissioners, by a vote of three to two, voted to amend the zoning ordinance to rezone the tract as requested by Rape.

Disturbed by this action, three adjoining landowners, within three weeks of the rezoning, filed an action in Superior Court, Union County, on 15 December 1980 seeking a declaratory judgment to the effect that the Commissioners' action in rezoning the Rape tract was null and void because it constituted "spot zoning." Meanwhile, Mr. Rape, pursuant to a "previous arrangement" with Gro-More of Monroe, Inc., obtained a building permit to construct the grain storage facility and began construction of the facility. Gro-More's majority shareholder is Eastern Plant Foods, Inc., of Greenville, South Carolina; Mr. Rape is president and minority shareholder of Gro-More. In May 1981, construction was completed, and pursuant to the arrangement with Gro-More, Mr. Rape transferred 4.25 acres of his 17.45-acre tract containing the grain storage facility and office space to Gro-More. Subsequent to the facility being completed and its transfer to Gro-More, and during the pendency of the action for declaratory judgment, the Union County Board of Commissioners on 25 August 1981 amended the zoning ordinance to make provision for "Nonconforming Situations" (hereinafter, Section 70).

On 11 December 1981, Judge Kivett entered an order in the declaratory judgment action declaring the Commissioners' rezoning of the Rape tract on 23 November 1980 null and void because such action constituted "spot zoning."[1] The result of this order

1. "Spot zoning amendments are those which by their terms single out a particular lot or parcel of land, usually small in relative size, and place it in an area the land use pattern of which is inconsistent with the small lot or parcel so placed, thus projecting an inharmonious land use pattern. Such amendments are usually triggered by efforts to secure special benefits for particular property owners, without proper regard for the rights of adjacent landowners. These are the real spot zoning situations. Under no circumstances could the tag of validity be attached thereto.

". . . .

"Of one thing there can be no doubt. The law is well settled that 'spot zoning,' as properly known and understood, and 'spot zoning' ordinances, as properly identified, are invalid on the general ground that they do not bear a substantial relationship to the public health, safety, moral and general welfare and are out of

was that the entire tract remained subject to the original R-20, low density residential designation. Gro-More and Eastern Plant Foods appealed to the Court of Appeals, which affirmed Judge Kivett's order in *Godfrey v. Union Co. Bd. of Commissioners*, 61 N.C. App. 100, 300 S.E. 2d 273 (1983). Pursuant to that opinion, Union County Zoning Enforcement Officer H. Steve Morton notified Mr. Rape by letter of 14 April 1983 that the Gro-More grain storage facility was not in compliance with the R-20 district in which it was located and that Mr. Rape had thirty days to bring the use into compliance.

On 4 May 1983, Gro-More and Eastern Plant Foods, by their attorney, petitioned the Union County Board of Adjustment for an allowance of the continuance of the "nonconforming situation" on the 4.26-acre tract. The Board of Adjustment held meetings on 6 June and 11 July 1983 and heard from Mr. Rape, as well as from plaintiffs in this action. Both parties were represented by counsel. On 11 July 1983, the Board of Adjustment approved Gro-More's petition allowing the facility to continue as a "nonconforming situation." Pursuant to N.C.G.S. § 153A-345(e), plaintiffs petitioned the Superior Court, Union County, for a writ of certiorari to review the Board's 11 July 1983 order. In their petition for the writ, plaintiffs stated as "Reasons Why the Writ Should Issue" that "the action of the Board of Adjustment was arbitrary and capricious in that there was no showing that a nonconforming use ever existed and further there was [sic] not sufficient findings of fact by the Board to grant any relief."

Upon the review by a superior court upon writ of certiorari issued pursuant to N.C.G.S. § 153A-345(e),

> the findings of fact made by the Board, if supported by evidence introduced at the hearing before the Board, are conclusive. *In re Application of Hasting*, 252 N.C. 327, 113 S.E. 2d 433; *In re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 15 S.E. 2d 1. The matter is before the Court to determine whether an error of law has been committed and to give relief from an

harmony and in conflict with the comprehensive zoning ordinance of the particular municipality."

2 E. Yokley, Zoning Law and Practice § 13-3 (4th ed. 1978) (footnote omitted). *See also Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972).

> order of the Board which is found to be arbitrary, oppressive or attended with manifest abuse of authority. *Durham County v. Addison,* 262 N.C. 280, 136 S.E. 2d 600; *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128. It is not the function of the reviewing court, in such a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board. It may vacate an order based upon a finding of fact not supported by the evidence.

In re Campsites Unlimited, 287 N.C. 493, 498, 215 S.E. 2d 73, 76 (1975). *See also Coastal Ready-Mix Concrete Co., Inc. v. Board of Comm'rs of the Town of Nags Head,* 299 N.C. 620, 623-27, 265 S.E. 2d 379, 381-83, *reh'g denied,* 300 N.C. 562, 270 S.E. 2d 106 (1980).

On 16 November 1983, Judge Hal H. Walker entered an order finding no error in the proceedings and concluding that the Board's 11 July 1983 order allowing continuation of the nonconforming use was proper. On appeal by plaintiffs, the Court of Appeals affirmed the superior court's decision in its opinion at 73 N.C. App. 299, 326 S.E. 2d 113.

The Court of Appeals recognized that, according to Union County Zoning Ordinance, Sections 70.1(1) and 70.2, the grain storage facility is not a "nonconforming use" subject to being continued because the facility was not in existence at the effective date of the ordinance or the effective date of the amendment to the ordinance rezoning the property from R-20 to H-I. However, the Court of Appeals found that the situation *became* nonconforming as a result of the subsequent judicial declaration that the purported 1980 rezoning to H-I constituted "spot zoning" and was null and void and of no effect. Additionally, the court found that Mr. Rape had incurred "great expense in constructing a large facility valued at $400,000" in "good faith reliance" upon the 1980 zoning amendment and the building permit. *Id.* at 302, 326 S.E. 2d at 115. Relying on *Town of Hillsborough v. Smith,* 276 N.C. 48, 170 S.E. 2d 904 (1969), and its progeny, the court held that "the landowner acquired a vested right to continue using the facility." *Godfrey,* 73 N.C. App. at 302, 326 S.E. 2d at 115. The Court of Appeals, adopting defendant's argument, noted that plaintiffs could have protected their interests by obtaining an injunction when they filed their petition for a writ of certiorari, and the land-

owners' interest could have been protected by means of a bond. We conclude that the reasoning and the result of the panel below is erroneous, and we therefore reverse.

A.

[1] Following public hearings on 6 June and 11 July 1983, the Union County Zoning Board of Adjustment issued an order in which it concluded that the Gro-More facility constituted a "nonconforming situation" as defined in Section 70 and was entitled to continuation pursuant to Section 70.2. Our review of the record convinces us that the Board erred as a matter of law in concluding that the subject property was a "nonconforming situation" and thus erred in allowing continuation pursuant to Section 70.2.

The 1981 amendment to the Union County Zoning Ordinance, *"Section 70. Nonconforming Situations,"* provides the framework for analysis in the determination of whether the Gro-More facility could legally be permitted to continue as such following the judicial determination that the 1980 purported zoning change under which the facility was constructed constituted unlawful "spot zoning." The relevant portions of Section 70 provide in pertinent part:

> 70.1 *Definitions*
>
> (1) *Nonconforming Situation.* A situation that occurs when, *on the effective date of this ordinance or any amendment to it,* an existing lot or structure or use of an existing lot or structure does not conform to one or more of the regulations applicable to the district in which the lot or structure is located. Among other possibilities, a nonconforming situation may arise because . . . land or buildings are used for purposes made unlawful by this ordinance.
>
> . . . .
>
> 70.2 *Continuation of Nonconforming Situations*
>
> Nonconforming situations that were otherwise lawful on the effective date of this ordinance may be continued, subject to the restrictions and qualifications set forth in subsections 70.3 and 70.6 of this section.

(Emphasis added.)

By clear definition, a situation may be designated "nonconforming" for purposes of continuation under the ordinance only if it is an *existing lot or structure on the effective date of the ordinance or amendment.* Section 70.1(1). According to the record, the effective date of the comprehensive zoning ordinance was 2 June 1975. On that date, the entire Rape tract was being farmed, and *no* structure was in existence on the property. The effective date of the amendment purporting to rezone the tract from R-20 to H-I was 23 November 1980. It is uncontroverted that *no* structure existed on the tract on that date. In fact, the 1980 amendment was enacted for the sole purpose of accommodating Mr. Rape's plan to erect the structure which is the subject of this controversy. Mr. Rape acquired a building permit and began construction some time *after* 23 November 1980; the facility was completed in May 1981. Thus, as the Court of Appeals recognized, the grain storage facility fails to come within the Section 70.1(1) definition of a "nonconforming situation" because *it was not in existence* at the time of either the date of the ordinance or the date of the purported amendment to it. "Before a supposed nonconforming use may be protected, it must exist somewhere outside the property owner's mind." *Cook v. Bensalem Township Bd. of Adjustment*, 413 Pa. 175, 179, 196 A. 2d 327, 330 (1964).

The plain meaning of Section 70, as applied to these facts, is that the grain storage facility is not a "nonconforming situation" as defined by Section 70.1(1) and therefore cannot be "continued" pursuant to Section 70.2. Thus, the superior court erred in failing to conclude that the Board committed an error of law in authorizing the continuance of the Gro-More facility.

[2] Defendant argues, however, that there is another relevant "effective date of . . . amendment" to the ordinance prior to which the Gro-More structure had come into existence. Defendant contends that the superior court order of 11 December 1981, affirmed by the Court of Appeals in *Godfrey v. Union Co. Bd. of Commissioners*, 61 N.C. App. 100, 300 S.E. 2d 273, amounted to a "judicial amendment" of the zoning ordinance because its effect was to rezone the tract from the H-I "spot zoning" designation back to the original R-20. Defendant contends that the facility, completed in May 1981, was in existence on the effective date of the December 1981 "judicial amendment" to the zoning ordinance and therefore constitutes a "nonconforming situation" as defined

in Section 70.1(1), entitled to continuance pursuant to Section 70.2. This argument is without merit.

"The courts do not possess the power to amend the zoning regulations." 1 R. Anderson, American Law of Zoning 2d § 4.26 (1976) (footnote omitted). "While the courts possess the authority to pass upon the validity of a zoning ordinance, this authority does not include the power to determine the ultimate zoning classification." *La Salle Nat'l Bank v. City of Chicago*, 130 Ill. App. 2d 457, 460, 264 N.E. 2d 799, 801 (1970). *See also Petlin Associates, Inc. v. Township of Dover*, 64 N.J. 327, 316 A. 2d 1 (1974). Zoning is properly a legislative function, and courts are prevented by the doctrine of separation of powers from invasions of this field. *City of Miami Beach v. Weiss*, 217 So. 2d 836, 837 (Fla. 1969); *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 445, 211 S.E. 2d 48, 55, *cert. denied*, 423 U.S. 940, 46 L.Ed. 2d 272 (1975); 1 R. Anderson, American Law of Zoning 2d § 4.26 (1976); 3 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning § 36.01 (4th ed. 1986).

"[A]n unconstitutional amending statute or ordinance is in reality no law and, in legal contemplation, is as inoperative as if it had never been passed." 2 E. Yokley, Zoning Law and Practice § 11-8 (4th ed. 1978), citing *Archer v. City of Shreveport*, 226 La. 867, 77 So. 2d 517 (1955); *City of New Orleans v. Levy*, 223 La. 14, 64 So. 2d 798 (1953), and cases cited therein.

The act of a municipal legislative body which purports to enact or amend a zoning ordinance but which in fact amounts to an unconstitutional "spot zoning" is beyond the authority of the municipality. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972). "If the amending ordinance is beyond the legislative power of the city, whether for the reason that it constitutes spot zoning or on some other ground, its adoption does not remove the designated area from the effect of the comprehensive zoning ordinance previously enacted. In that event, *the proposed use remains unlawful*." *Zopfi v. City of Wilmington*, 273 N.C. 430, 437, 160 S.E. 2d 325, 333 (1968).

We do not accept defendant's argument that upon "judicial amendment" of the ordinance, the grain storage facility, completed seven months earlier, became a "nonconforming situation" because it was in existence on the date of the 1981 superior court

order declaring the 1980 amendment to constitute unlawful "spot zoning." "While a use of land or a building may become nonconforming through circumstances other than the enactment of a zoning restriction causing the use or building to violate the ordinance, nonconformities so caused are not included in the class of protected nonconforming uses or structures." 4 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning § 51.01[1] (4th ed. 1986). The December 1981 order of the superior court, affirmed by the Court of Appeals, did not constitute an "amendment" to the Union County Zoning Ordinance. The effect of the order was to declare the 23 November 1980 act of the Commissioners null and void as being beyond the authority of that legislative body. The result left the zoning ordinance as it would have been had the purported rezoning never taken place. Consequently, the provisions of the last prior valid zoning ordinance continued to apply to the tract, and thus the property remained subject to the R-20 zone restrictions. *See Harris Trust & Sav. Bank v. Duggan*, 105 Ill. App. 3d 839, 847, 435 N.E. 2d 130, 137 (1982), *aff'd*, 95 Ill. 2d 516, 449 N.E. 2d 69 (1983); *In re Concordia Collegiate Inst. v. Miller*, 301 N.Y. 189, 197, 93 N.E. 2d 632, 636 (1950); 3 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning § 36.02 (4th ed. 1986).

[3] Finally, the superior court could have found that the action of the Board in entering its 11 July 1983 order was "arbitrary, oppressive, or capricious" or was attended with an abuse of discretion. The Board's "findings of fact" in no way support its conclusions and order which consist, in their entirety, of the following:

> The Zoning Board of Adjustment for Union County having held a public hearing on June 6, 1983, which was continued until July 11, 1983, to consider the petition for Gro-More of Monroe, Inc., for the continuation of a Nonconforming Situation as provided in Sec. 70.2 of the Union County Zoning Ordinance as will be more fully shown in the petition filed herein and having heard all of the evidence and arguments presented at said hearings, makes specific findings as follows:
>
> (a) That the subject property was zoned R-20 in September of 1980 when a petition to rezone to H-I was filed.

(b) That in November of 1980 the Union County Board of Commissioners rezoned the subject property to H-I.

(c) That subsequent to said rezoning the then owner obtained a building permit and constructed on the site a grain storage and transfer facility and the offices that go with it at considerable expense.

(d) That in March of 1983, subsequent to the completion of the above construction, the North Carolina Court of Appeals affirmed a Superior Court order that the rezoning was "spot zoning" and therefore invalid.

That the Board concludes from the above findings that a Nonconforming Situation exists with respect to the subject property in accordance with Section 70 of the Union County Zoning Ordinance and that it is entitled to continuation under Section 70.2.

This 11th day of July, 1983.

THE ZONING BOARD OF ADJUSTMENT

G. C. Funderburk, Jr.
Charles J. Haywood

Sam Duncan
Edd M. Little

A determination made by a board of adjustment at a hearing, if not supported by substantial evidence, constitutes an "abuse" of the discretion vested in the board by ordinance or statute; a determination which is not supported by substantial evidence is an arbitrary decision. *Cf. Coastal Ready-Mix Concrete Co., Inc. v. Board of Comm'rs of the Town of Nags Head,* 299 N.C. 620, 265 S.E. 2d 379, *reh'g denied,* 300 N.C. 562, 270 S.E. 2d 106 (1980) (decisions of town boards regarding special use permits must be supported by "competent, material and substantial evidence in the whole record"). *Accord In re Application of Goforth Properties,* 76 N.C. App. 231, 233, 332 S.E. 2d 503, 504 (1985). A decision which lacks a rational basis—where there is no substantial relationship between the facts disclosed by the record and conclusions reached by the board—is also termed "arbitrary." 3 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning § 42.07[1] (4th ed. 1986).

The "findings of fact" recited in the Board's 11 July 1983 order are undisputed and are fully supported by the record. Yet these findings neither support the Board's conclusion nor relate to the crucial questions before the Board in determining whether the grain storage facility was "in existence" and was "otherwise lawful" on the relevant dates. Because there is no substantial relationship between the findings of fact and the Board's conclusions, the Board's 11 July 1983 decision was arbitrary and capricious, and the trial court erred in failing to so find.

In summary, therefore, defendant's order of 11 July 1983 is facially erroneous as a matter of law because the grain storage facility was not a "nonconforming situation" as defined in the Union County Zoning Ordinance on the effective date of the ordinance or any amendment to it. Furthermore, defendant may not rely on the judicial action invalidating its purported rezoning as amounting to an "amendment" of the ordinance before the effective date of which the grain storage operation was in existence so as to constitute a "nonconforming situation" (Section 70.1(1)) which may be continued pursuant to Section 70.2. The judicial declaration could not and did not constitute an "amendment" to the zoning ordinance. Moreover, we find that, as a matter of law, defendant acted arbitrarily and capriciously in reaching its conclusion allowing a continuance of the "nonconforming situation" because that conclusion is wholly unsupported by facts as found by defendant.

The Court of Appeals erred in concluding that the superior court judge correctly determined there was no error as a matter of law in the Zoning Board of Adjustment's order allowing continuance of the "nonconforming situation" pursuant to Section 70.2.

B.

[4] Defendant Zoning Board of Adjustment argued before the Court of Appeals, and the panel below concluded, that Mr. Rape acquired a "vested right" in the continued use of the grain storage facility because the permit was issued and construction had been completed after the property had been rezoned from R-20 to H-I and before that rezoning was declared unlawful "spot zoning."

The record before us contains no indication that there was ever any attempt to present the "vested rights" issue to the Zon-

ing Board of Adjustment or that the Board ever considered the doctrine of "vested rights" as a ground for allowing the continuance of the grain storage facility in contravention of the zoning district regulations to which it was subject. The Board based its decision solely on its interpretation of the zoning ordinance and the effect of the later judicial determination that the amendment was "spot zoning." The 11 July 1983 order of the Board clearly states that it purported to allow continuance of the "nonconforming situation" "under Section 70.2." Nor is there any indication that the trial court, reviewing the order upon writ of certiorari, ever considered the "vested rights" issue, limited as it was to review for errors of law appearing on the face of the record. Yet, the Court of Appeals' panel below based its decision on the "vested rights" doctrine which appears to have been raised for the first time before that court.

Succinctly stated, "[a] lawfully established nonconforming use is a vested right and is entitled to constitutional protection." 4 E. Yokley, Zoning Law and Practice § 22-3 (4th ed. 1979). The "vested rights" doctrine has evolved as a constitutional limitation on the state's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances. The doctrine is rooted in the "due process of law" and the "law of the land" clauses of the federal and state constitutions. U.S. Const. amend. XIV, § 1; N.C. Const. art. I, § 19.

It has been said that the solution to the "vested rights" question

> has required the reconciliation of the doctrine of separation of powers with the constitutional requirements of substantive due process, a balancing of the interests of the public as a whole and those of the individual property owners, and, in many cases, the elements of good faith and bad faith and resort to equity and equitable principles.

4 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning § 50.01 (4th ed. 1986).

The multi-faceted, constitutionally based "vested rights" issue was not properly addressed by the panel below. In *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E. 2d 103 (1985), the Court of Appeals properly refused to address the peti-

tioner's challenge to the constitutionality of a particular zoning ordinance when the issue was not addressed by the local board or by the superior court on review by writ of certiorari. A unanimous panel wrote:

> These arguments are not properly before us. G.S. 160A-388(e) states in pertinent part: "Every decision of the board [of adjustment] shall be subject to review by the superior court by proceedings in the nature of certiorari." The board of aldermen, sitting in their quasi-judicial capacity as the board of adjustment in this case, only had the authority to grant or deny a variance under the zoning ordinance. G.S. 160A-388(d); [*Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E. 2d 128 (1946)]. The Board's decision was to deny the variance. Under G.S. 160A-388(e) the superior court, and hence this Court through our derivative appellate jurisdiction, had the statutory power to review only the issue of whether the variance was properly denied. The constitutionality of the zoning ordinance is a separate issue not properly a part of these proceedings since the denial of the variance request never addressed the validity of the zoning ordinance. Furthermore, the superior court sat in the posture of an appellate court, *see Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980), so it was not in a position to address constitutional issues that were not before the board.

Id. at 649, 334 S.E. 2d at 105.

Moreover, a determination of the "vested rights" issue requires resolution of questions of fact, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures. *See, e.g., Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E. 2d 904 (1969); *Warner v. W & O, Inc.*, 263 N.C. 37, 138 S.E. 2d 782 (1964). Fact finding is not a function of our appellate courts.

Nor was it appropriate in this context for the panel below to affirm the decision of the Zoning Board of Adjustment by substituting for its basis a legal theory not relied upon by the Board.

> [A] court cannot affirm the administrative action of a board by substituting its own premises in sustaining that action for

> those which served as the basis of the agency's action. "[A] reviewing court, in dealing with the determination . . . which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." (*Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, [91 L.Ed. 1995, 1999 (1947)]; *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169, 83 S.Ct. 239, [246], 9 L.Ed. 2d 207, [216 (1962)]; *Matter of Barry v. O'Connell*, 303 N.Y. 46, [50,] 100 N.E. 2d 127 [129 (1951)]. *Golisano v. Town Board* [of the Town of Macedon], 31 A.D. 2d 85, [---,] 296 N.Y.S. 2d 623, 626 (1968).

3 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning § 42.07[3] (4th ed. 1986). *Accord De Maria v. Enfield Planning and Zoning Comm'n*, 159 Conn. 534, 541, 271 A. 2d 105, 109 (1970). "Nor may the board whose determination is being reviewed urge grounds for affirmance other than and additional to those set forth in its decision." 3 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning § 42.07[3] n. 38 (4th ed. 1986). *See Bernstein v. Board of Appeals, Village of Matinecock*, 60 Misc. 2d 470, ---, 302 N.Y.S. 2d 141, 147 (1969).

We also note that the landowners are not even parties to this proceeding. Only the petitioners, Frank B. Godfrey, Joe N. Sutton, O. Fred Howey, and Billips Hood, on the one hand, and the respondent, the Union County Zoning Board of Adjustment, on the other, are parties to the judicial review of the latter's decision. No judicial determination of the good faith issue necessary to a "vested rights" analysis can bind one whose good faith is in question if that person is not a party to the judicial proceedings which result in the determination.

Whether the landowners may maintain the facility under the "vested rights" doctrine is not a question which is presented in this proceeding.[2] The Court of Appeals erred in addressing the "vested rights" issue.

2. We acknowledge the dissent of Justice Martin in which it is contended that the "vested rights" issue was properly presented and should be resolved in this

C.

[5] We disagree with the suggestion of the panel below that plaintiffs and others similarly situated must resort to obtaining or

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opinion. The dissent suggests that the issue should be resolved in Mr. Rape's favor, though he is not a party to this action. While we do not reach the "vested rights" issue, we would point out that if that issue is litigated at some future date, the outcome is not so certain as suggested in the dissent.

Our research has revealed no case directly on point in this state, but there is persuasive reasoning in several reported decisions from other jurisdictions which would support a different result.

In *Omaha Fish & Wildlife Club, Inc. v. Community Refuse Disposal, Inc.*, 213 Neb. 234, 329 N.W. 2d 335 (1983), the Nebraska Supreme Court refused to apply the doctrine of "vested rights" for the benefit of defendant landowner. That court found that expenditures made by defendant with knowledge that a lawsuit had been filed challenging his proposed use were not made in good faith.

In an analogous situation, the Supreme Court of Hawaii held that a resort developer proceeded at his own risk where he made expenditures despite notice that a petition had been certified for a public referendum which would (and, when passed, did) prohibit the proposed use. The court refused to apply the "vested rights" or "equitable estoppel" doctrines to allow property rights to vest. *County of Kauai v. Pacific Std. Life Ins.*, 65 Haw. 318, 653 P. 2d 766, *appeal dismissed*, 460 U.S. 1077, 76 L.Ed. 2d 338 (1982).

In *Bosse v. City of Portsmouth*, 107 N.H. 523, 226 A. 2d 99 (1967), the Pace Industrial Corporation had successfully persuaded the local administrative body to rezone its particular tract from residential to light industrial. Adjoining landowners had sought two injunctions to prevent the proposed use, and during the hearings, the trial court had twice warned Pace that it proceeded with construction at its own peril. The New Hampshire Supreme Court held that the designation change procured by Pace constituted unlawful "spot zoning" and stated that Pace had taken a "calculated risk" in proceeding with construction after plaintiffs had twice instituted legal proceedings seeking to enjoin the construction. Quoting from the Master's order below, the court went on to note:

> " 'Under the circumstances, and considering the fact that the Pace Industrial Corporation was aware that this was a Residential Zone at the time the purchase was made, and was aware shortly after the passage of the ordinance that the validity of this particular zone would be attacked, the Master finds that no vested interest accrued to Pace Industrial Corporation.' "

Id. at 532, 226 A. 2d at 107.

Finally, in an often-cited Florida Supreme Court case, *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963), that court held that knowledge by a developer that a political contest in which the success of certain candidates might alter the voting pattern of the municipal body did not prevent good faith reliance on an act of the current governing body. However, the court was careful to point out that

> "[t]he effect of pending litigation directly attacking the validity of a permit or zoning ordinance, or the effect of an eventual determination that such permit

attempting to obtain injunctive relief in order to protect their property interests against unlawful actions of a zoning board. Plaintiffs were well within their rights in electing to challenge the 1980 amendment through a declaratory judgment action rather than attempting, possibly in vain, to raise sufficient bond in order to procure an injunction.

> A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment. G.S. 1-254; *Woodard v. Carteret County*, 270 N.C. 55, 153 S.E. 2d 809. The plaintiffs, owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action. *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78; *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E. 2d 325.

> was invalid, may present a very different problem. The decision in the instant case was not rested on any showing that petitioner, at the time he acted in reliance on the permit granted him, was a party defendant in legal action directly attacking its validity, that he had any notice that his permit might have been invalid in its inception, or that its revocation was in fact required in the public interest."

Id. at 436 (footnote omitted). *See generally* Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urban L. Ann. 63, 80.

A trial court could conclude that application of the "vested rights" doctrine is inappropriate on the facts of this case and hold that when the landowner here incurred expenses with the knowledge that a lawsuit had been filed challenging the validity of the zoning ordinance amendment under which the landowner had obtained his building permit, he proceeded at his peril and thereby acquired no vested rights in the use of the property which is prohibited as a result of a judicial declaration that the ordinance amendment was invalid. In such a situation, it could not be said that the landowner had expended funds in good faith and in reasonable reliance upon a building permit issued pursuant to the challenged amendment.

It is entirely conceivable that a trial court could find that when, in the case at bar, Mr. Rape applied for rezoning in September 1980, he knew that the proposed grain storage facility was not permitted in the R-20 zone; that at the time the Board voted to rezone the property from R-20 to H-I, Mr. Rape knew of the substantial opposition and of the narrow three to two vote in favor of his application; that Mr. Rape knew that, within three weeks of the purported rezoning, the adjoining property owners had filed suit in superior court seeking to nullify the rezoning action by the Board on the basis that the action constituted unlawful "spot zoning"; that, with full knowledge of the pending suit, Mr. Rape obtained a building permit and began construction of the grain storage facility—and thus conclude that he did so at his own risk.

Blades v. City of Raleigh, 280 N.C. 531, 544, 187 S.E. 2d 35, 42. *See also* 3 A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning § 35.01[1] (4th ed. 1986).

The adjoining property owners should not be called upon to suffer to protect the financial investment of one who acts at his own peril with forewarning of the possible consequences. If the law were otherwise, there would be no protection from a zoning board which, unlike the situation before us, might act from purely corrupt motives. If one, in a situation such as the one at bar, could be assured that a major investment would be protected regardless of the outcome of his gamble, a comprehensive zoning ordinance would offer little or no protection to those who have relied upon that ordinance.

The ultimate result in cases such as this may indeed be harsh. As this Court said in *City of Raleigh v. Fisher*, 232 N.C. 629, 61 S.E. 2d 879 (1950):

> Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.

Id. at 635, 61 S.E. 2d at 902.

Though the result be harsh, it cannot be said that Mr. Rape was totally unfamiliar with the possible consequences of his actions. In *Atkins v. Zoning Board of Adjustment of Union County*, 53 N.C. App. 723, 281 S.E. 2d 756 (1981), the same James Dennis Rape had made additions to his grain storage and fertilizer sales facility at another location in Union County without obtaining the necessary permits after having his petition to rezone the property to H-I denied in 1978. There, as here, Mr. Rape had attempted to have additions to his operations in Union County declared to be a nonconforming use. The Court of Appeals, in an opinion by Becton, J., held that the Union County Zoning Board of Adjustment had no authority to grant Mr. Rape a Class A nonconforming status to uses and structures Rape added to his agricultural supply business where these new uses and structures were un-

lawful at their inception because they were begun after the effective date of the zoning ordinance and because no building permit was issued. In addition, the Board was without authority to grant Class A nonconforming use status to proposed uses and structures which were not in being at the time Mr. Rape filed his petition for Class A nonconforming status. Although the *Atkins* case arose prior to the 1981 Section 70 amendments to the Union County Zoning Ordinance relevant to this case, the law governing the establishment of nonconforming use status (lawfully in existence at the effective date of the ordinance or amendment) is essentially the same.

In summary, then, we hold that the Court of Appeals erred in affirming the order of the superior court finding no error in the 11 July 1983 order of the Union County Zoning Board of Adjustment which purported to allow a continuance of the Gro-More "nonconforming situation." Accordingly, we reverse the decision of the Court of Appeals and remand the action to that court for further remand to the Superior Court, Union County, with instructions to vacate its order of 16 November 1983 and to enter an order not inconsistent with this opinion.

Reversed and remanded.

Justice MARTIN dissenting.

I cannot concur in the majority opinion. The majority states that because the $400,000 grain facility did not exist on 2 June 1975, when the zoning law was effective, or on 23 November 1980, when the owners' property was rezoned to H-I, it cannot be a nonconforming use. This narrow interpretation of the zoning law overlooks basic legal principles and in effect leaves the landowners without a remedy, and defeats the interests of the people of Union County as expressed by their zoning board of adjustment.

When the county commissioners rezoned the subject property to H-I, heavy industrial, on 23 November 1980, the landowners had a right to rely upon the validity of the ordinance. They were not obligated to delay the lawful use of their property until the uncertain conclusion of a lawsuit on 1 March 1983, more than two years after the rezoning.

Amendments to zoning ordinances are presumed to be valid, and parties who assert their invalidity bear the burden of proof. *Allgood v. Town of Tarboro*, 281 N.C. 430, 189 S.E. 2d 255 (1972); *Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E. 2d 352 (1971). Having a valid building permit based upon a valid amendment to the zoning ordinance, the owners in good faith constructed a grain storage facility upon the property, at a cost in excess of $400,000.

The decision of the Court of Appeals declaring the amendment to the zoning ordinance to be null and void had the effect of rezoning the subject property to R-20. While it is true that the courts do not have the authority to zone real property, the action of the Court of Appeals in this case had that *effect*. Otherwise, the bizarre result would obtain whereby the subject property would be free of *all* zoning restrictions. As the majority states, the result of the order was that "the entire tract remained subject to the original R-20" zoning.

I can see no difference in the result reached, whether the property is rezoned by the county or whether the decision of the Court of Appeals resulted in a change in the zoning of the property. By either means the H-I zoning was eliminated and the owners' present utilization of the property was recognized by the zoning board of adjustment as a valid nonconforming use.

Under the facts of this case, in determining that the landowners were entitled to a nonconforming use permit under the ordinance, the Board necessarily had to find that the issuance of the permit was valid under the "vested rights" doctrine.

The issuance of the building permit alone created no vested right; it merely authorized the owners to act. But where the owners in good faith exercised their privilege granted by the permit at a time when the act was lawful, they will be protected. *Warner v. W & O, Inc.*, 263 N.C. 37, 138 S.E. 2d 782 (1964).

> The law accords protection to nonconforming users who, relying on the authorization given them, have made substantial expenditures in an honest belief that the project would not violate declared public policy. It does not protect one who makes expenditures with knowledge that the expenditures are made for a purpose declared unlawful by duly enacted ordinance.

Id. at 43, 138 S.E. 2d at 786-87.

This Court also held:

> It is the rule in this State that *the issuance* of a building permit, to which the permittee is entitled under the existing ordinance, creates no vested right to build contrary to the provisions of a subsequently enacted zoning ordinance, unless the permittee, acting in good faith, has made substantial expenditures in reliance upon the permit at a time when they did not violate declared public policy. . . . When, at the time a builder obtains a permit, he has knowledge of a pending ordinance which would make the authorized construction a nonconforming use and thereafter hurriedly makes expenditures in an attempt to acquire a vested right before the law can be changed, he does not act in good faith and acquires no rights under the permit.

Keiger v. Board of Adjustment, 281 N.C. 715, 719, 190 S.E. 2d 175, 178 (1972) (citations omitted). In so holding, this Court implicitly recognized that the substantial economic value of the improvement to the property justifies the continued existence of the facility as a nonconforming use.

Here, there is no evidence that the owners did not act in good faith. The owners were issued the building permit prior to the institution of the declaratory judgment action seeking to invalidate the amendment to the zoning ordinance. The construction of the grain storage facility was completed in May 1981, seven months before the decision of the superior court and almost two years before the filing of the Court of Appeals decision, 1 March 1983, that declared the amendment to be null and void. It is to be noted that the Court of Appeals did not declare that the amendment was void ab initio, but accorded the amendment its proper presumption of validity and affirmed the judgment of the trial court "that the rezoning . . . is declared null and void and of no effect." *Godfrey v. Union Co. Bd. of Commissioners*, 61 N.C. App. 100, 103, 300 S.E. 2d 273, 275 (1983).

Certainly, the facility itself and the expenditure of at least $400,000 is substantial in amount. The owners had no way to predict whether the lawsuit would be pursued to judgment, much less what the outcome of the case would be.

Plaintiffs could have protected their interests in the declaratory judgment action by obtaining an injunction prohibiting the

owners from constructing pursuant to their building permit. A concomitant bond would have protected the rights of the owners, who were parties to the declaratory judgment action. By so doing, the present litigation probably would not have been necessary.

I conclude that the facts of this appeal are within the holding of this Court in *Town of Hillsborough v. Smith*, in which Justice Lake, speaking for the Court, stated:

> We, therefore, hold that one who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance *or by other means* . . . .

276 N.C. 48, 55, 170 S.E. 2d 904, 909 (1969) (emphasis added). I submit that "by other means" includes the changing of a zoning ordinance by court action, such as occurred in our case. The court action caused a change in the zoning ordinance of Union County to the same effect and degree as would be done by an amendment to the ordinance.

The majority refuses to address the "vested rights" issue, arguing that it is not properly before us. All parties relied upon and argued the issue. The board of adjustment did indeed consider the "vested rights" doctrine without referring to it by name. The Board found: "That subsequent to said rezoning [to H-I] the then owner obtained a building permit and constructed on the site a grain storage and transfer facility and the offices that go with it at considerable expense." In affirming the decision of the Board, the superior court approved this finding. The issue was then squarely presented to the Court of Appeals and this Court. Under these circumstances, I find that the "vested rights" issue has been properly presented to this Court by the parties and that we should resolve it.

Although the majority holds that the Court of Appeals erred in addressing the "vested rights" issue, it devotes four and one-

half pages to a discussion of the doctrine. My Brother Meyer thereafter includes a three-page footnote analyzing the issue with respect to this appeal and predicting that if the issue "is litigated," it will probably be determined in the plaintiffs' favor. It thus appears that the majority has in effect decided the "vested rights" issue, all the while denying the propriety of such action.

The zoning board of adjustment held that the owners' use of the property was a nonconforming use and was entitled to continuation under the zoning ordinance of Union County. The superior court and the Court of Appeals affirmed this holding. I vote to affirm the decision of the Court of Appeals and allow this nonconforming use to continue.

Justice EXUM concurring in result.

I concur in the result reached by the Court on the nonconforming use issue for all the reasons stated in Justice Meyer's opinion. I also agree with the Court's conclusion that this is the only question before us. The majority rightly concludes that whether the landowner can ultimately establish in a proper proceeding that he acted in good faith in constructing his building and may have thereby acquired a vested right to maintain it are questions we should not now decide. For cases discussing this doctrine see *In re Campsites Unlimited*, 287 N.C. 493, 215 S.E. 2d 73 (1975); *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E. 2d 904 (1969).

I write only to disassociate myself from what I perceive to be an unwarranted suggestion in footnote 2 and Part C of the Court's opinion. These portions of the opinion seem to suggest that the landowner will not be able to demonstrate in a future proceeding his "good faith" merely because a declaratory judgment action challenging his right to build under the amended ordinance had been filed against him before he began construction. This has not yet been declared the law in North Carolina, and I do not wish to say nor imply now that it should or should not be. I am satisfied the existing lawsuit should be one circumstance to be considered, probably among others, on the issue of the landowner's good faith; but I doubt that it should be controlling on

the question. In any event, I think the question should be left for the future.

Chief Justice BRANCH joins in this concurring opinion.

STATE OF NORTH CAROLINA v. LOUISE EDITH LACHAT

No. 243A85

(Filed 3 June 1986)

1. **Constitutional Law § 34; Criminal Law § 26.8— murder prosecution—prior mistrial—no findings on necessity—double jeopardy violation**

The trial court erred by denying defendant's motion to dismiss a murder charge on the ground of former jeopardy where the court in defendant's first trial declared a mistrial when no necessity existed; the court stated more than once that it did not believe the jury could ever reach a verdict and that the case would be considered later by another jury; the jurors made clear that they would like a recess but wished to continue deliberations; the court struck its withdrawal of a juror; the jury returned the next day and resumed deliberations; a mistrial was declared when a verdict could not be reached; the trial court did not make findings or conclusions concerning any necessity for its actions; and an attempt four months later to make the required findings and conclusions was not successful. N.C.G.S. § 15A-1064.

2. **Criminal Law § 128; Constitutional Law § 34— murder—double jeopardy—no objection to prior mistrial—not required in capital case**

Defendant's failure to object to a mistrial during her first murder trial did not prevent her from receiving relief on double jeopardy grounds; the rule of *State v. Odom*, 316 N.C. 306, should not be applied in capital cases. N.C.G.S. § 15A-1064.

APPEAL by the defendant from judgment entered on 14 December 1984 by *Wood, J.*, in Superior Court, FORSYTH County.

The defendant was tried on an indictment, proper in form, charging her with murder in the first degree. Upon her plea of not guilty, the jury returned a verdict of guilty of murder in the first degree. The State then stipulated that there were no aggravating factors present. The trial court concurred in that conclusion and entered judgment sentencing the defendant to imprisonment for the term of her natural life. The defendant appealed to the Supreme Court as a matter of right under N.C.G.S. § 7A-27(a). Heard in the Supreme Court 19 November 1985.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Assistant Attorney General, for the State.

Cofer and Mitchell, by William L. Cofer, for the defendant appellant.

MITCHELL, Justice.

This appeal presents *inter alia* the issue of whether the prohibition against double jeopardy forbade the second trial of the defendant for murder, since her previous trial on the same charge had been terminated by a mistrial without findings of fact by the trial court showing that a mistrial was necessary. We answer in the affirmative and hold that the trial court erred by denying the defendant's motion to dismiss the murder charge against her on the ground of former jeopardy. As a result, the judgment entered against the defendant in this case must be vacated and the defendant discharged from custody.

The defendant, Louise Edith Lachat, was indicted on 5 March 1984 for the murder in the first degree of her thirteen-year-old daughter Michelle. She was first tried on this charge before the Superior Court, Forsyth County, in August of 1984. That trial ended during the guilt determination phase when the court declared a mistrial *ex mero motu* on 11 August 1984.

On 6 December 1984, the defendant filed a written motion to dismiss the charge against her. In her motion she stated that the declaration of mistrial which terminated her first trial was made without consulting her attorney or affording him an opportunity to object and without making findings of fact with respect to the grounds for the mistrial. The defendant therefore contended that a retrial would unconstitutionally "subject her to double jeopardy for the same offense." On 10 December 1984, the trial court heard arguments of counsel, took evidence, made findings of fact and conclusions of law and denied the defendant's motion to dismiss. The trial court then commenced the second trial of the defendant —the trial from which this appeal was taken.

A complete recitation of the evidence presented at the trial from which this appeal was taken is unnecessary to a consideration of the issues we find dispositive. In summary, some of the evidence tended to show the following:

Michelle Lachat appeared in September 1982, to be the normal and healthy thirteen-year-old daughter of Remy and Louise Lachat. Michelle and her mother had a very warm and loving relationship. They had visited relatives in Switzerland in August and returned to prepare for the coming school year.

Remy Lachat worked for the LaRose Company, a sportswear manufacturer. The Lachats lived well. In September 1982, however, Louise Lachat became increasingly suspicious that her husband's sportswear manufacturing business was failing. He assured her throughout the summer that the business was fine. Finally, on Sunday, 12 September 1982, the defendant Louise Lachat contacted one of the partners in the LaRose Company. He informed her that the business stood on the verge of bankruptcy and no longer employed her husband. The defendant reacted like a concerned wife who had just learned of an investment failure. Despite the failure, the Lachats appeared financially secure for the immediate future.

At approximately 6:30 p.m. on Monday, 13 September 1982, Remy Lachat began screaming and banging on the door of his neighbor, John Storch's house. Remy was yelling that his daughter and wife were dead. Storch and Remy Lachat ran to the Lachat home. Once there, Storch observed Michelle apparently dead in a bathtub of cold water. The defendant Louise Lachat appeared to be dead lying on her bed in the master bedroom of the home. Remy Lachat carefully removed his daughter's body and placed it on the bed in her room.

Dr. Lou Stringer, Forsyth County Medical Examiner, arrived at the Lachat home shortly after 7:00 p.m. He found the defendant unconscious with very poor breathing and pulse. He was able to stabilize the defendant's condition, and an ambulance transported her to Baptist Hospital. Dr. Stringer found Michelle Lachat on her bed and determined that she was dead.

After treating the defendant Louise Lachat and examining the body of Michelle, Dr. Stringer performed his function as a medical examiner. An autopsy indicated that Michelle had died of drowning, but only a minimal amount of water was found in her lungs. A high level of amitriptyline, a tricyclic antidepressant drug, indicated that Michelle had been drugged before drowning.

Sally Virginia West, a registered nurse working in the intensive care unit of Baptist Hospital, testified that after regaining consciousness the defendant made certain statements. The defendant specifically stated that she had killed her daughter. Nurse Linda Johnson testified that the defendant made a statement to her in which the defendant admitted that she had gotten Michelle up for breakfast, placed medicine in her food and later held her underwater in the bathtub until the defendant was sure that she was dead. The defendant also stated that she had killed Michelle because of financial problems which she did not want her daughter to have to live through. The defendant stated that: "She was very sorry that she hadn't died too."

Dr. Barry Cole, a qualified psychiatrist, met the defendant Louise Lachat in the intensive care unit of Baptist Hospital the day after her daughter's death. He interviewed the defendant at that time, and she told him of her actions causing the death of her daughter. Dr. Cole also spoke with members of the hospital staff concerning information they had received from the defendant's family and friends and examined the defendant's hospital medical records. Dr. Cole formed the opinion that the defendant did not know the difference between right and wrong at the time she killed her daughter.

Dr. Selwyn Rose examined the defendant on 15 September 1982. He examined her again on two occasions within the following week. He had the defendant transferred to another hospital and later to the Mandala Center. During the following six or seven weeks, he thoroughly examined the defendant and had several tests performed on her. He too formed the opinion that the defendant did not know the difference between right and wrong at the time she killed her daughter. Although he felt that the defendant understood the nature of her act in killing her daughter, he was of the opinion that she did not understand the quality of her act.

The jury returned a verdict of guilty of murder in the first degree. The trial court then concluded that there were no aggravating factors and entered judgment sentencing the defendant to imprisonment for life.

[1] The defendant assigns error to the trial court's denial of her *motion to dismiss the charge against her prior to her second trial*

for the murder of her daughter. She contends that by denying her motion, the trial court erroneously placed her in jeopardy a second time for the same offense in violation of the Constitution of the United States, the Constitution of North Carolina and the statutes and common law of North Carolina. We neither consider nor decide the questions the defendant contends arise under the Constitution of the United States. Instead, we conclude that she is entitled on adequate and independent grounds of North Carolina law to have the judgment against her vacated and the charge of first degree murder dismissed.

The defendant specifically contends that the trial court committed reversible error by failing to make findings of fact on the question of the necessity for a mistrial before declaring a mistrial during her first trial for the murder of her daughter. We find this contention to have merit.

After the admission of all of the evidence at the defendant's first trial, the jury began deliberations at 4:24 p.m. on a Thursday. Court was recessed for the evening at 5:10 p.m. The jury returned on Friday morning at 9:30 a.m. and deliberated until 8:06 p.m. At that time the jury returned to the courtroom and reported to the trial court as follows:

> FOREMAN OF THE JURY: Your Honor, the jury feels that we are not able to reach a unanimous decision. We have reached an impasse.
>
> COURT: Let me ask you a question. Now, I don't want to know how you're divided up, I want to know the numerical differences, such as ten and two or eight and four or how you are divided that way.
>
> FOREMAN OF THE JURY: It's either nine and three or eight and four or seven and three.
>
> COURT: Well, I'm going to ask you to go back in there and deliberate further.
>
> . . . .
>
> FOREMAN OF THE JURY: We'll try.
>
> (JURY DELIBERATIONS CONTINUED AT 8:09 P.M.)

(The following took place about 9:45 p.m.)

COURT: You all want to approach the bench here?

(COUNSEL APPROACHED THE BENCH.)

COURT: Bring the jury in.

(JURY RETURNED TO THE COURTROOM AT 9:46 P.M.)

COURT: Mr. Foreman, are you making any progress?

FOREMAN OF THE JURY: No, sir.

COURT: You think you—

FOREMAN OF THE JURY: We have gotten to the point that we would like to ask for a recess.

COURT: Until tomorrow?

FOREMAN OF THE JURY: Until some time. We feel that some of the jurors are pretty fatigued and we're not making that much progress.

COURT: Well, let me ask you this: Do you think if you came back tomorrow you could make any progress?

FOREMAN OF THE JURY: I don't know how much.

COURT: Well, when I say progress, do you think you could reach a verdict in this case if you came back.

FOREMAN OF THE JURY: The last period of time has been very difficult moving forward.

COURT: Well, I'm going—what I'm going to do at this time, I'm going to withdraw a juror and declare a mistrial; so we'll withdraw Juror Number 12 and declare a mistrial.

I think that you deliberated long enough; if you could reach a verdict, you would have done it by now.

So I want to thank you for your service, your patience here and for your hard work on this case. I'm sorry that you couldn't reach a verdict.

And, of course, this means this case will have to be tried again by some other jury. I can say that to you now.

But it's my feeling if you couldn't reach a verdict all day today until nine and an hour yesterday that I don't believe you would have ever done it by staying out—by bringing you back tomorrow morning or staying late—letting you stay out further tonight.

I don't want to let you stay out further tonight. I don't want to punish jurors.

FOREMAN OF THE JURY: Yes, Your Honor, we tried very, very hard. We made a lot of progress. We fought and reiterated and no one was bashful about talking. No one was bashful about putting their input in.

We have some divergent opinions and we have individuals. All of us are very strong willed about their opinions, and there's always a possibility that given more time that people do change their minds, and I don't—

It has been very difficult for all of us to say that we cannot reach a verdict, but I think we—and I want the record to show that we did try very hard.

COURT: No question about that. Let me tell you, you're not the first jury that's been in this situation.

FOREMAN OF THE JURY: Again, we are willing to keep trying, and it's a situation that—that has not made a lot of progress and it just keeps—

The issues are not that profound, but it's a question that we're—that we have just not been able to accomplish getting over the barrier. And that's kind of the way I sum it up.

COURT: I think that then I made a mistake withdrawing a juror.

JUROR NUMBER SEVEN: I do.

FOREMAN OF THE JURY: I can't say that. I don't know that. I don't have that much experience, you know. Certainly you have much more than I do.

I don't want the jury to think I made a decision for them on the thing. And I have not done that, but we have reached a point that we have been for several hours, and it has been a very rapid discussion about the issues and the points.

And I just wanted to make that statement.

COURT: Well, you think if you came back here tomorrow and tried again that you could reach a verdict?

JUROR NUMBER SEVEN: There's a possibility.

JUROR NUMBER FIVE: Anything's possible. Everyone's tired.

JUROR NUMBER SEVEN: We didn't say that. We did not agree to say that. Everybody wants to try. We haven't given up.

COURT: Any objections to my declaring a mistrial?

MR. COFER: I've never been faced with this situation before.

. . . .

COURT: How's the defendant feel?

MR. COFER: Well, obviously, Your Honor, if I thought the verdict was going my way I'd want them to stay here all night, but—

COURT: I'm not talking about staying here all night. I'm going to comply with the wishes of the jury under the circumstances.

MR. COFER: Well, if the jurors can deliberate in good faith. I agree they've been here too long.

COURT: Yes, I thought they'd been here too long, and I came—made my mind up when you came back and—that you'd been here too long.

Well, I'll strike the withdrawal of the juror, reinstate Juror No. Twelve, and we'll continue with this tomorrow morning.

And since the general opinion of the members of the jury is that they can possibly make some progress tomorrow.

The court then released the jury for the evening with instructions to return the following morning. All of the jurors were present at the appointed time the next day, when the following transpired:

COURT: Now, ladies and gentlemen, again I send you back to the jury room to deliberate. Again I tell you to make up your—to deliberate conscientiously, make up your verdict, and let your verdict speak the truth.

(JURY DELIBERATIONS CONTINUED AT 9:41 A.M.)

(JURY SENT A QUESTION TO THE JUDGE.)

(JURY RETURNED TO THE COURTROOM AT 10:46 A.M.)

COURT: You have a question.

FOREMAN OF THE JURY: Your Honor, the jury has conferred. They've mediated, they've been over the case. We are at an impasse. We cannot get a unanimous decision.

This hasn't been an easy thing. We've discussed it openly. We've gone through all the evidence we have been given, both physically and in the courtroom.

We understand each other's opinion and each other's idea, and we are unable to give you a unanimous decision.

COURT: All right. Then the Court—do you think—do you feel now that further deliberations would be useless.

FOREMAN OF THE JURY: I have covered that in specific, and it's our general opinion that further deliberations will be useless.

COURT: All right, then. Court will withdraw Juror Number 12, then declare a mistrial.

The jury selected for the defendant's first trial was discharged by the trial court.

On 10 December 1984, the first day of the defendant's second trial on the charge of murdering her daughter, the trial court considered the defendant's motion to dismiss and made findings and conclusions concerning the necessity for the mistrial which had terminated the first trial four months earlier. It is readily apparent from the candid remarks of the trial court during its hearing on the defendant's motion, however, that the trial court had little independent recollection of the specific events which had led to the mistrial. Instead, the trial court was required to have the

court reporter testify from the stenographic record of the prior trial.

After making findings based in large part upon the court reporter's testimony, the trial court concluded that its first declaration of a mistrial during the previous trial of the defendant had been a "premature mistrial." The trial court further concluded that its comments to the jury immediately after the "premature mistrial" to the effect that the jury would never be able to reach a verdict and that another jury would have to consider and decide the case did not prejudice the defendant. The trial court then concluded that its final declaration of a mistrial terminating the first trial was a necessity because the jury had been "hopelessly deadlocked." Based upon its findings and conclusions, the trial court denied the defendant's motion to dismiss the charge against her on the ground of former jeopardy.

It has long been a fundamental principle of the common law of North Carolina that no person can be twice put in jeopardy of life or limb for the same offense. *E.g., State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838 (1962); *State v. Prince,* 63 N.C. 529 (1869); *State v. Garrigues,* 2 N.C. 241 (1795). This principle has also been viewed as an integral part of the "law of the land" guarantees currently contained in article I, section 19 of the Constitution of North Carolina. *E.g., State v. Shuler,* 293 N.C. 34, 235 S.E. 2d 226 (1977); *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243 (1954) (decided under former art. I, § 17). However, the principle is not violated where a defendant's first trial ends with a mistrial which is declared for a manifest necessity or to serve the ends of public justice. *State v. Simpson,* 303 N.C. 439, 447, 279 S.E. 2d 542, 547 (1981). "It is axiomatic that a jury's failure to reach a verdict due to a deadlock is a 'manifest necessity' justifying the declaration of a mistrial." *Id.* When a mistrial is declared properly for such reasons, "in legal contemplation there has been no trial." *State v. Tyson,* 138 N.C. 627, 629, 50 S.E. 456 (1905).

The decision to order a mistrial ordinarily rests with the sound discretion of the trial court. *State v. Odom,* 316 N.C. 306, 309, 341 S.E. 2d 332, 334 (1986). Under the common law of this State, however, a trial court in a capital case has no authority to discharge the jury without the defendant's consent and hold the defendant for a second trial, absent a showing of "manifest

necessity" for a mistrial. *Id.; State v. Birckhead*, 256 N.C. at 505, 124 S.E. 2d at 846-47; *State v. Crocker*, 239 N.C. at 449-50, 80 S.E. 2d at 246; *State v. Beal*, 199 N.C. 278, 294-95, 154 S.E. 604, 614 (1930); *State v. Ephraim*, 19 N.C. 162, 166 (1836). The common law of North Carolina has also long been that in trials for capital felonies it is the duty of the trial court when declaring a mistrial due to manifest necessity "to find the facts and set them out in the record, so that his conclusion as to the matter of law arising from the facts may be reviewed by this Court." *State v. Jefferson*, 66 N.C. 309 (1872). We have previously said:

> While it is stated repeatedly that the order of mistrial, even in capital cases, is a matter resting in the sound discretion of the trial judge, it is equally well settled that the findings of fact must be sufficient to warrant the exercise of this discretionary authority.

State v. Crocker, 239 N.C. at 451, 80 S.E. 2d at 246.

In 1977 the General Assembly extended the requirement of findings of fact to apply to all cases in which a mistrial was ordered.

> § 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). As pointed out in the official commentary to this statute:

> 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.

We recently held that the findings required by the statute are mandatory, and that the failure to make them is error. *State v. Odom*, 316 N.C. at 311, 341 S.E. 2d at 335.

We must turn our attention then to the dispositive question of whether the findings of fact and conclusion of necessity made by the trial court in the present case, four months after the de-

fendant's first trial, provided a sufficient basis for the mistrial. If so, the trial court's denial of the defendant's motion to dismiss for reasons of former jeopardy was proper. Given the peculiar facts presented on appeal in this case, however, we are constrained to hold that the trial court's findings and conclusions were not sufficient.

The record on appeal clearly indicates that at the time the trial court withdrew a juror and initially declared a mistrial during the defendant's first trial in August, no necessity existed for such action. The jurors immediately made this clear to the trial court by their statements to the effect that, although they were tired and would like a recess, they had made progress toward a verdict and wished to continue their deliberations. With the benefit of hindsight not available to the trial court, we now can say that had it attempted to make the required findings prior to its initial declaration of a mistrial, the trial court would have discovered the actual position of the jury. It would not then have declared a mistrial where no necessity existed.

Upon hearing the objections of the jurors, the trial court immediately displayed commendable candor by acknowledging that it had made a mistake in declaring a mistrial. It then attempted to repair the damage by striking its withdrawal of a juror and attempting to reinstate the jury. This effort failed. We find it unnecessary to decide whether such an effort can ever be successful, however, and confine our consideration to the specific facts of this case.

Upon initially declaring a mistrial, the trial court unfortunately stated to the jury more than once that it did not believe that the jury could ever reach a verdict and that the case would be considered at some later time by another jury. It is impossible for us to know on appeal whether these comments by the trial court encouraged one or more wavering jurors to harden their positions and refuse to join in a verdict acquitting the defendant. The trial court faced this same handicap when it attempted to make findings and conclusions four months later. It is possible, however, to know that such comments by the trial court *may have* encouraged the jurors to pass the difficult decision facing them to another jury, because the trial court had stated that it did not expect the present jury to ever reach a verdict.

We can know with certainty only that the jury returned on the morning after the initial declaration of a mistrial and, after brief deliberations, reported to the trial court that they were unable to reach a verdict. At that time the trial court again declared a mistrial without making findings or conclusions concerning any necessity for its action. Although the trial court belatedly attempted to make the required findings and conclusions after receiving the defendant's motion to dismiss four months later, it is apparent that memories had dimmed by that time and that the trial court's efforts at independent recollection of the crucial events were unsuccessful.

Given the foregoing facts, it is clear that the initial declaration of a mistrial during the defendant's first trial on the capital charge against her was not the result of manifest necessity and, therefore, was error. We are unable to determine on the record before us whether the error in initially declaring a mistrial caused the jury to fail to reach agreement thereafter and deprived the defendant of a verdict. Therefore, we are required to hold that the trial court erred when it later denied the defendant's motion to dismiss the charge of murder in the first degree against her for the reason that she had formerly been placed in jeopardy for the same offense.

[2] The defendant did not object to either declaration of mistrial during her first trial. We recently held in *State v. Odom*, 316 N.C. 306, 341 S.E. 2d 332 (1986), a noncapital case, that a defendant is not entitled by reason of former jeopardy to dismissal of the charge against him, where he failed to object to the trial court's termination of his first trial by a declaration of mistrial. The requirement for such objections during the first trial, however, is neither expressed nor implied by the terms of N.C.G.S. § 15A-1064 which are mandatory in nature. Like other rules requiring objections at appropriate points in a trial, the rule we announced in *Odom* is a court-made rule designed to prevent avoidable errors and the resulting unnecessary appeals. We conclude, however, that the same rule should not be applied in capital cases. To strictly require such objections to mistrials in capital cases would require payment of a price too high even for the commendable result of improved judicial efficiency. *See generally*, *State v. Garrigues*, 2 N.C. 241 (1795) (a brief history of the abuses leading to

the acceptance in England and in North Carolina of the common law rule against double jeopardy in capital cases).

Further, we doubt that a great deal of judicial efficiency could be achieved by requiring objections to mistrials in capital cases. Capital cases are those cases "in which the death penalty may, but need not necessarily, be imposed." *State v. Barbour*, 295 N.C. 66, 70, 243 S.E. 2d 380, 383 (1978), *quoting with approval State v. Clark*, 18 N.C. App. 621, 624, 197 S.E. 2d 605, 607 (1973). Conviction of the offense charged in such cases must result in either a sentence of death or a sentence of imprisonment for life. N.C.G.S. § 15A-2000 (1983). Judgments in such cases are almost always appealable directly to this Court as a matter of right, and our experience has been that those convicted almost always take advantage of that right. N.C.G.S. § 7A-27(a) (1981).

In any event, we have previously indicated that "a charge of first degree murder carries with it the possibility of a sentence of death and must therefore be, and is, subject to additional safeguards." *State v. Strickland*, 307 N.C. 274, 291, 298 S.E. 2d 645, 657 (1983). Although the State's stipulation during the sentencing phase of the second trial caused the case against this defendant to lose its capital nature at that time, the case was a capital case throughout her first trial. Therefore, we conclude that in this case the defendant's failure to object to the termination of her first trial by a declaration of mistrial does not prevent her now receiving relief to which she otherwise is entitled on grounds of former jeopardy.

We also decline for an additional reason to apply the rule announced in *Odom* requiring that a defendant object to a mistrial or waive the right to present it later as a basis for an assignment of error on appeal. In *Odom* we emphasized that the record on appeal indicated that the defendant had been given notice and an opportunity to object to the mistrial before it was declared, and that the defendant made no argument that he was denied such opportunity. In the present case, however, both declarations of mistrial by the trial court were entered on the trial court's own motion and without prior notice or warning to the defendant. To require her to go through the formality of objecting after a mistrial had already been declared or lose her protection against double jeopardy would be a triumph of form over substance on these

facts. This is particularly true since the defendant properly raised the issue of former jeopardy before the commencement of the second trial by filing her written motion to dismiss the charge against her, and it was the trial court's denial of that motion which preserved this issue for appeal.

Obviously, we have decided this case on the facts arising from the specific record before us. We wish to make it clear, however, that this opinion does not address and is not dispositive of those cases in which manifest necessity for a mistrial clearly appears in the record, such as, for example, cases involving the death or incapacity of the trial judge occurring during the trial.

For the foregoing reasons, the declaration of a mistrial terminating the defendant's first trial was error, and the defendant was entitled to have her motion to dismiss granted. Accordingly, the judgment entered against the defendant by the trial court on 14 December 1984 must be vacated and the defendant discharged from custody. It is so ordered.

Judgment vacated.

STATE OF NORTH CAROLINA v. WAYNE THEODORE MERCER

No. 410A85

(Filed 3 June 1986)

1. Criminal Law § 42.5— jewelry stolen from kidnapping and rape victim—admissible

In a prosecution for rape, kidnapping, and felonious possession of stolen goods, a wedding ring and watch taken from the victim and admittedly found in defendant's possession after the offenses did not raise impermissible inferences because the stolen jewelry tended to make defendant's connection to the offenses more probable than without the evidence; a chain of custody for each item was introduced; the victim testified that she believed those items were the ones stolen from her; and the fact that defendant was in possession of the stolen jewelry soon after its theft had probative value on the issue of the identity of the perpetrator of the rape and kidnapping. N.C.G.S. 8C-1, Rules 401, 402, 403.

2. Criminal Law § 106.2— rape, kidnapping, possession of stolen goods—circumstantial evidence—evidence sufficient

In a prosecution for kidnapping, rape, and possession of stolen goods, the trial court properly determined that a reasonable inference of defendant's guilt could be drawn from the circumstances and denied defendant's motion to dismiss for insufficient evidence where the established facts which remain uncontroverted at trial were that a tall, thin black man in his twenties abducted the victim, stole her jewelry, and raped her; the defendant was a tall, thin black man in his twenties; the blood grouping reactions of semen stains were consistent with defendant and 14% of the general population; defendant was in possession of the victim's wedding band eight days after it was stolen; defendant was also in possession of the victim's stolen digital watch and gave it to his girlfriend prior to his incarceration fourteen days after the watch had been stolen; and the person who stole the victim's jewelry was the same person who kidnapped and raped her.

BEFORE *Winberry, J.*, at the 20 June 1985 Criminal Session of Superior Court, NASH County, defendant was convicted of first-degree rape, second-degree kidnapping, and felonious possession of stolen goods. Following a sentencing hearing conducted pursuant to N.C.G.S. § 15A-1334, defendant was sentenced to life imprisonment for the rape conviction and to presumptive terms of nine years and three years, respectively, for the second-degree kidnapping and the possession of stolen goods. Defendant appeals the imposition of 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 his appeal of the convictions for the kidnapping and possession charges was allowed 16 July 1985. Heard in the Supreme Court 17 April 1986.

Lacy H. Thornburg, Attorney General, by Marilyn R. Mudge, Assistant Attorney General, for the State.

Robert D. Kornegay, Jr., and Howard A. Knox, Jr., for defendant-appellant.

MEYER, Justice.

The evidence for the State tended to show that shortly after 7:00 p.m. on 3 January 1985, the victim, a 56-year-old female schoolteacher, drove the four blocks from her home in Rocky Mount to the Piggly-Wiggly grocery store. She parked her Honda automobile in front of the grocery store entrance, went inside, purchased a loaf of bread, and returned to her car. Once inside the car, the victim reached over to the left side door to close it

but was unable to do so because a man was standing beside the open door. The man held a small handgun to the left side of the victim's head and said, "Woman, I want your money."

The victim was unable to see the man's face because she was seated in the compact car, and the man, whom she described as "reasonably tall," was standing next to the car. The victim handed her assailant her change purse which contained only sixty cents, a small coin inscribed with biblical verses, and her house key. She explained to the man that she had no more money because she had come to the store only for a loaf of bread and had left her pocketbook at home. The man then ordered her to slip up the seat of the two-door Honda, and he slid easily into the back seat. As he entered the car, the man reached forward and knocked the rear view mirror askew. When he did, the victim noticed that the hand "belonged to a black person." The man ordered the victim not to look at him and to begin driving; she complied, and the man directed her to stop the car in the parking lot of the Rocky Mount Senior High School.

The man moved to the front seat of the car, pulled the victim's toboggan cap down over her face so that she could not see him, and engaged in vaginal intercourse with the victim against her will. The victim testified that her assailant held the handgun against her from time to time during the ordeal. While they were at the high school, the man ordered the victim to relinquish her rings and her watch. She gave him her engagement ring, her thin gold wedding band, and her digital Criterion watch. The assailant then had the victim drive him back to the Piggly-Wiggly store, where he got out of the car and left. The victim drove straight home, related the incident to her husband, then went to Nash General Hospital where Dr. Winters conducted an examination and prepared an SBI rape kit.

On 11 January 1985, the defendant appeared at the M&T Pawn Shop where Melvin Corbett was working. Mr. Corbett had known the defendant for four or five years. The defendant brought in a small, thin yellow gold wedding band for which Mr. Corbett paid him five dollars. Mr. Corbett tagged the ring, according to the store's policy, with an identification number and the date. He also completed a form for police records upon which he listed the seller's (defendant's) name, address, "North Carolina

I.D. number," date of birth, race, and sex. The defendant signed the form, a copy of which was filed with the police department.

On 15 January 1985, Detective Tommy Thompson of the Rocky Mount Police Department went to the pawn shop with the police department's copy of the pawn ticket and took custody of the fourteen carat gold wedding band defendant had pawned there four days earlier. He displayed the ring to the victim, who identified it as the one her attacker had stolen from her on 3 January. Detective Thompson arrested defendant pursuant to a warrant for possession of stolen goods issued and served on 17 January 1985. The defendant remained in jail until he made bond on the evening of 12 February 1985. The next day, 13 February, Detective Thompson arrested defendant pursuant to warrants for first-degree kidnapping and first-degree rape issued 12 February 1985.

Later in the day of 13 February, defendant's girlfriend, Laura Ann Winstead, spoke with Detective Thompson at his office in the police department. She was wearing a digital watch which she told Detective Thompson defendant had given to her some time before he was incarcerated on 17 January. Ms. Winstead relinquished the watch to Detective Thompson, who took it to the victim for possible identification the same day. The victim identified the watch as the one which had been stolen from her on 3 January. She noted that her watchband had originally been gold in color but that the gold coating had worn off from wear, leaving the band silver in color except where the clasp had covered it. When the victim tried on the watch, it was too small for her wrist. Detective Thompson adjusted the band so that the clasp covered the one-fourth inch yellow gold space. The watch then fit the victim.

David J. Spittle, SBI forensic chemist in the field of serology, compared body fluid samples of defendant and the victim. He concluded that the blood grouping reactions from the semen stains on the victim's underpants were consistent with those of the defendant and approximately fourteen percent of the general North Carolina population. The blood group type of defendant was consistent with reactions detected on the underpants and different from the victim's.

Detective Wayne Sears of the Rocky Mount Police Department testified at trial that he examined a latent fingerprint re-

moved from the rear-view mirror of the victim's car, but that the print did not have sufficient detail for comparison because the ridges were not distinct and could not be matched to any set of fingerprints. He sent the latent print to the SBI laboratory where Examiner Robert Duncan also concluded that the latent print was not of value for identification.

The defendant was convicted of first-degree rape, second-degree kidnapping, and felonious possession of stolen goods.

[1] Defendant first assigns as error the trial court's denial of his pretrial "motion to suppress" the introduction of the wedding ring and digital watch pursuant to N.C.G.S. §§ 15A-974 and -977.[1]

During the hearing upon defendant's motion, defense counsel stated as grounds for suppression that

> the most a jury could draw from the introduction of these items would be an inference that they in fact were the stolen items involved in this matter that were stolen from the prosecuting witness at the time of the sexual assault and at the time of the alleged kidnapping. From that inference there could only be another inference that in fact he was the assailant.

The trial judge denied defendant's motion in open court following a *voir dire* examination of the victim.

Defendant contends that, because the State's case was entirely circumstantial as to the identity of the perpetrator, admission into evidence of the watch and ring, both admittedly in defendant's possession after their theft, would prejudice the defendant because the jury would infer that defendant was the perpetrator of the sexual assault and kidnapping. We cannot quarrel with defendant's assessment of the purpose and intended effect of the introduction of the jewelry. Without doubt, the State intended that the evidence link the defendant with the offenses for which he was charged.

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1. By his failure to comply with N.C.G.S. § 15A-977, the defendant has waived suppression of the evidence pursuant to N.C.G.S. § 15A-974, "Exclusion or suppression of unlawfully obtained evidence." *State v. Holloway*, 311 N.C. 573, 319 S.E. 2d 261 (1984). We therefore do not consider the allegations contained in his unverified written "motion to suppress" purportedly made pursuant to N.C.G.S. §§ 15A-974, -977, and consider only his oral pretrial motion to exclude "the admission and identification" of the jewelry.

The State contends that the very simplicity of the trial court's ruling on defendant's motion manifests its correctness. The ruling, in pertinent part, was:

> The facts, based upon the evidence before me, appear to be . . . that [the victim] was the victim of a sexual assault and robbery on January 3, 1985; that certain property was taken from her including a wedding band and a digital watch; . . . that she believes State's Exhibit No. 1 to be the wedding band that was taken from her[;] and that she believes State's Exhibit No. 2 to be the watch that was taken from her. Based upon those findings of fact, the Court concludes as a matter of law that State's Exhibit No. 1 and State's Exhibit No. 2 are admissible into evidence, and that the motion to suppress is DENIED.

This Court has stated that

> [t]he well established rule in a criminal case is that every object that is calculated to throw light on the supposed crime is relevant and admissible. *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975) [, *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208 (1976)]; *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied*, 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966); 1 Stansbury, N.C. Evidence § 118, p. 356 (Brandis Rev. 1973).

State v. Hedrick, 289 N.C. 232, 235, 221 S.E. 2d 350, 352 (1976). *See also State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985) (victim's wristwatch missing when his body discovered; defendant's girlfriend in possession of the watch two to three weeks after murder and armed robbery; defendant in possession of the watch one week later); *State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983) (attacker took bag of groceries just purchased by victim; defendant caught holding the bag shortly after attack); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981) ("football candies" and "football candy wrappers" found in pocket of jacket located in truck used by defendants matched appearance of candy in store where murder took place); *State v. Young*, 16 N.C. App. 101, 191 S.E. 2d 369 (1972) (two rings stolen from victim by her attacker identified by victim at trial; State's witness properly allowed to testify that the defendant attempted to sell the rings to her).

Rule 402 of the North Carolina Rules of Evidence states a simple rule of admissibility:

> Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
>
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.

N.C.G.S. § 8C-1, Rule 402 (Cum. Supp. 1985).

Rule 401 defines "relevant evidence":

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985).

The watch and ring are "relevant" because they tend to make the existence of a fact of consequence—defendant's connection to the offenses with which he is charged—more probable than it would be without the evidence. Because defendant does not contend that the evidence is rendered inadmissible by any provision of the state or federal constitutions or by any other statute, the relevant evidence is admissible unless rendered inadmissible by the Rules of Evidence. N.C.G.S. § 8C-1, Rule 402.

Although defendant in his brief does not refer to Rule 403, his argument appears to be that the jewelry should have been excluded because its probative value is substantially outweighed by its prejudicial effect. Rule 403 provides:

> 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).

Rule 403 calls for a balancing of the proffered evidence's probative value against its prejudicial effect. Necessarily, evidence

which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree. The relevant evidence is properly admissible under Rule 402 *unless* the judge determines that it must be excluded, for instance, because of the risk of "*unfair* prejudice." *See* N.C.G.S. § 8C-1, Rule 403 (Commentary) (" 'Unfair prejudice' within its context means an *undue* tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." (Emphasis added.)) Defendant contends that the jewelry should have been excluded because it was unduly prejudicial to him.

Initially, we note that the defendant was tried for three offenses: felonious possession of stolen property (the wedding band), first-degree rape, and first-degree kidnapping.[2] The prosecutor informed the court at the hearing on defendant's motion to exclude the jewelry that the State intended to consolidate all three cases for trial. The record contains no indication that the defendant made a motion to sever the offenses, and defendant does not argue on appeal that the offenses were improperly joined. The three offenses were properly joined for trial. N.C.G.S. § 15A-926(a), (c) (1983). We also note that the defendant failed to object at trial to the identification or introduction of the watch and ring and also failed to request a limiting instruction at any time.

The basis of defendant's motion to exclude the jewelry as unfairly prejudicial appears to be an argument that its introduction would permit the jury to draw two improper inferences. First, the jury would infer that the jewelry introduced at trial was, in fact, the jewelry stolen from the victim by her assailant. This contention is without merit. The State established a chain of custody for both items which were introduced, and the victim testified that she believed those items were the ones stolen from her on 3 January. She had previously identified both items as hers when exhibited to her by Detective Thompson when he recovered them. Therefore, introduction of the jewelry raises no *inference* that it was the jewelry stolen from the victim; her direct testimony, corroborated by Detective Thompson, was that it *was in fact* the jewelry stolen from her on 3 January.

2. The trial judge submitted second-degree kidnapping to the jury because the kidnapping indictment, 85CRS1401, was insufficient to support first-degree kidnapping, but was sufficient to support second-degree kidnapping.

Second, defendant contends that from the first "inference" (jewelry at trial was same jewelry stolen in January), the jury would further infer that the defendant was the assailant. Defendant contends that the jewelry was the only evidence presented by the State linking the defendant to the offenses. Besides being factually incorrect, this contention relates, not to the admissibility of the evidence, but to the sufficiency of the State's case to withstand defendant's motion to dismiss for insufficiency of the evidence.

In addition to tending to prove the offense of felonious possession of stolen property, the fact that the defendant was in possession of the stolen jewelry recently after it was stolen from the victim by her attacker has probative value on the issue of the identity of the perpetrator of the rape and kidnapping.[3] Such highly probative evidence necessarily is prejudicial to the defendant—otherwise it would not have such great probative value. However, we do not find its prejudicial effect to be "undue" or to substantially outweigh its probative value so as to require exclusion pursuant to Rule 403. We therefore find no error in the trial judge's discretionary ruling denying defendant's pretrial motion to exclude the watch and ring.

[2] The remainder of defendant's assignments of error relate to the sufficiency of the evidence to support his convictions and motions to "set aside the verdict," for a new trial, and for arrest of judgment. Defendant did not object at trial to the denial of these motions. Defendant's argument on all these assignments of error essentially is that the State's evidence was insufficient to take the case to the jury.

In *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980), this Court set out the standard of review of a trial court's denial of defendant's motion to dismiss at the close of the State's evidence.

> In testing the sufficiency of the evidence to sustain a conviction, a motion for dismissal pursuant to G.S. 15A-1227 is identical to a motion for judgment as in the case of nonsuit

3. " 'Whenever goods have been taken as a part of the criminal act, the fact of subsequent possession is some indication that the possessor was the taker, *and therefore the doer of the whole crime.*' 1 Wigmore on Evidence § 153 (3d Ed. 1940)." *State v. Joyner*, 301 N.C. 18, 29, 269 S.E. 2d 125, 132 (1980) (emphasis in original).

under G.S. 15-173. Cases dealing with the sufficiency of evidence to withstand the latter motion are therefore applicable to motions made under G.S. 15A-1227. *See State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971).

If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734 (1960). This is true even though the suspicion so aroused by the evidence is strong. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967).

The terms "more than a scintilla of evidence" and "substantial evidence" are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary. *See State v. Smith, supra. But see State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684 (Exum, J., dissenting), *cert. denied*, 439 U.S. 830, 99 S.Ct. 107, 58 L.Ed. 2d 124 (1978).

The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. *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).

The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to

the jury and not with its weight. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969). The trial court's function is to test whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence. *State v. Thomas, supra; State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965).

> The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. *State v. Stephens, supra.* "When the motion . . . 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. Rowland, supra. See also State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Cutler, supra.* In passing on the motion, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially true when the evidence is circumstantial since one bit of such evidence will rarely point to a defendant's guilt. *State v. Thomas, supra. See also State v. Rowland, supra.*

State v. Powell, 299 N.C. 95, 98-99, 261 S.E. 2d 114, 117-18. *See also State v. Wilson*, 313 N.C. 516, 534, 330 S.E. 2d 450, 463 (1985).

On this appeal, the defendant does not contend that the State failed to present substantial evidence of each element of the offenses charged. Rather, the defendant challenges the sufficiency of the State's evidence as to the identity of the perpetrator of the offenses. Both the State and the defendant recognize that the State's case was circumstantial as to the identity issue.

The defendant again contends that his possession of the jewelry shortly after the commission of the offenses is the only evidence linking him to those offenses, and in order to find that he was the perpetrator, the jury would have had to pile inference upon inference.

First, as the State points out, the jewelry was not the only evidence presented that tended to link the defendant with the

commission of the offenses. Uncontradicted, competent evidence was introduced tending to show that analysis of semen stains on the victim's underwear revealed a blood grouping reaction consistent with that of this defendant and fourteen percent of the population of this state. In addition, the description the victim gave of her assailant, while certainly insufficient for a positive identification, is consistent with the defendant's appearance. The victim never attempted to identify the defendant as her assailant and repeatedly asserted that she never had an opportunity to observe her attacker's face. Indeed, she clearly indicated that she could not identify the defendant as her attacker. However, she was adamant in her description of her assailant as a tall, thin black man in his twenties. This description is consistent with the defendant's appearance. Defendant's reliance on cases involving attempted eyewitness identifications are inapposite; the identity issue in this case had to be resolved on circumstantial, rather than "direct," evidence.

It is immaterial that any individual piece of circumstantial evidence, taken alone, is insufficient to establish the identity of the perpetrator. *See State v. Ledford,* 315 N.C. 599, 340 S.E. 2d 309 (1986). If all the evidence, taken together and viewed in the light most favorable to the State, amounts to substantial evidence of each and every element of the offense and of defendant's being the perpetrator of such offense, a motion to dismiss is properly denied. *State v. Powell,* 299 N.C. 95, 261 S.E. 2d 114.

Defendant's contention that the jury was required to pile inference upon inference in order to convict him is without merit. It is well settled that " '[a] basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based upon inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption.' " *State v. Ledford,* 315 N.C. 599, 610, 340 S.E. 2d 309, 317 (citations omitted).

In the instant case, the jury was required to make only one inference in order to find that the defendant was the perpetrator of all the offenses for which he was convicted: that he took the jewelry from the victim on 3 January 1985. The "established facts" which remained uncontroverted at trial and from which the jury could reasonably infer that the defendant was the man who

took the jewelry are as follows: A tall, thin black man in his twenties abducted the victim, stole her jewelry, and raped her; the defendant is a tall, thin black man in his twenties; the blood grouping reactions of semen stains on the victim's underpants were consistent with this defendant and fourteen percent of the general population; the defendant was in possession of the victim's wedding band eight days after it was stolen from the victim, and he pawned the ring at the M&T Pawn Shop for five dollars; the defendant was not in possession of just one item taken from the victim—the ring—but was *also* in possession of the victim's stolen digital watch, and he gave it to his girlfriend prior to his 17 January 1985 incarceration, fourteen days after it had been stolen from the victim; the person who stole the victim's jewelry was the same person who kidnapped and raped her.

From this uncontroverted evidence, the jury could reasonably draw one essential inference: that the defendant was the man who took the victim's jewelry and kidnapped and raped her on 3 January 1985. Unlike the situation in *State v. Parker*, 268 N.C. 258, 150 S.E. 2d 428 (1966), or *State v. Davis*, 74 N.C. App. 208, 328 S.E. 2d 11, *disc. rev. denied*, 313 N.C. 510, 329 S.E. 2d 406 (1985), the State's evidence did not require stacking of inferences in order to identify the defendant as the perpetrator of the offenses.

Therefore, in denying defendant's motion to dismiss for insufficiency of the evidence, the trial court properly determined at the close of the State's evidence that a reasonable inference of defendant's guilt could be drawn from the circumstances. It was for the jury, then, to decide whether the facts, taken singly or in combination, satisfied them beyond a reasonable doubt that the defendant was actually guilty. *See State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965). We find no error in the trial court's denial of defendant's motion to dismiss at the close of the State's evidence.

At his sentencing hearing, the defendant made three motions: a motion to "set aside the verdict as being against the weight of the evidence"; a motion for a new trial for errors committed throughout the course of the trial; and a motion in arrest of judgment. The defendant declined the trial judge's invitation to be heard as to each of these motions, and each motion was denied.

Defendant did not object to denial of any motion and takes exception in the record only to the denial of his motion to "set aside the verdict." This motion, properly denominated "a motion for dismissal for insufficiency of the evidence to sustain a conviction . . . after return of a verdict of guilty and before entry of judgment," N.C.G.S. § 15A-1227(a)(3) (1983), was correctly denied for the same reasons as for the proper denial of his motion to dismiss at the close of the State's evidence, N.C.G.S. § 15A-1227(a)(1). Although the defendant has failed to preserve for review the denial of the remaining motions, N.C.R. App. P. 10(b)(1), we have reviewed them and we find no error.

No error.

STATE OF NORTH CAROLINA v. CURTIS EUGENE SMITH

No. 521A84

(Filed 3 June 1986)

1. Infants § 17— juvenile defendant in custody at time of confession

The evidence showed that a reasonable person in the sixteen-year-old defendant's position would not have believed that he was free to go or that his freedom of action was not being deprived in a significant way so that defendant was "in custody" when he confessed where it tended to show that two police officers went to defendant's house after they learned that defendant had been implicated in a robbery and assault; defendant was informed that he was a suspect in the crimes and was asked to accompany the officers to the local police station; an officer stayed with defendant while he got dressed, and defendant was driven to the police station in the back seat of an official police vehicle; defendant was read his juvenile rights on the way to the station and upon arrival at the station; when defendant requested the presence of his mother, one officer was sent to locate her while defendant waited in the same room at the police station; while waiting, defendant was confronted by the police chief and a police sergeant who explained that another participant in the crimes had implicated defendant and that the police had enough to charge defendant whether or not he made a statement; and at no time was defendant told that he was free to leave.

2. Infants § 17— interrogation of juvenile—invocation of right to have parent present—resumption of questioning by police—confession inadmissible

A juvenile's confession was inadmissible where it resulted from the "functional equivalent" of custodial interrogation initiated by the police in the

absence of a parent after the juvenile had invoked his right under N.C.G.S. § 7A-395(a)(3) to have a parent present during questioning.

Justice MARTIN dissenting.

APPEAL by defendant pursuant to N.C.R. App. P. 4(d) and N.C.G.S. § 15A-979(b) from a judgment imposing life imprisonment, entered by *Owens, J.*, at the 24 May 1984 Criminal Session of Superior Court, GASTON County. Judgment entered upon a plea of guilty to a charge of murder in the first degree following the denial of a motion to suppress evidence. Heard in the Supreme Court 17 October 1985.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

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

FRYE, Justice.

Defendant seeks a new trial because of an alleged error committed by the trial court. Defendant, a juvenile, contends that the trial court erred in denying his motion to suppress his confession because it was obtained in violation of his right to be free from compelled self-incrimination, to have counsel present, and to have his mother present. Having carefully reviewed the record and the relevant law, we conclude that defendant's confession was obtained in violation of his juvenile rights as set forth in N.C.G.S. § 7A-595, and that the motion to suppress was improperly denied. Defendant is entitled to a new trial.

Defendant was charged with murder in the first degree.[1] Evidence for the State tended to show that on 29 November 1983, between the hours of 8:00 and 9:00 a.m., Paschal Oil Company in Mount Holly was robbed and Marvin Hunt, an employee, was severely beaten. Hunt died as a result of the inflicted injuries. Judson Lee Ross was identified as a suspect by witnesses near the scene of the crime. Upon police questioning, Ross stated that he and defendant planned and executed the robbery and assault at the oil company.

1. A charge of armed robbery against defendant was dismissed pursuant to a plea bargain agreement.

As a result of Ross' statement, two police officers picked up defendant from his home around 10:48 a.m. and took him to the Mount Holly Police Station for questioning. An officer read defendant his juvenile rights on the way to the station. *See* N.C.G.S. § 7A-595 (1981). At the police station, defendant was taken to the police chief's office and read his juvenile rights in the presence of Officer Moore. Pursuant to those rights, defendant requested the presence of his mother during questioning. At that point, the interview ceased and Officer Cook went to locate defendant's mother. This occurred at approximately 11:20 a.m. Defendant told Officer Cook that his mother had gone to the Gaston County Jail in Gastonia to take care of an unrelated matter. Officer Cook called the jail twice and learned that defendant's mother had not yet arrived. He decided to drive to Gastonia to locate defendant's mother and to secure a search warrant for defendant's home.

Meanwhile, around 12:55 p.m., defendant's mother returned home. She was told by officers at her home that defendant was at the Mount Holly Police Station. Officer Cook arrived at the house ten or fifteen minutes later. The evidence is conflicting as to whether Officer Cook told defendant's mother that defendant had asked to see her.

Sometime between 11:52 a.m. and 12:15 p.m., while Officer Cook was attempting to locate defendant's mother, Officer Moore returned to the room where defendant was waiting. He told defendant that he wanted to explain some things to him and asked defendant not to say anything. Around 12:15 p.m., shortly after Officer Moore began talking to defendant, Chief Huffstetler, Mount Holly Police Department, entered the room. Officer Moore introduced defendant and told Chief Huffstetler that defendant had been advised of his rights and had requested the presence of his mother during the questioning. According to Officer Moore's testimony, Chief Huffstetler talked briefly with defendant and asked defendant if he wanted to "straighten" it out, apparently referring to the assault and robbery at the oil company. Officer Moore left the room but returned shortly thereafter. Upon his return, Officer Moore informed defendant that the crimes being investigated, robbery and assault, were quite serious; that if the victim died it could be murder; that Judson Ross had implicated him in the crimes; that Ross would be a witness against him if the case went to trial; that he wanted him to tell the truth; and that a

confession could be considered as a mitigating circumstance by the trial judge.

At 12:30 p.m., defendant told the officers that he wanted to make a statement but did not want his mother present. Defendant was advised of his rights, stated that he understood them, and signed the waiver of rights form. Mrs. Nan Oates, a bookkeeper for the City of Mount Holly, witnessed these acts. After signing the waiver, defendant confessed to having committed the charged offenses. He stated that he entered the side door of the building while Ross waited at the front. He hit Marvin Hunt with a stick "in the back of the head" and when Hunt tried to "get a hold of [defendant]," he "swung the stick at him some more." Defendant didn't know whether he hit Hunt again during this struggle. Defendant opened the front door for Ross. They took money from the cash register and left separately.

Defendant's motion to suppress his confession was denied 24 May 1984. On 29 May 1984, defendant, pursuant to a plea bargain agreement, entered a plea of guilty to murder in the first degree. On 14 June 1984, following a sentencing hearing, a jury, after finding no aggravating circumstances, unanimously recommended that defendant be sentenced to life imprisonment. N.C.G.S. § 15A-979(b) permits a defendant whose motion to suppress is denied to plead guilty and appeal the ruling of the judge on the motion. If the appellate court sustains the trial court's ruling on the motion, the conviction stands; if the ruling on the motion is overturned, the defendant is entitled to a new trial wherein the evidence will be suppressed. *See* Official Commentary, N.C.G.S. § 15A-979 (1983).

As grounds for suppression of his incriminating statement, defendant contends that it was obtained in violation of his fifth amendment right against compulsory self-incrimination, his sixth amendment right to counsel, and his right to have a parent present during police questioning in accordance with N.C.G.S. § 7A-595(a)(3). We find it unnecessary to address defendant's arguments which rely on the United States Constitution, since this case is fully resolvable under our own statute, N.C.G.S. § 7A-595.

In determining whether there was a violation of defendant's rights under N.C.G.S. § 7A-595(a), we must first determine whether defendant was in custody when his confession was obtained.

The trial judge concluded that it was unnecessary to determine whether defendant was in custody at the time he confessed since he had earlier concluded that none of defendant's rights under the state or federal constitutions had been violated in obtaining his confession. Nevertheless, the juvenile's rights under N.C.G.S. § 7A-595 arise, under the specific language of the statute, only if the juvenile is in custody. Accordingly, it is necessary to determine whether defendant was in custody within the meaning of N.C.G.S. § 7A-595 at the time his confession was obtained.

The standard objective test for "custody" is whether "a reasonable person in the suspect's position would believe himself to be in custody or that his freedom of action was deprived in some significant way." *Oregon v. Mathiason*, 429 U.S. 492, 494, 50 L.Ed. 2d 714, 718 (1977); *see also Berkemer v. McCarty*, 468 U.S. 420, 82 L.Ed. 2d 317 (1984); *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985); *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983); *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979). This Court, in *Perry*, looked to events occurring prior to, during, and after the investigative interview to determine whether there was "custody." The operative question is whether a reasonable individual would have believed under the circumstances that he was free to leave. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496.

[1] The evidence in the instant case shows that defendant was "in custody" when he gave his confession. Two police officers went to defendant's house after they learned that defendant had been implicated in the robbery and assault at Paschal Oil Company. Defendant was informed that he was a suspect in the crimes and was asked to accompany the officers to the local police station "to talk about it." Defendant agreed to do so and asked if he could get dressed. Officer Cook answered in the affirmative and stayed with defendant while he dressed "from the skin out." Defendant was driven to the police station in the back seat of an official police vehicle. The doors of the car could only be opened from the outside. On the way to the station, defendant was read his juvenile rights. Upon arrival at the station, defendant was escorted to a room and again read his rights in the presence of Officer Moore. When defendant requested the presence of his mother, one officer was sent to locate her while the defendant waited in the same room at the police station. While waiting, defendant, a sixteen year old youth, was confronted by the police

chief and a police sergeant, both of whom were much larger than defendant. These officers "explained," among other things, that Judson Ross had implicated defendant and would be a witness against him at trial, and that the police had enough to charge him and would charge him whether he made a statement or not. At no time was defendant told that he was free to leave. In fact, the constant presence of law enforcement officers with firearms would suggest the contrary to a person of defendant's age and experience.

Under these circumstances, we cannot say that a reasonable person in defendant's position would have believed that he was free to go or that his freedom of action was not being deprived in a significant way. Therefore, we conclude that defendant was "in custody" at the time his confession was obtained.

The State contends that the facts of this case are so similar to the facts in *Oregon v. Mathiason*, 429 U.S. 492, 50 L.Ed. 2d 714, and *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134, that those cases should control the decision here. In each of those cases, it was determined that the defendant was not in custody. However, we note that the defendant in each of those cases was an adult. We also note that in *Jackson*, the defendant was told that he was free to leave at any time, while in *Mathiason*, the defendant was not placed under arrest but was released immediately after his confession. Therefore, we do not find these cases controlling.

The State asks this Court to reconsider that portion of its opinion in *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 605 (1983), which held that any person who has not reached his eighteenth birthday, with a few exceptions not here applicable, is a juvenile within the meaning of N.C.G.S. § 7A-595. Specifically, the State asks that we hold that N.C.G.S. § 7A-595 does not apply to a person who has reached his sixteenth birthday. Believing that our decision on this question was correct and that any change therein is for legislative consideration, we decline to make the distinction requested by the State.

[2] Since defendant was a juvenile in custody, N.C.G.S. § 7A-595 required that he be advised prior to questioning that he had a right to remain silent; that any statement he made could and might be used against him; that he had a right to have a parent, guardian or custodian present during questioning; and that he had

a right to consult with an attorney, and that one would be appointed for him if he was not represented and wanted representation. Here defendant was advised of his rights in accordance with the statute and exercised his right under subsection (a)(3) by requesting the presence of his mother, "if that would be all right." N.C.G.S. § 7A-595(c) provides that if the juvenile indicates "in any manner and at any stage of questioning pursuant to this section that he does not wish to be questioned further, the officer shall cease questioning." The statute makes no provision regarding a resumption of interrogation once the officer has ceased questioning the juvenile pursuant to the juvenile's exercise of his right to remain silent or to consult with an attorney or to have a parent present during questioning.

In resolving this issue, we find that while cases decided under the fifth and sixth amendments to the United States Constitution are not controlling, the principles established therein apply with equal force to the resumption of custodial interrogation under N.C.G.S. § 7A-595.[2] In *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L.Ed. 2d 378, 386 (1981), the United States Supreme Court held that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Whether using a fifth or sixth amendment analysis, advice of rights and written waivers "are insufficient to justify police-initiated interrogations after the request for counsel." *Michigan v. Jackson*, --- U.S. ---, ---, 89 L.Ed. 2d 631, 642 (1986). We hold that the juvenile's right, pursuant to N.C.G.S. § 7A-595(a)(3), to have a parent present during custodial interrogation, is entitled to similar protection. Interrogation refers to "not only express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response

2. For similar treatment in other states, *see e.g., People v. Burton*, 6 Cal. 3d 375, 491 P. 2d 793 (1971) (a minor's request to see his parents, made during custodial interrogation, constituted an invocation of the minor's fifth amendment rights); *People v. Castro*, 118 Misc. 2d 868, 462 N.Y.S. 2d 369 (1983) (juvenile suspect's attempts to contact parents should have been interpreted as request to consult parent which was equivalent of request to consult attorney, invoking fifth amendment privilege).

from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed. 2d 297, 308 (1980). The latter definition is often referred to as the "functional equivalent" of questioning. *See Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297.

In the case *sub judice*, defendant, after being advised of his statutory right to have a parent present during police questioning, requested that his mother be brought to the station. At this point, the police were obliged to cease all questioning until the mother was made available or defendant initiated further conversation with the police. Officer Moore testified that the interview ceased for approximately fifteen to twenty minutes. Then Officer Moore returned to the room where defendant was waiting and told defendant that he wanted to explain some things to him about Judson Ross' statement and asked defendant not to say anything. A few minutes after this conversation began, Chief Huffstetler entered the room. Officer Moore told Chief Huffstetler that defendant had been advised of his juvenile rights and had requested that his mother be brought to the police station, and that another officer was trying to locate her. Chief Huffstetler talked to defendant and asked him if he wanted to "straighten" it out. Officer Moore left the room but returned shortly thereafter and continued to talk to defendant. Officer Moore said: " '[defendant], you do what you want to; and certainly I don't want you to make any remarks until your mother gets here.' . . . I said, 'just listen to me;' and I said, 'I want you to know these facts of the case. I want you to know the circumstances that surround what we're hoping to interview you about.' " Officer Moore testified that he assured defendant that he was not expecting a response to his statement. Officer Moore proceeded to tell defendant that Judson Ross had confessed to being involved in the assault and armed robbery and had informed police that defendant was primarily responsible for injuries inflicted on Marvin Hunt. He further informed defendant that Judson Ross would be a witness against defendant if defendant went to trial; that the crimes being investigated were serious offenses and defendant could possibly face a murder charge; and that in his opinion the trial court could consider a confession as a mitigating circumstance.

While the evidence shows that there were few express questions asked defendant by the police, we find that defendant was subjected to the "functional equivalent" of questioning. Given the

fact that much of the conversation centered around defendant's participation in the crimes and the serious nature of the crimes, the police should have known that defendant was likely to respond in some way. Under the circumstances the officers' statements were particularly evocative. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297. Taken together, they clearly establish that defendant was subjected by the police to words that the police should have known were reasonably likely to elicit an incriminating response from him. *Id.* Since the juvenile's confession resulted from police-initiated custodial interrogation in the absence of counsel or a parent after the juvenile invoked his right to have a parent present during questioning, the confession was erroneously admitted.[3] N.C.G.S. § 7A-595. Accordingly, defendant is entitled to a new trial wherein his confession must be suppressed. N.C.G.S. § 15A-979(b).

New trial.

Justice MARTIN dissenting.

The record on appeal discloses that defendant was born on 16 December 1966. On the date of the murder, 30 July 1983, he was 16 years and 7½ months old. It is to be remembered that defendant was charged with and pleaded guilty to murder in the first degree. The majority grants defendant a new trial for the reason that defendant's mother was not present when he confessed to the murder, holding that this violated defendant's rights under N.C.G.S. § 7A-595(a)(3).

For the reasons set out in my concurring opinion in *State v. Fincher*, 309 N.C. 1, 23, 305 S.E. 2d 685, 699 (1983), I dissent from the holding that N.C.G.S. § 7A-595(a)(3) (1981) is applicable to defendant Smith. This statute applies only to juvenile delinquency proceedings.

In effect, the majority seeks to engraft an additional requirement upon officers before interrogating persons under the age of eighteen, who are being investigated on charges of murder in the first degree, by requiring that they be advised that they have a

3. For a similar result under more egregious circumstances, *see State v. Hunt*, 64 N.C. App. 81, 306 S.E. 2d 846 (1983).

right to have a parent or guardian present during questioning. This result is reached by reasoning that the statute defines a juvenile as one who has not reached his eighteenth birthday; defendant is only 16½ years old, so he is entitled to the benefit of the statute. N.C.G.S. § 7A-595(a)(3) simply does not apply to investigations of murder charges where the defendant is more than sixteen years old.

Additionally, in this case defendant expressly waived in writing the presence of his mother during his questioning:

> BEFORE YOU ARE ASKED ANY QUESTIONS, IT IS REQUIRED THAT YOU BE ADVISED OF YOUR CONSTITUTIONAL RIGHTS.
>
> 1. You have the right to remain silent. [s/ yes]
> 2. Anything you say can be and may be used against you. [s/ yes]
> 3. You have the right to have a parent, guardian, or custodian present during questioning. [s/ yes]
> 4. You have a right to talk with a lawyer for advice before questioning and to have that lawyer with you during questioning. If you do not have a lawyer and want one, a lawyer will be appointed for you. [s/ yes]
> 5. If you consent to answer questions now, without a lawyer, parent, or guardian present, you still will have the right to stop answering at any time. [s/ yes]
>
> WAIVER OF RIGHTS
>
> I have read this statement of my Constitutional Rights and I intelligently understand what my rights are. I am willing to make a statement and answer questions. I do not want an attorney at this time. I do not want a parent, guardian, or custodian present during questioning. I understand and know what I am doing. No promise or threats have been made to me and no pressure or coercion of any kind has been used against me.
>
> SIGNED: Curtis Eugene Smith

The majority does not address the voluntariness of defendant's waiver, nor shall I. However, consideration of defendant's waiver

is necessary under the majority's theory of the law in order to determine whether the perceived violation of the statute was harmless error. N.C.G.S. § 15A-1443(a) (1983).

For these reasons, I dissent.

LINDA CADE WATTS, KIM WATTS, AND GEORGE WATTS v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC.; DR. JAMES ASKINS; DR. RALPH MORESS; NORTH CAROLINA BAPTIST HOSPITALS, INC.; DR. VICTOR KERANEN; DR. W. C. MILLER; DR. MENNO PENNICK; DR. EBAN ALEXANDER, JR.; DR. JAMES TOOLE; AND DAN HALL

No. 384A85

(Filed 3 June 1986)

1. **Fraud § 12; Physicians, Surgeons and Allied Professions § 16.1— constructive fraud by physicians—insufficient evidence**

Plaintiff's allegations that she was at one time under the care of each defendant-physician was sufficient to allege a fiduciary relationship in support of a claim for constructive fraud. However, plaintiff failed to produce a sufficient forecast of evidence to support a claim based upon constructive fraud by defendants in concealing from her the alleged fact that X rays taken shortly after her 1974 automobile accident revealed a number of fractures which had not been discovered at the time the X rays were taken where the evidence showed that plaintiff sought and received numerous second opinions from other specialists as to the source of her complaints, since this evidence dispels the presumption of reliance and intentional deceit that arises from the fiduciary relationship itself.

2. **Fraud § 12; Physicians, Surgeons and Allied Professions § 16.1— fraudulent concealment by physicians—insufficient evidence**

Plaintiff's forecast of evidence was insufficient to support her claim against four physicians for actual fraud in concealing from her the alleged fact that X rays taken shortly after her 1974 automobile accident revealed a number of fractures in the cervical and lumbar regions of her spine which had not been discovered when the X rays were taken where the evidence showed that one physician did not even meet plaintiff until two years after she was told by another doctor in 1979 that spinal fractures were apparent on earlier X rays; plaintiff presented no evidence suggesting that fractures were apparent on the X rays taken in the short period between her June 1974 accident and the termination of plaintiff's care by two other physicians, and even if such X rays revealed fractures, plaintiff offered no evidence that these two physicians actually examined those X rays or discovered the breaks; plaintiff offered no evidence that the fourth physician ever examined either plaintiff's 1974 X rays or 1976 X rays purportedly showing the fractures; and evidence that all four

physicians concluded that plaintiff's pain had at least some psychological underpinnings did not sustain the element of intentional deceit necessary to a claim sounding in fraud.

ON petition for discretionary review by plaintiff Linda Cade Watts and appeal of right by defendants Menno Pennink and James Toole of the decision of a divided panel of the Court of Appeals, 74 N.C. App. 769, 330 S.E. 2d 256 (1985), which affirmed in part and reversed in part orders signed by *Johnson, J.*, on 14 October 1983, in Superior Court, CUMBERLAND County. Heard in the Supreme Court 12 March 1986.

Hedahl & Radtke, by Joan E. Hedahl, for plaintiff Linda Cade Watts.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay and H. Lee Evans, Jr., for defendants Menno Pennink, Victor Keranen, and Ralph Moress.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Martha Jones Mason, and Susan Milner Parker, for defendant James Toole.

MARTIN, Justice.

The record before this Court indicates the following facts:

On 7 June 1974 Linda Cade Watts was injured in an automobile accident. She was treated at the emergency room at Cape Fear Valley Hospital, where X rays were made of her right arm, right knee, sternum, and ribs. She was released the same day. Between 10 June and 2 July Mrs. Watts was seen five times by a physician in Laurinburg, North Carolina, for complaints of pain in a number of sites, including her neck and back.

In early July Mrs. Watts revisited the emergency room because of persistent pain in her left knee and pain in her neck and in the back of her head. Mrs. Watts returned to the hospital the next day. Additional X rays were taken, and she was examined and admitted by Dr. Victor Keranen. His admission notes remarked upon her medical history, including her involvement in the automobile accident, her visits to the emergency room, her symptoms of headaches, staphylococcal infections, borderline diabetes, a nerve-related skin rash, and previous history of a

psychiatric disorder.[1] During her hospital stay, Mrs. Watts was seen by a neurologist and by Dr. Ralph Moress, a psychiatrist, in addition to Dr. Keranen. Mrs. Watts avers that Dr. Moress spoke with her only twice—once to introduce himself and once the next day to complete her discharge. She was released from the care of Drs. Moress and Keranen on 18 July 1974. Dr. Moress's discharge summary reflected in part on the possibility of somatization or malingering, and it concluded with a final diagnosis of neck and back sprains and a hysterical personality disorder.

When Mrs. Watts's attorney later requested medical reports, Dr. Keranen responded that he felt such records would be of little help in Mrs. Watts's automobile accident case because "most of her hospital stay was related to a psychological condition which clearly antedated the automobile accident." A subsequent letter received in response to the attorney's repeated request summarized Dr. Keranen's admission notes and indicated that Mrs. Watts had been seen by Dr. Moress and that she had been treated with supportive therapy and subjected to a lumbar puncture.

On three occasions over the next four months, Mrs. Watts consulted an orthopedic surgeon, Dr. Askins, who later reported that he had examined X rays of Mrs. Watts's cervical spine and left knee and that he had found no bone or joint abnormalities. He diagnosed mild sprains to the cervical and lumbosacral regions of Mrs. Watts's spine, as well as contusions and abrasions, and he concluded that Mrs. Watts would suffer some discomfort for about eight weeks but that he did not suspect the injury would lead to permanent disability.

Mrs. Watts continued to suffer from a variety of symptoms and was seen periodically throughout 1975 and 1976 at Womack Army Hospital. These consultations and treatments were supplemented by visits in 1976 to neurosurgeons at North Carolina Memorial Hospital.

On 6 April 1976 Mrs. Watts was admitted to North Carolina Baptist Hospital. There she underwent a cervical myelogram, which revealed spurs but no narrowing of the spinal cord, and a lumbar myelogram, which was read as normal. Neurosurgeons

1. Mrs. Watts's complaint denies any such history of psychiatric disorder.

evaluating the cervical myelogram determined that surgery would be of no benefit to Mrs. Watts at that time.

In June of 1977 Mrs. Watts was seen for the first time by Dr. Menno Pennink. Dr. Pennink performed carpal tunnel surgery on Mrs. Watts's right wrist and ordered X rays, discograms, and a second myelogram. This myelogram revealed some degeneration of the lumbar discs. Dr. Pennink noted that Mrs. Watts's low back pain was probably "degenerative disc disease with some psychological overlay." Mrs. Watts continued to be seen by Dr. Pennink throughout the remainder of 1977. She also maintained her therapy and monitoring by physicians at Womack throughout this period.

Mrs. Watts returned to Dr. Pennink in the summer of 1978, complaining of cervical and coccyx pain. Dr. Pennink hospitalized Mrs. Watts and performed a cervical discogram, which was read as being normal. It was again Dr. Pennink's impression at this time that Mrs. Watts had "considerable psychological overlay."

In November of 1978, Mrs. Watts was hospitalized and extensively tested at Walter Reed Army Hospital. Her discharge diagnosis recognized "non-specific low back and cervical syndromes, without evidence of organic neurological deficit" and "suspect adjustment reaction to adult life."

Mrs. Watts's symptoms were followed by physicians at Womack through the remainder of 1978. On 20 May 1979, Dr. Gene Coin, a radiologist at Sandhills Diagnostic Center, performed a CT-scan of Mrs. Watts's lumbar region, observing "definite vertical wedge-shaped defects in the lower lumbar vertebral bodies." He examined the original cervical X rays (the lumbar films were missing) and reported that he believed these defects "represent residual changes from previous vertical fractures of L4 and L5 vertebral bodies." Dr. Coin told Mrs. Watts of his findings. Dr. Coin retracted these conclusions in 1981 after performing a repeat CT-scan that showed all lumbar discs to be within normal limits. His report included this note: "We believe this study to be accurate and that our earliest study, done in May 1979, was an error due to technical difficulties."

Mrs. Watts subsequently moved to Florida, where she was followed throughout the remainder of 1979 and through the

spring of 1980 by a neurosurgeon, who eventually sent her to the Mayo Clinic for testing. While in Florida, Mrs. Watts underwent a third and fourth myelogram, upon which discharge diagnoses of arachnoiditis and cervical spondylosis were based.

In May 1981 Mrs. Watts consulted Dr. James Toole, a neurologist at North Carolina Baptist Hospital, and was admitted for tests and evaluations. These included orthopedic, gynecological, and psychiatric and psychological examinations, as well as Dr. Toole's neurological examination. Dr. Toole diagnosed arachnoiditis and muscle wasting and neuropathic pain, all probably caused by Mrs. Watts's previous myelography. The discharge note signed by Dr. Toole indicated that psychologists and psychiatrists had felt that "this unfortunate woman [had] somehow developed a dependence on pain." Dr. Toole prescribed pain medication and referred Mrs. Watts to Dan Hall, a pastoral counselor. Mrs. Watts alleges in her complaint that Dr. Toole did not disclose the full extent of her injuries as he did not detail "the lumbar break." In addition, a radiology report issued at this time stated that compression fractures on Mrs. Watts's thoracic spine were "unchanged since 1976."

In 1982 Mrs. Watts and her husband and daughter filed a complaint against two hospitals, seven physicians, and Dan Hall, alleging medical malpractice, breach of fiduciary duty, and fraudulent concealment. The trial court heard and granted motions for summary judgment for the seven physicians and North Carolina Baptist Hospital based upon plaintiffs' untimely filing of their malpractice claims. In addition, the trial court granted summary judgment against plaintiffs' claims based on fraudulent concealment and breach of fiduciary duty. Linda Cade Watts alone perfected her appeal to the Court of Appeals, and her appeal addressed the single issue of fraudulent concealment as to the physicians only.

The Court of Appeals affirmed summary judgment as to Drs. Keranen and Moress, among others, and reversed as to Drs. Pennink and Toole. That court singled out Dr. Coin's May 1979 report on the CT-scan of Mrs. Watts's lumbar region as the sole evidence in support of an initial misdiagnosis. The Court of Appeals felt that this report would have enabled plaintiff to have survived a motion for summary judgment on a medical malpractice claim, but

that it was not sufficient to buoy up claims based upon fraudulent concealment as to Drs. Keranen and Moress. The appellate court differentiated plaintiff's case regarding Drs. Pennink and Toole by the more lengthy period that she was in their care and by the extensive test results and records available to them but not to the other defendants.

Summary judgment is appropriate (1) when a claim or defense is utterly baseless in fact, or (2) when the facts are indisputable but there is controversy as to a question of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971). There is no unsettled question of law in this case. This Court implicitly recognized a cause of action for fraudulent concealment under circumstances similar to those presented by this case in *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957). In *Shearin*, as in the case sub judice, the plaintiff's claim for medical malpractice was barred by the three-year statute of limitations, and he failed to put forward sufficient evidence in support of his allegations of fraudulent concealment to withstand a judgment of involuntary nonsuit. Ordinarily, summary judgment is proper when the pleadings, depositions, affidavits, and answers to interrogatories show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). If the movant can prove that an essential element of the opposing party's claim is nonexistent or if he can show through discovery that the opposing party cannot produce evidence to support an essential element of his claim, his burden of establishing the absence of a triable issue is met. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). We find that defendants' motions for summary judgment were judiciously granted under all of these circumstances.

Plaintiff alleges that Drs. Moress, Keranen, Pennink, and Toole fraudulently concealed from her the alleged fact that X rays taken shortly after her 1974 accident revealed a number of fractures in the cervical and lumbar regions of her spine. There are two species of fraud—actual and constructive—and both are implicated in plaintiff's allegations.

Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less "exacting" than that re-

quired for actual fraud. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981); *Development Co. v. Bearden*, 227 N.C. 124, 41 S.E. 2d 85 (1947). When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit. 37 Am. Jur. 2d *Fraud and Deceit* § 442, at 602 (1968). "This presumption arises not so much because [the fiduciary] has committed a fraud, but [because] he may have done so." *Atkins v. Withers*, 94 N.C. 581, 590 (1886). The superior party may rebut the presumption by showing, for example, "that the confidence reposed in him was not abused, but that the other party acted on independent advice." 37 Am. Jur. 2d *Fraud and Deceit* § 442, at 603. Once rebutted, the presumption evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud.

[1] In stating a cause of action for constructive fraud, the plaintiff must allege facts and circumstances "(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E. 2d 725, 726 (1950). Plaintiff has met these requisites in alleging that she was at one time or another under the care of each defendant, for this Court has recognized that the relationship of patient and physician is considered to be a fiduciary one, "imposing upon the physician the duty of good faith and fair dealing." *Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E. 2d 469, 482 (1985). Evidence put forward by plaintiff and defendants, however, amply demonstrates that plaintiff sought and received a number of second opinions as to the source of her complaints. Even if a presumption of fraud arises from the alleged benefit to defendants of buttressing their medical reputations, the history of plaintiff's seeking and acquiring numerous second opinions from several other specialists dispels the presumption of reliance and intentional deceit that arises from the fiduciary relation itself. Plaintiff has therefore failed to produce a sufficient forecast of evidence to support a claim based upon constructive fraud.

[2] Proof of actual fraud requires that the plaintiff allege facts in support of five essential elements:

> (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, (5) resulting in damage to the injured party.

Terry v. Terry, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974)).

Assuming arguendo that Dr. Coin's 1979 report was correct and that spinal fractures were apparent on plaintiff's earlier X rays, a forecast of plaintiff's evidence must show that each defendant physician subject to this appeal concealed that material fact from her, intending to and succeeding in deceiving her as to the source of her pain and causing her the damage alleged—*i.e.*, years of aggravating, painful, and costly medical complications, as well as wage loss, familial distress, and unnecessary psychological counseling. It is not sufficient that plaintiff allege these elements in general terms nor that she merely allege facts from which fraud might be inferred; she must allege those facts which, if true, would constitute fraud. *Products Corporation v. Chestnutt*, 252 N.C. 269, 113 S.E. 2d 587 (1960).

It is obvious that such evidence is insufficient to support a claim of fraud as to Dr. Toole, for he did not even meet plaintiff until 1981—two years after she was told by Dr. Coin of the contents of his report. She could not have been deceived as to a material fact of which she was already aware.

The evidence forecast by plaintiff's complaint and interrogatory answers is also insufficient as to Drs. Keranen and Moress, for plaintiff presents no evidence whatsoever suggesting that fractures or fissures were apparent on the X rays taken in the short period between her June 1974 accident and the termination of their care of her the following month. Even if such X rays were now available and even if they revealed the defects apparent in 1976 as noted in Dr. Coin's 1979 report and indicated in the 1979 radiology report from North Carolina Baptist Hospital, plaintiff offers no evidence that either Dr. Keranen or Dr. Moress actually examined those X rays or discovered the breaks. Merely to allege that those physicians breached a duty to examine the X rays and to discover the breaks (if any) is insufficient to withstand a motion for summary judgment on charges of fraud.

Dr. Pennink is the single defendant as to whom plaintiff's only evidence of discovered fractures has any relevance. However, plaintiff has proffered no evidence that Dr. Pennink ever examined either her 1974 X rays or the 1976 X rays implicated in Dr. Coin's and the radiology reports. Dr. Pennink may have had a duty to review these records; he may have had a duty to discover independently spinal defects allegedly apparent in the original X rays through tests he ordered for plaintiff over the three-year period she was in his care; he may have breached such duties. But these allegations do not describe any of the elements necessary to make out a cause of action for fraud.

In addition, although each of these physicians concluded that plaintiff's pain had at least some psychological underpinnings, such conclusions, while arguably offensive to the patient, appear to have been legitimate medical opinions. Such opinions cannot sustain the indispensable element of intentional deceit to a claim of relief sounding in fraud. *See Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

We therefore hold that plaintiff has failed to produce evidence sufficient to show a genuine issue as to any material fact regarding her allegations of fraudulent concealment on the part of the four defendant physicians, Drs. Keranen, Moress, Pennink, and Toole, and that the trial court was correct in granting their motions for summary judgment. We accordingly affirm that portion of the Court of Appeals decision upholding summary judgment as to Drs. Keranen and Moress, and we reverse that portion of the appellate court decision reversing the judgment of the trial court regarding Drs. Pennink and Toole.

Affirmed in part; reversed in part.

STATE OF NORTH CAROLINA v. VANCE STERLING ALLEN

No. 413PA85

(Filed 3 June 1986)

1. **Robbery § 5.2— armed robbery—instruction on dangerous weapon—toy pistol**

In a case where the instrument used to commit a robbery is described as appearing to be a firearm or other dangerous weapon capable of threatening or endangering the life of the victim and there is no evidence to the contrary, it would be proper to instruct the jury to conclude that the instrument was what it appeared to be; however, the jury should not be so instructed if there is evidence that the instrument was not such a weapon but a toy pistol or some other instrument incapable of threatening or endangering the victim's life even if the victim thought otherwise.

2. ***Robbery § 5.2— armed robbery—cap pistol—instructions erroneous***

The trial court erred in an armed robbery prosecution by instructing the jury that an instrument which appears to be a weapon capable of inflicting a life threatening injury is in law a dangerous weapon and that a cap pistol which looks like a real firearm is a dangerous weapon within the meaning of the armed robbery statute. No matter what an instrument appears to be, if in fact it is a cap pistol, a toy pistol, or some other instrument incapable of threatening or endangering life, it cannot be a firearm or other dangerous weapon within the meaning of the armed robbery statute; the jury should have been instructed that they could, but were not required to, infer from the instrument's appearance to the victim that it was a firearm or other dangerous weapon. N.C.G.S. § 14-87(a) (1981).

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. 449, 328 S.E. 2d 615 (1985), which found no error in defendant's conviction of robbery with a dangerous weapon and sentence of fourteen years' imprisonment, entered after a jury trial at the 12 June 1984 Session of MARTIN County Superior Court, *Bruce, J.*, presiding.

Lacy H. Thornburg, Attorney General, by Thomas B. Wood, Assistant Attorney General, for the state.

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

EXUM, Justice.

We allowed defendant's petition for discretionary review to consider the following question: Whether the trial court commit-

ted reversible error by instructing the jury in this armed robbery case that: "The term 'dangerous weapon' also includes pistols which look like firearms such as cap pistols. An instrument is a dangerous weapon if it is apparently a weapon capable of inflicting a life threatening injury." We answer the question affirmatively and reverse the Court of Appeals.

The state's evidence tended to show as follows: A black male wearing a ski mask entered the Quick Snack store in Williamston shortly before 11 p.m. on 10 September 1983, pointed what appeared to be a small caliber pistol at the clerk, Dorothy Davenport, and demanded the money in the cash register. Ms. Davenport saw the gun's barrel. When she gave the man the money, which included one or two $20 bills, she noticed a regular customer, Rudy Brown, an off-duty employee of the North Carolina Department of Correction, drive up to the store. As the masked man left the store still holding what appeared to be a small revolver, he met Brown and told him, "Get back or I'll shoot." Brown also saw the revolver's barrel.

The man fled on foot east on Highway 64 toward Martin General Hospital. Brown got in his car and pursued the man, stopping on the way to alert Chief Deputy Sheriff Jerry Beach. Brown saw the masked man, whom he identified as defendant, run into a wooded area, and observed him minutes later sitting behind the wheel of a car parked nearby. Defendant was out of breath and perspiring heavily when Brown and law enforcement officers apprehended him. Brown recognized defendant as the man who had confronted him at the Quick Snack store, although when apprehended the man was not wearing a ski mask. When the arresting officers searched him they found part of a gun in his pocket and a crumpled $20 bill in his pants. They found another crumpled $20 bill on the front seat of the car and defendant's wallet under the seat. When confronted by Deputy Sheriff Beach, defendant told him, "I'm on coke."

The state also offered defendant's statement to Beach indicating defendant had used a "cap pistol" to rob the store and had no intention of hurting the clerk. Defendant said he lost the money, ski mask and the front part of the cap pistol in the woods. The next morning Beach and other law enforcement officers combed the woods through which defendant had fled and found

the ski mask, but were unable to locate the money and the barrel of the pistol.

A gun dealer, Clifton Hollis, testified for the state that the gun taken from defendant was the lower half of an RG-10, .22 caliber pistol. The barrel and cylinder appeared to have been broken off at the lower trigger hammer. Hollis believed if a cylinder and barrel were attached to the part of the pistol in evidence, it would fire. In contrast, Deputy Sheriff Beach testified on cross-examination that defendant had told him on the night of his arrest that the barrel of the cap pistol he used had come off and he had reattached it with a rubber band. Consequently, the cap pistol would not fire.

Defendant offered no evidence.

The trial court instructed the jury it could find defendant guilty of armed robbery, common law robbery or not guilty. Pursuant to the state's request, and over defendant's objection, the trial court instructed the jury as follows:

> The term 'dangerous weapon' includes firearms. A .22 caliber pistol is a firearm within the meaning of the law as it applies to this case. The term 'dangerous weapon' also includes pistols which look like firearms such as cap pistols.
>
> An instrument is a dangerous weapon if it is apparently a weapon capable of inflicting a life threatening injury.

The jury found defendant guilty of armed robbery.

Armed robbery is defined in N.C.G.S. § 14-87(a) as follows:

> (a) Any person . . . who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . shall be guilty of a Class D felony.

Id. We first note there is no contention that defendant used the pistol as anything but a pistol. He did not use it as a club. Having used the pistol only as a pistol, defendant argues the trial court's definition of the term "dangerous weapon" creates an impermissi-

ble mandatory presumption that whatever appears to be a dangerous weapon, even if in fact it is not, is in law a dangerous weapon. The state concedes inoperative firearms, and cap, or toy, pistols are not dangerous weapons within the meaning of the statute because they cannot endanger or threaten life when used as firearms. Nevertheless, the state argues that even if the instruction of the trial court was erroneous in the abstract, the error is not reversible because there is no credible evidence in this case that defendant in fact used an inoperative firearm or a cap pistol.

The Court of Appeals held "the evidence [that defendant had used a cap pistol] was not so compelling as to prevent a *permissive inference* of danger or threat to life or to require a directed verdict in defendant's favor as to the charge of robbery with a dangerous weapon." *State v. Allen,* 74 N.C. App. at 453, 328 S.E. 2d at 617. The Court of Appeals also concluded as follows:

> The evidence is clear that the object used by defendant in the commission of the robbery, notwithstanding the fact that it may have been an inoperable pistol or a cap pistol, was perceived by the victim to be a real gun. Accordingly, the trial court's instruction to the jury that a cap pistol could be a dangerous weapon if it is apparently capable of inflicting a life threatening injury, was not error.

Id. at 455, 328 S.E. 2d at 618. We agree that a permissive inference that the weapon defendant brandished was a firearm or other dangerous weapon may be drawn from the witnesses' testimony that it appeared to be so. But in the presence of evidence that a toy or cap pistol was in fact used, the law does not transform such an instrument into a dangerous weapon merely because it appears to be one.

We think both the trial court and the Court of Appeals misapplied some of our recent decisions on the "dangerous weapon" element of armed robbery. We begin with *State v. Thompson,* 297 N.C. 285, 254 S.E. 2d 526 (1979). In *Thompson* the state's evidence tended to show that defendant, brandishing what appeared to be a pistol, took cash belonging to a business from the presence of several employees. Defendant was accompanied by another man armed with a shotgun. On cross-examination, one of the employees, a state's witness, stated that "she did not know

whether the shotgun was a real gun, a fake gun, a toy gun or what kind of gun, it was metal and did not look like a toy." *Id.* at 288, 254 S.E. 2d at 527. Another employee, testifying for the state, said on cross-examination, "With respect to the pistol, I don't know whether it was a real pistol, fake pistol, or what kind of pistol. It looked very real. It was not a cap pistol." *Id.*, 254 S.E. 2d at 528. The Court held that these admissions on cross-examination did not require submission of the lesser-included offense of common law robbery on the theory that the weapons brandished in the case might have been toys. The Court concluded that failure of the witnesses on cross-examination to positively testify that the weapons used were in fact real weapons was "not of sufficient probative value to warrant submission of the lesser included offense of common law robbery." 297 N.C. at 289, 254 S.E. 2d at 528. More importantly for our purposes here, the Court also said:

> When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be—a firearm or other dangerous weapon.

Id.

In *State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614 (1982), the state's evidence tended to show that defendants, brandishing a rifle, took cash from a store in the presence of the store attendants. One of the attendants testified that the rifle appeared to be a .22 rifle and was not a BB gun or a pellet rifle. One of the state's witnesses, however, James Robinson, defendant's accomplice who actually wielded the rifle, testified on cross-examination that the instrument was actually a BB rifle. We concluded in *Alston* that a BB rifle could not be a firearm or other dangerous weapon within the meaning of the armed robbery statute because it was incapable of endangering or threatening a person's life. Therefore the testimony, offered by the state, that the rifle was a BB rifle "was affirmative testimony tending to prove the absence of an element of the offense charged and required the submission of the case to the jury on the lesser included offense of common law robbery." *Alston*, 305 N.C. at 651, 290 S.E. 2d at 614.

Finally, in *State v. Joyner*, 312 N.C. 779, 324 S.E. 2d 841 (1985), the question was whether the state's evidence was sufficient to overcome defendant's motion for a directed verdict on a charge of armed robbery. The state's evidence tended to show that defendant, brandishing what appeared to be a rifle, robbed a store of cash in the presence of store employees at approximately 2:45 a.m. on 7 December 1982. Defendant was apprehended at 8:30 a.m. on 7 December. Defendant confessed to the robbery and took detectives to an old abandoned building where he located a hidden .22 caliber bolt action rifle which he said he had used in the robbery. Defendant told detectives the rifle would not fire. Later the detectives determined the rifle had no firing pin. Possible verdicts of guilty of armed robbery, guilty of common law robbery or not guilty were submitted and the jury convicted defendant of armed robbery.

Defendant in *Joyner* contended on appeal that since the state's evidence showed the rifle he used was not loaded and did not have a firing pin, it could not have constituted an instrument whereby the life of a person could be endangered or threatened. This Court concluded the evidence was sufficient to be submitted to the jury on the question of defendant's guilt of armed robbery. The Court set out, for the first time, the appropriate evidentiary rules to resolve the sufficiency of evidence question in armed robbery cases where the instrument used appears to be, but may not in fact be, a firearm or other dangerous weapon capable of endangering or threatening the life of another. The rules are: (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be. (2) If there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened. (3) If all the evidence shows the instrument could not have been a firearm or other dangerous weapon

capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.

Neither *Thompson, Alston* nor *Joyner* stands for the proposition that the state in armed robbery cases is relieved from the burden of proving beyond a reasonable doubt that the instrument used is in fact a firearm or dangerous weapon which in fact does endanger or threaten the life of the victim. All of these cases deal with whether the evidence was sufficient to permit the jury to make these essential findings. *Joyner*, however, does permit the state to rely on a mandatory presumption that an instrument which appears to the victim to be a firearm or other dangerous weapon capable of threatening or endangering the victim's life is in law such a weapon when and only when there is no evidence in the case to the contrary.

[1] A fair summary of our holdings in this area would be this: In an armed robbery case the jury may conclude that the weapon is what it appears to the victim to be in the absence of any evidence to the contrary. If, however, there is any evidence that the weapon was, in fact, not what it appeared to the victim to be, the jury must determine what, in fact, the instrument was. Finally, if other evidence shows conclusively that the weapon was not what it appeared to be, then the jury should not be permitted to find that it was what it appeared to be.

Accordingly, in a case where the instrument used to commit a robbery is described as appearing to be a firearm or other dangerous weapon capable of threatening or endangering the life of the victim and there is no evidence to the contrary, it would be proper to instruct the jury to conclude that the instrument was what it appeared to be. The jury should not be so instructed if there is evidence that the instrument was not, in fact, such a weapon, but was a toy pistol or some other instrument incapable of threatening or endangering the victim's life even if the victim thought otherwise.

[2] In the instant case there was evidence that the instrument used by defendant in the robbery appeared to be a firearm capable of endangering or threatening the life of the victim. There was also evidence that the instrument was either a cap pistol or an inoperative firearm incapable of threatening or endangering the life of the victim. It was thus for the jury to determine the

nature of the weapon. The jury should have been instructed that they could, but were not required to, infer from the instrument's appearance to the victim that it was a firearm or other dangerous weapon. Judge Bruce's instruction that an instrument which appears to be a weapon capable of inflicting a life-threatening injury is in law a dangerous weapon effectively gave the state the benefit of a mandatory presumption when it was entitled only to the benefit of a permissive inference.

Judge Bruce also erred in instructing the jury that a cap pistol which looks like a real firearm is a "dangerous weapon" within the meaning of the armed robbery statute. No matter what an instrument appears to be, if in fact it is a cap pistol, or a toy pistol, or some other instrument incapable of threatening or endangering life, it cannot be a firearm or other dangerous weapon within the meaning of the armed robbery statute.

These instructions deprived defendant of having the jury properly consider evidence in the case that the instrument he used was in fact not a firearm or other dangerous weapon but was a cap pistol or an inoperative firearm. Even if the jury had believed this evidence, under Judge Bruce's instructions it nevertheless would have been compelled to convict defendant of armed robbery when under appropriate legal principles he would have been guilty at most of common law robbery.

The state argues the evidence tending to show the instrument used by defendant was either a cap pistol or an inoperative firearm was not credible and could not under any circumstance have been believed by the jury. Therefore, the trial judge's instruction, even if error in the abstract, could not have harmed this defendant. Suffice it to say that the evidence in question was not so lacking in credibility that the jury should not have been permitted to consider it. The existence of this evidence and the possibility that the jury might have believed it formed the basis of the trial judge's instructions on the alternative lesser-included offense of common law robbery. The credibility of this evidence was ultimately for the jury. If the jury believed it, defendant, under proper instructions, could have been found guilty at most of common law robbery. *See State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614. The instructions as given effectively removed this evidence from the jury's consideration. Under these circum-

stances we think there is a reasonable possibility that had the error in the instructions not been made a different result would have been reached at the trial. N.C.G.S. § 15A-1443.

The decision of the Court of Appeals is, therefore, reversed and the case remanded to that court for further remand to the Superior Court of Martin County for a new trial.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JIMMY DEXTER COVINGTON

No. 708A84

(Filed 3 June 1986)

1. **Criminal Law § 91.6— murder and attempted armed robbery—list of State's witnesses provided prior to jury selection—continuance denied—no error**

   There was no error in the denial of defendant's motion for a continuance in a prosecution for murder and attempted armed robbery where defendant first learned the names and addresses of all the State's witnesses against him prior to jury selection but not prior to trial. Defendant did not show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.

2. **Criminal Law § 102.6— murder—prosecutor's closing argument—reasonable inference from the evidence**

   The assistant district attorney's closing argument in a prosecution for murder that defendant killed the victim was a reasonable inference from evidence that only two people were involved in the attempted armed robbery and assault which led to the murder; defendant was placed at the scene of the crime by his written confession which stated that he was a wheelman for Bass Pass; three eyewitnesses to the assault described the assailant as a tall, broad-shouldered, heavyset man, therefore resembling defendant's husky build rather than the slim physique of Bass Pass; and defendant when arrested was in possession of a sawed-off shotgun which he identified as the weapon used to murder the victim.

3. **Homicide § 26— murder and attempted armed robbery—instructions—no error**

   The trial court did not err in a prosecution for murder and attempted armed robbery by instructing the jury that defendant could be found guilty of either perpetrating the murder himself or of aiding and abetting Bass Pass in the perpetration thereof where evidence was presented at trial from which it could reasonably be inferred that defendant was in fact the actual perpetrator of the murder and there was nothing to indicate that defense counsel was mis-

led at the jury instruction conference on the matters on which the judge would instruct. N.C.G.S. § 15A-1232.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment plus forty years entered by *Bailey, J.*, at the 27 August 1984 Criminal Session of Superior Court, DURHAM County, upon jury verdicts of guilty of murder in the second degree and attempted armed robbery. Defendant's motion to bypass the Court of Appeals on the attempted armed robbery conviction was allowed by this Court on 18 April 1985. Heard in the Supreme Court 11 September 1985.

Lacy H. Thornburg, Attorney General, by Wilson Hayman, Assistant Attorney General, for the State.

Richard T. Rigsbee, for defendant-appellant.

FRYE, Justice.

Defendant contends that he is entitled to a new trial because of three alleged errors committed by the trial court. First, defendant contends that the trial court erred in denying his motion for continuance. Second, he contends that the trial court erred in allowing the prosecutor by his argument to place before the jury incompetent matters not raised by the evidence. Third, defendant contends that the trial judge erred in instructing the jury that defendant could be found guilty of either perpetrating the murder or of aiding and abetting his co-defendant in the perpetration thereof. After a careful review of the record, we find that defendant received a fair trial free from prejudicial error.

Defendant was charged with murder in the second degree and attempted armed robbery. The evidence for the State tended to show that on 22 November 1983, Frances "Jack" Zeck was shot to death during an attempted robbery of his store, Jack's Food Mart in Durham. In February 1984, the police obtained information from Bass Pass, which implicated defendant in the murder and attempted armed robbery. Upon gathering this information, the police questioned defendant. Defendant, after being informed that Bass Pass had implicated him in the crimes, told the officers that on 22 November 1983 Bass Pass asked him to serve as a "wheelman" in a "job" that he was going to do in Durham. Defendant stated that after picking up Pass, they drove to the in-

tersection of Morehead and Rosedale Avenue in Durham where Pass pointed to Jack's Food Mart. Defendant parked his car near the store and Pass left the vehicle carrying a sawed-off shotgun. After approximately fifteen minutes elapsed, Pass ran back to the car and told defendant, "That fool pulled a gun and I had to waste him." Defendant also told the officers that the sawed-off shotgun, which was in his possession at the time of his 20 February 1984 arrest on an unrelated matter, was the weapon used by Bass Pass to shoot Jack Zeck.

Defendant testified in his own behalf and offered an alibi witness. Both men testified that they were together in Raleigh for several hours on the evening of 22 November 1983. After driving to Durham, they learned that someone had been shot, but did not go to the scene of the crime because defendant's car would not start. Defendant testified that his earlier confession was untrue and that he did not even know Bass Pass. When questioned as to why he signed a confession indicating otherwise, defendant responded as follows: "There're several reasons behind that. The first reason is the law of the jungle, the law of nature. When someone drop [sic] a bomb on you, you push that bomb off of you and push it back to them, and that's what I did."

The jury returned verdicts of guilty of murder in the second degree and attempted armed robbery.

[1] Defendant contends that the trial court erred in denying his motion for a continuance on the grounds that the denial deprived him of his constitutional rights to a fair trial. By this assignment, defendant contends that he was deprived of the right to effective assistance of counsel, and the right to confront witnesses against him by the trial court's failure to grant a continuance upon defendant first learning the names and addresses of all the State's witnesses in the case against him.

"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.

It is a long-standing rule in North Carolina that a criminal defendant does not have the right to discover in advance of trial the names and addresses of the State's prospective witnesses. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Therefore, defendant was not entitled to a list of the State's witnesses prior to trial. The trial judge, after a hearing on the motion, stated that while the State was not required to furnish defendant the names of its witnesses prior to trial, the State would be required to provide the names prior to jury selection. The record discloses that this was done. Defendant has not shown how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion. *See State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). Under these circumstances, defendant has failed to show how either his right to effective assistance of counsel or his right to confront the witnesses against him was impaired by the denial of his motion to continue made at the time of trial.

[2] Defendant next contends that the trial court erred in allowing the prosecutor, over defendant's objection, to place before the jury incompetent and prejudicial remarks not supported by the evidence. The assistant district attorney, in his closing argument to the jury, stated: "This gun is one of the reasons that I submit to you that you should believe that [defendant] was the person who killed Jack Zeck." Defendant contends that this statement is not a reasonable inference arising from the evidence presented and was calculated to mislead and prejudice the jury.

Counsel must be allowed wide latitude in his argument before the jury in hotly contested cases. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). Counsel may argue to the jury "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. Williams*, 314 N.C. 337, 358, 333 S.E. 2d 708, 722 (1985).

> Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. (Citations omitted.) Even so, counsel may not employ his argument as a device to place

> before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs, and opinions not supported by the evidence. (Citations omitted.) It is the duty of the trial judge upon objection to censor remarks not warranted by the evidence or the law and, in cases of gross impropriety, the court may properly intervene, *ex mero motu*. (Citation omitted.)

Id. at 358, 333 S.E. 2d at 722. Here, the prosecutor's argument that the jury should believe that defendant "was the person who killed Jack Zeck" was within the bounds of the record evidence. All of the evidence showed that only two people were involved in the attempted armed robbery and assault which led to the murder charge. Defendant's written confession stating that he was a "wheelman" for Bass Pass placed defendant at the scene of the crime. Three eyewitnesses to the assault described the assailant as a tall, broad-shouldered, heavyset man, therefore resembling defendant's husky build rather than the slim physique of Bass Pass. Also, when defendant was arrested in connection with another matter, he was in possession of a sawed-off shotgun which he identified as the weapon that was used to murder Jack Zeck. The prosecutor's argument that defendant killed Jack Zeck was a reasonable inference to be drawn from the evidence. Therefore, the argument was not improper.

[3] Lastly, defendant contends that the trial court erred in instructing the jury that defendant could be found guilty of either perpetrating the murder himself or of aiding and abetting Bass Pass in the perpetration thereof. Defendant argues that the evidence at trial did not support this instruction and that the trial judge at the jury instruction conference did not inform defense counsel that he would give such an instruction.

"The trial judge must, without special request, charge the law applicable to the substantive features of the case arising on the evidence and apply the law to the essential facts of the case." *State v. Benton*, 299 N.C. 16, 23, 260 S.E. 2d 917, 922 (1980). N.C.G.S. § 15A-1232 at the time of defendant's trial,[1] required

1. 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." 1985 N.C. Sess. Laws ch. 537, § 1.

that "[i]n instructing the jury, the judge must declare and explain the law arising on the evidence . . . ." As discussed earlier in this opinion, there was evidence presented at trial from which it could be reasonably inferred that defendant was in fact the actual perpetrator of the murder. This was a feature of the case arising on the evidence. Therefore, the judge properly instructed thereon. We have carefully reviewed the transcript of the jury instruction conference and we find nothing therein to indicate that defense counsel was misled as to the matters on which the judge would instruct. We therefore reject defendant's third assignment of error.

Defendant received a fair trial free from prejudicial error.

No error.

IN THE MATTER OF: MICHAEL LEE TERRY, SR., AND LA VERNE CRABTREE TERRY, FOR THE ADOPTION OF MAGGIE LYNN TERRY

No. 726PA85

(Filed 3 June 1986)

Adoption § 2.1— revocation of consent—sufficiency of letter

A letter mailed by the natural mother of a child to petitioners constituted sufficient notice of revocation of her consent to adoption of the child and was timely made inasmuch as less than three months had elapsed since execution of the consent to adopt and no interlocutory or final order of adoption had been entered. N.C.G.S. § 48-11.

THE respondent in this adoption proceeding, natural mother of Maggie Lynn Terry, petitioned this Court for discretionary review of a unanimous decision of the Court of Appeals, 76 N.C. App. 529, 333 S.E. 2d 526 (1985), reversing an order of the Superior Court, DURHAM County, vacating the Final Order of Adoption. The petition was allowed 7 January 1986. Heard in this Court 13 May 1986.

Gail T. Donovan and William J. Riley, Attorneys for Petitioner-appellant.

Arthur Vann, Attorney for Respondent-appellees.

BILLINGS, Justice.

The sole question presented is whether the natural mother of Maggie Lynn Terry timely revoked her consent to adoption of the child, thereby withdrawing from the Clerk of Superior Court the authority to enter the Final Order of Adoption on 15 November 1983.

On 13 July 1983, Sandra Kay Kinder Summerall executed a form consenting to the adoption of her daughter, Maggie Lynn Terry, by the petitioners, Michael Lee Terry, Sr. and La Verne Crabtree Terry. Mr. and Mrs. Terry are the parents of Michael Lee Terry, Jr., the putative father of the child, who was living with the child's mother at the time of the child's conception and birth but to whom the child's mother was not married.

Mr. and Mrs. Terry, Sr. filed a petition for adoption of the child with the Clerk of Superior Court of Durham County on 28 July 1983.

Prior to 1 June 1983, N.C.G.S. § 48-11 provided that a consent by a parent to adoption of his or her child could not be revoked after entry of an interlocutory or final decree of adoption or after six months following consent. Effective 1 June 1983, the time period for revoking consent to adoption was shortened to three months. However, according to testimony at the trial of this matter, new forms for consenting to adoption were not made available by the North Carolina Department of Social Services until several months after 1 June 1983, and the Office of the Clerk of Superior Court of Durham County continued to use the old forms. The form provided to the natural mother for her consent to this child's adoption contained the following paragraph immediately preceding the signature line: "I understand the Consent to Adoption can be revoked within the next six months provided the Interlocutory Decree or Final Order of Adoption has not been issued."

A final order of adoption was entered on 15 November 1983. On 14 December 1983 the natural mother filed a motion to set aside the final order of adoption. Upon denial of the motion, the natural mother appealed to the Superior Court. Following a hearing, Judge Farmer entered an order on 31 July 1984 setting aside the final order of adoption on the basis that, as a parent consent-

ing to adoption of her child, the mother could rely upon the advice given to her by the Clerk of Superior Court regarding her rights in the adoption proceeding and that the consenting parent "had 6 months to withdraw or revoke her consent provided the Final Order of Adoption had not been issued." The trial judge further concluded that the consenting parent had revoked her consent on 15 November 1983, prior to entry of the final order.

The Court of Appeals reversed, holding that the incorrect information supplied to the consenting parent by the Clerk of Court did not aid her, for "[o]ne is presumed to know the law and will be held to it." 76 N.C. App. at 531, 333 S.E. 2d at 527. The Court of Appeals held that since the trial judge concluded that consent was revoked on 15 November 1983, more than three months after execution of the consent form, the revocation was not timely.

We do not find it necessary to decide whether a private citizen, misinformed by a judicial official regarding the law applicable to a matter before the official, may rely on that statement of the law if it is contrary to the actual rule of law. Rather, we conclude that the findings of the trial judge establish that the natural mother revoked her consent to adoption within three months of the consent and before entry of the final order of adoption[1] and thus acted within the time limit set by the law in effect at the time.

In his order of 31 July 1984, Judge Farmer made the following findings of fact which are fully supported by the evidence and are not contested on this appeal:

(8) The consenting parent, Sandra K. Kinder [Summerall], mailed a Notice on August 14, 1983 to Ms. La Verne Terry, 319 W. Gear St., Durham, N.C., one of the petitioners stating that she was withdrawing her consent but said Notice was not filed with the Clerk of Superior Court.

(9) On the morning of November 15, 1983 the consenting parent, Sandra K. Kinder [Summerall], came to the office of the Clerk of Superior Court and talked with Charlotte

1. Because the child is the blood grandchild of the petitioners, an interlocutory decree was not required, N.C.G.S. § 48-21(c), and none was entered.

H. Goodwin, Assistant Clerk handling adoptions, and that the said parent stated that she wished to revoke or withdraw her consent to the adoption and that the said parent was told that it was too late even though a final order had not been entered.

(10) On November 15, 1983 and prior to the Final Order being issued the Social Services employee handling the adoption had a conversation with the consenting parent, Sandra K. Kinder [Summerall], and had the impression that she wanted to revoke or withdraw her consent and that said employee told said parent that it was too late; and that the said employee called the petitioners' attorney and told him that a woman was asking questions about the adoption and was informed by the attorney that no Final Order had been issued at that time.

(11) The Final Order of Adoption was filed on November 15, 1983 at 2:03 P.M. and signed by Ruby M. Gardner, Assistant Clerk of Superior Court.

Apparently the trial judge attached some significance to the fact that notice was not filed with the Clerk of Superior Court. At the time of the events in question, the General Statutes of North Carolina did not specify the method to be followed in revoking consent to adoption.[2]

In the absence of specified procedures, we rely on case law to determine whether respondent's letter of 14 August constituted adequate notice of her revocation of consent to adoption.

In considering revocation of consent cases, courts have, by implication, held that notice is sufficient if given to the adopting parents in person, *Ellis v. McCoy*, 332 Mass. 254, 124 N.E. 2d 266 (1954); by telephone, *Matter of Andersen*, 99 Idaho 805, 589 P. 2d 957 (1978) (phone calls followed by letter), *B.J.B.A. v. M.J.B.*, 620 P. 2d 652 (Alaska 1980) (phone call followed by wire to Probate Master); *Small v. Andrews*, 20 Or. App. 6, 530 P. 2d 540 (1975); or by letter, *French v. Catholic Community League*, 69 Ohio App. 442, 44 N.E. 2d 113 (1942); *Franklin v. Biggs*, 14 Or. App. 450, 513

2. Effective 1 October 1983, N.C.G.S. § 48-11(b) controls the method for giving notice of revocation of consent to adoption.

P. 2d 1216 (1973) (letter was not made a part of the Record); *State ex rel. Rothrock v. Webber*, 245 La. 901, 161 So. 759 (1964) (letter to curator appointed to represent natural parents as absentees, followed by letter to adoptive parents, phone calls and letter by certified mail, none of which were acknowledged); *Re Appeal in Pima County Juvenile Action*, 118 Ariz. 437, 577 P. 2d 723, *aff'd*, 118 Ariz. 428, 577 P. 2d 714 (1977). We therefore hold that the method of communicating notice in this case, that is, by letter to the petitioners, was adequate and reasonable.

In North Carolina, as elsewhere, there is a *prima facie* presumption that material which is marked, postage prepaid, and correctly addressed, was received in due course. *See Willis v. Davis Industries*, 280 N.C. 709, 186 S.E. 2d 913 (1972); *State v. Teasley*, 9 N.C. App. 477, 176 S.E. 2d 838, *cert. denied*, 277 N.C. 459, 177 S.E. 2d 900 (1970). We therefore hold that the letter mailed by respondent on 14 August 1983 constituted sufficient notice of revocation and was timely made inasmuch as less than three months had elapsed since execution of the consent to adopt and no interlocutory or final order of adoption had been entered.

We 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.

STATE OF NORTH CAROLINA v. WILLIAM HUNT CARROLL

No. 83A85

(Filed 3 June 1986)

1. **Constitutional Law § 40— failure to appoint counsel—defendant not indigent**

The trial court did not err in failing to appoint counsel to represent defendant at trial where the court correctly determined that defendant was not indigent at the time of his trial.

2. **Criminal Law § 29.1— mental capacity to stand trial—inquiry not required**

The trial court had no obligation, *ex mero motu*, to conduct an inquiry to determine whether defendant had the mental capacity to stand trial or appear *pro se* where nothing in the record suggests that defendant suffered from any mental illness or defect as specified in N.C.G.S. § 15A-1001(a).

3. Constitutional Law § 49— sentencing hearing—waiver of counsel not voluntary

Defendant's waiver of counsel at his sentencing hearing for two counts of first degree sexual offense was not voluntary and knowing where the trial judge had indicated that he would impose concurrent life sentences, the most favorable action within his power; defendant then indicated that he would appear *pro se*; when the State put on evidence that defendant had a prior conviction of assault on a female, the trial judge changed his mind and imposed consecutive life sentences; and defendant received no notice that the judge was not going to sentence him as the judge had previously indicated.

APPEAL by defendant from consecutive life sentences imposed by *Preston, J.*, at the 29 October 1984 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 15 October 1985.

Lacy H. Thornburg, Attorney General, by James B. Richmond, Special Deputy Attorney General, and Charles M. Hensey, Assistant Attorney General, for the State.

James L. Blackburn, for defendant-appellant.

FRYE, Justice.

Defendant was convicted on 30 October 1984 on two counts of first degree sex offense. He brings three assignments of error before this Court. Because none of the assignments of error involve the facts of the crime itself, we will not discuss those facts in this opinion.

[1] As his first assignment of error, defendant asserts that he was entitled to appointed counsel, and the trial judge's failure to appoint counsel to represent him at trial deprived him of his constitutional rights. The State has no obligation to furnish a defendant with appointed counsel unless he is indigent. *State v. Turner*, 283 N.C. 53, 194 S.E. 2d 831 (1973); *State v. Hoffman*, 281 N.C. 727, 190 S.E. 2d 842 (1972). The trial court determined that defendant was not indigent at the time of his trial; our review shows that this determination was correct.

[2] Second, citing N.C.G.S. § 15A-1001(a), defendant argues that the trial court erred in failing, *ex mero motu*, to conduct an inquiry to determine whether defendant had the mental capacity to stand trial or appear *pro se*. We have carefully reviewed the entire record on appeal, and we find nothing to suggest that defend-

ant suffered from any "mental illness or defect" as specified in N.C.G.S. § 15A-1001(a) (1983). The trial court therefore had no obligation, *ex mero motu*, to conduct any inquiry on the subject. *See State v. Heptinstall*, 309 N.C. 231, 306 S.E. 2d 109 (1983); *cf. Meeks v. Smith*, 512 F. Supp. 335 (W.D.N.C. 1981).

[3] Finally, defendant argues that the trial court erred in sentencing him without giving him the opportunity to have counsel. Defendant waived his right to have counsel at trial and elected to appear *pro se*. At the sentencing hearing on 31 October 1984, defendant's relatives appeared in court with an attorney willing to represent defendant. Defendant was allowed to consult with his relatives and the attorney. He initially rejected the attorney's services.

The trial judge questioned him about this decision and told him anew that he did not recommend that defendant appear without a lawyer. The following exchange then occurred:

> MR. CARROLL: May I ask you a question, Your Honor?
>
> COURT: Yes, sir.
>
> MR. CARROLL: What would you recommend that I do now?
>
> COURT: I am not going to recommend to you anything. I don't recommend, you see, that you go through any of these proceedings without an attorney. I tell you that up front.
>
> Well, let me say this to you before we go any further. Yesterday in your case I ordered a pre-sentence diagnostic study, which I could do under the statute. You had been convicted by that jury of two Class B felonies. You have. Then by virtue of this conviction you are facing two mandatory life sentences. It is mandagory [sic]. It is locked in. The sentence is already done. The Legislature did that. And the jury found you guilty and I have no choice as to what I do on the life sentences, save and except I had a choice to what I was going to do, whether or not to tack them on. Life and then after that another life sentence or to run them concurrently.
>
> The second reason—and that's one of the questions I was going to pose to the diagnositc [sic] center as to what they would recommend.

> The second reason was that I was going to ask them what medication and what treatment would they recommend so I could put that on the commitment so that when you get to prison they would be able to treat you in that vein. All right.
>
> But over the evening, considering this case—and I don't take many cases home with me, but I took your case home with me. Understand? Mentally and so forth. I have decided that I am not going to tack these on. I would not take their recommendation in other words if they said tack them on. I am going to run them concurrently. So that is the first thing.
>
> And the second thing that I decided was that they would not be able to tell me anything that I cannot find out through the medical facilities at the prison and, therefore, I would not go through the procedure of having a pre-sentence diagnostic study and, therefore, I am not going to do that. I am going to—I will be glad to listen to you or your people. I will be glad to listen to the District Attorney at this sentencing hearing and then we will proceed to sentence. So having said that, again I tell you that you have the choice at the sentencing hearing . . . to have an attorney represent you . . . .

Defendant subsequently affirmed his decision to appear *pro se* at the sentencing hearing.

At the hearing, the State introduced evidence that defendant had a prior misdemeanor conviction of assault on a female. Defendant put on no evidence. The fact of defendant's prior conviction disturbed the trial judge, and he imposed consecutive life sentences instead of the concurrent sentences mentioned in his talk with defendant. Defendant received no notice that the judge was not going to sentence him as he had previously indicated.

A criminal defendant has the right to proceed without counsel if he or she so desires, but this waiver must be both voluntary and knowing. *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). In the instant case, defendant could reasonably have understood the judge to be saying that he, the judge, had already made up his mind to give defendant the most favorable sentence within his power. Thus, there would have been nothing for an attorney to do

for defendant at the hearing, and his presence would have been a needless expense. When the judge changed his mind, an attorney's potential usefulness to defendant also changed. Defendant was not told about this change but was left under the belief that he would receive concurrent sentences. Under the facts of this case, we hold that defendant's waiver of counsel was not voluntary and knowing. It was therefore error for the judge to proceed to sentence defendant as he did. Because we cannot say that the error was harmless beyond a reasonable doubt, defendant is entitled to a new sentencing hearing.

Accordingly, we remand this case to the Superior Court, Wake County, for a new sentencing hearing.

Remanded for new sentencing hearing.

STATE OF NORTH CAROLINA v. FLOYD HOWARD

No. 757A85

(Filed 3 June 1986)

Rape and Allied Offenses § 3— indictment for rape of child under thirteen—failure to charge crime

An indictment alleging the rape of a "child under the age of 13 years" did not allege a criminal offense for a rape which allegedly occurred before the 1 October 1983 amendment to N.C.G.S. § 14-27.2.

APPEAL by defendant from judgment entered by *Gudger, J.*, at the 22 July 1985 session of Superior Court, JACKSON County. Heard in the Supreme Court 15 May 1986.

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

John I. Jay for defendant.

PER CURIAM.

Defendant was tried and convicted pursuant to N.C.G.S. § 14-27.2 of rape of a "child under the age of 13 years" upon a bill

of indictment which alleged that the offense occurred on 15 February 1983. This statute was amended effective 1 October 1983 by substituting "a child under the age of 13 years" for "a child of the age of 12 years or less." At the time of this alleged offense, the prior statute controlled. The bill of indictment in this case, returned 22 July 1985, although a valid indictment for a rape occurring *after* 1 October 1983, did not allege a criminal offense for a rape allegedly occurring *before* the amendment to the statute, 1 October 1983. Therefore, the trial court did not have subject matter jurisdiction and the judgment entered must be arrested. The state may seek an indictment of defendant based upon the statute in effect on 15 February 1983.

Judgment arrested.

STATE OF NORTH CAROLINA v. THOMAS EARL COOPER

No. 670A85

(Filed 3 June 1986)

1. **Criminal Law § 73.3— evidence showing condition and state of mind**

   Testimony that on the night of the alleged rape the witness had a telephone conversation with the victim who was hysterical was properly admitted to show the victim's condition and state of mind.

2. **Criminal Law § 96— withdrawal of evidence—curative instruction**

   Defendant was not prejudiced by the admission of his own nonresponsive answer on cross-examination which related evidence that had been excluded upon his motion *in limine* where the court allowed defendant's motion to strike and instructed the jury not to consider defendant's answer.

APPEAL by defendant from imposition of a life sentence by *Battle, J.*, at the 24 June 1985 Criminal Session of WAKE County Superior Court, upon a verdict of guilty of first degree rape upon seventeen-year-old Charlene Thompson.

The victim, Charlene Thompson, testified that defendant had sexual intercourse with her against her will and that her resistance was overcome by the threatened use of a knife.

Defendant admitted having *consensual* intercourse with Charlene Thompson.

Lacy H. Thornburg, Attorney General, by Daniel F. McLawhorn, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Leland Q. Towns, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

[1] Defendant assigns as error the admission of Sonya McIntyre's testimony that on the night of the alleged rape she had a telephone conversation with Charlene who was hysterical. Defendant contends that this evidence did not corroborate the testimony of the prosecuting witness and violated the hearsay rule.

This direct testimony was offered to show the victim's condition and state of mind shortly after the rape. It was not offered as corroborative evidence. Further, our examination of the record reveals that objection was not timely made, and evidence of like import had been previously admitted so that the benefit of the already late objection was lost. *See State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973).

[2] Defendant's remaining assignment of error relates to the admission of evidence which had been excluded by order pursuant to a motion *in limine*. On cross-examination the defendant, in response to a proper question, gave a nonresponsive answer which related the very evidence which had been excluded upon his motion *in limine*. Defense counsel did not interpose an objection until defendant had completed his answer. He then moved to strike. The court allowed his motion and instructed the jury not to consider defendant's answer. Under these circumstances, we find no merit in this assignment of error. We note in passing that the evidence attacked by this assignment of error was to the effect that defendant had been kidnapped and beaten by kinsmen of the prosecuting witness. This evidence would seem to evoke sympathy for defendant rather than prejudice his cause.

We have carefully examined this entire record and find

No error.

STATE OF NORTH CAROLINA v. RALPH WOODS, JR.

No. 751PA85

(Filed 3 June 1986)

ON grant of a petition for discretionary review of a decision of the Court of Appeals, 77 N.C. App. 622, 336 S.E. 2d 1 (1985), finding no error in defendant's trial, conviction, and sentence for armed robbery and carrying a concealed weapon. Heard in the Supreme Court 14 May 1986.

Lacy H. Thornburg, Attorney General, by William F. O'Connell, Senior Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Leland O. Towns, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

The sole issue before this Court is whether the Court of Appeals erred in affirming the sentence imposed by the trial court. Defendant was initially convicted on the present charges on 21 June 1982. He appealed this conviction and won a reversal. *See State v. Woods*, 311 N.C. 80, 316 S.E. 2d 299 (1984). While his appeal was pending, he entered a plea bargain in Davidson County and pled no contest to one count of common law robbery in return for a ten-year sentence that was to run concurrently with the sentence imposed upon his initial conviction on the instant charges. Defendant was re-tried on the instant charges at the 26 November 1984 Criminal Session of Superior Court, Montgomery County. Upon verdicts of guilty of both charges, the trial judge sentenced defendant to six months for the concealed weapon offense and fourteen years for the armed robbery conviction. The six-month sentence was to run concurrently with the Davidson County sentence, but the trial judge concluded after hearing arguments that he was required by N.C.G.S. § 14-87(d) to make the armed robbery sentence run consecutively to the Davidson County sentence. The Court of Appeals agreed with the trial judge's conclusion.

This Court affirms the decision of the Court of Appeals on this issue without prejudice to the defendant's ability to file a mo-

tion for appropriate relief in the Davidson County case. The Clerk of Court of Montgomery County shall calculate the amount of credit to which defendant is entitled.

Affirmed.

STATE OF NORTH CAROLINA v. RONNIE L. MOORE

No. 771PA85

(Filed 3 June 1986)

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 77 N.C. App. 553, 335 S.E. 2d 535 (1985), which found no error in the trial and conviction of defendant before *Rousseau, J.*, at the 5 November 1984 session of Superior Court, WILKES County. Heard in the Supreme Court 12 May 1986.

Lacy H. Thornburg, Attorney General, by Victor H. E. Morgan, Jr., Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Robin E. Hudson, Assistant Appellate Defender, for defendant.

PER CURIAM.

The Court is evenly divided. Under these circumstances, following the uniform practice of this Court and the ancient rule of praesumitur pro negante, the decision of the Court of Appeals is affirmed, not as precedent but as the decision in this case. *Lynch v. Hazelwood,* 312 N.C. 619, 324 S.E. 2d 224 (1985).

Affirmed.

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

PEERLESS INSURANCE COMPANY v. NATHAN FREEMAN v. GREAT AMERICAN INSURANCE CO.

No. 109A86

(Filed 3 June 1986)

APPEAL by Great American Insurance Company, third-party defendant, pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals (opinion by *Judge Johnson* with *Judge Phillips* concurring and *Judge Webb* dissenting) reported at 78 N.C. App. 774, 338 S.E. 2d 570 (1986), affirming judgment entered by *Ward, J.*, on 29 January 1985 in BEAUFORT County District Court.

McLendon & Partrick by Neal Partrick for defendant, third-party plaintiff appellee.

Rodman, Holscher & Francisco by Edward N. Rodman for plaintiff appellee.

Williamson, Herrin, Barnhill & Savage by Mickey A. Herrin for third-party defendant appellant.

PER CURIAM.

Notwithstanding its reliance in part on *Smith v. Nationwide Mut. Ins. Co.*, 72 N.C. App. 400, 324 S.E. 2d 868 (1985), *rev'd*, 315 N.C. 262, 337 S.E. 2d 569 (1985), for the other reasons given in its opinion the decision of the Court of Appeals is

Affirmed.

ROMER G. TAYLOR v. RAMON A. BRITTAIN AND WIFE, NELLIE TAYLOR BRITTAIN

No. 633PA85

(Filed 3 June 1986)

RESPONDENTS' petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 76 N.C. App. 574, 334 S.E. 2d 242 (1985), was allowed 18 February 1986. The Court of Appeals reversed partial summary judgment entered by the trial court in favor of the respondents in a special proceeding to establish a boundary line under N.C.G.S. § 38-1, *et seq.* Heard in the Supreme Court 12 May 1986.

McMurray & McMurray, by John H. McMurray, for respondent-appellants.

Simpson, Aycock, Beyer & Simpson, P.A., by Samuel E. Aycock and Michael Doran, for petitioner-appellee.

PER CURIAM.

The decision of the Court of Appeals reversing entry of partial summary judgment in favor of the respondents and remanding to the trial court for further proceedings is affirmed. We disavow, however, the language of the Court of Appeals relating to the correction deed from the petitioner's grantor to the petitioner and the holding that the deed is void due to the statute of limitations and the intervening rights of the respondents.

Modified and affirmed.

JAMES LINVILLE BROWN, PLAINTIFF-EMPLOYEE v. WALNUT COVE VOLUNTEER FIRE DEPARTMENT, DEFENDANT-EMPLOYER, AND NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT-INSURANCE CARRIER

No. 696A84

(Filed 3 June 1986)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals (*Judge Hill* with *Judge Hedrick* concurring and *Judge Webb* dissenting) reported at 71 N.C. App. 409, 322 S.E. 2d 443 (1984), affirming a workers' compensation award by the Industrial Commission.

Jerry Rutledge for plaintiff appellee.

Tuggle, Duggins, Meschan & Elrod, P.A., by Richard L. Vanore and J. Reed Johnston, Jr. for defendant appellants.

PER CURIAM.

Affirmed.

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

STATE OF NORTH CAROLINA v. GARFIELD NOAH PREVETTE

No. 62A85

(Filed 2 July 1986)

1. **Constitutional Law § 34; Criminal Law § 26.5— murder and kidnapping—reliance on same restraint—double jeopardy**

In order to avoid a violation of the constitutional prohibition against double jeopardy in a case in which defendant was convicted of first degree murder and first degree kidnapping, defendant's conviction of kidnapping must be vacated where the State relied on the same evidence of restraint which was an inherent feature of the victim's murder by suffocation to support the restraint element of kidnapping, and where the trial court's kidnapping instructions related to restraint of the victim for the purpose of terrorizing the victim "by preventing her from removing a mouth gag to get sufficient passage of air."

2. **Homicide § 21.5— first-degree murder—premeditation and deliberation—sufficient evidence**

The State presented sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder by suffocation where it tended to show that there was no provocation by the victim; while still in prison before the murder, defendant told a fellow inmate that he was going to kill the victim because he had seen her talking to a black prisoner at a religious meeting; shortly before his release from prison, defendant told a fellow inmate that he had unfinished business in the area and that if he returned to prison, he would have either a life sentence or no release date; defendant described the murder to a witness as a brutal one before the circumstances were made known to him by the police; defendant moved out of his apartment the day after the murder; the victim was beaten about her face, her hands were tied behind her back, and her knees were also bound; the binding at the knees was so securely tied that it bruised the skin directly underneath; the bindings prevented the victim from removing a gag wrapped tightly around her mouth and head; defendant left the elderly and obese victim in this position, obviously realizing that she was helpless and would not be missed or discovered for many hours; death resulted within one to three minutes or as long as thirty minutes after the gag was placed across the victim's mouth, and she endured physical and psychological torture before she died of suffocation; and defendant was present while the victim was dying.

3. **Homicide § 15— statement by defendant—relevancy to show intent to kill**

Testimony in a murder case concerning defendant's statement that he had "unfinished business" in the area to take care of upon his release from prison had some probative value on the issue of defendant's intent to kill the victim and was thus relevant and properly admitted. N.C.G.S. § 8C-1, Rule 401.

4. **Criminal Law § 122.1— additional instructions on first degree murder—failure to reinstruct on second degree murder**

In view of the jury's specific request for a clarification of the elements of first degree murder only, the trial court did not abuse its discretion in refus-

ing to reinstruct on second degree murder pursuant to defendant's request when it reinstructed on first degree murder.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Pope, J.*, at the 4 September 1984 Criminal Session of Superior Court for WAYNE County. Defendant's motion to bypass the Court of Appeals on the Class D felony was allowed on 2 December 1985.

Defendant was charged with first degree murder, first degree sexual offense, first degree kidnapping, common law robbery, larceny, receiving stolen property, and possessing stolen property. The charges of first degree sexual offense and receiving stolen property were voluntarily dismissed prior to trial. At the conclusion of the State's presentation of evidence, the trial court dismissed all the remaining charges against defendant, except for murder and kidnapping. The jury returned a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation and under the felony murder rule. The jury also returned a verdict of guilty of first degree kidnapping. On the jury's recommendation, defendant was given a life sentence for murder. For kidnapping, defendant was sentenced to a forty year consecutive term of imprisonment.

The State's evidence tended to show that on Sunday morning, 8 January 1984, sometime after 8:00 a.m., Goldsboro Police Sergeant V. E. Davis, Jr., responded to a call from the station concerning Ms. Goldie Jones. He arrived at her home on South Oleander Avenue around 8:51 a.m. and noticed that her car, a 1977 Datsun, was gone. A police dispatcher had phoned Ms. Jones' residence and found the line to be busy. Sergeant Davis knocked on the front and back doors but received no answer. He further determined that the doors were locked and all windows were secured. After talking with some neighbors, Davis radioed officers to be on the lookout for Ms. Jones and her car. Davis then went to the home of the Granthams who lived directly behind Goldie Jones and asked Mrs. Grantham to call Ms. Jones' brother and sister-in-law, Harry and Mary Jones, to ascertain Ms. Jones' whereabouts and to get permission to enter Ms. Jones' home. Sergeant Davis thereafter resumed his patrol duties and later returned to the Grantham home around 11:00 a.m. However, Mrs. Grantham had not yet been able to contact the Joneses.

At approximately 3:00 p.m. that same day, Sergeant Davis met Harry Jones at Ms. Goldie Jones' residence. Mr. Jones gave Davis permission to enter his sister's house. Sergeant Davis removed a storm window on the back porch where the wooden window was unlocked. Davis entered the house through the window into the den. According to Davis, the den appeared ransacked with the room's contents scattered all over the floor. As he proceeded through the house, Davis entered the kitchen and noticed that the telephone receiver was off the hook. He then walked through the living room which was "very neatly kept" to the bedroom in the front of the house. Davis there observed Ms. Jones, an elderly female, lying on the bed on her back left side. She was nude and her ankles, knees, wrists, and mouth were bound by various materials. Her face was swollen and bruised. Davis further noticed smeared fecal matter underneath the body on the bed. He then radioed other police officers and a rescue unit. Davis testified that, besides the rescue personnel's check for the victim's vital signs, nothing in the house was disturbed.

SBI crime lab analyst Dennis Honeycutt arrived at Goldie Jones' residence that day at approximately 5:51 p.m. After a preliminary walk-through examination, Agent Honeycutt began his crime scene search at 6:00 p.m. He measured the size and recorded the contents of each room in the house. Of particular interest, he noted that there was a bathtub half-filled with water; a pink curtain tie-back missing from the second bedroom and a pink cloth tied around the victim's hands; a blood-stained eyeglass lens on a bookcase in the front bedroom with the victim; a kitchen towel partially covering the fecal matter near the victim's buttocks; a blood-like stain on the bedroom door frame; two orange plastic scissor handles without the attached blades on the den floor; a pair of glasses frames missing one lens on the den floor; several items of clothing including a pair of brown pants, a brown shirt, a toboggan, a girdle, and a bra on the den floor; and the contents of a tan pocketbook dumped on the bed in the second bedroom. Honeycutt also vacuumed the house for hair evidence, tested various stains with phenolphthalein solution for indications of blood, examined the body with cyanocrylate fuming for fingerprints and collected fingerprints from other locations in the house. He received positive results of blood on a couch cushion on

the den floor, on the couch itself, on the den floor, and in the hallway.

The following day at approximately 10:30 a.m., Dr. Robert M. Anthony, an expert in the field of forensic pathology, performed an autopsy on the body of Goldie Jones. Dr. Anthony testified that the victim was 5′5″ in height, 191 pounds, and sixty-one years of age. He first noted that Ms. Jones' hands were bound behind her back with some type of pink "drapery hangings," that her ankles were tied together by nylon stockings, that her knees were bound by a bathrobe belt, and that her mouth was bound and gagged through the use of an apron.

As Dr. Anthony removed these bindings, he observed an abundance of fecal material across the small of the victim's back, buttocks, and the back of both legs. Dr. Anthony stated that the spread of this material across the body indicated that the victim was most likely alive when she defecated and was probably having thrashing agonal movements. He noticed that the back of the victim's right knee was bruised directly underneath the affixed ligature. Dr. Anthony likewise observed that the victim's left eye was bruised. He discovered a large amount of blood and mucus in her nose. He stated that the injury to the nose could have resulted from the same blow to the eye. Dr. Anthony further observed that the apron gag was quite wet and damp in the area adjacent to Ms. Jones' mouth by a mixture of blood, saliva and vomitus. He explained that if the victim had been suffering from an upper respiratory infection she would have been breathing primarily through her mouth. He therefore placed significance on the presence of mucus in the victim's nose and vomitus in the back of the victim's mouth. In Dr. Anthony's opinion, the vomitus would have soaked the gag further, making the normally porous apron cloth a more effective airtight seal, or would have acted as an irritant and blocked the victim's ability to move air. He concluded from his examination that Ms. Jones "died as a result of suffocation from having a gag tied across her mouth."

Dr. Anthony also explained the stages the body goes through when approaching death by suffocation:

> As the oxygen levels get lower a person would ordinarily go through an initial phase of excitement and struggle against whatever it was that was causing their lack of oxy-

> gen. If it was a binding it would be fighting against that. If its water or [a] pillow, whatever it happens to be they're going to fight against that. As they lose strength and begin to lose consciousness a series of events will happen. People will begin to have problems with irregular heart beats. They may lose control of their bowels and bladder, and once that occurs . . . irreversible injury to the brain has occurred. Death usually occurs shortly thereafter.

He concluded that at the time Ms. Jones lost control of her bowels she would have been in a depressed state of consciousness, approaching death. Dr. Anthony opined that death resulted within one to thirty minutes after the gag had been placed across Ms. Jones' mouth. Dr. Anthony estimated that prior to the autopsy the victim had been dead eighteen to thirty-six hours, placing the time of death between 10:30 p.m., Saturday, 7 January 1984, to 4:30 p.m., Sunday, 8 January 1984.

Finally, Dr. Anthony's examination revealed small superficial lacerations present along the walls of the vagina. In his opinion, these lacerations might have been caused by a male penis or by a pair of scissors.

Also, on 9 January 1984, Agent Honeycutt went to the Ash Street Service Center to check Ms. Jones' car for evidence. The car had been spotted by Ms. Lillie Rudisill around 4:00 a.m. on 8 January 1984 parked on a street next to her house, one-half mile from defendant's residence. After the Sunday evening news, she called the police who had the car towed to the Service Center. Agent Honeycutt found the driver's door unlocked and the turn signal in the left turn position. With the help of Officers Melvin and Pinto, Honeycutt lifted latent fingerprints from the interior driver side door, the steering wheel, and the inside of the gas tank cover. No ignition key was discovered.

Next, evidence was obtained from a trash dumpster located near defendant's residence at the time of the slaying. On 10 and 11 January 1984, police searched the dumpster and found a brown paper bag and a clear plastic bag containing: (1) a brown wallet; (2) a pair of scissor blades with a stain on it; (3) seven keys on a ring; (4) a black pair of scissors; and (5) a pair of blue jeans. The scissor blades discovered in the trash fit the orange scissor handles found by the officers on Goldie Jones' den floor. The keys

found among the trash fit Ms. Jones' 1977 Datsun, the back door of her residence, and various other locks found at the victim's residence. Furthermore, the brown wallet contained several personal papers and credit cards in Ms. Jones' name.

An analysis of all the physical evidence collected was performed by various SBI experts. SBI forensic chemist Scott Worsham, an expert in the field of hair analysis and comparison, found that pubic hairs obtained from the victim's bedroom floor and brown blouse were microscopically consistent with known pubic hairs of defendant and could have originated from him. SBI forensic serologist Jona Medlin determined that blood found on the victim's couch and cushion was consistent with the victim's blood. According to SBI fingerprint expert Joyce Petzka, fingerprints lifted from the plastic bag found in the trash dumpster were identical to defendant's right middle finger and right ring finger. Also, Agent Petzka testified that a fingerprint obtained from the door frame between the victim's kitchen and den matched defendant's left index finger and a fingerprint found on the steering wheel of the car matched defendant's right ring finger.

Other evidence produced by the State revealed that prior to January 1984, Ms. Jones had met defendant while he was in prison through the Yoke Fellows, a religious organization which conducted Bible study and held devotionals with the inmates at the prison.

Mrs. Frances Creech, age 71, testified that on Saturday, 7 January 1984, Goldie Jones arrived at her house at approximately 11:00 a.m. They went to list their taxes and to do other shopping. Ms. Jones, who was not feeling well due to a virus, drove Mrs. Creech back to her house around 2:00 p.m. Next, Mrs. Helen Gulick, age 83, testified that later that afternoon Goldie Jones drove her to the grocery store around 4:30 p.m. When they returned to Mrs. Gulick's home around 5:30 p.m., they decided that Ms. Jones, even with her cold, would pick Mrs. Gulick up at 8:00 a.m. the next day to go to mass as they had done on a number of prior occasions. Between 7:00 p.m. to 7:30 p.m. and 7:50 p.m. that evening, Mrs. Verna Mullinax talked with Goldie Jones on the telephone. She testified that during their conversation Ms. Jones stated that "she ha[d] a visitor and that it was Garfield and that [Mrs.

Mullinax] knew him." Mrs. Mullinax informed the victim that one of the girls associated with Yoke Fellows had gotten married. Then she heard Ms. Jones ask: "Garfield, did you know that little girl at Yoke Fellows had got [sic] married?" She heard a male voice respond. Later, around 9:00 p.m., Ms. Jones called Mrs. Gulick to obtain Minnie Tarzy's unpublished telephone number.

Shortly after 9:00 p.m., Mrs. Tarzy received a telephone call from Ms. Jones who asked if a friend presently in her home could wait in the Waynesborough House lobby until his roommate who had taken his apartment keys returned. Mrs. Tarzy replied that the lobby had just closed at 9:00 p.m. She suggested that she call Father Harper at the church rectory and asked Ms. Jones to call back to let her know what happened. Mrs. Tarzy testified that she waited until 12:30 a.m., but that the victim did not call.

Reverend Jimmy Whitfield testified that after 9:00 p.m. on Saturday evening defendant phoned him at his home trying to locate his roommate, Robert Sweet, because he had been locked out of their apartment. Reverend Whitfield replied that he did not know where Sweet was and heard some conversation on defendant's end, but could not identify the sex of the person's voice.

Finally, Mrs. Gulick testified that when Ms. Jones failed to pick her up for mass the next morning she called her number and found the line busy. At 8:20 a.m., she called the police and asked them to check by Ms. Jones' house.

The State also offered the testimony of Daley Potter, a cellmate of defendant's who had attended Yoke Fellows meetings with him. Potter testified that defendant normally sat with Ms. Jones during these meetings. According to Potter, around Christmas of 1982, defendant stated in reference to Ms. Jones: "I'm going to kill the nigger loving bitch because she was talking to a black guy at Yoke Fellows." In early 1983, defendant told Potter that he had tried to touch Ms. Jones' private area during a Yoke Fellows meeting, but that she had pushed his hand away. In October of 1983, on the night before defendant's release, he told Potter that he had some unfinished business to take care of in the area and that if he ever returned to prison he would return for life or with no release date.

Robert Sweet testified that defendant had started living with him in November of 1983. Sweet stated that on Saturday, 7 January 1984, defendant was not at home when he returned around 2:30 p.m. Sweet was awakened later that night between 11:00 and 11:30 p.m. by defendant who was preparing to go to bed. On the following Monday, Sweet discovered when he returned from work that defendant had moved out.

Goldsboro Police Sergeant Perry Sharp testified that on Sunday evening, 8 January 1984, he located defendant at Sweet's apartment. When informed about Ms. Jones' death, defendant told Sharp that his last contact with the victim was by phone the previous day. Defendant indicated that they had conversed twice, around 4:30 to 5:00 p.m. and 7:30 to 8:00 p.m. During Sharp's interview with defendant, Sharp did not describe the manner in which Ms. Jones had died.

Later that Sunday evening, defendant called Ina Mixen and stated that "Goldie has been brutally murdered" and that he had just been visited by the police. At trial, Mrs. Mixen read a letter written by defendant to her admitting that he was at the victim's house until 8:00 p.m. on Saturday, 7 January, but denying that he had killed her.

Defendant offered no evidence.

Lacy H. Thornburg, Attorney General, by Reginald L. Watkins, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss the kidnapping charge against him. He contends that the State failed to produce substantial evidence of the kidnapping element of restraint which was separate and distinct from the restraint evidence necessary to sustain his murder conviction. Because the jury found defendant guilty of first degree murder on theories of premeditation and deliberation and felony murder, there was no merger of the kidnapping conviction with the murder conviction, and additional punishment could be im-

posed for kidnapping. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

> 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. Freeland, 316 N.C. 13, 21, 340 S.E. 2d 35, 39 (1986).

On a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving it the benefit of every reasonable intendment and inference to be drawn therefrom. *State v. Brown*, 315 N.C. 40, 58, 337 S.E. 2d 808, 822 (1985).

In order to sustain a conviction for kidnapping, the State must prove that "the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E. 2d 401, 404 (1986). The trial court in the case *sub judice* submitted the offense of kidnapping to the jury on the theory that defendant had confined and restrained Goldie Jones for the purpose of terrorizing her. *See* N.C.G.S. § 14-39(a)(3) (Cum. Supp. 1985). The trial court in its instructions correctly defined terrorizing as "more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *See State v. Moore*, 315 N.C. at 745, 340 S.E. 2d at 405. The trial judge further instructed as follows:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about January 7 and 8, 1984 Garfield Noah Prevette unlawfully confined Goldie Gray Jones in a bedroom and restrained her, that is, by binding or tying up her hands, knees and feet, and Goldie Gray Jones did not consent to this confinement and restraint, and that this was for the purpose of terrorizing Goldie Gray Jones by preventing her from removing a mouth gag to get a sufficient passage of air into her body, and that Goldie Gray Jones was not released in a safe place and had been seriously injured, it

> would be your duty to return a verdict of guilty of first degree kidnapping.

The trial court's charge on first degree murder based on premeditation and deliberation provided that the State, among other things, must prove that "defendant intentionally and with malice placed a gag across the mouth of Goldie Gray Jones, thereby causing her suffocation" and that "the placing of a gag across the mouth of Goldie Gray Jones . . . was a proximate cause of [her] death." Proximate cause was defined by the trial judge as "a cause without which Goldie Gray Jones' death would not have occurred."

In light of the evidence produced by the State and by virtue of these instructions, we are constrained to find that the restraint essential to the kidnapping conviction was an inherent and inevitable feature of this particular murder. We recognize the fact that murder is not within that class of felonies, such as forcible rape and armed robbery, which cannot be committed without some restraint of the victim. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E. 2d 338, 351 (1978). However, we agree with defendant's assertion that in this case the placement of the gag over Ms. Jones' mouth could not have been the proximate cause of her death without the binding of her hands and feet which prevented the removal of the gag. Based on the State's evidence, the victim's death would not have occurred without these other ligatures. Therefore, the restraint of the victim which resulted in her murder is indistinguishable from the restraint used by the State to support the kidnapping charge.

Contrary to the State's argument, the circumstances of this case did not involve a situation where two criminal offenses stemmed from the same course of action. *See State v. Fulcher*, 294 N.C. at 523, 243 S.E. 2d at 351-52; *State v. Price*, 313 N.C. 297, 327 S.E. 2d 863 (1985). The State presented no evidence which would indicate that defendant restrained the victim by any other means than by the bindings. Nor was there evidence that defendant terrorized her prior to committing the acts constituting the murder. Although there was evidence that the victim was struck in the face less than an hour before her death, there was no evidence indicating whether the victim was struck before being bound. Even the State's evidence tending to show that the victim

may have been sexually assaulted does not support its theory that defendant bound the victim for the purpose of terrorizing her due to the fact that the victim was bound at the knees, creating a reasonable inference that any sexual assault occurred prior to the placement of the bindings.

In any event, the trial court's specific instruction that the victim was restrained for the purpose of terrorizing the victim "by preventing her from removing a mouth gag to get a sufficient passage of air" requires this Court to assume that the jury impermissibly relied on the same evidence of restraint which was an inherent feature of the victim's murder by suffocation to support the restraint element of kidnapping. *State v. Fulcher*, 294 N.C. at 523, 243 S.E. 2d at 351; *see generally, State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35.

Because the State has failed to furnish any evidence of restraint apart from that necessary to accomplish the murder, defendant may not be separately punished for the kidnapping unless the legislature authorized cumulative punishment. *State v. Freeland*, 316 N.C. 13, 21, 340 S.E. 2d 35, 39; *State v. Gardner*, 315 N.C. 444, 460-61, 340 S.E. 2d 701, 712 (1986). Nowhere in the pertinent statutes did the legislature explicitly authorize cumulative punishment. Therefore, we must determine the legislature's intent by examining the subject, language, and history of the statutes. *State v. Gardner*, 315 N.C. at 461, 340 S.E. 2d at 712. Such an examination of the pertinent statutes yields no evidence that the legislature intended to authorize punishment for kidnapping when the restraint necessary to accomplish the kidnapping was an inherent part of the first degree murder.

Because the State failed to produce substantial evidence of restraint, independent and apart from the murder, we hold that the trial court improperly failed to allow defendant's motion to dismiss the charge of first degree kidnapping. In order to avoid a violation of the constitutional prohibition against double jeopardy, defendant's conviction for kidnapping must be vacated.

[2] By his second assignment of error, defendant contends that the trial court improperly denied his motion to dismiss the charge of first degree murder because the evidence was insufficient to prove the elements of premeditation and deliberation. Possible verdicts of involuntary manslaughter, second degree murder, first

degree felony murder, and first degree premeditated and deliberated murder were submitted to the jury. In general, before submitting the issue of a defendant's guilt to the jury, the trial court must be satisfied that the State has produced substantial evidence tending to prove each essential element of the offenses charged and that the defendant was the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). 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).

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808. Premeditation means that the act was thought out beforehand for some length of time, however short. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Deliberation denotes an intent to kill carried out in a cool state of blood in furtherance of a fixed design. *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979).

The trial judge in instant case correctly instructed the jury as follows:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proven by a proof of circumstances from which they may be inferred such as the lack of provocation by the victim; conduct of the defendant before, during and after the killing; threats and declarations of the defendant; use of grossly excessive force; brutal or vicious circumstances of the killing; and the manner in which or the means by which the killing was done.

See State v. Brown, 315 N.C. at 59, 337 S.E. 2d at 822-23. Defendant argues that the evidence does not support the conclusion that defendant knew that the loose fabric of the apron would become blocked or that Ms. Jones could not breathe through her nose. According to defendant, the evidence is therefore insufficient to prove a premeditated and deliberated intent to kill. Defendant contends that at most the evidence may be sufficient to establish

malice or criminal recklessness to support the submission of second degree murder or involuntary manslaughter to the jury. He also suggests that there is no evidence of brutal or vicious circumstances.

We disagree and hold that the first degree murder elements of premeditation and deliberation are substantially supported by the State's evidence and the reasonable inferences arising thereon. In the first place, there was absolutely no evidence of provocation by the victim. Ms. Jones met defendant by her involvement with a religious organization concerned with the plight of prison inmates. Ms. Jones' willingness to help defendant even extended beyond his prison stay. The State's evidence tended to show that immediately prior to her murder Ms. Jones allowed defendant to enter her home as she attempted to find him a place to wait for his roommate who defendant alleged had taken his apartment key.

Secondly, defendant's conduct and declarations before and after the killing tend to show his premeditated and deliberated intent to kill. State's witness Daley Potter testified that while in prison defendant stated that he was going "to kill the nigger loving bitch" because he had seen Ms. Jones talking to a black prisoner at a Yoke Fellows meeting. Shortly before his prison release, defendant told Potter that he had unfinished business in the area and that if he returned to prison, he "would come back with it all," meaning either a life sentence or with no release date. Moreover, Ina Mixen testified that around 6:30 p.m. on Sunday, 9 January 1984, defendant telephoned her and stated that he had just been visited by the police and learned that Ms. Jones had been brutally murdered even though Sergeant Sharp stated that he had not described for defendant the circumstances surrounding the victim's death. Sergeant Sharp also testified that upon his request defendant gave him the telephone number of Robert Sweet's apartment in case the police needed to contact him further. Robert Sweet testified that when he returned from work the following day defendant had moved out.

Finally, the manner and means by which the killing was carried out, including the force used and its brutal circumstances, constitute substantial evidence sufficient to support a conclusion that the killing was premeditated and deliberated. The State's

evidence tended to show that the victim was beaten about her face. Her hands were tied behind her back and her knees and ankles were also bound. The ligature at the knees was so securely tied that it bruised the skin directly underneath. Furthermore, these bindings securing her limbs prevented the victim from removing a gag which was tightly wrapped around her mouth and head. Defendant left the victim, an elderly and obese woman, in this position, obviously realizing that she was helpless and would not be missed or discovered for many hours.

Dr. Anthony testified that once the gag was placed across Ms. Jones' mouth, death resulted within one to three minutes or as long as thirty minutes. He described the physical, and surely psychological, torture that the victim would endure as she died of suffocation. Dr. Anthony explained that the entire focus of the person would be to get her breath. As she became more and more hypoxic, she would fight and struggle to catch her breath, involving not only the usual muscles of respiration but all the accessory muscles, such as the muscles of the chest and abdomen. Dr. Anthony stated that the victim would begin to thrash around vigorously and would reach a state of terror as she fought with all her strength to get air. Contrary to defendant's argument, this method of murder was extremely cruel, increasing in its brutality the longer the victim lived and was forced to suffer. Defendant, himself, described the murder as a brutal one to Ina Mixen before the circumstances were made known to him by police.

There is also evidence, tending to establish the elements of premeditation and deliberation, that defendant was present while the victim was dying. SBI Agent Dennis Honeycutt testified that a kitchen towel or hand towel was partially covering the fecal material near the victim's buttocks. Honeycutt specifically stated that fecal material was found on the bottomside of the towel, not on the top of the towel, and very close to the victim's body. The other fecal material had been smeared by the victim's body as she thrashed from side to side. Dr. Anthony testified that by the time the victim lost control of her bowels she would be very close to death. Police Sergeant Davis, who discovered the body, testified that nothing in the house was disturbed and that the rescue personnel touched only Ms. Jones' neck for vital signs.

The State's evidence, taken together and in its most favorable light, was sufficient to survive defendant's motion to dismiss. We hold that the trial court properly denied defendant's motion to dismiss the charge of first degree murder based on premeditation and deliberation.

[3] Defendant next assigns as error the trial court's denial of his motion *in limine* to preclude Daley Potter's testimony concerning defendant's statement that he had "unfinished business" in the area to take care of upon his release from prison. He argues that because this testimony was never connected with the death of Ms. Jones it was irrelevant and that its admission constituted prejudicial error.

N.C.G.S. § 8C-1, Rule 401, 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." This Court has stated on numerous occasions that evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. *E.g., State v. Hannah*, 312 N.C. 286, 294, 322 S.E. 2d 148, 154 (1984); *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983).

The State argues that this portion of Potter's testimony, when taken with the rest of his testimony, is probative on the issues of defendant's motive and intent to kill Goldie Jones. Potter testified that on two different occasions defendant expressed anger and frustration towards the victim. The first incident occurred when Ms. Jones was seen talking to a black inmate. According to Potter's testimony, defendant who was extremely upset over the incident stated, "I'm going to kill the nigger loving bitch because she was talking to a black guy at Yoke Fellows." The second incident involved defendant's attempt "to stick his hand up around [Ms. Jones'] private area." He was prevented from doing so by the victim who refused such contact. The "unfinished business" statement was made after these incidents and in response to Potter's comment that defendant upon release should return to Colorado. Potter reminded defendant that taking care of such business would only bring him back to prison. Defendant acknowledged this fact and stated that he knew that if he did return "he would come back with it all."

Through Potter's other testimony, we find that the State has provided a logical basis on which this objected to statement may be connected with the crime committed. *Quoting* 1 Stansbury's North Carolina Evidence § 78, at 237 (Brandis rev. ed. 1973), this Court in *State v. Covington*, 290 N.C. 313, 335, 226 S.E. 2d 629, 645 (1976), stated:

> The standard of admissibility based on relevancy and materiality is of necessity so elastic, and the variety of possible fact situations so nearly infinite, that an exact rule cannot be formulated. In attempting to express the standard more precisely, the Court has emphasized the necessity of a *reasonable*, or *open and visible* connection, rather than one which is remote, latent, or conjectural, between the evidence presented and the fact to be proved by it, at the same time pointing out that the inference to be drawn need not be a *necessary* one. . . .

(Emphasis in original.)

Although the inference the State wished the jury to draw between the "unfinished business" statement and defendant's death threat against Ms. Jones was not necessarily the inference the jury would draw from this evidence, it was a reasonable one with a visible link to the crime charged against defendant. Because the "unfinished business" statement had some probative value on the issue of defendant's intent to kill the victim, we hold that the evidence was relevant and properly admitted.

[4] By his final assignment of error, defendant asserts that the trial court committed prejudicial error by failing to reinstruct the jury on the law of second degree murder when it, in response to the jury's request for a clarification on malice, premeditation, and deliberation, reinstructed the jury on first degree murder. Defendant reasons that the reinstruction on second degree murder was required in order to avoid the placement of undue emphasis on the charge of first degree murder. This contention lacks merit.

N.C.G.S. § 15A-1234 provides that "[a]t any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions." In *State v. Hockett*, 309 N.C. 794, 800, 309 S.E. 2d 249, 252 (1983), this Court concluded that the statute did not re-

quire that the trial judge repeat instructions previously given in the absence of some error in the charge. In fact, in *State v. Dawson*, 278 N.C. 351, 365, 180 S.E. 2d 140, 149 (1971), we held that "needless repetition is undesirable and has been held erroneous on occasion." In view of the jury's specific request for a clarification of elements of first degree murder only, we hold that the trial court did not abuse its discretion in refusing to reinstruct on second degree murder pursuant to defendant's request. We believe it important to note that the trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions.

For reasons stated, we hold that defendant's kidnapping conviction must be vacated, but that in all other respects defendant received a fair trial free from prejudicial error.

First Degree Kidnapping—vacated.

First Degree Murder—no error.

STATE OF NORTH CAROLINA v. CHARLIE JOHNSON MANN

No. 755PA85

(Filed 2 July 1986)

1. **Criminal Law § 4— solicitation to commit common law robbery—infamous crime**

Solicitation to commit common law robbery is an infamous crime within the meaning of N.C.G.S. § 14-3; where a defendant has counseled, enticed, or induced another to commit as degrading an offense as theft from the person or presence of a victim by force or by putting him in fear, he has committed an act of depravity and a crime involving moral turpitude and has demonstrated that he has a mind fatally bent on mischief and a heart devoid of social duties.

2. **Criminal Law § 122.2— failure to reach verdicts—additional instructions—verdict not coerced**

The trial judge did not coerce a verdict in a prosecution for solicitation of common law robbery and conspiracy to commit robbery where the trial judge instructed the jury in accordance with N.C.G.S. § 15A-1235(b) when first informed that the jury had reached unanimous verdicts on all but one charge;

defendant concedes that the judge's instructions complied with the statute; the trial judge did not abuse its discretion or coerce a verdict by inquiring into the jury's division; consideration of all the circumstances of the case reveals no reasonable ground to believe that the jury was misled; and there is not a reasonable probability that the trial judge's actions or statements changed the result of the trial.

3. **Criminal Law § 138.29— nonstatutory aggravating factor—set a course of criminal conduct in motion which resulted in other crimes—no error**

The trial judge did not err when sentencing defendant for soliciting common law robbery by finding as a non-statutory aggravating factor that defendant set a course of criminal conduct in motion by his own actions which ultimately resulted in other crimes where the evidence was sufficient to establish by a preponderance of the evidence that defendant formed the original idea to rob the victim, that he masterminded the plan, and that he counselled and enticed others to rob the victim.

Justice BILLINGS concurring.

ON the State of North Carolina's petition for discretionary review of the decision of the Court of Appeals, 77 N.C. App. 654, 335 S.E. 2d 772 (1985), which found no error in the trial of defendant before *Hobgood, J.*, at the 30 April 1984 session of Superior Court, ALAMANCE County, but remanded the case for resentencing. Heard in the Supreme Court 17 April 1986.

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

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

MARTIN, Justice.

The primary issue raised on this appeal is one of first impression: whether solicitation to commit common law robbery is an infamous crime. We hold that it is and therefore reverse the decision of the Court of Appeals as to this issue.

At trial, the state's evidence showed that Penelope Dawkins, the fiancee of Richard Lockamy, lived with Lockamy in a Mebane trailer park which was managed by codefendant Keith Barts. In September 1983, while visiting Lockamy's sister, Penelope and Lockamy met defendant, Charlie Mann. Thereafter, Penelope and Lockamy would, about two to three times a week, help Mann with his sawmill, straighten up his yard, and clean his house. At some

point, Mann told Lockamy that he knew Lockamy had a criminal record and that Lockamy and Penelope needed money. Penelope testified that Mann told them that he knew an elderly man in Snow Camp who carried large sums of money in his bib overalls and that "[h]e would be an easy man to rob. It would take two men to rob the man. The best thing to do would be to go to a shed and wait for him to come home and after he got out of his truck, rob him from there." Lockamy told Mann he would think about it. Penelope testified that thereafter the subject came up three or four times a week. Mann would ask Lockamy if he had thought about it, and Lockamy would respond that he had, but that "he hadn't done anything about it. And, Mr. Mann kept telling him that if he didn't do it himself, . . . that he would find somebody else to do it or he would do it." About a week later, Mann picked up Lockamy at his trailer one morning in order to show him where the intended victim, Richard Braxton, lived.

Sometime later, it was discovered that Mann knew Keith Barts. About a week later, Barts told Penelope and Lockamy that he had known Mann for several years and that Mann "had set him up on three jobs," and he told Penelope and Lockamy "of the jobs he pulled off." Barts also said "[t]hat the set-up, the job in the country sounded like a good lick." Then, one Monday night approximately two weeks before Braxton was killed, Lockamy, Barts, and John David "Fireball" Holmes rode to Braxton's home planning to rob the old man. Their plan was thwarted when they saw Braxton's son or grandson was with him.

On 20 November 1983, Barts arrived at Penelope's trailer. He told Lockamy, "I did that job last night. . . . The job in the country, but I think I killed the man." Barts went on to say that he had gone to the old man's house, hidden in the shed, and waited for him to come home. When the old man arrived home, Barts jumped him and began beating him. Barts said, "I beat the old . . . until I got plumb tired of beating him. . . . I beat him until he quit moving. The whole time the old man screamed, 'Oh, God, you're gonna kill me.' " Barts said that the old man was strong and that when he "bucked" on him and hit Barts in the back with something, Barts got mad. Barts then said that the only way to know if he had actually killed the man would be to read about it in the newspaper.

In exchange for his testimony for the state, as well as for his guilty pleas to conspiracy to commit robbery and armed robbery, all other charges against Richard Lockamy were dismissed. Lockamy substantially corroborated Penelope's testimony, saying that Mann had told him he probably could tie Braxton up with a rope and wouldn't have to use any weapons to get the money. Mann also told Lockamy what he considered to be "the best way to do the job." Lockamy testified that Mann "was very persistent about someone doing the job." Mann was "interested in some of the merchandise out of [Braxton's] home or either a thousand dollars." Mann said Braxton often carried with him $10,000 to $15,000 at a time. Mann also told Lockamy he had previously set up a burglary job for Keith Barts, who went on to actually commit that burglary. After the robbery and killing of Braxton, Barts told Lockamy that he had broken into Braxton's house "and messed it up quite a bit" and that he had also broken into the tool shed. Barts admitted he'd beat Braxton with a hammer and "some type of tool."

"Fireball" Holmes testified that on 19 November 1983, he drove Earl and Keith Barts to Braxton's house, arriving there at about 8:00 p.m. When they left the car, Keith had a baseball bat and a crowbar, and Earl had Holmes' .25-caliber automatic pistol and a rubber hubcap hammer. Holmes drove the car to a bridge some distance away and waited. About thirty minutes later, Holmes drove into Braxton's driveway and encountered Earl, who was carrying the baseball bat, a .22-caliber revolver which they had found in Braxton's house, and some brass knuckles. Braxton had not yet come home, so Holmes returned in the car to the bridge. About one and a half to two hours later, Keith and Earl came barrelling down the road in Braxton's pickup truck. Keith said they had had to beat the old man. After arriving at Earl's trailer, the three men split up the money, each taking approximately $1,000.

Written statements given by Keith Barts, Penelope Dawkins, and Richard Lockamy to SBI agent Terry Johnson, substantially corroborating the trial testimony of Dawkins, Lockamy, and Holmes, were read into evidence. However, Keith's statement indicated that Earl Barts, not he, had killed Mr. Braxton.

The assistant chief medical examiner testified that he performed an autopsy on the body of seventy-four-year-old Richard Braxton. Dr. Anthony testified that Braxton had at least six large open cuts on his left forehead which all ran together; both eyes were blackened; there were bruises on his face and chest; defensive wounds were present on his right hand; numerous other small cuts and abrasions were present, and bruises on the body "were so numerous we didn't actually count or quantitate them." Dr. Anthony said that the blows to the outside of the scalp broke skull bones, fragments of which had been driven into the brain, and in his opinion, Braxton died as a result of blunt trauma to the head. Dr. Anthony also testified that death was not instantaneous and that Braxton probably lived "for a period of time" after the blows were struck.

Defendant took the stand at trial and denied ever having asked either Penelope Dawkins or Richard Lockamy to rob Mr. Braxton. He said that he had known Richard Braxton all his life, that Braxton was his friend, and that Braxton's name had been mentioned in conversations with Lockamy and Penelope only because the couple desperately needed money and Lockamy had asked Mann's sister about the possibility of his doing some painting for Mr. Braxton.

Defendant offered the testimony of several witnesses who testified as to his good character. He also offered the testimony of Hasan Abdus Sabr, one of Lockamy's former cellmates, to the effect that Lockamy and Penelope, not defendant, had originated the plan to rob Richard Braxton and that Lockamy had told him that Charlie Mann did not know anything about robbing Braxton. Sabr later shared a cell with defendant for a day and a half, but said he had no conversation with Mann about what Lockamy had said.

The jury returned verdicts of guilty of soliciting Richard Lockamy to commit common law robbery of Richard Braxton, not guilty of solicitation of Penelope Dawkins to commit common law robbery, not guilty of conspiracy to commit robbery with a dangerous weapon, and not guilty of feloniously conspiring with Richard Lockamy to commit robbery with a dangerous weapon or common law robbery of Richard Braxton. Defendant was sen-

tenced to imprisonment for seven years for conviction of a Class H felony under N.C.G.S. § 14-3(b).

Defendant appealed to the Court of Appeals, which found no error in defendant's trial but remanded the case for resentencing of defendant as a misdemeanant. We granted the State of North Carolina's petition for discretionary review.

I.

[1] It is well established that solicitation of another to commit a felony is a crime in North Carolina. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924 (1977); *State v. Hampton*, 210 N.C. 283, 186 S.E. 251 (1936). This is true even though the solicitation is of no effect and the crime solicited is never committed. *Id.* It has been recognized at common law since at least *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269 (1801) (solicitation to commit sodomy). It is an indictable offense under the common law of North Carolina. N.C.G.S. § 4-1 (1981). There is no question that common law robbery is a felony, *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056 (1982); *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974); *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965); nor is there any doubt that common law robbery itself is an infamous crime, *State v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853 (1956); *Arnold v. United States*, 94 F. 2d 499, 506 (10th Cir. 1938); *Stephens v. Toomey*, 51 Cal. 2d 864, 338 P. 2d 182 (1959); *Cousins v. State*, 230 Md. 2, 185 A. 2d 488 (1962), as is an attempt to commit the felony of common law robbery, *State v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853; *State v. Best*, 11 N.C. App. 286, 181 S.E. 2d 138, *cert. denied*, 279 N.C. 350 (1971). In order to determine whether defendant in this case is to be punished as a misdemeanant or as a felon, we must now decide whether solicitation of another to commit common law robbery is an infamous crime within the meaning of N.C.G.S. § 14-3.[1]

N.C.G.S. § 14-3, entitled "Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud," provides, in pertinent part:

> (b) If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and

1. Defendant has not made a challenge to the constitutionality of N.C.G.S. § 14-3; therefore, we decline to address it.

> malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony.

N.C.G.S. § 14-3(b) (1981).

N.C.G.S. § 14-3 has remained basically unchanged since 1927. This Court held, in determining that an attempt to commit burglary was punishable under the statute, that if the crime was "infamous," or is one "done in secrecy and malice," or is committed "with deceit and intent to defraud," falling into any one of these categories, it is a felony under N.C.G.S. § 14-3 and punishable as prescribed therein. *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949). Thus, if solicitation to commit the crime of common law robbery falls into either of the three categories set out in N.C.G.S. § 14-3, it is punishable under it.

A crime is "infamous" within the meaning of the statute if it is an act of depravity, involves moral turpitude, and reveals a heart devoid of social duties and a mind fatally bent on mischief, *Surles*, 230 N.C. at 277, 52 S.E. 2d at 883. Other courts, using a similar test, look to the crime to determine whether it "shows such depravity in the perpetrator . . . as to create a violent presumption against his truthfulness under oath." *King v. State*, 17 Fla. 183, 185-86 (1879); *see Sylvester v. State*, 71 Ala. 17 (1881) (citing 1 Bishop on Criminal Law § 974 (1923)); *Smith v. State*, 129 Ala. 89, 29 So. 699 (1900). As the court stated in *Grievance Committee v. Broder*, 112 Conn. 269, 275, 152 A. 292, 294 (1930):

> In *Drazen v. New Haven Taxicab Co.*, 95 Conn. 500, 506, 508, 111 Atl. 861, we define infamous crimes to be those "whose commission involves an inherent baseness and which are in conflict with those moral attributes upon which the relations of life are based. . . . They are said to be those which involve moral turpitude. . . . It [the infamous crime] includes anything done contrary to justice, honest, modesty, or good morals. . . .
>
> We define this term again in *Kurtz v. Farrington*, 104 Conn. 257, at page 262, 132 Atl. 540: "Generally speaking . . . moral turpitude involves an act of inherent baseness in the private, social, or public duties which one owes to his fellowmen or to society, or to his country, her institutions and her government."

Which offenses are considered infamous are affected by changes in public opinion from one age to another, *Mackin v. United States*, 117 U.S. 348, 29 L.Ed. 909 (1886); *Ex parte Wilson*, 114 U.S. 417, 29 L.Ed. 89 (1885); *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880, and the totality of circumstances must be examined in each case before a determination can be made that a specific crime is "infamous." *Accord State ex rel. Wier v. Peterson*, 369 A. 2d 1076, 1079 (Del. 1976). Further, "[i]n determining whether an offense is 'infamous,' state courts exercise independent judgment and are not bound by decisions of federal courts as to nature of crimes against federal government." *United States v. Carrollo*, 30 F. Supp. 3, 6 (D. Mo. 1939).

In determining whether the offense for which defendant was convicted in this case is infamous, we must, then, look to the nature of the offense being solicited. Our courts in prior cases have followed this analysis and concluded that solicitation to murder is an infamous crime, *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193; *see United States v. MacCloskey*, 682 F. 2d 468 (4th Cir. 1982), and that solicitation to commit perjury is an infamous offense, *State v. Huff*, 56 N.C. App. 721, 289 S.E. 2d 604, *disc. rev. denied*, 306 N.C. 389 (1982). The Court of Appeals has held, at the other end of the spectrum, that solicitation to commit crime against nature is not infamous. *State v. Tyner*, 50 N.C. App. 206, 272 S.E. 2d 626 (1980), *disc. rev. denied*, 302 N.C. 633 (1981). Solicitation to commit common law robbery lies somewhere between these opposite poles.

Solicitation involves the asking, enticing, inducing, or counselling of another to commit a crime. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193. The solicitor conceives the criminal idea and furthers its commission via another person by suggesting to, inducing, or manipulating that person. As noted by Wechsler, Jones, and Korn in *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum. L. Rev. 571, 621-22 (1961), "the solicitor, working his will through one or more agents, manifests an approach to crime more intelligent and masterful than the efforts of his hireling," and a solicitation, "an attempt to conspire," may well be more dangerous than an attempt. Indeed, a solicitor may be more dangerous than a conspirator; a conspirator may merely passively agree to a criminal scheme, while the solicitor

plans, schemes, suggests, encourages, and incites the solicitation. Further, the solicitor is morally more culpable than a conspirator; he keeps himself from being at risk, hiding behind the actor, as occurred in this case.

Common law robbery, the solicitation of which defendant here was convicted, is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974); *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965); *State v. Stewart*, 255 N.C. 571, 122 S.E. 2d 355 (1961). It is a crime against the person, effectuated by violence or intimidation. *State v. Rivens*, 299 N.C. 385, 261 S.E. 2d 867 (1980); *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966). Where a defendant has counselled, enticed, or induced another to commit as degrading an offense as theft from the person or presence of a victim by force or violence by putting him in fear, he has committed an act of depravity and a crime involving moral turpitude and has demonstrated that he has a mind fatally bent on mischief and a heart devoid of social duties. It is an infamous crime within the meaning of N.C.G.S. § 14-3 and defendant should be subject to punishment as a felon instead of as a misdemeanant.

We therefore hold that solicitation to commit common law robbery is an infamous crime within the meaning of N.C.G.S. § 14-3. Our extensive research of case and statutory law throughout the nation has revealed no result to the contrary.

II.

[2] Defendant next assigns as error certain of the trial court's actions and statements to the jury during deliberations, alleging that the trial court coerced a verdict in defendant's case.

Defendant's trial lasted twenty-one days; the trial transcript totals 3,236 pages. On 21 May 1984, the trial judge gave his charge to the jury and told the jurors:

> I instruct you that a verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be. You may not render a verdict by majority vote. You will have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment.

> Each of you must decide the cases for yourselves, but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, each of you should not hesitate to re-examine your own views and change your opinion if it is erroneous, but none of you should surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

The jury then retired to the jury room but not to deliberate. After hearing arguments of counsel, the trial judge called the jury back in, gave it further instructions, and sent the jurors to lunch at 12:30 p.m. At 2:00 p.m., court reconvened and the trial judge sent the jury to the jury room at 2:05 to begin deliberations. At 2:30, the jury sent a request for additional instructions as to the elements of each charge and "the steps necessary for conviction of each charge." The judge so instructed, the jury again retired at 2:55, and defendant renewed his objection to the charge of felonious conspiracy to commit common law robbery. The jury deliberated until 5:02 p.m., and the court recessed for the evening. At 9:35 a.m. on 22 May, the jury resumed deliberations. Court went into recess at 5:31 p.m., at which time the jurors had not reached a verdict as to all charges. On 23 May, the jury continued its deliberations, beginning at 9:35 a.m. At 10:38 a.m., the jury told the trial court it had reached a unanimous verdict on all but the charge of soliciting Richard Lockamy to commit robbery, and the trial judge thereupon instructed the jury:

> With respect to that case, your foreman informs me that you have so far been unable to agree upon a verdict. The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your difference if you can, without the surrender of conscientious convictions, but no juror should surrender his or her conscientious conviction as to the weight or effect of the evidence, solely because of the opinion of his fellow juror, or for the mere purpose of returning a verdict.
>
> A verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be. You may not render a verdict by majority vote. You all have a duty to con-

> sult with one another and to deliberate with a duty to reaching an agreement if it can be done without violence to individual judgment.
>
> Each of you must decide the case for yourselves, but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, each of you should not hesitate to re-examine your own view and change your opinion if it is erroneous, but none of you should surrender your honest convictions to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> At this time I'll let you resume your deliberations and see if you can reach a verdict in that case that the foreman has mentioned to me.

At 11:16, the jury asked the trial judge to again "define the elements needed with respect to solicitation and the definition of intent with respect to that file number." The trial judge complied with its request. The jury resumed its deliberations at 11:40 a.m. At 12:35 p.m., the jury returned to the courtroom before its lunch recess. At that time, it sent a note to the trial judge saying: "The jury is unable to reach a unanimous verdict with respect to file number 84-CRS-4858 only." The trial judge thereupon asked, "Without telling me how you are voting in that file number, can you tell me the numerical split for the jury?" The jury foreman replied that the last vote was eight-to-four, and the trial judge sent the jury to lunch. When the jurors returned at 2:00, the trial judge asked them to go back into the jury room "and discuss the evidence in this case once again and deliberate and to see if you can reach a verdict as to this particular case." The jury went to resume deliberations at 2:03 and returned at 3:00 with a verdict. The jury submitted the ten verdict sheets, and each and every juror raised his or her right hand to confirm agreement with the trial judge's reiteration of the verdicts in each case. Following this procedure, the defense attorney asked the trial judge to poll the jury on the solicitation of Lockamy to commit robbery charge, and the jury was polled. Each juror affirmed his or her assent to the guilty verdict.

Defendant contends that the trial court coerced the jury by, among other things, requesting that it resume its deliberations at

2:00 on 23 May without once more instructing the jurors at the time of his request that none of them had to give up their convictions in reaching a verdict. "[T]he actions and statements of the trial court, when viewed within the totality of the circumstances," defendant alleges, "were such that a reasonable juror could not help but feel required to surrender his individual convictions in order to reach a unanimous verdict." Defendant argues that the trial court's inquiring as to the numerical split and sending the jurors back for further deliberations without reinstructing them not to abandon their convictions "might easily have been construed as a refusal, on the court's part, to accept anything less then [sic] a unanimous verdict." This, defendant maintains, violated the well-settled prohibition against a trial judge's coercing a jury into reaching a verdict. *State v. Lipfird*, 302 N.C. 391, 276 S.E. 2d 161 (1981); *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *State v. Roberts*, 270 N.C. 449, 154 S.E. 2d 536 (1967). We disagree.

When the jury first informed the court it had reached unanimous verdicts on all but one charge but had not reached a verdict in case number 84-CVS-4858, the trial court instructed the jury in accordance with N.C.G.S. § 15A-1235(b). N.C.G.S. § 15A-1235(b) provides:

> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

Defendant concedes that the trial judge's instructions complied with the statute. Further, the trial court did not coerce a verdict by his inquiry as to the jury's division. The making of such inquiry lies within the sound discretion of the trial judge. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. Jeffries*, 57 N.C. App. 416, 291 S.E. 2d 859, *cert. denied & appeal dismissed*, 306 N.C. 561 (1982); *see generally* Annot. *Dissenting Jurors—Instructions*, 97 A.L.R. 3d 96 (1980 & Supp. 1985). We find no abuse of that discretion. Our consideration of all the circumstances in this case surrounding the trial judge's instructions reveals no reasonable ground to believe that the jury was misled, and we do not perceive a reasonable probability that the trial judge's actions or statements changed the result of the trial. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354. The trial court's charge to the jury on the matter of further deliberations was proper under the circumstances and without prejudice to defendant. Accordingly, this assignment of error is overruled.

[3] Last, defendant assigns as error the trial court's finding as a factor in aggravation that defendant set a course of criminal conduct in motion by his own actions which ultimately resulted in other crimes.

At the close of all the evidence, the trial court dismissed the charges against defendant of murder in the first degree, burglary in the second degree, felonious breaking or entering, and robbery with a dangerous weapon. The jury returned verdicts of not guilty of the solicitation of Penelope Dawkins to commit common law robbery and of conspiracy to commit armed robbery. At defendant's sentencing hearing on the convictions of soliciting Lockamy to commit common law robbery, the trial judge found as a nonstatutory factor in aggravation of punishment that

> [t]he defendant set a course of criminal conduct in motion by his own actions which ultimately resulted in the robbery with a dangerous weapon and death of Richard Braxton and the second degree burglary of his dwelling, the felonious breaking or entering of his storage shed, the felonious larceny of his truck and the taking of a large amount of cash money from his person.

Defendant contends that because all of the offenses for which this factor purports to hold defendant responsible were dismissed or

resulted in acquittals, the factor is not reasonably related to sentencing under N.C.G.S. § 15A-1340. *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983). He further argues that the finding of the factor was not supported by a preponderance of the evidence and violated the prohibition of N.C.G.S. § 15A-1340.4 (a)(1)(o). This statute proscribes as an aggravating factor the use of convictions for offenses joinable under Chapter 15A of the General Statutes of North Carolina with the crime for which a defendant is being sentenced. *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984).

A preponderance of the evidence is sufficient to prove an aggravating factor supporting a sentence in excess of the presumptive term. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983); *State v. Robinson*, 73 N.C. App. 238, 326 S.E. 2d 86 (1985). Here, both Richard Lockamy and Penelope Dawkins testified that defendant formed the original idea to rob Richard Braxton, that he masterminded the plan, and that he counselled and enticed others to rob Mr. Braxton. Defendant thereby set in motion a course of criminal conduct that resulted in the crimes of murder, burglary in the second degree, felonious breaking or entering, and felonious larceny of a truck. This evidence was properly considered by the trial court during sentencing and was sufficient to establish by a preponderance of the evidence that defendant set this course of criminal conduct into motion by his own actions.

Lattimore is inapposite because that case involved the aggravation of the defendant's sentence based on a joinable offense for which the defendant had been *convicted*. Here, the court properly considered evidence in support of an aggravating circumstance which supported crimes of which defendant was charged and tried but which were dismissed. *State v. Abee*, 308 N.C. 379, 302 S.E. 2d 230 (1983). This assignment of error is overruled.

We find no error in defendant's trial or sentence. Accordingly, that part of the decision of the Court of Appeals finding no error in the trial of this case is affirmed; the order of remand to the superior court for resentencing of defendant as a misdemeanant is reversed.

Affirmed in part; reversed in part.

Justice BILLINGS concurring.

Because of a long line of cases since this Court's decision in *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949) and the failure of the General Assembly to amend or repeal N.C.G.S. § 14-3, I feel compelled to concur in the Court's interpretation of the term "infamous crime" as used in N.C.G.S. § 14-3. However, for all of the reasons expressed by Justice Ervin in his dissenting opinion in *Surles*, I believe that the interpretation given to that term by the majority in *Surles* was contrary to the meaning of infamous crime at the time of the original enactment of the statute and that the common law definition was intended. At common law, infamous crimes constituted a fairly clearly-identified group of offenses.

As construed, however, the statute allows the Court to determine what general misdemeanors are to be treated as felonies based upon our perception of the degree of depravity involved in the commission of the offense. It seems to me that this makes it impossible for anyone to anticipate the scope of application of the statute. As the result of today's decision, we know that solicitation to murder is an infamous crime but that solicitation to commit crime against nature may be "at the other end of the spectrum" 317 N.C. 164, 171, 345 S.E. 2d 365, 369, and not infamous. Apparently, anything in between is potentially covered by the statute.

Justice Martin notes in the Court's opinion that the defendant has not made a challenge to the constitutionality of N.C.G.S. § 14-3, and, appropriately, the Court has not addressed that issue. I write separately not so much to suggest the unconstitutional vagueness of the statute as to suggest to the General Assembly that some legislative limitation on the scope of the statute as construed in *Surles* would seem appropriate.

RALPH J. HENDRIX v. LINN-CORRIHER CORPORATION (SELF-INSURED)

No. 55A86

(Filed 2 July 1986)

1. Master and Servant § 95— byssinosis—defendant's right to appeal—compensability—not waived

The defendant in a byssinosis case did not waive its right to challenge the compensability of plaintiff's disease when it failed to assign as error an Industrial Commission conclusion that plaintiff had a compensable occupational disease; that conclusion was directed to and was dispositive only of the question of whether plaintiff had an occupational disease.

2. Master and Servant § 95— byssinosis—partial disability—right to challenge not waived

The defendant in a byssinosis action did not waive its right to challenge a determination of partial disability by not preserving exceptions to specific findings of fact by the Deputy Commissioner where defendant excepted to and assigned as error both the Commission's adoption of specific findings of the Deputy Commissioner and the Commission's adoption and modification of the Deputy Commissioner's opinion and award.

3. Master and Servant § 68— byssinosis—partial disability—findings sufficient

The Industrial Commission's findings and conclusion that a byssinosis plaintiff was partially disabled were without error where the evidence was sufficient to support the findings required by N.C.G.S. § 97-2(9) and *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, in that the Commission found that plaintiff was unable to find employment in the cotton textile industry due to his inability to pass a breathing test; exertion continued to cause plaintiff shortness of breath and plaintiff should not be exposed to dust, fumes or chemicals; plaintiff had worked in the textile industry for 29 years and had developed job skills unique to that industry; plaintiff had engaged in persistent efforts to obtain any type of employment that might be available but had secured only minimum wage jobs; and the medical testimony established that plaintiff suffered from byssinosis.

4. Master and Servant § 69— byssinosis—partial disability—amount of award erroneous

The Industrial Commission erred by awarding a byssinosis plaintiff with a partial disability full compensation for the time he was unable to find gainful employment and a reduced rate for the five weeks he earned minimum wage at a restaurant. Plaintiff's partial disability could not have rendered him totally unable to earn wages; the evidence showed that he was able to obtain a permanent job with a restaurant at minimum wage and was released only because the restaurant went out of business, and his failure to secure a position paying at least the legal minimum wage must be attributed to general market conditions and not to conditions peculiar to plaintiff or to a lack of such positions under normal market conditions.

5. Master and Servant § 97.2— byssinosis—new evidence—refusal of Court of Appeals to remand—no error

The Court of Appeals did not err by denying defendant's motion to remand a byssinosis award for newly-discovered evidence because N.C.G.S. § 97-47 (1985) provides an avenue of review in the Industrial Commission.

APPEAL of right under N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 78 N.C. App. 373, 337 S.E. 2d 106 (1985), reversing a workers' compensation award by the Industrial Commission. Heard in the Supreme Court on 17 April 1986.

Lore & McClearen, by R. James Lore, for the plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by George W. Dennis, III and Linda Stephens, for the defendant-appellant.

Woodrow W. Gunter, II, for The North Carolina Academy of Trial Lawyers, amicus curiae.

MITCHELL, Justice.

This is an occupational lung disease case. At the conclusion of a hearing, a deputy commissioner of the Industrial Commission found and concluded that Ralph J. Hendrix, the claimant-plaintiff, suffered from byssinosis and chronic obstructive pulmonary disease and was permanently partially disabled as a result. The deputy commissioner awarded the plaintiff weekly compensation equal to two-thirds of the difference between his average weekly wage while employed by the defendant and the average weekly wage which he received after his employment with the defendant ended, not to exceed 300 weeks. Both the plaintiff and the defendant appealed to the Industrial Commission. The Industrial Commission adopted the factual findings and the conclusions of the deputy commissioner. The Commission modified only the amount of the award.

The defendant appealed to the Court of Appeals. The Court of Appeals, with one judge concurring in the result and one judge dissenting, reversed stating that the evidence was insufficient to support a finding that the plaintiff was incapable of earning the same wages he had earned before his injury.

The plaintiff appealed to this Court contending that there was competent evidence of record to support the findings and the conclusions of law to the effect that the plaintiff was partially disabled and was entitled to the compensation awarded by the Industrial Commission. The plaintiff further contends the Court of Appeals did not apply the correct legal standard dictated by *Little v. Food Service*, 245 N.C. 527, 246 S.E. 2d 743 (1978). The defendant appealed from the Court of Appeals' denial of its motion to remand for newly discovered evidence. We affirm the denial of the defendant's motion. We reverse the Court of Appeals' reversal of the Commission's award and remand with instructions.

I.

The evidence introduced tended to show that the plaintiff began working in cotton textile mills in 1952 when he was sixteen years old. In 1954, he first began working at Linn Mill (now the defendant Linn-Corriher) in the card room where cotton was processed. He left the defendant in 1961, worked at another textile mill and returned to work in the defendant's card room in 1969. The plaintiff continued to work for the defendant until 11 February 1981 when he was dismissed pursuant to company policy for more than twelve absences per year.

The plaintiff testified before the deputy commissioner that he had an eighth grade education but could not read or write well. His only work experience from 1952 until 1981 was in the cotton textile industry. He has smoked cigarettes since he was thirty-one years old.

The plaintiff's exposure to substantial amounts of cotton dust began in 1954. In 1972, he first noticed chest tightness and a cough. Shortness of breath occurred whenever he participated in strenuous work. However, he could still participate in activities such as bowling and pitching horseshoes. The plaintiff would experience shortness of breath on Sunday which was the first day of his work week. His symptoms would improve throughout the work week. His chest tightness and cough became worse during 1980. In 1981, the plaintiff became sick with pneumonia and was absent from work for nearly three weeks.

Dr. Kelling, an expert witness, testified that in his opinion the plaintiff had byssinosis. The combination of his smoking hab-

its and byssinosis had resulted in a twenty to thirty percent respiratory impairment. Dr. Kelling testified that the plaintiff should not work in an environment containing cotton or cotton dust. He also testified that the plaintiff stated that he was never so short of breath that he was unable to do his job. Dr. Kelling opined that

> Mr. Hendrix would be capable of doing work, which for short periods of time he could lift perhaps five to ten pounds of weight. Where he would be able to walk on a level plane, occasionally could be asked to climb one flight of stairs; certainly anything requiring manual dexterity would be within his range . . . . You would not want him in an environment of dust, fumes, chemical fumes.

After his dismissal by the defendant in 1981, the plaintiff sought employment in other textile mills. He was rejected by each of them when he could not pass a breathing test.

The deputy commissioner found that the plaintiff was "unable to obtain employment in the cotton textile industry due to his inability to pass the breathing test." The deputy commissioner further found:

> Plaintiff has worked at Sambo's a restaurant, for approximately five weeks at the rate of $3.35 per hour for a 40 hour week or approximately $134.00. Plaintiff was laid off from this job when the restaurant went out of business. Plaintiff has subsequently sought employment at Landis Ice and Fuel, Food Town Grocery Store, The Pantry, Phillip Morris Company and T & O Tile.

The deputy commissioner also found *inter alia* that:

> 9. Plaintiff's chronic obstructive pulmonary disease is mild in nature in that he has approximately 20% to 30% respiratory impairment. Since plaintiff has last been employed in the cotton textile industry his breathing has improved but exertion continues to cause shortness of breath. Plaintiff should not be exposed to dust or fumes or chemicals due to his respiratory impairment. Since plaintiff last worked for defendant Linn-Corriher Corporation on February 11, 1981, he has been and remains partially incapable of engaging in gainful employment. His partial incapacity to work and earn wages results from his permanent physical impairment

caused by his chronic obstructive lung disease and byssinosis which in combination with his age, his limited education and his 29 years of employment in the cotton textile industry limit his ability to earn wages.

Based on his findings, the deputy commissioner concluded that the plaintiff "has a compensable occupational disease." The deputy commissioner also concluded *inter alia*:

> 2. As a result of his occupational disease plaintiff is and remains partially disabled from working and earning the wages that he was earning when he was last employed by the defendant employer on February 11, 1981. Plaintiff is therefore entitled to weekly compensation, not to exceed 300 weeks equal to sixty six and two thirds percent of the difference between 196.91 his average weekly wage when he last worked for defendant Linn-Corriher, and the average weekly wage which he earned thereafter which is $134.00.

The deputy commissioner then entered an award granting the plaintiff compensation of $41.94 a week in accord with his conclusions.

On appeal, the Industrial Commission adopted the factual findings and the conclusions of the deputy commissioner. The Commission modified the award to the plaintiff, however, by holding that:

> In the opinion of the Commission, the provisions of G.S. 97-30 require that the plaintiff be paid his full compensation rate of $131.27 per week when his permanent partial disability prevents him from finding any gainful employment during the period not to exceed 300 weeks beginning 11 February 1981 and the plaintiff's compensation rate should be reduced to 41.94 a week only for the period of five weeks when he earned the minimum wage of $134.00 a week working at the fast-food restaurant. By the same token, and also in accordance with G.S. 97-30, if the plaintiff should find employment in the future earning more or less than the minimum wage, his compensation rate should be adjusted accordingly in accordance with the provisions of G.S. 97-30. The Conclusions of Law and the Award in the Opinion and Award are hereby MODIFIED and CLARIFIED accordingly.

The Court of Appeals reversed the award by the Commission on the ground that the evidence was insufficient to support a finding that the plaintiff was incapable of earning the same wages he had earned before contracting his lung disease.

II.

A.

[1] The plaintiff makes the initial argument that the defendant waived its right to challenge the compensability of his disease when it failed to assign as error the following conclusion of law:

> 1. Plaintiff has chronic obstructive pulmonary disease and byssinosis which are due to causes and conditions characteristic of and peculiar to employment in the cotton textile industry. Such lung diseases are not ordinary diseases of life to which members of the general public are equally exposed outside of that employment. Plaintiff has a *compensable* occupational disease. G.S. 97-53(13); *Rutledge v. Tultex Corporation/Kings Yarn*, 308 N.C. 85 (1983).

(Emphasis added.) The plaintiff contends that by failing to assign error to this conclusion, the defendant in effect conceded that the plaintiff's occupational disease was compensable, and that the only issue before this Court is the propriety of the amount of the award. We disagree.

The plaintiff was required to prove that his disease was an "occupational" disease under N.C.G.S. § 97-53(13) in order to establish that it was of a class which may be compensable under the Workers' Compensation Act, N.C.G.S. Ch. 97.[1] Having met this requirement, the plaintiff still had the burden of proving that the disease caused a disability under N.C.G.S. §§ 97-29 and 54 before

1. Byssinosis and chronic obstructive pulmonary disease are not among the prima facie occupational diseases listed in N.C.G.S. § 97-53. Therefore, to be "occupational" under the catch-all provision of § 97-53(13), the plaintiff's disease must be "(1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be 'a causal connection between the disease and the [claimant's] employment.'" *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E. 2d 359, 365 (1983), *quoting Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E. 2d 101, 105-06 (1981); *Booker v. Duke Medical Center*, 297 N.C. 458, 468, 475, 256 S.E. 2d 189, 196, 200 (1979).

an award of compensation could be granted. *Morrison v. Burlington Industries*, 304 N.C. 1, 12-13, 282 S.E. 2d 458, 466-67 (1981); *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965).

The use of the word "compensable" in the conclusion that the plaintiff had an occupational disease had a tendency to be confusing. However, it is apparent to us that the conclusion was directed to and dispositive of only the question of whether the plaintiff had an "occupational" disease—a disease which would entitle him to compensation if he could show that it had disabled him within the meaning of the Act. Therefore, the failure to except and assign error to this conclusion only prevented the defendant from contending on appeal that the disease was not an occupational disease. It did not amount to a waiver of the right to bring forward on appeal and argue other issues.

B.

[2] The plaintiff further contends that the defendant waived its right to challenge the determination of partial disability since the defendant did not preserve exception to the specific findings of fact by the deputy commissioner. This argument is without merit. The Commission is the fact-finding body. *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E. 2d 577, 580 (1976). The defendant excepted to and assigned as error both the Commission's adoption of specific findings of the deputy commissioner and the Commission's adoption and modification of the deputy commissioner's opinion and award. The exceptions and assignments were sufficient to entitle the defendant to appellate review.

III.

[3] We next turn to the issue of whether the Commission erred by concluding that the plaintiff is partially disabled by his occupational lung disease. The majority of the Court of Appeals held that the plaintiff did not produce evidence sufficient to show that he was not able to earn the same wages he had earned before his injury and, as a result, failed to show that he was disabled within the meaning of the Act. 78 N.C. App. 373, 375, 337 S.E. 2d 106, 108 (1985). We disagree.

In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent. *Hilliard v. Apex Cabinet Co.*, 305

N.C. 593, 290 S.E. 2d 682 (1982); *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965). In cases involving occupational disease, N.C.G.S. § 97-54 provides that "disablement" is equivalent to "disability" as defined by N.C.G.S. § 97-2(9). *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). N.C.G.S. § 97-2(9) defines "disability" as the "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." To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury. *Hilliard*, 305 N.C. at 595, 290 S.E. 2d at 683.

The Industrial Commission is the fact-finding body. *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E. 2d 577, 580 (1976). In considering factual issues, the Commission's responsibility is to judge the credibility of the witnesses and the weight to be given to their testimony. *Hilliard*, 305 N.C. at 595, 290 S.E. 2d at 683-84. The reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact. *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E. 2d 101, 104 (1981). When the Commission's findings of fact are supported by competent evidence, they are binding on the reviewing court in spite of the existence of evidence supporting contrary findings. *Walston v. Burlington Industries*, 304 N.C. 670, 677, 285 S.E. 2d 822, 827 (1982).

The Commission adopted the findings of fact and conclusions of law of the deputy commissioner. The findings only barely satisfy the three-part test of *Hilliard* which must be met before the Commission may conclude properly that a claimant is disabled. We emphasize here that the findings of the deputy commissioner adopted by the Commission should have been stated much more specifically in the terms of the three parts of the *Hilliard* test.

The findings include a finding that the "[p]laintiff has been unable to obtain employment in the cotton textile industry due to his inability to pass the breathing test." This finding is supported

by competent evidence. Dr. Kelling testified that the combination of the plaintiff's smoking habits and his byssinosis had resulted in a twenty to thirty percent respiratory impairment. Dr. Kelling opined that the plaintiff should not work in an environment containing cotton or cotton dust. The plaintiff testified that he applied for jobs at several other textile mills. He was refused employment at each of them after he took a breathing test. The foregoing evidence supports the finding that the plaintiff was unable to obtain employment in the cotton textile industry due to his inability to pass the breathing test. Although neither the deputy commissioner nor the Commission specifically so stated, this amounted to a finding that the plaintiff was incapable of earning the same wages he had earned before his injury in the same employment—employment in the cotton textile industry.

The Commission also failed to make a finding specifically stating that the plaintiff was incapable of earning the same wages he had earned before his injury in any other employment. The Commission did find, however, that exertion continued to cause the plaintiff shortness of breath and that, due to his occupational disease, the plaintiff should not be exposed to dust, fumes or chemicals. The Commission also specifically found that since the plaintiff had last worked for the defendant "he has been and remains partially incapable of engaging in gainful employment." These findings, taken together with the Commission's findings with regard to the plaintiff's permanent physical impairment, his age, limited education and job experience and efforts to secure employment, were minimally sufficient to meet the second part of the *Hilliard* test.

The defendant contends and the Court of Appeals held, however, that even if the findings were sufficient, the evidence was insufficient to support a finding that the plaintiff was incapable of earning the same wages he had earned before his impairment by occupational disease in any other employment. We do not agree.

In considering whether the plaintiff is incapable of earning the same wages at other employment, the Commission and the reviewing court must focus not on "whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff [him]self has such capacity." *Lit-*

tle v. Food Service, 295 N.C. 527, 531, 246 S.E. 2d 743, 746 (1978). This Court recently stated:

> 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.

Peoples v. Cone Mills Corp., 316 N.C. 426, 441, 342 S.E. 2d 798, 808 (1986), citing *Little v. Food Service*, 295 N.C. 527, 532, 246 S.E. 2d 743, 746 (1978). *See*, 2 Larson, *Workmen's Compensation*, § 57.61 (1983). *See generally*, Note, *Workmen's Compensation—Using Age, Education, and Work Experience to Determine Disability—Little v. Anson County Schools Food Service*, 15 Wake Forest L. Rev. 570 (1979).

From the opinion below, it is apparent that the majority of the Court of Appeals failed to give proper consideration to characteristics peculiar to the plaintiff. The evidence established that the plaintiff had worked in the textile industry since the age of sixteen—twenty-nine years. Although he completed the eighth grade, the plaintiff could not read or write with any degree of proficiency. The plaintiff testified that he could not read a newspaper aloud or spell.

From twenty-nine years in the cotton textile mills, the plaintiff developed job skills unique to that industry. His lack of education and limited work experience led to a specialization in the cotton textile industry. His occupational disease now prevents him from obtaining employment in that industry.

Although the evidence showed that the plaintiff engaged in persistent and commendable efforts to obtain any type of employment at all which might be available, he was only able to secure a job as a restaurant "bus boy" at the legal minimum wage and one other brief job in construction work. The minimum wages the plaintiff received in each of these positions were substantially less than the wages he had earned while employed by the defendant. The plaintiff's persistent efforts to obtain other employment

met with no success. The wages received by a claimant after his injury are strong but not conclusive evidence of his ability to earn for purposes of determining whether he is disabled within the meaning of N.C.G.S. § 97-2(9). *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 85, 155 S.E. 2d 755, 762 (1967). *See Peoples*, 316 N.C. at 440, 342 S.E. 2d at 807.

The evidence presented was sufficient to support the finding that the plaintiff "has been and remains partially incapable of engaging in gainful employment" and that his occupational disease combined with his age, limited education and work experience "limit his ability to earn wages." Therefore, the evidence was sufficient to show that *this plaintiff* was unable to earn wages in other employment equal to those he had earned while employed by the defendant before his impairment by his occupational disease.

The evidence also supported the Commission's finding of the third *Hilliard* factor: that the plaintiff's incapacity to earn was caused by his injury. The medical testimony established that the plaintiff suffered from byssinosis and chronic obstructive lung disease as a result of twenty-nine years of smoking and exposure to cotton dust. The evidence also tended to show that the combination of his respiratory impairment and personal characteristics of age, education, and work experience had produced a partial incapacity to earn wages at the same or other employment equal to those he had earned before his injury. Such evidence was sufficient to support the finding that the plaintiff's inability to earn was a result of his occupational disease.

The evidence was sufficient to support the findings required by N.C.G.S. § 97-2(9) and *Hilliard.* 305 N.C. at 595, 290 S.E. 2d at 683. The Commission's findings and its conclusion that the plaintiff was partially disabled were without error. The decision of the Court of Appeals to the contrary was error.

IV.

[4] The deputy commissioner awarded the plaintiff weekly compensation, not to exceed 300 weeks, equal to two-thirds of the difference between his average weekly wage when he last worked for the defendant and the average weekly wage which he received thereafter when he worked at the legal minimum wage.

This award by the deputy commissioner would have resulted in compensation of $41.94 a week to the plaintiff. The Commission modified the award to a full compensation rate of $131.27 a week when the plaintiff was unable to find gainful employment, not to exceed 300 weeks. The modified award also provided, however, that the plaintiff was to receive only $41.94 a week for the five week period when he earned the legal minimum wage working at the restaurant. We find error in the Commission's method of setting the amount of the award.

The social policy behind the Workers' Compensation Act is twofold. First, the Act provides employees swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. *Pleasant v. Johnson*, 312 N.C. 710, 712, 325 S.E. 2d 244, 246 (1985); *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E. 2d 479, 484 (1966). Second, the Act insures limited liability for employers. *Id.* Although the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory parameters. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 709, 295 S.E. 2d 458, 461 (1982).

The Act provides compensation for the loss of wage-earning *ability*. N.C.G.S. § 97-2(9) (1985). "Compensation must be based upon the loss of wage earning power rather than the amount actually received." *Hill v. Dubose*, 234 N.C. 446, 447-48, 67 S.E. 2d 371, 372 (1951).

Although the Commission concluded that the plaintiff was permanently partially disabled, it awarded him compensation based upon a total loss of wage earning ability. The Commission reduced his compensation only for the few weeks he actually worked at the restaurant. The Commission justified this award by stating that in its opinion N.C.G.S. § 97-30 required that the plaintiff be awarded undiminished compensation for those periods when his permanent partial disability prevented him from finding any gainful employment. We find the Commission's award self-contradictory in this regard.

The plaintiff's partial disability could not have made him totally unable to earn wages. If he was partially incapable of earning wages, then he must have been partially capable of earning some, albeit diminished, wages. To the extent the plaintiff was

partially able to earn wages, he received a windfall when he was awarded compensation at a rate equal to two-thirds of his entire average weekly wage before his injury.

The evidence in this case tended to show that after failing to obtain employment in the cotton textile industry, the plaintiff made an earnest and highly commendable search for other employment. He applied for work as a garbage man, truck driver, cashier, tile layer and duck chiller, but in each case was unsuccessful. He was able to obtain a permanent job with a restaurant at the minimum wage and was released from that employment only because business conditions resulted in the restaurant going out of business.[2] Such evidence supported the findings and conclusions of the deputy commissioner and the Commission to the effect that the plaintiff was able to carry out the duties of at least some permanent positions paying the legal minimum wage and available under normally prevailing market conditions. *See generally, Peoples*, 316 N.C. 426, 342 S.E. 2d 798 (1986). Therefore, his failure to secure such a position must be attributed to the general market conditions prevailing at the time he sought work and not to conditions peculiar to him or to the lack of such positions under normally prevailing market conditions. *Id.*

Having adopted the deputy commissioner's findings of fact and conclusions of law as its own, the Commission was required in this case to enter an award setting the plaintiff's compensation at two-thirds of the difference between his average wage of $196.91 a week while working for the defendant and the minimum wage of $134.00 a week which he received thereafter—an award of $41.94 per week, not to exceed 300 weeks.

2. The plaintiff urges this Court to adopt the doctrine of the "odd-lot" worker. Under the "odd-lot" doctrine, "total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." 2 Larson *Workmen's Compensation* § 57-51 (1983). Under this doctrine, if the claimant establishes a prima facie case that he is an odd-lot worker, the burden then shifts to the employer to show the existence of work that is regularly available to the claimant. *Id.*

We decline to consider the "odd-lot" doctrine at this time for two reasons. First, the issue is not properly presented on appeal. Second, even if adopted, the evidence in the present case would not seem to require application of the doctrine.

V.

[5] The defendant assigns as error the Court of Appeals' interlocutory order filed 28 January 1985 denying its motion to remand for newly discovered evidence. The defendant says that the plaintiff became employed on 13 February 1984 earning wages of $170.00 a week which were subsequently raised to $220.00 a week. The defendant contends that this new evidence is relevant to the issue of earning capacity and that a new hearing should be granted upon the grounds of newly discovered evidence. *McCulloch v. Catawba College*, 266 N.C. 513, 146 S.E. 2d 467 (1966).

The Court of Appeals did not err by denying the motion to remand. The Act sets forth a procedure to follow when a change of conditions has occurred. It provides in pertinent part:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . .

N.C.G.S. § 97-47 (1985). The defendant may utilize the avenue of review provided by the Act in seeking diminution of the award upon the ground of a change of conditions.

For the foregoing reasons, we affirm the Court of Appeals' denial of the defendant's motion to remand for newly discovered evidence. We reverse the decision of the Court of Appeals reversing the Commission's opinion and award and denying the plaintiff compensation on the ground of insufficiency of the evidence. This case is remanded to the Court of Appeals with instructions that it be further remanded to the Commission for the entry of an award consistent with this opinion.

Affirmed in part, reversed in part and remanded with instructions.

STATE OF NORTH CAROLINA v. RICHARD LEWIS JOHNSON

No. 124A85

(Filed 2 July 1986)

1. **Constitutional Law § 31— poisoning with insecticide—failure to appoint medical expert for defendant—no error**

The trial court did not err by denying defendant's motion to appoint a medical expert to assist in the preparation of his defense to a prosecution for the murder of his daughter where defendant merely asserted that an expert was needed to analyze all available information and possibly to testify on his behalf but failed to set out a particularized need for a medical expert; defendant acknowledged that he received before trial a letter from the Director of Industrial Medicine for the corporation which manufactured the poison that killed his daughter and that the doctor reviewed the medical records in question, provided a great deal of expert information, and offered to answer any questions defense counsel might have; and trial counsel showed great skill and knowledge in cross-examining the State's medical and chemical experts. N.C.G.S. § 7A-450(b).

2. **Constitutional Law § 63— death-qualified jury—not unconstitutional**

The practice of death qualifying the jury does not violate the federal constitution.

3. **Homicide § 4.1— murder by poison, lying in wait, imprisonment, starving, torture—intent to kill not an element**

In a prosecution for murder by poisoning, the trial court was not required to instruct the jury on intent to kill because intent to kill is not an element of first degree murder where the homicide is carried out by poison, lying in wait, imprisonment, starving, or torture.

4. **Homicide § 30.1— murder by poison—automatically first degree—failure to submit second degree—no error**

The trial court in a prosecution for first degree murder by poisoning did not err by failing to instruct the jury on second degree murder based on the possibility that the jury could have found that defendant administered the poison with the intent to injure the victim but without an intent to kill. Intent to kill is not necessary to constitute the crime of first degree murder when the murder was allegedly committed by means of poison; moreover, the only evidence to negate the elements of first degree murder was defendant's denial that he committed the offense.

5. **Homicide § 30.3— murder by insecticide—failure to submit involuntary manslaughter—no error**

In a prosecution for first degree murder by poisoning, defendant was not entitled to have involuntary manslaughter submitted to the jury where the State's evidence was sufficient to fully satisfy his burden of proving each element of first degree murder and there was no other evidence to negate those elements other than defendant's denial that he committed the offense.

BEFORE *Lamm, J.*, at the 26 November 1984 Criminal Session of Superior Court, MADISON County, defendant was convicted of first-degree murder. Finding no evidence of any of the aggravating factors set out in N.C.G.S. § 15A-2000(e) which would support the imposition of the death penalty, the trial judge terminated the proceeding without a sentencing phase and imposed a sentence 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 April 1986.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

The State's evidence tended to show that the defendant and his wife, Brenda Johnson, separated in March 1984, and the defendant retained custody of the two children born of the marriage. The separation was less than amicable. At one point, the defendant and Mrs. Johnson engaged in a heated confrontation concerning Mrs. Johnson's access to the children. On that occasion, the defendant asked Mrs. Johnson if she "remembered Jim Ward and what he done to his family." Mrs. Johnson testified that, approximately ten years earlier, Ward had killed his children and then committed suicide. Mrs. Johnson stated that the defendant threatened to do the same thing.

In June 1984, the defendant lived in Hot Springs, North Carolina, with his eleven-year-old son, Christopher, and his five-year-old daughter, Joyce. In early June 1984, Christopher Johnson was brought to Asheville Memorial Mission Hospital. At the time of the admission, Christopher was sweating profusely, his pupils were pinpointed, his chest muscles were fluctuating violently, and his speech was slurred. He was diagnosed as suffering from organophosphate poisoning. An antidote was administered, and Christopher soon began to recover. He was released the following day.

On 15 June, Joyce Johnson was brought to Asheville Memorial Mission Hospital suffering from nausea, abdominal pain, headaches, and pain during urination. She was diagnosed as suffering from a urinary tract infection, and the doctor prescribed an antibiotic which was described as a sweet-odored, dark-orange liquid.

On the morning of 17 June 1984, the defendant told Christopher to look after Joyce while he went into town. The defendant then gave Joyce a teaspoon of white liquid. Christopher testified at trial that the liquid which the defendant administered to Joyce had an odor similar to bug poison. The defendant then proceeded to town. A few minutes after the defendant's departure, Joyce became very ill. White foam was coming from her mouth, her stomach was growling, she was staggering, and her conversation made no sense at all. Christopher stated that Joyce eventually laid down on the bed and stopped moving.

Meanwhile, the defendant went to the cafe in Hot Springs and ate breakfast. As he was leaving, he approached a local emergency medical technician (E.M.T.) who was also in the cafe. The defendant asked the E.M.T. where the town ambulance was located. The E.M.T. responded that the ambulance was in the garage next to the ambulance hut in order to be painted. The E.M.T. then inquired as to why the defendant was concerned about the whereabouts of the ambulance. The defendant simply responded, "I might need it later." The defendant then left the cafe.

Upon his return home, the defendant was made aware of Joyce's illness. He immediately took her to the ambulance hut in Hot Springs. The E.M.T.s placed Joyce in the ambulance and proceeded to Asheville. The defendant and Christopher followed in a pickup truck. Near the Madison County-Buncombe County line, Joyce was transferred to a Buncombe County ambulance which took her to Asheville Memorial Mission Hospital.

The ambulance arrived at the hospital shortly before 10:00 a.m. Dr. Thomas Howald testified that upon arrival Joyce was not breathing and had no pulse. She was foaming at the mouth, and her pupils were pinpointed. Dr. Howald stated that the bubblous secretions or foam had an odor which he associated with an organophosphate insecticide such as Malathion or Diazinon. He

detected the same odor in her vomitus. Dr. Howald further testified that an organophospate poison is the only type of poison that would cause the symptoms which he observed. He also opined that the poison was introduced into Joyce's system orally as opposed to being absorbed through the skin. Dr. Howald was also of the opinion that in order for Joyce to exhibit the symptoms that he observed, she would have had to orally ingest the poison within thirty minutes to two hours of the onset of the symptoms. He also stated that the symptoms he observed could not have been the result of a periodic, chronic exposure to organophosphate poisoning.

Despite a valiant effort by medical personnel to reverse the effects of the poison, Joyce suffered irreversible brain death. Life support systems were withdrawn on the afternoon of 20 June 1984, and Joyce died approximately thirty minutes later without ever regaining consciousness.

Tim Ramsey, a friend of the defendant, testified that he had a conversation with the defendant at the hospital on 20 June 1984. He testified that the defendant told him that the doctors had said Joyce "had got in some kind of poisoning." Ramsey stated that the defendant offered to take him to his house and show him what Joyce "had gotten into." He also testified that the defendant said half a teaspoon of the poison would kill a person. Ramsey further testified that approximately one month after the defendant and his wife separated, the defendant told him that he "would rather see the kids in hell as his wife have them."

On the afternoon of 20 June 1984, Dr. David Biggers, a pathologist at Asheville Memorial Mission Hospital, performed an autopsy on the body of Joyce Johnson. He testified that, in his opinion, Joyce's death was caused by extensive swelling of and softening of the brain. Dr. Biggers further testified that this opinion would be consistent with a finding of death resulting from organophosphate poisoning.

John Neal, a supervising chemist with the Occupational Health Pesticide Unit of the Public Health Laboratory of North Carolina, testified for the State. He analyzed a stomach fluid sample which was taken from Joyce Johnson upon her arrival at Asheville Memorial Mission Hospital. Mr. Neal testified that the sample contained 18.9 micrograms of Diazinon per gram of liquid.

Dr. Page Hudson, Chief Medical Examiner for the State of North Carolina, testified for the State. He testified that Diazinon is an organophosphate poison that may be introduced into the body through oral ingestion or absorption through the skin. He stated, however, that his experience and training indicated Diazinon poisoning could cause serious illness or death only when it had been orally ingested. Dr. Hudson was of the opinion that a teaspoon of Diazinon, administered orally, would be fatal to a child of Joyce's age and size. Dr. Hudson also testified that the various symptoms exhibited by Joyce and noted by Christopher Johnson, the E.M.T.s, and medical personnel at the hospital were consistent with organophosphate poisoning. He also agreed with Dr. Biggers' opinion that Joyce's death was caused by brain damage resulting from organophosphate poisoning.

The defendant testified on his own behalf. He stated that in early June 1984, he sprayed his house with Malathion in order to alleviate an insect problem. The insecticide which was left over was placed in a container and left on the back porch.

The defendant further testified that on the morning of 17 June 1984, he woke up his two children and prepared to go into town to get some gas. When Joyce acted as though she was not feeling well, the defendant was reminded that she was on medication. The defendant stated that he went to the refrigerator, got the bottle of medicine, and gave Joyce a teaspoonful. He then proceeded to town. He admitted asking the E.M.T. in the cafe about the whereabouts of the ambulance, but he indicated that he did so merely out of curiosity after observing that it was not parked in its usual location. The defendant denied telling Tim Ramsey that he had any poison at his house. He also denied making the statement attributed to him by his wife in which he threatened to kill his children and himself. The defendant testified that he loved Joyce and Christopher, and he denied administering poison to Joyce.

Leroy Johnson, the defendant's father, testified that he took Christopher to the hospital when he became sick in early June. Mr. Johnson told the doctor that Christopher had entered the house immediately after it had been sprayed for insects. The doctor asked if there was any of the insecticide remaining. Mr. Johnson said yes and brought the container to the hospital. He

testified that he never saw the container again. The defendant's mother testified that after Christopher was poisoned, the defendant scrubbed the entire house in an effort to remove all traces of the poison. Carol Johnson, the defendant's sister-in-law, testified that she was present during the confrontation during which the defendant was alleged to have threatened to kill his children. Carol Johnson testified that the defendant made no statement with regard to a "Ward man from Hot Springs." The defense also produced several witnesses who testified that the defendant had a good relationship with his children.

The jury found the defendant guilty of first-degree murder.

[1] The defendant initially argues that the trial court erred in denying his motion to appoint a medical expert to assist in the preparation of his defense. The defendant contends that such an expert would have aided in the investigation and preparation of his trial through the evaluation of medical reports, the autopsy results and samples, and the prevailing scientific data on organophosphate poisons. Defendant contends that the denial of the motion deprived him of his right to a fair trial. We conclude that the trial court did not err in denying this motion.

Under N.C.G.S. § 7A-450(b), the State must provide an indigent defendant "with counsel and the other necessary expenses of representation." We have interpreted this provision to require the appointment of expert assistance only upon a showing by the defendant that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his defense. *E.g.*, *State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977).

As noted by the defendant, the United States Supreme Court has recently addressed the question of appointment of experts to assist indigent defendants. In *Ake v. Oklahoma*, --- U.S. ---, 84 L.Ed. 2d 53 (1985), the Supreme Court was faced with the issue of whether an indigent defendant was constitutionally entitled to the services of an appointed psychiatrist. The Court stated that three factors were relevant to the resolution of the question: (1) the private interest that will be affected by the State, (2) the governmental interest that will be affected if the expert assist-

ance is to be provided, and (3) the probable value of the assistance that is sought and the risk of an erroneous deprivation of the affected interest if the assistance is not provided. *Id.* at ---, 84 L.Ed. 2d at 62. After applying these factors, the Court held that when a defendant makes an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the federal constitution requires the State to provide a psychiatric expert to examine the defendant and to assist in the evaluation, preparation, and presentation of the defense. *Id.* at ---, 84 L.Ed. 2d at 66. The defendant argues that application of the factors enunciated in *Ake* leads to the conclusion that the trial court's refusal to appoint a medical expert in his case violated his right to due process. We do not agree.

The Supreme Court explicitly limited the holding in *Ake* to those cases where "a defendant demonstrates to the trial judge 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. This requirement of a threshold showing of specific necessity was subsequently reaffirmed by the Court in *Caldwell v. Mississippi*, --- U.S. ---, 86 L.Ed. 2d 231 (1985), and is consistent with decisions of this Court holding that the denial of a motion for appointment of an expert is proper where the defendant has failed to show a particularized need for the requested expert. *E.g.*, *State v. Artis*, 316 N.C. 507, 342 S.E. 2d 847 (1986). In his motion seeking the appointment of a medical expert, the defendant merely asserted that an expert was needed to analyze all available information and to possibly testify on his behalf. He failed to set out any facts evidencing a specific or particularized need for a medical expert. We are therefore unable to say that the trial court erred in denying the motion.

Furthermore, in his brief before this Court, the defendant candidly acknowledges that prior to trial, his mother received a letter from Dr. Edgar Flint, Director of Industrial Medicine for CIBA-GEIGY Corporation, a manufacturer of Diazinon. This letter discloses that Dr. Flint was provided with and reviewed the medical records in question. In the letter, Dr. Flint provided a great deal of expert information and offered to answer any further questions that defense counsel might have. It is therefore apparent that notwithstanding the trial court's denial of the motion, the defendant did in fact receive assistance from a medical expert and had the opportunity for continued access to such expert as-

sistance. Finally, we note that trial counsel showed great skill and knowledge in cross-examining the State's medical and chemical experts. (E.g., defense counsel cross-examined several of the State's medical witnesses concerning the possibility that Joyce may have suffered from a hereditary cholinesterase deficiency which may have rendered her more susceptible to organophosphate poisoning than would otherwise be the case.) For the reasons set out above, this assignment of error is overruled.

[2] The defendant next argues that the practice of "death qualifying" the jury prior to the guilt phase of his trial violates the federal constitution on the grounds that it results in the selection of a jury biased in favor of the prosecution on the issue of guilt and which is not composed of a cross-section of the community. 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. This assignment of error is overruled.

[3] The defendant's next argument relates to the instructions given to the jury by the trial court. The trial judge instructed the jury in pertinent part:

> Now, Members of the Jury, I charge that for you to find the Defendant guilty of first degree murder by means of poison, the State must prove three things beyond a reasonable doubt: FIRST, that the Defendant intentionally caused poison to be placed into or to enter the body of Joyce Johnson. A poison is a substance which is likely to cause death by a chemical reaction when placed into or caused to enter the body of a human being.
>
> Intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

> SECOND, the State must prove that the Defendant did this with malice. Malice means not only hatred, ill-will or spite as it is ordinarily understood, to be sure that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious injury upon another, which proximately results in her death without just cause, excuse or justification. Or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of sense of social duty and a callous disregard for human life.
>
> And THIRD, the State must prove that the poisoning was a proximate cause of Joyce Johnson's death. A proximate cause is a real cause, a cause without which Joyce Johnson's death would not have occurred.
>
> So, I finally charge you, Members of the Jury, that if you find from the evidence beyond a reasonable doubt that on or about June 17th, 1984, Richard Johnson intentionally administered Diazinon to Joyce Johnson by mouth, thereby proximately causing her death, and that he acted with malice, it would be your duty to return a verdict of guilty of first degree murder by means of poison.

The defendant contends that the trial court committed reversible error by failing to specifically instruct the jury that in order to return a conviction for first-degree murder, it was required to find that he possessed the specific intent to kill Joyce at the time the poison was administered. In order to resolve this issue, we find it necessary to review certain fundamental principles concerning first-degree murder.

N.C.G.S. § 14-17 provides:

> § 14-17. Murder in the first and second degree defined; punishment.
>
> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be mur-

> der in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class C felon.

In *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983), we interpreted this statute as separating first-degree murder into four distinct classes as determined by the proof: (1) murder perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; (2) murder perpetrated by any other kind of willful, deliberate, and premeditated killing; (3) murder committed in the perpetration or attempted perpetration of certain enumerated felonies; and (4) murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon.

First-degree murder has been historically defined in this State as the unlawful killing of a human being with malice and with premeditation and deliberation. *E.g.*, *State v. Pridgen*, 313 N.C. 80, 326 S.E. 2d 618 (1985); *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982); *State v. Lamm*, 232 N.C. 402, 61 S.E. 2d 188 (1950); *State v. Utley*, 223 N.C. 39, 25 S.E. 2d 195 (1943); *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938). However, this definition is not entirely correct, as it is well established that the prosecution need not show premeditation and deliberation in order to obtain a conviction for first-degree murder under the felony-murder rule. *State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982); *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976).

Numerous cases also hold that a specific intent to kill is an essential element of first-degree murder. *E.g.*, *State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983); *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *State v. Mitchell*, 288 N.C. 360, 218 S.E. 2d 332 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210 (1976); *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22 (1972); *State v. Hamby*, 276 N.C. 674, 174 S.E. 2d 385 (1970), *death sentence*

vacated, 408 U.S. 937, 33 L.Ed. 2d 754 (1972). Once again, this is not completely correct, as it is well established that a homicide committed during the perpetration or attempted perpetration of a felony is first-degree murder without regard to whether the death was "intended." *E.g., State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652; *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972); *State v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340 (1958).

In *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645, we stated that when a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, the law conclusively presumes that the murder was committed with premeditation and deliberation. In a concurring opinion, Justice Mitchell took issue with this statement. He felt that "when a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the law does not presume, conclusively or otherwise, that the murder was carried out with premeditation and deliberation. Instead, the presence or absence of premeditation and deliberation is irrelevant." *Id.* at 306, 298 S.E. 2d at 663. We belatedly conclude that Justice Mitchell's well-reasoned view was correct and now hold that premeditation and deliberation is not an element of the crime of first-degree murder perpetrated by means of poison, lying in wait, imprisonment, starving, or torture. Likewise, a specific intent to kill is equally irrelevant when the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; and we hold that an intent to kill is not an element of first-degree murder where the homicide is carried out by one of these methods. Cases from other jurisdictions support this view. *See People v. Thomas*, 41 Cal. 2d 470, 261 P. 2d 1 (1953); *State v. Thomas*, 135 Iowa 717, 109 N.W. 900 (1906); *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131 (1883); *Rupe v. State*, 42 Tex. Cr. R. 477, 61 S.W. 929 (1901). *But see State v. Farmer*, 156 Ohio St. 214, 102 N.E. 2d 11 (1951). Since the intent to kill is not an element of the crime of first-degree murder when the murder is perpetrated by means of poison, the trial court was not required to instruct the jury on intent to kill.

We acknowledge that there is language in several prior opinions of this Court which intimates that in cases involving death by means of poison, the prosecution is still required to come forward with evidence showing an intent to kill in order to obtain a

conviction for first-degree murder. *See, e.g., State v. Barfield,* 298 N.C. 306, 259 S.E. 2d 510 (1979). In *Barfield,* the defendant was charged with first-degree murder by poison. We held that evidence that the defendant had poisoned other individuals was admissible on the basis that "[s]uch evidence is clearly relevant in a prosecution for first-degree murder in that the state must prove a specific intent to kill if it is to win a conviction." *Id.* at 328, 259 S.E. 2d at 529. We also note that the pattern jury instruction for first-degree murder by means of poison includes a specific instruction requiring the jury to find that the defendant administered the poison with the intent to kill the victim. N.C.P.I.—Crim. 206.12 at 3 (1978). Nevertheless, we hold that when the State proceeds upon a theory of first-degree murder perpetrated by means of poison, the State is not required to come forward with evidence tending to show that the defendant possessed the intent to kill the victim, and the trial judge should not instruct the jury that it is required to find such an intent as a prerequisite for returning a conviction for first-degree murder.

When a murder is committed during the commission of a felony, the murder is first degree even if all of the evidence presented tends to show only an intent to injure. The rule is no different when the murder is committed by means of poison—the murder is first degree even if all the evidence presented tends to show only an intent to make the victim ill. In the case before us, the only contention of the defendant is that he did not administer the poisonous substance at all.

[4] The defendant also contends that the trial court erred by failing to instruct the jury on second-degree murder based on the possibility that the jury could have found that he administered the poison with the intent to injure the victim but without an intent to kill. However, as discussed above, an intent to kill is not necessary to constitute the crime of first-degree murder when the murder was allegedly committed by means of poison. Any murder committed by means of poison is automatically first-degree murder. Furthermore, a defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it. *Id.; 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). The defendant emphatically and repeatedly testified that on the morning of 17 June, he gave Joyce a teaspoon of medicine and that at

no time did he administer Diazinon to his daughter. If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, the defendant is not entitled to an instruction on a lesser offense. *See State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645. The evidence in this case supported each element of the charged crime of first-degree murder. The only evidence to negate these elements was the defendant's denial that he had committed the offense. The trial court did not err by refusing to instruct the jury on second-degree murder.

[5] Finally, the defendant argues that the trial court erred by failing to instruct the jury on the lesser-included offense of involuntary manslaughter. We do not agree.

Involuntary manslaughter is 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). As noted above, 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. Involuntary manslaughter has been defined as 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; *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983). The defendant notes that a great deal of evidence was elicited as to the differences in the odor and appearance of organophosphate poison and the medicine which had been prescribed for Joyce. He argues that based on this evidence, the jury could find that he was culpably negligent in administering the insecticide instead of the medicine. This contention, however, ignores the fact, alluded to above, that the defendant testified that he gave the victim medicine and did not at any time either by design or by mistake administer insecticide to his daughter. Since the State's evidence was sufficient to fully satisfy its burden of proving each element of first-degree murder and there was no other evidence to negate these elements other than the defendant's denial that he committed the offense, the defendant was not entitled to an instruction on the lesser-included offense of involuntary manslaughter. *See*

State v. Strickland, 307 N.C. 274, 298 S.E. 2d 645. This assignment of error is overruled.

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

No error.

KENNETH LITTLE, EMPLOYEE v. PENN VENTILATOR COMPANY, EMPLOYER, AND HOME INSURANCE COMPANY, CARRIER

No. 398PA85

(Filed 2 July 1986)

1. **Master and Servant § 75— workers' compensation—future medical expenses—effect a cure or give relief**

   Under N.C.G.S. § 97-25, awards for expenses for future medical treatments are appropriate when such treatments are required to "effect a cure" or "give relief" even if they will not lessen the period of disability.

2. **Master and Servant § 75— workers' compensation—meaning of "relief"**

   "Relief" within the meaning of N.C.G.S. § 97-25 embraces not only an affirmative improvement toward an injured employee's health but also the prevention or mitigation of further decline in that health due to the compensable injury.

3. **Master and Servant § 75— workers' compensation—medical expenses to "give relief"**

   Future expenses which will be incurred to monitor an employee's medical condition are reasonably required to "give relief" if there is a substantial risk that the employee's condition may take a turn for the worse.

4. **Master and Servant § 75— workers' compensation—award of future medical expenses**

   Where the Industrial Commission made findings of fact supported by competent evidence that plaintiff faces a substantial risk of future medical complications from an eye injury, including loss of vision, future treatments to monitor his condition are reasonably required to give relief, and an award of future medical expenses for such purpose was proper.

5. **Master and Servant § 73.1— compensation for eye injury—applicable statute**

   Plaintiff's eye injury was compensable under N.C.G.S. § 97-31(24) rather than under subsections (16) and (19) where plaintiff did not lose the injured eye or suffer any loss of vision.

6. **Master and Servant § 69— compensation under N.C.G.S. § 97-31(24)—discretion of Industrial Commission**

By employing the word "may" in N.C.G.S. § 97-31(24), the Legislature intended to give the Industrial Commission discretion whether to award compensation under that section. However, if the Commission does make an award, it must make a proper and equitable one.

7. **Master and Servant § 69— amount of compensation—discretion of Industrial Commission**

The decision regarding the amount of compensation awarded under N.C.G.S. § 97-31(24) rests in the sound discretion of the Industrial Commission, and its decision will not be overturned on appeal absent an abuse of discretion on its part.

8. **Master and Servant § 73.1— amount of compensation for eye injury**

An award of $2,500 for a serious, permanent eye injury was proper and equitable where the injury places plaintiff at great risk for future complications but he has not yet suffered any loss of vision or decrease in earning capacity.

ON plaintiff's petition for further review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 75 N.C. App. 92, 330 S.E. 2d 276 (1985), affirming a workers' compensation award by the Industrial Commission.

Ralph G. Jorgensen for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe by William J. Garrity and Edward L. Eatman for defendant appellees.

EXUM, Justice.

Plaintiff seeks workers' compensation for an injury to his left eye. A deputy commissioner of the Industrial Commission awarded plaintiff $2,500 under N.C.G.S. § 97-31(24) for permanent eye injury and medical expenses incurred as a result of the injury until plaintiff reached maximum improvement. The deputy commissioner denied any future medical expenses after plaintiff reached maximum medical improvement concluding: "There is no provision in the Workers' Compensation Act for periodic medical examinations unless they are determined to be necessary to lessen the plaintiff's disability." Both plaintiff and defendants appealed to the Full Commission. Plaintiff contended $2,500 was not adequate compensation for permanent injury to his eye and defendants contended N.C.G.S. § 97-31(24) does not entitle plaintiff to

any compensation. The Full Commission affirmed the $2,500 award but modified that portion relative to medical expenses as follows:

> [I]t appears from a reading of the record that plaintiff will need monitoring of his medical condition in the future by his physicians so as to tend to lessen his period of disability. The portion of the decision relating to medical expenses shall be amended and revised to provide that the defendants shall continue to pay medical expenses incident to plaintiff's injury so long as his physician deems it necessary to lessen the period of disability. The Full Commission adopts as its own the Opinion and Award of the Hearing Commissioner as herein amended.

Both parties brought before the Court of Appeals the same contentions they argued to the Industrial Commission. In addition, defendants argued the Commission's award of future medical expenses was improper because plaintiff had no period of disability resulting from his injury which future medical treatments could lessen. The Court of Appeals struck that aspect of the Commission's award pertaining to future medical expenses, saying:

> 'Disability' is defined under the applicable law as '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.' G.S. 97-2(9). *See Watkins v. Central Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971). G.S. 97-25 entitles plaintiff to reimbursement of such medical expenses as will tend to 'lessen [his] period of disability.' The record before us reveals no evidence of continuing disability as that term is defined in the Workers' Compensation Act. In fact the evidence in this case shows affirmatively that plaintiff had returned to work after five weeks and was earning more than before his injury.

Little v. Ventilator Co., 75 N.C. App. at 97-98, 330 S.E. 2d at 279. The questions presented are whether: (1) plaintiff is entitled to future medical expenses under N.C.G.S. § 97-25 even though they will not lessen the period of disability; (2) N.C.G.S. § 97-31(24) authorizes compensation for plaintiff's eye injury; and (3) if it does, whether $2,500 is proper and equitable compensation. We answer them all affirmatively.

I.

Evidence in the record tends to show the following: While operating a rivet machine in the employment of Penn Ventilator Company, plaintiff was struck in the left eye by a flying sliver of metal. Plaintiff's physician, Dr. J. K. Chambers, elected not to remove the metal; instead, he performed laser surgery to seal the site where it entered plaintiff's eye.

After plaintiff's release from the hospital, he returned to work for defendant, Penn Ventilator Company, and at the time of the hearing below was earning wages at a higher rate than before he was injured. Plaintiff testified the injury had no adverse effect on his ability to perform his job.

Although vision in plaintiff's eye remains normal, plaintiff's injury poses a constant threat of future complications, including loss of vision. The metal imbedded in his eye may rust or cause retinal detachment. Upon evidence of the happening of either event, surgery will be necessary. Because of the threat to plaintiff's eyesight posed by these potential complications, plaintiff's eye requires close medical supervision, including at a minimum periodic check-ups and yearly electroretinograms, a test for recording changes in the retina.

With this evidence before it, the Commission, adopting the findings of the hearing commissioner, made findings and conclusions of law as follows:

> 1. On March 28, 1980, plaintiff was operating a rivet machine when it malfunctioned and a piece of metal hit plaintiff in his left eye. Plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer.
>
> 2. Plaintiff was hospitalized and treated for a laceration of his cornea and as a result of that treatment the piece of metal was left in his eye and the laceration was closed around it. As a result, plaintiff has a visible scar tract through the vitreous gel body of his left eye which presents a clear danger for retinal detachment in the future. Plaintiff has a scar in the retina surrounding the encysted foreign body. This type of injury results in a significantly increased

occurrence of retinal detachment when compared with the incidence in normal, uninjured eyes.

3. As a result of the injury herein, plaintiff has suffered permanent injury to an important part of his body, i.e., his left eye, for which no compensation is payable under any other subdivision of this section. Plaintiff has not suffered any loss of vision as a result of this injury at this time.

. . . .

5. As a result of the injury herein plaintiff will require periodic check-ups to make sure there is no loss of vision or rusting of the metallic body left in his eye or evidence of retinal detachment. . . .

Defendants owe to plaintiff $2,500.00 for permanent injury to his eye. G.S. 97-31(24).

Upon the foregoing findings of fact and conclusions of law the Commission entered an award of $2,500 less $350 for attorney's fees for the eye injury and directed payment of further medical expenses as hereinabove set out.

II.

Plaintiff contends the Court of Appeals erred in striking his award for future medical expenses. We agree with the Court of Appeals that future medical treatment will not lessen the period of plaintiff's disability because plaintiff's injury has not resulted in a period of disability beyond the healing period. Where as in this case there is no reduction in earning ability, there is no period of disability to be lessened. N.C.G.S. § 97-25 does not, however, limit an employer's obligation to pay future medical expenses to those cases in which such expenses will lessen the period of disability. The statute also requires employers to pay the expenses of future medical treatments even if they will not lessen the period of disability as long as they are reasonably required to (1) effect a cure or (2) give relief.

Before 1973 an employer was not obligated to pay the expenses of medical treatment given more than ten weeks after the date of injury unless the additional treatment would tend to lessen the period of disability. N.C.G.S. § 97-25 then provided:

> Medical, surgical, hospital, nursing services, medicines, sick travel, and other treatment including medical and surgical supplies as may reasonably be required, *for a period not exceeding ten weeks from date of injury* to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, . . . shall be provided by the employer.

(Emphasis added.) *See Peeler v. Highway Comm'n*, 302 N.C. 183, 186, 273 S.E. 2d 705, 707 (1981). The ten-week limitation had the practical effect of making all awards for the expenses of future medical treatment contingent upon a claimant's showing that such treatment is required to lessen the period of disability.

[1] In 1973 the legislature amended N.C.G.S. § 97-25 by deleting the ten-week limitation with respect to medical treatments required to effect a cure or give relief. 1973 N.C. Sess. Laws ch. 520, § 1(b). It is this version of the statute which governs this case, and it provides:

> Medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the commission will tend to lessen the period of disability, . . . shall be provided by the employer.

N.C.G.S. § 97-25 (1985). The legislature's obvious intent was to compel employers to provide medical treatments reasonably required to "effect a cure or give relief" more than ten weeks after the date of injury. As a result of the 1973 amendment N.C.G.S. § 97-25 contains three grounds upon which an employer must provide future medical expenses where before 1973 it contained only one. In addition to the traditional duty to provide treatments required to lessen the period of disability, the employer also must provide treatments to effect a cure or give relief.

If awarding of expenses for medical treatment were construed to be dependent upon a claimant's showing that further treatment would lessen disability, many victims of scheduled injuries would be left without compensation. Claimants with scheduled injuries often are unable to demonstrate their injuries

resulted in any decrease in earning ability. In those cases, as in the case before us, where claimants have no earning disability, no amount of medical treatment will lessen their disability. Even under the law as it existed prior to 1973, compensation presumably was paid for medical expenses incurred not more than ten weeks after injury without a showing of disability or that the medical treatment caused a decrease therein. By removing the ten-week limitation, the legislature surely intended not to restrict but to extend the right of claimants to recover their medical expenses.

A case which illustrates the correct interpretation of N.C.G.S. § 97-25 by analogy is *Smith v. American & Efird Mills*, 305 N.C. 507, 290 S.E. 2d 634 (1982). The issue in that case was whether the Industrial Commission erred in restricting its award of future medical expenses to the 300-week period for which it awarded compensation for partial disability. *Smith* applied the 1970 version of N.C.G.S. § 97-59[1] rather than § 97-25. N.C.G.S. § 97-59 contains a specific provision for awarding medical benefits in cases involving occupational disease. Under it benefits may be awarded under that provision if they will: (1) lessen the period of disability or (2) provide needed relief. The statute applied in *Smith* provided:

> In the event of disability from an occupational disease, the employer shall provide reasonable medical and/or other treatment for such time as in the judgment of the Industrial Commission will tend to lessen the period of disability or provide needed relief . . . .

305 N.C. at 512, 290 S.E. 2d at 637. In *Smith* the Court found competent evidence to support the Commission's finding of fact that " 'medical treatment will be necessary for plaintiff's lifetime and will provide plaintiff with needed relief, though treatment will not reverse the damage to the lungs which has become permanent, but will only serve to prevent further damage.' " *Id.* at 513, 290 S.E. 2d at 638.

In N.C.G.S. § 97-25, as in N.C.G.S. § 97-59, the governing statute in *Smith*, the legislature has provided alternate grounds

1. Although N.C.G.S. § 97-59 has since been rewritten, *see* N.C.G.S. § 97-59 (1985), there has been no change substantively in the provisions applied in *Smith*.

for awarding expenses for future medical treatments. Awards for such treatments are appropriate, therefore, even if those treatments will not lessen the period of disability as long as they are required to "effect a cure" or "give relief."

Language in the Court of Appeals' opinion indicates that court may have considered and rejected other grounds for awarding future medical expenses besides lessening of disability:

> The medical reports and letters from plaintiff's physicians indicate that he has reached maximum recovery and that his condition has remained stable. While plaintiff is required to undergo continued medical treatment for his injury, the treatment is for purposes of monitoring and observation rather than to hasten plaintiff's return to health or give relief. The expenses involved in that treatment are not recoverable under G.S. 97-25.

Little v. Ventilator Co., 75 N.C. App. at 98, 330 S.E. 2d at 279. This language in the Court of Appeals' opinion indicates that future medical treatment for purposes of monitoring and observation of an injured employee's condition cannot as a matter of law give relief. We disagree. On the basis of the Commission's findings of fact we conclude that future medical services which will be incurred to monitor plaintiff's condition will give relief. We, therefore, reverse the Court of Appeals on this point and reinstate the Commission's award of future medical expenses.

[2, 3] In our judgment relief embraces not only an affirmative improvement towards an injured employee's health, but also the prevention or mitigation of further decline in that health due to the compensable injury. *See Smith v. American & Efird Mills*, 305 N.C. 507, 290 S.E. 2d 634 (medical treatment would prevent further damage though it would not reverse damage to lungs). As a result of the 1973 amendment to N.C.G.S. § 97-25 employers must provide treatments reasonably required more than ten weeks after an injury to prevent an employee's health from further declining. In the usual case where future treatments are required to give such relief, treatments already begun must be extended into the future to relieve the effects of an injury which became manifest on the date the injury occurred or soon afterwards. The full extent of an injury is not, however, always immediately apparent. We believe the 1973 amendment requires employers to

provide medical treatment or services reasonably required to avoid insidious complications which could in the future develop from the injury. It follows that future expenses which will be incurred to monitor an employee's medical condition are reasonably required to give relief if there is a substantial risk that the employee's condition may take a turn for the worse. Monitoring the employee's condition plays a vital role in preventing its future deterioration. Early detection of any unfavorable change in that condition not only signals the necessity for procedures to arrest the deterioration but also almost always improves a patient's prognosis.

Furthermore and importantly, where there is a substantial risk that an employee's condition will decline, monitoring serves to assuage the employee's fear by keeping him informed of the lack of any change in his condition. Even if the employee's condition does change for the worse, monitoring alleviates the anxiety which arises out of uncertainty by keeping the employee informed about his medical status. We believe these psychological and emotional benefits which flow from monitoring the employee's condition constitute "relief" as that term is used in the statute.

[4] Because in this case the Commission made findings of fact supported by competent evidence that plaintiff faces a substantial risk of future medical complications, including loss of vision, we conclude that future treatments to monitor his condition are reasonably required to give relief.

Our conclusion that plaintiff's future medical expenses are required to give relief is bolstered by the impracticable result which would follow a contrary decision. Had plaintiff's physician elected to perform surgery to remove the embedded foreign body immediately after the accident, certainly the treatment would have fallen within the statutory definition of "relief." Plaintiff's physician apparently elected a safer treatment than immediate surgery because of the considerable risks associated with surgery on the intricate optical organ. Sound public policy would not condone the denial of plaintiff's medical expenses involved in the more conservative monitoring approach simply because his physician elected not to pursue a riskier course of treatment.

Our conclusion that monitoring plaintiff's condition will give relief also distinguishes this case from *Millwood v. Cotton Mills,*

215 N.C. 519, 2 S.E. 2d 560 (1939), and *Peeler v. Highway Comm.*, 48 N.C. App. 1, 269 S.E. 2d 153 (1980), *aff'd per curiam*, 302 N.C. 183, 273 S.E. 2d 705 (1981), relied upon by the Court of Appeals. Although in both cases this Court denied future medical expenses, both cases arose under the pre-amended version of N.C.G.S. § 97-25 in which decreasing the period of disability was the sole ground upon which the statute obligated an employer to pay for such expenses. In *Millwood* plaintiff suffered an industrial accident which left her totally and permanently disabled. The issue in that case was whether the Industrial Commission properly awarded medical expenses for an additional period of time beyond the statutorily prescribed ten weeks. The Court interpreted the pre-amended version of N.C.G.S. § 97-25 as follows:

> As we read and construe the wording of the act, it is plain that in order to effect a cure or give relief, medical, surgical, hospital or other treatment shall be provided by the employer for a period of ten weeks. But such treatment may not be required for additional time unless 'it will tend to lessen the period of disability. . . .' Whether additional hospital treatment will tend to lessen the period of disability is a question of fact to be ascertained by the Industrial Commission upon competent evidence. Until and unless such finding be made, the Commission is without jurisdiction to make an award for treatment for an additional period.

Millwood v. Cotton Mills, 215 N.C. at 523, 2 S.E. 2d at 562. Because plaintiff was totally disabled permanently, no amount of treatment would lessen the period of disability.

In *Peeler* claimant suffered an injury which resulted in a 20 percent permanent partial disability of his back, a 28 percent permanent partial disability of his right leg, and a 5 percent permanent partial disability of his left leg. He also sustained injuries included within the schedule of N.C.G.S. § 97-31 which resulted in impotence and the lost use of his bladder and secondary sexual organs. The Commission made findings of fact that plaintiff would have to have regular, periodic future examinations because of the risk of future complications including, among others, urinary tract infections, stone formation, electrolyte imbalances and renal insufficiency. The Court of Appeals determined the pre-amended version of N.C.G.S. § 97-25 to be the applicable law. It noted that

under the statute, after a ten-week period beginning on the date of injury, an award of expenses for medical treatment could be made only where that treatment is required to lessen the period of disability. Because plaintiff failed to prove further treatment would lessen the period of his disability, the Court of Appeals denied future medical expenses. In dissent Judge Robert M. Martin argued that the amended version of N.C.G.S. § 97-25 was the applicable law. He interpreted the amended statute to permit an award for future medical expenses on any one of the three alternate grounds noted above. Although it was clear to him that continued treatment would never "effect a cure," or "lessen the period of disability," he thought the evidence would support a finding by the Commission that such treatment is reasonably required to "give relief." *Peeler v. Highway Comm.*, 48 N.C. App. at 8, 269 S.E. 2d at 158. On appeal as of right this Court affirmed *per curiam*. It held that the 1973 amendment did not apply and under the law as it existed prior to 1973 plaintiff was not entitled to future medical expenses.

Neither *Peeler* nor *Millwood*, therefore, was decided under the amended version of N.C.G.S. § 97-25. Neither case precludes the Industrial Commission from awarding future medical expenses in cases where claimants show that further treatment will give relief. If anything, *Peeler's* holding that the 1973 amendment did not apply in that case implies expenses in similar factual circumstances might properly be awarded under the amended version on the ground that they would give relief.

III.

[5] Plaintiff and defendants both contend the Court of Appeals committed error in affirming the Industrial Commission's $2,500 award of compensation. The Commission based plaintiff's award on N.C.G.S. § 97-31(24) which provides:

> In case of the loss or for permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000).

N.C.G.S. § 97-31(24) (1985). Defendants argue this section does not authorize compensation for plaintiff's injury because compensa-

tion is payable for eye injuries under subdivisions (16) and (19) of the schedule.[2] We agree completely with the Court of Appeals that "[t]his argument is without merit" for the reasons stated in Judge Eagles' opinion:

> Subsections (16) and (19) of G.S. 97-31 by their very terms contemplate some loss, either of the eye itself or of the vision in an eye. While plaintiff here has unquestionably sustained a permanent injury to his eye, the evidence at the time of his hearing shows, and the Commission found, that he did not lose the injured eye or suffer any loss of vision. Since plaintiff's injury is not specifically encompassed by subsection (16) or (19) or any other subsection of G.S. 97-31, subsection (24) was the appropriate basis for the Commission's award.

Little v. Penn Ventilator Co., 75 N.C. App. at 95, 330 S.E. 2d at 278.

[6] Plaintiff disputes the award because he says $2,500 is not adequate compensation for permanent injury to his eye. The word selected by the legislature to invest the Commission with authority to make awards under N.C.G.S. § 97-31(24) is significant. In construing companion provisions in N.C.G.S. § 97-31 which provide compensation for disfigurement,[3] this Court has said where

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2. These subdivisions provide in pertinent part:

"(16) For the loss of an eye, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 120 weeks."

"(19) [L]oss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. . . ."

3. "(21) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed ten thousand dollars ($10,000). In case of enucleation where an artificial eye cannot be fitted and used, the Industrial Commission may award compensation as for serious facial disfigurement.

"(22) In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000)."

N.C.G.S. § 97-31(21), (22) (1985).

the statute provides that the Commission "may" award compensation for bodily disfigurement, the Commission has discretion whether to award compensation; but where the statute provides that the Commission "shall" award compensation, the Commission has no choice but to award proper and equitable compensation. *See Davis v. Construction Co.*, 247 N.C. 332, 101 S.E. 2d 40 (1957). By employing the word "may" in N.C.G.S. § 97-31(24) the legislature intended to give the Industrial Commission discretion whether to award compensation under that section.

[7] While the Commission has discretion whether in the first instance to make an award, if it does make an award it must make a proper and equitable one. The Commission has no discretion to make an improper or inequitable award. What constitutes a "proper and equitable award" calls for the exercise of judgment and balancing. We believe, therefore, the decision regarding the amount of compensation should be left to the sound discretion of the Industrial Commission. Accordingly, its decision will not be overturned on appeal absent an abuse of discretion on its part.

The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. The test for abuse of discretion is whether a decision "is manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985), or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E. 2d 450, 465 (1985). The intended operation of the test may be seen in light of the purpose of the reviewing court. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason.

[8] We cannot say in this case that the Commission's award has no rational basis in the facts. Plaintiff has received a serious, permanent eye injury which places him at great risk for future complications. Plaintiff has not yet suffered any loss of vision nor has he suffered any decrease in earning ability. The extent of his future complications as well as his prognosis if they should arise

lie outside the realm of certainty. We are not inclined to substitute our judgment for that of the Commission.

For all the foregoing reasons the decision of the Court of Appeals, insofar as it affirmed the Commission's award of $2,500 for plaintiff's eye injury, is affirmed; but the decision, insofar as it reversed the Commission's award of future medical expenses, is reversed. The result is that the Commission's award is in all respects reinstated.

Affirmed in part and reversed in part.

STATE OF NORTH CAROLINA v. ROBERT LEE WEST

No. 213A85

(Filed 2 July 1986)

1. **Criminal Law § 82— priest-penitent privilege not applicable—defendant not seeking counsel of minister—conversation not confidential**

A preacher was not incompetent to testify under North Carolina's codification of the priest-penitent privilege where the evidence suggested that the preacher sought out defendant and their conversation was held in the presence of the preacher's wife. N.C.G.S. § 8-53.2 (1981), N.C.G.S. § 15A-1443(a) (1983).

2. **Rape and Allied Offenses § 4.1— first degree rape and sexual offense—admission of purchase of pornographic materials and ladies' underwear—no prejudice**

In a prosecution for first degree rape and first degree sexual offense against defendant's stepdaughter, there was no prejudicial error in the admission of defendant's admission to his preacher of the purchase of pornographic material and ladies' underwear. Defendant neither objected nor moved to strike the remark at trial and, even if it was arguably irrelevant, the error was not of so fundamental a nature that defendant was deprived of a fair trial.

3. **Criminal Law § 85.2— rape—minister's statement that defendant sick—nonprejudicial**

The trial court did not err in a prosecution for first degree sexual offense and first degree rape by admitting statements by defendant's preacher that defendant was sick and needed help. The context of the preacher's remarks did not indicate that he was relying exclusively on statements by defendant's stepdaughter, the victim; the use of the word sick in describing defendant's behavior was colloquial, indicating the speaker's perception of defendant's lack of moral equilibrium; and there was no reasonable possibility that a different result could have been obtained had the remarks been excluded.

4. Criminal Law § 75.1— rape investigation focused on defendant—officers called on defendant at home—no arrest warrant or charge—inculpatory statement admissible

An inculpatory statement made by defendant to officers in a prosecution for first degree rape and first degree sexual offense was admissible where deputies called defendant at home and said they would like to talk with him; defendant agreed and deputies arrived at his home about twenty minutes later; the three officers identified themselves and defendant invited them into the living room; a deputy told defendant that his stepdaughter and her mother had made certain allegations against him and said that they wished to hear his side; defendant asked whether anything he said could be used against him and was told that it could; defendant asked what the allegations were and, once informed, admitted that they were true; the Sheriff Department's investigation had already centered on defendant but deputies did not yet have a warrant when they went to interview him; *Miranda* warnings were not issued; defendant was told that warrants would be drawn in light of what his stepdaughter, her mother and defendant had told deputies; defendant was asked if he would like to accompany officers back to the courthouse and defendant asked officers to come back later; and officers returned at a later time with a warrant and issued *Miranda* warnings. Although the investigation had focused on defendant, defendant had not been charged, a warrant had not been issued, and the officers' conversation with defendant in the familiarity and convenience of his own living room was not equivalent to the compelling atmosphere of a custodial interrogation.

5. Criminal Law § 70— tape recording found close to defendant's house admissible

The trial court did not err by admitting into evidence in a prosecution for first degree rape and first degree sexual offense the contents of a tape recording found less than a mile from defendant's house in which a voice identified by the victim and her mother as defendant described a sexual fantasy involving the victim and included the remark that the speaker had been having sexual relations with the victim since she was eleven. Defendant objected at trial only on the basis of chain of custody and voice identification, not on Rule 401 or 404 grounds; the trial court's findings regarding chain of custody were sufficient; defendant's wife, his stepdaughter, and the deputy who interviewed him were all sufficiently familiar with his voice to make an identification; the tape's contents corroborated their identification testimony; and there was no question that the contents of the tape were relevant to the offenses for which defendant was tried. N.C.G.S. § 8C-1, Rules 401 and 404.

APPEAL by defendant from judgments entered by *Ellis, J.*, at the 13 November 1984 session of Superior Court, SCOTLAND County. Defendant was convicted of rape in the first degree and sexual offense in the first degree. From the judgments of life imprisonment, defendant appeals as a matter of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 13 May 1986.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Assistant Attorney General, for the state.

Gordon Widenhouse for defendant.

MARTIN, Justice.

We find no error in defendant's trial and sentences.

Defendant was indicted on charges of rape in the first degree and sexual offense in the first degree. The charges stemmed from the allegations of Kimberly Ann Hayes, defendant's stepdaughter. Kimberly testified that on the morning of 16 April 1984, she missed the school bus and decided to skip school. Her mother had already left for work. She heard a door open and close at the back of the house, then saw defendant standing in the hallway. She ran to her bedroom and locked the door. Hearing defendant try the door, she opened the window and ran out into the yard. Defendant came out the front door into the yard, told Kimberly to come back into the house, and moved towards her. She refused, walking away towards a neighbor's house. She rang the neighbor's doorbell and was admitted. The neighbor, who could see that Kimberly was cold, shaking, and upset asked her what was wrong, and Kimberly replied that she couldn't take it any more and, when pressed for details, stated that defendant had been raping her over the course of several years. At Kimberly's request, the neighbor drove her to the parsonage of Kimberly's family church in McColl, S.C., where Kimberly told the preacher and his wife what had happened. The preacher's wife in turn told Kimberly's mother, and Kim and her mother notified the sheriff's department.

Kimberly's testimony about defendant's past attacks on her included in particular an incident occurring on the morning of 23 November 1981, when she was eleven years old. She was home from school with a cold, and defendant came into her room where she had been sleeping, carried her, kicking and screaming, to his bedroom, threw her on the bed, pulled a large chest in front of the door, disrobed her, then engaged in cunnilingus and intercourse with her. Similar incidents recurred several times over the succeeding years; but defendant threatened to hurt Kimberly and her mother if she ever told anyone, and, until the spring of 1984, fear and guilt compelled Kimberly's compliance. Shortly prior to

the 16 April incident, however, following an argument with her mother, Kimberly told a friend about defendant's attacks. Then, on the morning of the sixteenth, her encounter with defendant at home precipitated the allegations giving rise to defendant's trial on charges of rape in the first degree and sexual offense in the first degree. Defendant was found guilty of both offenses and sentenced to imprisonment for two consecutive life terms.

In this appeal, defendant assigns error to the admission into evidence of certain information elicited from three sources other than Kimberly's testimony, to wit:

Reverend Black, the preacher at the McColl Church of God, testified that he met with defendant at the parsonage on April 17, the day after Kimberly had run to her neighbor for help. The preacher's wife was also present. Reverend Black testified that he talked to defendant about Kimberly's accusations, to which defendant responded that he was guilty and that he knew he had "done wrong." Defendant elaborated on his sexual desires, telling the preacher that he had had intercourse with Kimberly from when she was around nine years old, that he would just go into a "rage," and that he had bought pornographic literature and women's underwear.

[1] Defendant assigns error to three aspects of Reverend Black's testimony. First, defendant argues that the preacher was incompetent to testify under North Carolina's codification of the priest-penitent privilege, which provides:

> No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

N.C.G.S. § 8-53.2 (1981). The wording of the statute suggests two requisites that are not met under the facts of this case: one is that the defendant be *seeking* the counsel and advice of his minister; the other is that the information be *entrusted* to the minister —that the communication be *confidential*.

Prior to 1967, when the current provisions were enacted, the statute (chapter 646 of the 1959 North Carolina Session Laws) defined privileged information as that which may have been "confidentially communicated." The legislature's excision of the term "confidential" from the current version of this statute was clearly not intended to broaden application of the privilege to all genre of general conversation with one's spiritual mentor, but merely to broaden the range of advisory and counseling practices to which it applies. We conclude that the expectation of trust and confidentiality inherent in communications covered under the prior statute was not affected by the legislature's modification in 1967 of that statute's wording.

There is no indication from the evidence before the trial court that defendant sought the counsel of Reverend Black. Rather, the evidence suggests that the preacher, who had told defendant's wife the day before that defendant "need[ed] help" and that he "was going to try to help him," had sought out *defendant* for that purpose. Nor was the meeting, attended as it was by defendant, Reverend Black, *and* the latter's wife, one in which defendant had any reason to expect confidentiality. The conversation between defendant and Reverend Black, held as it was in the presence of Mrs. Black, appeared to be one in which the preacher was offering his advice and counsel, but it was not one in which defendant's admissions were *entrusted* to Reverend Black in pursuit of such counsel and advice. We hold that, under these circumstances, N.C.G.S. § 8-53.2 does not apply.

[2] Second, defendant contends that the preacher's testimony of defendant's admitting to the purchase of pornographic material and ladies' underwear was irrelevant and prejudicial. Defendant argues that this testimony should have been excluded under the authority of Rule 403 of the North Carolina Rules of Evidence, because any probative value was outweighed by the danger of unfair prejudice. The record reflects that defendant neither objected to nor moved to strike this remark at trial. He has therefore

waived his right to assert this alleged error on appeal. N.C.G.S. § 15A-1446(b) (1983); N.C.R. App. P. 10(b)(1).[1]

We see no reason in the interests of justice to disturb the verdict in this case based upon the admission of this testimony. Defendant's telling the preacher of his purchasing habits was an admission, and admissions are competent evidence when not barred by an exclusionary statute or rule and when they are relevant. 2 Brandis on North Carolina Evidence § 167 (1982). So long as it is at all probative, the question whether an admission is prejudicial is immaterial. Apropos, the words of Justice (later Chief Justice) Ruffin, written over one hundred and fifty years ago, are still current:

> The rule is universal that whatever a party says or does shall be in evidence against him, to be left to the jury. It is competent evidence. The jury can and will give it its due weight, according to the manner of obtaining the confession or the relative interests of him whose admissions are proved. I know of no solitary exception to this rule and cannot imagine one.

McRainey v. Clark, 4 N.C. 698, 699 (1818).

Even if it was arguably error on relevance grounds to admit this portion of the preacher's testimony, it was not one of "such fundamental nature that . . . defendant has been deprived of a fair trial." *State v. Black*, 308 N.C. 736, 745, 303 S.E. 2d 804, 809 (1983) (Martin, J., concurring). Nor was it so egregious or manifestly prejudicial that there was a reasonable possibility that a different result would have obtained. N.C.G.S. § 15A-1443(a) (1983). The weighing of such evidence was properly left to the jury.

1. Defendant contends that, because this conversation was privileged and because the priest-penitent privilege statute arguably makes this evidence inadmissible in light of a significant public policy, an objection is deemed taken as a matter of law. 1 Brandis on North Carolina Evidence § 27 (1982). Given our analysis of the inapplicability of the priest-penitent privilege to the facts of this case, we reject this reasoning. In addition, we remind defendant of Brandis's highly critical attitude towards this exception, indicated in a footnote to the very passage cited by defendant, including Brandis's conclusion that "there is no satisfactory answer [to the scope of the exception] except complete repudiation of the rule." 1 Brandis on North Carolina Evidence § 27, at 100 n.82.

[3] Third, the trial court permitted Reverend Black to testify that, after he had heard Kimberly's account of how defendant had treated her, he had told Mrs. West "that Bob need[ed] to get help; that he was sick," and that "he need[ed] help and I was going to try to help him." Defendant objects that these remarks do not qualify under N.C.R. Evid. 701 as admissible lay opinion based on a rational perception of the witness that is materially helpful to the jury. Defendant argues that Reverend Black's characterization of defendant's behavior was based not upon his own perception of that behavior, but upon Kimberly's accusations and that, instead of being helpful to the jury, such remarks engender prejudice.

The context of Reverend Black's remarks to Mrs. West, however, does not indicate that Reverend Black necessarily or exclusively relied on what the victim had to say; rather, the facts that Reverend Black had known defendant for several months and that he had seen him regularly at church services gave the depth of his own experience to what he had more recently been told. In addition, these remarks aided the jury in understanding the witness and why he met with defendant the following day.

Reverend Black's use of the word "sick" in describing defendant's behavior was not an expert's term of art—it did not signify that the preacher was any better qualified than the jury to draw inferences from the facts. *See* 1 Brandis on North Carolina Evidence § 132 (1982). It was not meant to indicate the preacher's opinion that defendant was physically or emotionally sick, as the same testimony by a physician or psychiatrist would have done. The preacher's use of that term was colloquial. Given the identity of the speaker, it indicated his personal perception of defendant's lack of moral equilibrium, a perception based at least in part upon his own acquaintance with defendant. Even assuming arguendo that the preacher's remarks were based solely upon what Kimberly had told him, it was not prejudicial error to admit those remarks: there is no reasonable possibility that a different result would have obtained had they been excluded. N.C.G.S. § 15A-1443(a) (1983); *State v. Jordan*, 305 N.C. 274, 287 S.E. 2d 827 (1982). The weight of the evidence against defendant—not only from Kimberly's testimony but from defendant's own admissions—assures us that these remarks by Reverend Black did not con-

tribute to defendant's conviction. *State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981).

[4] Defendant also assigns error to the trial court's failure to bar evidence derived from a second source: his admission of guilt made to officers in what defendant contends was a custodial interrogation, in violation of his constitutional rights as protected by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966). Garland Patterson, the deputy sheriff who had interviewed Kimberly and her mother, testified for the state that on 19 April he called defendant at home, identified himself as a detective with the Scotland County Sheriff's Department, and told defendant he would like to come over and talk to him. The latter was agreeable, and, about twenty minutes later, Patterson arrived with two other officers. The three identified themselves as police officers, and defendant invited them into the living room. Patterson told defendant that Kimberly and her mother had made certain allegations against him and said that they wished to hear his side. Defendant asked whether anything he said could be used against him in court and was told that it could. He then asked what the allegations were and, once informed, admitted that they were true.

Patterson testified on voir dire that the department's investigation had already centered on defendant when the officers went to interview him, but that they did not yet have an arrest warrant. *Miranda* warnings were not issued. Patterson told defendant that in light of what Kimberly, her mother, and defendant himself had told him, warrants would be drawn, and he asked defendant if he would like to accompany the officers back to the courthouse. Defendant replied that he would like to fix something to eat and call his mother and asked the officers to come back later if they could. The officers made an appointment to return at seven o'clock in the evening, which they did, serving a warrant and issuing *Miranda* warnings at that time.

The trial court concluded that none of defendant's constitutional rights had been infringed by this interview: there were no promises, offers of reward or inducements made by the officers in return for a statement or the lack of one; defendant had not been in custody, but in the privacy and freedom of his own home; and defendant's statement had been made freely, voluntarily, and understandingly.

We agree with the conclusions of the trial court. A custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. at 444, 16 L.Ed. 2d at 706. In *Miranda*, the United States Supreme Court recognized the critical difference between interrogation at police headquarters and questioning in the home of the defendant. Stressing the psychological influence of the interview's physical surroundings, that Court quoted the following from a criminal investigation text: "In his own home, he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support." *Id.* at 449-50, 16 L.Ed. 2d at 709.

Aware as we are of the psychological influence of the interview's milieu, we do not consider the officers' conversation with defendant in the familiarity and convenience of defendant's own living room to have been equivalent to the "compelling atmosphere" of a custodial interrogation, which would render a confession without *Miranda* warnings involuntary. *See, e.g., State v. Gladden*, 279 N.C. 566, 184 S.E. 2d 249 (1971). Our view is reinforced by the fact that the officers subsequently left, permitting defendant to exercise his freedom even more fully.

Although, by the time they arrived at defendant's door, the officers' investigation had focused on him, defendant had not been charged. No warrant had been issued; he was not under arrest. The commandments of *Miranda* do not apply in situations "where the defendant has available the easier and more effective method of invoking the [Fifth Amendment] privilege simply by leaving," *State v. Davis*, 305 N.C. 400, 418, 290 S.E. 2d 574, 585 (1982), or, under the circumstances of this case, simply by refusing to admit the officers or by asking them to leave. Such action might have been rude, but the constraints of etiquette are not tantamount to custody.

The facts before us are not significantly different from those in *Gladden*, 279 N.C. 566, 184 S.E. 2d 249, in which the defendant called the police, then invited an officer into her home in order to explain what had happened. This Court held that, under the cir-

cumstances of that case, there was no indication that defendant was in custody or had otherwise been deprived of her freedom prior to or during her conversation with the officer, nor was there any indication that at that time she had been charged with any criminal offense. Because defendant West's freedom was not restricted in any significant way, we hold that his statement was "given freely and voluntarily without any compelling influences," and as such, it was admissible in evidence. *Miranda*, 384 U.S. at 478, 16 L.Ed. 2d at 726.

[5] Finally, defendant objects to the admission into evidence of the contents of a tape recording found by the side of the road within a mile of his house. The voice on the tape was identified by both Kimberly and her mother as being that of defendant. The voice described a sexual fantasy in which Kimberly was assaulted by several men, and it included the remark, "I've been f--- her since she was eleven." Defendant's present objections to the tape rest generally upon the asserted irrelevance of its contents. N.C. R. Evid. 401. In addition, defendant opines, citing Rule 404, the tape impermissibly serves to show defendant's propensity to commit the offenses charged by illustrating his bad character, but does not fit within the exception to this rule permitting the admission of such evidence for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident." N.C.R. Evid. 404(b).

At trial, however, defendant objected specifically not on Rule 401 or 404 grounds but on the basis of chain of custody and voice identification.[2] These grounds have not been reiterated in his appeal. It is a well-recognized rule that:

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2. Defendant's assignments of error indicate that he twice subsequently objected generally to the admission of the tape into evidence. Although N.C.R. Evid. 103 requires no particular form for objections in order to preserve the alleged error on appeal, it does require that the alleged error be "clearly presented" to the trial court. N.C.R. Evid. 103(a)(1). The function of an objection is not only to signify that there is an issue of law, but also "to give notice of the terms of its issue." 1 Wigmore, *Evidence* § 18 (Tillers rev. 1983). Defendant cited no new terms for issuing his second and third objections, and the trial court would surely have been justified in assuming that defendant reiterated his objection based upon the grounds originally specified. In addition, no other grounds for an objection were obvious at that point in the trial record—least of all irrelevance and objectionable prejudice.

> A specific objection, if overruled, will be effective only to the extent of the grounds specified. It makes no difference that there was another ground which would have been valid, unless there is no purpose at all for which the evidence would have been admissible.

1 Brandis on North Carolina Evidence § 27 (1982). In addition, Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure deems as abandoned exceptions "in support of which no reason or argument is stated or authority cited." Taken together and applied to the record before us, these rules bar consideration on appeal of grounds not specifically cited as part of the objection as well as consideration on appeal of grounds specifically cited but not briefed. In short, "[the] theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E. 2d 535, 539 (1982).

Even if this Court were to overlook the effect of these rules of disallowing the assertion of new grounds on appeal, defendant's objection that the contents of the tape were inadmissible is without merit. This is not a situation where a third person has learned of and reiterates examples of the defendant's behavior which indicate his bad character, calling into play the constraints of Rule 404. *See, e.g., State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982) (former supervisor's testimony that defendant had admitted to committing fellatio with a prostitute held inadmissible because not relevant to offense in case at bar). Nor is it analogous to situations where the defendant is being cross-examined concerning specific acts of criminal and degrading conduct for purposes of impeachment. *See* 1 Brandis on North Carolina Evidence § 111. And *see, e.g., State v. Jean*, 310 N.C. 157, 311 S.E. 2d 266 (1984) (defendant admitted on cross that he had watched pornographic movies depicting acts of sexually deviant behavior); *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973) (defendant properly cross-examined about possession of, familiarity with, and interest in pornographic magazines).

Properly authenticated,[3] the contents of the tape comprise an admission, which, as we noted before, is competent evidence and

3. N.C.R. Evid. 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient

as to which objections based upon prejudicial effect are misplaced. We are satisfied with the trial court's findings regarding chain of custody, and we agree with the trial court's judgment that Mrs. West, Kimberly, and the deputy sheriff who interviewed defendant were all sufficiently familiar with defendant's voice to enable them to identify his voice on the recording. In addition, the tape's contents corroborate this identification testimony: the speaker mentions Kimberly's name and age and fantasizes about what he would like to do "sometime when I know she's home by herself and her mama is gonna be at that plant . . . ." There can be no question that the tape's contents, including as they do defendant's admission of intercourse since Kimberly was eleven, are relevant to the offenses with which he was charged and tried. Accordingly, we hold that the contents of the tape were properly admitted into evidence.

In conclusion, we hold that none of defendant's assignments of error in this appeal is meritorious.

No error.

STATE OF NORTH CAROLINA v. WESLEY ADDISON SAMS

No. 173A85

(Filed 2 July 1986)

1. Criminal Law § 91— Speedy Trial Act—motion to dismiss denied—prior order granting continuance voidable—collateral attack

The trial judge in a prosecution for being an accessory before the fact to murder did not err by denying defendant's Speedy Trial Act motion to dismiss where defendant was tried within 120 days of his indictment if the time covered by a continuance was excluded as required by the order granting the continuance. Defendant took no exception to the order and therefore failed to preserve any error or mistake for appellate review; the trial judge could overrule the prior judge who granted the continuance only if the order was void or

to support a finding that the matter in question is what its proponent claims." This provision is illustrated for the purposes of voice identification at Rule 901(b)(5): "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." As mentioned above, however, defendant does not contest the tape's authenticity on appeal.

voidable; the fact that the continuance was granted *ex parte* may have made it voidable, but not void; and defendant's attack on the order was collateral. N.C.G.S. § 15A-701(b), N.C.G.S. § 15A-951.

2. Criminal Law § 10.2— accessory before the fact to murder—evidence sufficient

The trial judge did not err by denying defendant's motion to dismiss in a prosecution for being an accessory before the fact to murder, despite defendant's contention that the State had not proved the element of absence, where a witness testified that he was hired by defendant to shoot the victim; defendant called the witness on 28 February to say that the job had to be done before the next morning; the witness murdered the victim that night; his next contact with defendant was about four days later when he spoke to defendant over the telephone; and the witness went to defendant's house a couple of days later to get his money, at which time defendant asked him questions such as where the victim had been shot and whether the witness had shot him. The State offered ample evidence from which a reasonable inference of defendant's absence could be drawn.

3. Criminal Law § 10.1— accessory before the fact to murder—indictment sufficient

An indictment charging defendant with being an accessory before the fact to murder which did not charge that defendant was not present when the murder was committed was sufficient.

4. Criminal Law § 10.2— cross-examination of State's witness—State's objection sustained—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for being an accessory before the fact to murder by sustaining objections by the State to two of the questions defendant sought to ask the State's witnesses concerning the impact of the death penalty on their testimony. Defendant was allowed to freely inquire into the extensive criminal past of the State's witness who committed the murder and his plea bargain with the State, and defendant was also allowed to establish that the other witness had been friends with the murderer for several years.

5. Criminal Law §§ 10.3, 111.1— instructions—charges against codefendant dismissed—no plain error

The trial court did not commit plain error in its instructions in a prosecution for being an accessory before the fact to murder where the charges against a codefendant were dismissed at the close of the State's evidence; the court at that time instructed the jury that the case involving the other defendant had been disposed of, that the case against defendant was proceeding, and that the disposition of the other case should not affect the jury's deliberations; and, in the final instructions, the court instructed the jury to consider all of the evidence. Rules of App. Procedure, Rule 10(b)(2).

APPEAL by defendant from concurrent sentences of life imprisonment and ten years, imposed by *Seay, J.*, following defendant's conviction of being an accessory before the fact to murder

and of felonious conspiracy to commit murder, at the 22 October 1984 Criminal Session of Superior Court, RANDOLPH County. Heard in the Supreme Court 18 November 1985.

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

Charles T. Browne for defendant-appellant.

FRYE, Justice.

Defendant brings six assignments of error before this Court. The first concerns the Speedy Trial Act; the second, the sufficiency of the evidence; the third and fourth, the trial judge's acts in sustaining two of the prosecutor's objections; and the last two, jury instructions. After considering each of these assignments, we find no reversible error.

The facts underlying this case are bizarre. Around 10:00 p.m. on 28 February 1979, the Randolph County Sheriff's Department was called to the home of the victim, defendant's brother-in-law. The deputies found him lying on the floor of his living room beside a sliding glass door with broken glass. There were what appeared to be powder burns on his body. A shotgun lay nearby. The deceased's widow told the deputies that her husband had taken his shotgun outside to investigate noise made by his chickens, some of which were kept for fighting. Upon hearing a shot and a cry, she rushed into the living room and found the victim on the floor. Before he died, he told her and her son that he had fallen and shot himself in the process. The deputies subsequently found a break in the chain-link fence around the property and, nearby, a pair of bolt cutters and a ski mask. The authorities concluded that deceased had died as the result of an accidental self-inflicted wound.

As a result of new information, law enforcement officials exhumed deceased's body in 1983 and sent it to the office of the Chief Medical Examiner in Chapel Hill. The autopsy revealed that deceased's wounds were consistent with those caused by a rifle, and not a shotgun. The authorities arrested one Steven Luther Douglas, also under investigation for other charges, and charged him with first-degree murder. In early 1984, Douglas offered information in return for plea bargain arrangements. Douglas told

the police that defendant had hired him to kill the deceased, and that he had done so with a .30-30 rifle and had been paid $5,000 for the job. Douglas had a long criminal history, with four other murders, about twenty-five robberies and kidnappings, and various assaults and other crimes to his credit. Douglas testified for the State at defendant's trial in return for a life sentence to be served concurrently with two life sentences for his other murders.

Defendant was arrested on 24 and 25 April 1984, pursuant to warrants charging him with being an accessory before the fact to murder and with conspiracy to commit murder. On 30 April 1984, the grand jury returned bills of indictment for both offenses. Defendant and his sister, the victim's widow, were tried together at the 22 October 1984 Criminal Session of Superior Court, Randolph County, before Seay, J. At the close of the State's evidence, the trial judge dismissed the charges against the widow. Defendant then elected not to put on any evidence in his own behalf. The jury found him guilty of both offenses, and the trial judge sentenced him to life imprisonment for being an accessory before the fact to murder and ten years for conspiracy to commit murder. Defendant appealed his life sentence to this Court. His motion to bypass the Court of Appeals on his appeal of his conviction for conspiracy was allowed 8 April 1985.

I.

[1] As his first assignment of error, defendant argues that the trial judge erred in denying his motion to dismiss for failure of the State to try him within the limits fixed by the Speedy Trial Act, N.C.G.S. § 15A-701.

The Speedy Trial Act requires the State to try a defendant charged with a felony within 120 days from the date the defendant is arrested, served with criminal process, waives indictment or is indicted, whichever occurs last, unless that time is extended by certain specified events. N.C.G.S. § 15A-701 (1983 and Cum. Supp. 1985). In defendant's case, the starting date was the date of his indictment, 30 April 1984. His trial did not begin until 23 October 1984, 176 days later. Unless at least 56 of the days between defendant's indictment and his trial are excludable from computation for one of the statutory reasons, the trial judge should have granted defendant's motion.

While the burden of proof on this question remains with the defendant, the State bears the burden of going forward with evidence to show that time should be excluded. N.C.G.S. § 15A-703 (1983). Defendant's motion to dismiss was heard when his case was called for trial on 22 October 1984. At that time, the State produced an order signed by Beatty, J., granting a continuance from 23 August 1984 until 22 October 1984 and directing that this time be excluded under the Speedy Trial Act. The Speedy Trial Act allows delays resulting from a continuance to toll the running of time under the Act "if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing . . . the reasons for so finding." N.C.G.S. § 15A-701(b)(7) (Cum. Supp. 1985). This subsection also requires that motions for such a continuance be in writing. *Id.*

Here, the requirements of the Speedy Trial Act were met. The State's motion for a continuance was in writing. Judge Beatty's order contains the mandatory finding about the ends of justice and sets forth two reasons for granting the continuance: the temporary unavailability of a witness and the inability of the judge assigned to the intervening terms to try the case.

However, defendant argues that Judge Seay should not have excluded the time covered by Judge Beatty's order for continuance because that order was *ex parte*. N.C.G.S. § 15A-951 (1983) requires written motions to be served upon the opposing party and proof of service filed with the court. Defendant introduced uncontradicted evidence that the State's motion for continuance was never served upon either the defendant or his attorney, and that although both had been in court for a hearing on defendant's motion to reduce bond on the date that appears on Judge Beatty's order, neither knew anything about the order. No return of service appeared in the file.

Thus, the question before this Court is whether Judge Seay should have disregarded Judge Beatty's order. We note initially that this question is the only one before this Court. Although defendant argues that one of the reasons given in Judge Beatty's order, that an essential witness was unavailable within the meaning of N.C.G.S. § 15A-701(b)(3), was an erroneous conclusion of

law, and that Judge Beatty abused his discretion in granting the order, defendant took no exception to Judge Beatty's order. He has therefore failed to preserve any error or mistake of law found therein for appellate review. N.C. R. App. P. 10(a). We note further that Judge Seay could not have given defendant relief for either alleged error. *See Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972) ("The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law . . ."). Judge Seay had the power to grant relief only if Judge Beatty's order was either void or voidable.

An order is void *ab initio* only when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored. *Manufacturing Co. v. Union*, 20 N.C. App. 544, 202 S.E. 2d 309, *cert. denied*, 285 N.C. 234, 204 S.E. 2d 24 (1974) (consent order issued without the parties' consent would be void); *see also State v. Boone*, 310 N.C. 284, 311 S.E. 2d 552 (1984) (pretrial order denying suppression motion was a nullity where signed and entered out of session, out of county, and out of district); *Stroupe v. Stroupe*, 301 N.C. 656, 273 S.E. 2d 434 (1981) (order directing husband to pay wife's attorney's fees was void where the judge had not been assigned to preside over a session of court in the county on that date and was not authorized to hear motions and enter interlocutory orders on that date); *Pifer v. Pifer*, 31 N.C. App. 486, 229 S.E. 2d 700 (1976) (judge had no jurisdiction under URESA to condition child support payments on visitation rights; order was therefore void); *accord*, *Lumber Co. v. West*, 247 N.C. 699, 102 S.E. 2d 248 (1958); *Windham Distributing Co. v. Davis*, 72 N.C. App. 179, 323 S.E. 2d 506 (1984), *cert. denied*, 313 N.C. 613, 330 S.E. 2d 617 (1985) ("a judgment is not void 'if the court had jurisdiction over the parties and the subject matter and had authority to render the judgment entered' ").

In contrast, a voidable order stands until it is corrected. It may only be corrected by a direct attack; it may not be attacked collaterally. An irregular order, one issued contrary to the method of practice and procedure established by law, is voidable. *Manufacturing Co. v. Union*, 20 N.C. App. 544, 202 S.E. 2d 309, *cert. denied*, 285 N.C. 234, 204 S.E. 2d 24. *Accord*, *Menzel v.*

Menzel, 250 N.C. 649, 110 S.E. 2d 333 (1959), and *Lumber Co. v. West*, 247 N.C. 699, 102 S.E. 2d 248 (1958).

An order issued without notice where actual notice is required is irregular and thus voidable, but it is not void. It stands until set aside by a motion to vacate. *See Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953). Upon receipt of such a motion, the court may declare the order void. *Id. See also Hagins v. Redevelopment Commission*, 275 N.C. 90, 165 S.E. 2d 490 (1969); *Pask v. Corbitt*, 28 N.C. App. 100, 220 S.E. 2d 378 (1975).

Because N.C.G.S. § 15A-951 requires actual notice by service of process where, as here, a motion is written, Judge Beatty's *ex parte* order of continuance may have been voidable; nevertheless, it was not void. It was therefore binding on Judge Seay until defendant attacked it in a proper manner. This, however, defendant failed to do.

Instead of attacking Judge Beatty's order directly, by moving to vacate it or set it aside, defendant attacked it collaterally, a method permissible only for void orders. He moved under the Speedy Trial Act for dismissal of the charges against him and contended that the time excluded by the order should not toll time under the Act because the order was *ex parte*. Although faced with a clearly collateral attack, Judge Seay at one point during the hearing on defendant's motion nevertheless inquired of defendant's attorney, "Are you attempting to attack the Order that Judge Beatty signed? Is that what you're doing?" Defendant's lawyer replied, "I'm trying to find out if there ever was a hearing on it." At the hearing's conclusion, Judge Seay determined that defendant's attack on the order of continuance was collateral and that the order remained in force. He went on to find that with the time covered by the order excluded, defendant's trial did begin within 120 days of his indictment. Accordingly, he denied defendant's motion.

We find no error in Judge Seay's decision. He had before him a valid order of continuance that met the requirements set forth in N.C.G.S. § 15A-701(b)(7). Under these circumstances, he was required to exclude the time granted in the order of continuance in computing the time within which the State was required to try defendant. N.C.G.S. § 15A-701(b) (Cum. Supp. 1985) ("The follow

ing periods *shall* be excluded . . . ." (Emphasis added.)). Defendant's first assignment of error is rejected.[1]

II.

[2] As his next assignment of error, defendant argues that the trial court should have granted his motion to dismiss at the close of the State's evidence because the State failed to offer substantial evidence of one of the elements of being an accessory before the fact of murder.

As we have said before, in ruling upon defendant's motion to dismiss, there must be substantial evidence of each essential element of the offense charged. *State v. Lowery*, 309 N.C. 763, 766, 309 S.E. 2d 232, 235 (1983). The elements of being an accessory before the fact to murder are:

1) that defendant counseled, procured, commanded, encouraged, or aided the principal to murder the victim,

2) that the principal did murder the victim, and

3) that defendant was not present when the crime was committed.

State v. Hunter, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539 (1977). Defendant contends that the State failed to introduce substantial evidence of the third element, that defendant was not present.

The State established defendant's involvement in his brother-in-law's death through the testimony of the witness Douglas. Douglas testified that defendant hired him to shoot the victim around 23 or 24 February 1979. On 28 February, defendant called Douglas to say that the job had to be done before the next morning; he testified that he had no further contact with defendant before the shooting. Douglas murdered the victim that night. He had a partner[2] take him to the scene and pick him up after the job was done. He testified that his next contact with defendant (after 28 February) was about four days later, when he spoke

1. We also note that the State apparently could have had the required time excluded under other exceptions.

2. Douglas had been convicted of murdering this partner.

briefly to defendant over the telephone. Douglas went to defendant's house a couple of days after this conversation to be paid. At that time, defendant asked him such questions as where the victim had been shot and whether Douglas had shot him.

Evidence from which the jury can reasonably infer defendant's guilt is sufficient evidence to go to the jury. *State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232. Here, the State offered ample evidence from which a reasonable inference of defendant's absence could be drawn. The fact that the principal did not mention the defendant's presence has been held to be sufficient by itself. *See State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). Here, Douglas did not mention defendant in his account of the murder. The resulting inference that defendant was not present is strengthened in the instant case by Douglas' testimony that he did not have any contact with defendant between the 28 February phone call and the shooting and that his next contact after 28 February was some days later, and that defendant later asked about details of the murder that defendant would have known had he been present.

[3] As a subissue, defendant contends that the indictment charging him with being an accessory before the fact to murder is fatally defective in that it fails to charge that he was not present. We have reviewed the indictment and find it substantially similar to the indictment found sufficient in *State v. Branch*, 288 N.C. 514, 541-42, 220 S.E. 2d 494, 513-14 (1975), *cert. denied*, 433 U.S. 907, 53 L.Ed. 2d 1091 (1977).

Accordingly, this assignment of error is rejected.

III.

[4] As his next two assignments of error, defendant contends that the trial court erred in sustaining the prosecutor's objections to questions defendant asked two of the State's witnesses on cross-examination.

The first occurred during defendant's cross-examination of the witness Douglas.

> Q. You told the police this story about Wesley Sams and killing [the victim], about the month of April of 1984. Would that be about right?

A. I really don't keep up with time.

Q. Well, wasn't it about the time that Mr. Hutchins received the death penalty in Raleigh?

MR. ROOSE: OBJECTION.

THE COURT: SUSTAINED.

[Defendant Excepts—Defendant's Exception #18]

Q. Wasn't it in the spring of 1984?

A. Correct.

Q. And it was just before you were to be tried for the first degree murder of [the victim], isn't that right?

A. That's right.

Defendant contends that this question was a permissible attempt to disclose Douglas' reasons for testifying.

The second instance occurred during cross-examination of the State's witness, Patrick Gebauer, who testified to corroborate portions of Douglas' account. The attorney for defendant's sister inquired,

Q. You are a friend of Steve Douglas, are you not?

A. Yes, sir, I am.

Q. You don't want to see him go to the gas chamber, do you?

MR. ROOSE: OBJECT.

THE COURT: SUSTAINED.

[Defendant Excepts. Defendant's Exception #21]

MR. GREENE: I have nothing further.

Defendant argues that this question was designed to explore the extent of any bias Gebauer had that reflected upon his credibility.

Defendant certainly has the right to establish the bias of a witness who testifies against him. *State v. Spicer*, 285 N.C. 274, 204 S.E. 2d 641 (1974) (reversible error for trial judge to sustain every objection to questions attempting to establish who was providing money for state's witness and his wife, when both were un-

employed, and thus completely prevent defendant from showing the witness' bias). The range of relevant cross-examination is very broad. *State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983). Nevertheless, the extent of cross-examination is largely within the discretion of the trial judge, and his rulings thereon will not be held in error absent a showing that the verdict was improperly influenced thereby. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574.

Defendant here has failed to establish that the trial judge's limitations on the cross-examination of these two witnesses improperly influenced the verdict in his case. Defendant was allowed to establish sufficient bias on the part of Douglas to cast serious doubt upon his credibility. He was freely allowed to inquire into Douglas' extensive criminal past and the plea bargains Douglas had negotiated with the State. Defendant was also allowed, during his own cross-examination of Gebauer, to establish that Gebauer and Douglas had been friends for several years. Accordingly, the trial court did not abuse its discretion in sustaining the State's objections to these two questions. These two assignments of error are therefore rejected.

IV.

[5] As his last two assignments of error, defendant contends that the trial court erroneously instructed the jury on two different occasions.

At the close of the State's evidence, the charges against the victim's widow were dismissed. At that time, the trial judge instructed the jury that the case against defendant Sams would be proceeding. When defendant declined to introduce any evidence, the judge sent the jury out and held a charge conference. Before final arguments he instructed the jury as follows:

> THE COURT: Now, members of the jury, as I said a few moments ago, this case is proceeding only as against the defendant, Wesley Sams. Now, the case that involved the other defendant was disposed of, is of no concern to you and you are not to allow this development—that is, how the [other] case was disposed of—not to allow this to affect in any way your deliberations and your determination in this case between the State of North Carolina and the defendant, Wesley Sams. [Defendant Excepts—Defendant's Exception #24.]

Defendant did not object or request an alternate to either instruction. Defendant now argues before this Court that the failure to explain to the jury the disposition of the charges against the victim's widow was prejudicial to him, because the jury would assume that she had pled guilty.

The second alleged error occurred when the judge made his final charge to the jury. He instructed, "[I]t is your duty to remember *all* of the evidence and *all* of it that has been offered here . . . during the course of this trial." (Emphases added.) Defendant argues that this instruction was incorrect. The judge should have instructed the jury to consider only the evidence relating to defendant. Instead, defendant argues, the jury was effectively instructed to consider against him, in determining his guilt, evidence that only related to his sister's possible guilt. Defendant also failed to object to this instruction.

Because defendant failed to object to either instruction at trial, Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure bars him from assigning either instruction as error, unless the error amounts to "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). To obtain relief under the "plain error" rule, defendant must show both that a particular instruction was error and that this error had a probable impact on the jury's finding of guilt. *Id.* The "plain error" rule is only applied in exceptional cases. *Id.*

Applying this test to defendant's first allegedly improper instruction, we find that the test is not met. Even assuming, *arguendo*, that it was error for Judge Seay to say merely that the case against defendant would continue, we believe that his subsequent instruction removed any possible prejudice resulting from his original statement.[3] *See State v. McGuire*, 297 N.C. 69, 254 S.E. 2d 165, *cert. denied*, 444 U.S. 943, 62 L.Ed. 2d 310 (1979).

We also find that the test is not met with respect to the second instruction. Although defendant is technically correct that Judge Seay's instruction to consider all of the evidence was er-

3. We note in passing that had the judge done what defendant says he should have done and explained to the jury that there was insufficient evidence to convict defendant's sister, the jury could have assumed that defendant must be guilty or the judge would have dismissed the case against him, too.

roneous, the instruction was not prejudicial in this case. The primary piece of evidence introduced at trial that would not have been admissible against defendant was his sister's extrajudicial statement describing the night her husband died. In this statement, she told essentially the same story she had originally told the sheriff's deputies. She consistently maintained that her husband told her he shot himself by accident. We have carefully reviewed this statement, and we conclude that, far from being prejudicial to defendant, its admission was probably favorable to him.

Accordingly, these two assignments of error are also rejected.

For all of the reasons discussed herein, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOSEPH EUGENE VINES

No. 69A85

(Filed 2 July 1986)

1. **Constitutional Law § 28— murder—testimony at related trial—immunity hoped for—not promised—motion to dismiss denied**

The trial court did not deny defendant due process in a prosecution for first degree murder by failing to grant his motion to dismiss due to a grant of immunity where the judge found that defendant was not promised immunity from prosecution in this case in exchange for his testimony in other cases and the findings were supported by the testimony of defendant and others at the other trial and the affirmation of such testimony at the hearing on defendant's motion to dismiss.

2. **Indictment and Warrant § 3; Criminal Law § 13— kidnapping in one county—murder in another—indictments in one county valid**

Indictments which alleged that both a kidnapping and murder occurred in Buncombe County were valid on their face, and evidence that the murder actually occurred in Ashe County did not raise a fatal variance between the allegations of the indictment and the proof at trial and did not deprive Buncombe County of jurisdiction because the kidnapping undisputably took place

in Buncombe County and defendant was charged and convicted on the theory of felony murder.

3. **Criminal Law § 15— kidnapping and murder—separate counties—exclusive venue—first county to return true bill**

The venue in a murder prosecution lay in Buncombe County rather than Ashe County where the Ashe County grand jury returned a finding of "no true bill" and the Buncombe County grand jury subsequently returned a true bill. Criminal process was issued against defendant only when the true bill was returned by the Buncombe County grand jury and Buncombe County, being the first county to issue criminal process in defendant's case, had exclusive venue under N.C.G.S. § 15A-132(c) (1983).

4. **Jury § 7.11— death-qualified jury—motion to prohibit—properly denied**

The trial court in a first degree murder prosecution did not err by denying defendant's motion to prohibit the prosecution from death qualifying the jury.

5. **Homicide § 30.1— felony murder—refusal to submit lesser offense—no error**

The trial court did not err in a prosecution for first degree murder by refusing to submit to the jury possible verdicts of second degree murder and involuntary manslaughter where defendant was found guilty under the felony murder rule with kidnapping being the underlying felony. All of the evidence tended to show that the murder was committed in the perpetration of the kidnapping, there is no second degree felony murder, and duress is not a defense to an intentional killing. N.C.G.S. § 14-17 (1981).

6. **Homicide § 21.6— felony murder—evidence sufficient**

The trial court properly denied defendant's motions to dismiss in a first degree murder prosecution based on felony murder where there was substantial evidence of each essential element of first degree kidnapping, first degree murder by reason of premeditation and deliberation and under the felony murder rule, and that defendant was the perpetrator of the crimes.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment entered by *Lewis, J.*, at the 25 October 1984 Criminal Session of Superior Court, BUNCOMBE County, upon a jury verdict of guilty of first-degree murder under the felony murder rule. Heard in the Supreme Court 15 October 1985.

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

Gary S. Cash and Edward C. Hay, Jr., for defendant-appellant.

FRYE, Justice.

Defendant was tried upon indictments charging him with first-degree kidnapping and murder of Lonnie Gamboa.[1]

Defendant contends that the trial court erred in denying his motion to dismiss the charges against him due to a grant of immunity, in denying his motion to dismiss for improper venue, in denying his motion to prohibit death qualification of the jury, in failing to submit second-degree murder and involuntary manslaughter as possible verdicts, and in denying his motions to dismiss for insufficiency 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 first-degree kidnapping. Evidence for the State showed that on 5 January 1982, defendant had a meeting with federal agents R. B. Kaiser, Stan Keel and Thomas Chapman to discuss the murder and kidnapping of Lonnie Marshall Gamboa. Defendant told the agents that on 23 December 1981, at the request of Alan Ray Hattaway, he picked up Lonnie Marshall Gamboa and took him to a bar on Swannanoa River Road where they met with Hattaway. After talking briefly in the bar, the three men got into Hattaway's car and drove to another bar where they met Gary Hansford Miller. Miller got into the car and pointed a pistol at Gamboa. Gamboa was disarmed, his hands and arms taped together, and put in the trunk of the car. This all occurred in Buncombe County. The four men then drove for approximately two hours to Paul Bare's residence in Ashe County. Upon arrival at Bare's house, defendant and Miller removed Gamboa from the trunk and handcuffed him to a tree in the woods.

After approximately four hours elapsed, Bare and Miller released Gamboa from the tree and took him to Bare's garage. After discussing a debt that Gamboa owed Miller, Gamboa was blindfolded and driven to Ore Knob Mine in Ashe County. Defendant took Gamboa inside the fenced-in area surrounding the mine

1. Paul Wilson Bare, Gary Hansford Miller, and Alan Ray Hattaway were also convicted for their participation in the murder and kidnapping of Lonnie Gamboa. *See State v. Bare*, 309 N.C. 122, 305 S.E. 2d 513 (1983), and *State v. Miller*, --- N.C. ---, 341 S.E. 2d 531 (1986).

shaft, and after receiving instructions from Bare and Miller, pushed Gamboa into the mine shaft. Because Gamboa got hung on a tree root during the fall, defendant pulled him out and pushed him in again. Gamboa's body was recovered from the mine shaft on 25 January 1982.

On 6 January 1982, after being advised of his *Miranda* rights, defendant related his story concerning the Gamboa murder and kidnapping to Ashe County Sheriff Richard Waddell. Defendant's statement was subsequently reduced to writing and signed by defendant. Defendant was not arrested by Ashe County authorities at this time. He was allowed to leave North Carolina and travel to Florida where he remained for several months. While still residing in Florida, defendant traveled to Chicago, Illinois, to testify against Gary Miller concerning another murder and kidnapping in Ashe County. Defendant then returned to North Carolina to testify as the State's chief witness in the case against Paul Bare, *State v. Bare*, 309 N.C. 122, 305 S.E. 2d 513 (1983). After Bare's trial, defendant was enrolled in the Federal Witness Protection Program for approximately one year.

On 23 March 1983, a first-degree murder charge was sent to the Ashe County Grand Jury and a finding of "no true bill" was returned. On 14 February 1984, the Buncombe County Grand Jury indicted defendant on murder and first-degree kidnapping charges.

Defendant testified in his own behalf at trial. Defendant's testimony was that he primarily makes a living traveling to different locations working as an undercover agent for various state and federal law enforcement agencies. Defendant's testimony was consistent with his written confession obtained earlier by the Ashe County Sheriff. However, defendant testified that he had committed the acts under duress and had felt badly about the matter.

The jury returned verdicts of guilty of first-degree murder under the felony murder rule and first-degree kidnapping. The trial judge held that the kidnapping conviction merged with the felony murder conviction and, therefore, defendant was not sentenced thereon.

I.

[1] Defendant contends that the trial court committed reversible error in failing to grant his motion to dismiss the charges against him due to a grant of immunity.

In the case against Paul Bare, defendant was the State's chief witness. Defendant also testified in a federal criminal case against Gary Miller in Chicago, Illinois, concerning another murder and kidnapping in Ashe County. While preparing for these trials, defendant worked closely with Ashe County police officers, the Ashe County district attorney, and some federal agents. Defendant claims that he was often told by these officials, though not "promised," that he would not be prosecuted in the Gamboa case. Defendant contends that under these circumstances it would be a denial of due process to permit him to be prosecuted.[2]

The trial court held a two-day hearing on defendant's motion and heard testimony from defendant, federal agents Thomas Chapman and Steve Keel, District Attorney Michael Ashburn, and Assistant District Attorney Mike Helms of the Twenty-Third Judicial District, Asheville Police Officers Will Annarino and Ross Robinson, former Ashe County Sheriff Richard Waddell, and John Downey of the Winston-Salem Journal. The court also heard testimony concerning portions of transcripts of previous hearings in which defendant and others testified that no grant of immunity had been promised defendant in exchange for defendant's testimony in Bare's trial. The trial judge's findings were as follows:

> . . . .
>
> 2. On 5 January 1982, Defendant called A.T.F. Special Agent Thomas L. Chapman, and volunteered information concerning a murder in Ashe County;
>
> 3. From that time on until indicated, Defendant cooperated with and offered trial testimony for the State of North Carolina, and the United States;
>
> 4. The Defendant has not been granted formal immunity in accordance with G.S. 15A-1054(a) or applicable Federal statutes;

2. Defendant does not claim a grant of immunity under Article 61, Chapter 15A, of the North Carolina General Statutes.

5. Although Defendant may have hoped that his cooperation with or testimony for State and Federal officials would result in his not being prosecuted, no officer, much less prosecutor, ever told him or indicated in any manner that he would not be prosecuted *if he provided truthful testimony* (emphasis in original); indeed "truthful testimony" was never mentioned in this record;

6. In fact, Defendant testified that he "hasn't [sic] been told that if I testified I wouldn't be charged" and that he probably would have testified regardless;

7. Defendant has repeatedly made sworn statements in two (2) trials consistent with paragraph six.

It is well settled that "facts found by the trial judge are conclusive on the appellate court when supported by competent evidence." *State v. Pruitt II*, 286 N.C. 442, 454, 212 S.E. 2d 92, 100 (1975). Thus, we must determine whether the judge's findings are so supported.

In *State v. Bare*, 309 N.C. 122, 305 S.E. 2d 513, defendant, when questioned as to whether he had been granted immunity from prosecution in the Gamboa case, testified:

Q. Have you ever been promised anything else other than the Witness Protection Program for testimony you are giving here and participation in this case?

A. No sir I have not even been promised to [sic] put on Witness Protection; the case is still in Washington and still deciding if they are going to put me under witness protection. Not been promised anything by Mr. Chapman, Ashburn or anything else.

Q. So far as you know if they wanted to charge you today they could?

A. Yes sir.

Q. But they never said they wouldn't charge you, is that correct?

A. No sir, they didn't tell me they would not.

At a probable cause hearing in the *Bare* case, defendant testified as follows:

Q. Have you been offered any deal whatsoever by the State of North Carolina or any of its agencies or with the Federal Government or United States in exchange for your testimony in this case?

A. No, sir.

. . . .

Q. Have you been offered any immunity?

A. No, sir.

. . . .

Q. You have not discussed immunity with the State?

A. I haven't discussed it.

. . . .

Q. So that you came forward as a citizen to offer this information to Sheriff Waddell to do with as he sees fit?

A. Yes, sir.

. . . .

Q. And if he wants to arrest you right now, he has that right.

A. Yes, sir.

At the hearing on the motion to dismiss, defendant was read the questions and answers above in which he stated that he had not been granted immunity for his testimony in the Bare trial. Defendant testified that he had made such statements and that "nobody made any deals with me."

In addition, Thomas L. Chapman, a federal agent, testified at Bare's trial as to the possible indictment of defendant as follows:

Q. Well sir, isn't it true in order to get into the program, if Mr. Ashburn is the man who did it, whoever is in charge, have to first tell the government they will not be indicted for the crime [sic] which he was involved?

A. No sir, that is incorrect, he could be put in the program if in fact at a later time he was going to be indicted.

. . . .

Q. Is it your testimony that no promise of immunity of any type have [sic] been given to Mr. Vines?

A. That's correct.

Q. And you discussed that with Mr. Ashburn and Mr. Waddell?

A. That's correct.

Q. And if any of the parties wanted to, who had the power and authority they could indict Mr. Vines at this time?

A. It's my understanding he could be indicted.

At the hearing on defendant's motion to dismiss, Agent Chapman testified that prior to Bare's trial District Attorney Michael Ashburn told him that he had no intention of prosecuting defendant. Chapman later relayed this message to defendant. On cross-examination, Chapman admitted that he had testified under oath at Bare's trial that defendant had not been promised immunity from prosecution.

Michael Ashburn, District Attorney for the Twenty-Third Judicial District (includes Ashe County), testified at the hearing that he never promised or implied to defendant that he would not prosecute him and that he did not recall telling any other individuals that he would not prosecute defendant. In light of defendant's and others testimony under oath during Bare's trial, and the affirmation of such testimony at the hearing on defendant's motion to dismiss the charges, we conclude that the judge's findings that defendant was not promised immunity from prosecution in the Gamboa case in exchange for his testimony against Paul Bare were supported by competent evidence. Therefore, the trial judge did not err in denying defendant's motion to dismiss the charges against him based on a grant of immunity.

II.

Defendant next contends that the trial court erred in denying his motion to dismiss the murder charge against him because of improper venue. Defendant further contends that Buncombe County was without jurisdiction to indict him for the murder of Lonnie Gamboa.

JURISDICTION

[2] Defendant argues that since the State's evidence showed that he participated in the kidnapping of Gamboa in Buncombe County, and the murder in Ashe County, Buncombe County is without jurisdiction in the murder case. In support of his argument, defendant erroneously relies on *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984). In *Randolph*, defendants contended that the trial court erred when it refused to dismiss the indictments against them for kidnapping and larceny. Although defendants were indicted by the Wake County Grand Jury, the indictments alleged that the crimes were committed in Cumberland County. We held that the indictments were fatally flawed since a grand jury has jurisdiction to indict only for crimes alleged to have occurred in its own county. On the authority of *Randolph*, we arrested judgments entered on indictments for first-degree sexual offense and rape where the indictments were returned by the Stanly County Grand Jury but alleged that the offenses occurred in Mecklenburg County. *State v. Paige and Lowery*, 316 N.C. 630, 343 S.E. 2d 848 (1986). We so held because "the indictments show on their face that the grand jury which returned them lacked jurisdiction over the offenses charged." *Id.* at 639, 343 S.E. 2d at 854.

In the instant case, the indictments returned by the Buncombe County Grand Jury in both the murder and kidnapping cases alleged that the crimes occurred in Buncombe County. Therefore, the indictments are valid on their face. *Id.* The problem arises here since the indictment alleges that the murder occurred in Buncombe County, but the evidence tends to show that the victim was actually pushed into the mine shaft in Ashe County. We must therefore determine whether a fatal variance exists between the allegations in the indictment and the proof at trial.

Defendant was charged with and convicted of first-degree murder on the theory of felony murder. A necessary element of first-degree murder under the felony murder rule is the underlying felony. *See State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). The underlying felony, kidnapping, undisputably took place in Buncombe County. Thus, a necessary element of the murder took place in Buncombe County. Under the law of determining jurisdic-

tion as between states, jurisdiction lies in this state if any of the essential acts forming the crime take place in this state. *See* N.C.G.S. § 15-131; N.C.G.S. § 15-132; *see also State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964). This same rationale extends to jurisdiction of the county grand jury to indict.

Since the indictment alleges that the murder occurred in Buncombe County and the evidence disclosed that the kidnapping, an essential element of the crime, occurred in Buncombe County, there was no fatal variance between the allegations in the indictment and the proof at trial. Thus, we reject defendant's jurisdictional challenge to the indictment.

VENUE

[3] Defendant contends that venue in the murder case did not properly lie in Buncombe County since Ashe County first sought an indictment for murder against him.

N.C.G.S. § 15A-132, *Concurrent venue*, provides that:

> . . . .
>
> (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.

On 23 March 1983, a first-degree murder charge was submitted to the Ashe County Grand Jury and returned with a finding of "no true bill." On 14 February 1984, the Buncombe County Grand Jury returned a true bill charging defendant with the murder and kidnapping of Lonnie Marshall Gamboa. No true bill of indictment has been returned in Ashe County charging defendant with the murder or kidnapping of Gamboa.

"The office of an indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare his defense." *State v. Gates*, 107 N.C. 832, 835, 12 S.E. 319, 320 (1890). An indictment returned "no true bill" is not criminal process issued since it lacks the force and effect to instigate criminal action against an individual. Criminal process was issued in the murder case against defendant only when the true bill of indictment was returned by the Buncombe County Grand Jury. Buncombe County, being the first county to issue criminal

process in defendant's case, had exclusive venue to try the murder case. N.C.G.S. § 15A-132(c) (1983).

III.

[4] Defendant next contends that the trial court erred by denying his motion to prohibit the prosecution from "death qualifying" the jury prior to the guilt-innocence phase of the trial. Specifically, defendant asks this Court to reconsider *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985) ("death qualification" of jury in first-degree murder cases is constitutional) in light of the "original" arguments made in *Keeten v. Garrison*, 578 F. Supp. 1164 (W.D.N.C. 1984) ("death qualification" of jury violates sixth amendment right to be tried by jury drawn from representative cross-section of community).

We first note that the decision on which defendant relies, *Keeten v. Garrison*, 578 F. Supp. 1164, was reversed by the Fourth Circuit Court of Appeals, *Keeten v. Garrison*, 742 F. 2d 129 (4th Cir. 1984). That court held that a state may exclude jurors opposed to the death penalty without violating a defendant's right to be tried only by a jury drawn from a fair cross-section of the community.

In the recent decision of *Lockhart v. McCree*, 476 U.S. 162, ---, 90 L.Ed. 2d 137, 147 (1986), the United States Supreme Court held that the federal constitution "does not prohibit the states from 'death qualifying' juries in capital cases." *See also State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986). In light of this holding, it is clear that the trial court did not err in denying defendant's motion.

IV.

[5] Defendant contends that the trial court erred in refusing to submit to the jury as possible verdicts second-degree murder and involuntary manslaughter. The trial judge submitted as possible verdicts: first-degree murder by reason of malice, premeditation and deliberation; first-degree murder under the felony murder rule; voluntary manslaughter, and not guilty. Defendant was found guilty of first-degree murder under the felony murder rule, kidnapping being the underlying felony. Defendant contends that his evidence that he pushed Gamboa into the mine shaft under duress is sufficient to require the submission of second-degree

murder and involuntary manslaughter, and the failure of the court to do so was prejudicial error.

In the instant case, all of the evidence tended to show that the murder was committed in the perpetration of the felony of kidnapping. *See* N.C.G.S. § 14-17 (1981). Under the circumstances, the only way the jury could properly have found defendant guilty of second-degree murder or involuntary manslaughter would be to fail to find that the murder was committed in the perpetration of the kidnapping. Such finding would be completely contrary to the evidence presented. There is no second-degree felony murder nor is duress a defense to an intentional killing. *State v. Brock,* 305 N.C. 532, 290 S.E. 2d 566 (1982). Since defendant was found guilty of murder in the first degree on the theory of felony murder and was found not guilty on the charge of first-degree murder with premeditation and deliberation, no prejudice resulted from the court's failure to submit second-degree murder or involuntary manslaughter as possible verdicts. *See State v. Wall,* 304 N.C. 609, 621, 286 S.E. 2d 68, 75 (1982).

V.

[6] Lastly, defendant contends that the trial court erred in denying his motions to dismiss at the close of the State's evidence, to dismiss at the close of all the evidence, and to set aside the verdict based on the insufficiency of the evidence.

After the denial of defendant's motion to dismiss at the close of the State's evidence, defendant proceeded to offer evidence. Having offered such evidence, defendant waived his motion to dismiss at the close of the State's evidence. *State v. Leonard,* 300 N.C. 223, 266 S.E. 2d 631 (1980). Proper consideration is only upon his motion to dismiss made at the close of all the evidence. *Id.*

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 crimes. *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). When 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. 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. *Id.* 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. *Id.*

When the evidence in the instant case is viewed in the light most favorable to the State, there is substantial evidence of each essential element of first-degree kidnapping, first-degree murder by reason of premeditation and deliberation and under the felony murder rule, and that defendant was the perpetrator of the crimes. Thus, the trial judge's denial of defendant's motion was proper.

For the reasons stated above, we also find no error or abuse of discretion in the trial court's denial of defendant's motion to set aside the verdict based on the insufficiency of the evidence.

In defendant's trial we find

No error.

LEA COMPANY v. NORTH CAROLINA BOARD OF TRANSPORTATION

No. 588PA85

(Filed 2 July 1986)

1. **Eminent Domain § 5.10— delay in payment—additional compensation—rate of interest**

The statutory or legal rate of interest provided by N.C.G.S. § 136-113 as the measure of additional compensation for delay in payment in condemnation actions is deemed presumptively reasonable, but the landowner may rebut the rate's reasonableness by introducing evidence of prevailing market rates and demonstrating that the prevailing rates are higher than the statutory rate.

2. **Eminent Domain § 5.10— delay in payment—additional compensation—rate of interest—prudent investor standard**

The "prudent investor" standard is adopted for determining the appropriate interest rate to be used in calculating additional compensation for delay of payment in condemnation actions. Accordingly, in determining the proper rate of interest for delayed payment, the trial court shall consider any

evidence introduced as to the prevailing interest rates for investments varying in length and risk during the period of delay.

3. **Eminent Domain § 5.10— delay in payment—additional compensation—rate of interest—decision by court**

The trial court rather than the jury may determine the proper rate of interest and the amount to be added to the property owner's award to compensate for loss due to delay of payment in a condemnation action.

4. **Eminent Domain § 5.10— delay of payment—additional compensation—compound interest**

Compound interest rather than simple interest should be allowed for delayed payment in condemnation cases if the evidence shows that during the pertinent period the "prudent investor" could have obtained compound interest in the market place.

ON discretionary review of the judgment entered 11 April 1985 by *Ross, J.* in Superior Court, GUILFORD County. Heard in the Supreme Court on 12 February 1986.

Foster, Conner, Robson & Gumbiner, P.A., by C. Allen Foster and Eric C. Rowe, for the plaintiff-appellee.

Lacy H. Thornburg, Attorney General, by James B. Richmond, Special Deputy Attorney General, for the defendant-appellant.

MITCHELL, Justice.

This appeal involves an action brought by the plaintiff Lea Company under N.C.G.S. § 136-111 for inverse condemnation. The primary issue raised before this Court involves the constitutionality of the statutory interest rate as applied to the facts of this case. The trial court held that it would be unconstitutional to apply the statutory rate of 8% per annum in calculating the additional compensation owed the plaintiff by reason of the defendant's delay in payment from the date of the taking to the date of judgment awarding compensation. We agree.

The plaintiff alleged that the defendant North Carolina Board of Transportation (hereinafter "BOT") had taken a compensable interest in Lea Company's property as a result of intermittent and recurring flooding caused by inadequately sized culverts installed by BOT in its highway structures downstream of Lea Company's property. On 18 August 1980, judgment was entered in Superior Court, Guilford County, holding that BOT was liable

to pay just compensation for the taking of Lea Company's property. That judgment on the issue of liability was affirmed by the Court of Appeals, 57 N.C. App. 392, 291 S.E. 2d 844 (1982), and by this Court, 308 N.C. 603, 304 S.E. 2d 164 (1983).

The case was remanded to the Superior Court for a trial on the issue of damages. On 11 April 1985, the trial court found just compensation for the property taken to be $700,000, the difference in fair market value of the developed real property immediately prior to the taking by BOT and the value immediately after the taking that occurred on 1 September 1974. The trial court also determined that the plaintiff was entitled to compensation for the delay in payment during the time between the date of taking and the date of judgment awarding compensation for the property taken. The additional compensation for delay was measured "by interest on the amount of compensation to which plaintiff is entitled as of the date of the taking."

In determining the appropriate interest rate to use for measuring the additional amount to be awarded the plaintiff for delayed compensation, the trial court received evidence of interest rates which Lea Company had paid on borrowings on unsecured lines of credit and of interest rates Lea Company had received monthly from investments of surplus funds in repurchase agreements during the period from 1 September 1973 through 22 February 1985. The interest rates paid ranged from 6.75% to 21.00% and the interest received ranged from 6.75% to 19.625%. The weighted average was 12.56%.

The plaintiff's expert economist testified to various weighted monthly average rates of interest for a period from September 1974 through December 1984. The evidence of weighted monthly average rates considered by the trial court related to the following:

(1) Prime rates—the rates banks charge their best customers. (low, 6.25% in 3/77; high, 20.50% in 8/81; weighted average 11.50% from 9/74 to 12/84);

(2) Prime commercial paper—high quality commercial paper—borrowings and lendings of excess funds by leading, financially stable corporations in the market place. (low, 5.23% in 2/77; high, 18.07% in 12/80);

(3) Long Term U.S. Government bonds—20 year series. Bonds of other maturities which have been adjusted, but are at constant maturity for 20 years, by the Treasury Department. (low, 6.61% in 2/75; high, 15.13% in 10/81);

(4) New Issue AAA Utility—new issues of the highest quality utilities coming out monthly (reporting ended December 1983; subsequent reporting of A-rated utilities at higher rate because of increased risk). (low, 8.04% in 8/77; high, 17.21% in 9/81);

(5) National Mortgage Contract Note—the weighted average of all conventional mortgage loans, developed by the Department of Housing and Urban Development. (low, 8.63% in 5/75; high, 15.68% in 11/81);

(6) FHLBB Series—the Federal Home Loan Bank Board series—rates of mortgage backed by the Federal Home Loan Bank Board. (low, 8.89% in 7/75; high, 16.38% in 11/81);

(7) HUD Series—rates of mortgages subsidized by the Department of Housing and Urban Development. (low, 8.80% in 1/77; high, 18.30% in 9/81); and

(8) Moody's Composite Index—yields on long-term AAA rated corporate bonds (through February, 1985). (low, 7.92% in 9/77, high, 15.49 in 9/81).

From the evidence received, the trial court found *inter alia* that: (1) as determined from Moody's Composite Index of Yields on Long-term Corporate Bonds, the approximate weighted average interest rate for the period September 1974 through February 1985 was 10.85% per annum; (2) the approximate weighted average prime interest rate for the period September 1974 through December 1985 was 11.51% per annum; (3) "a reasonable and prudent investor could have obtained an average interest rate for the period September 1974 through April 1985 of 11% per annum"; and (4) an interest rate of 11% per annum was a good and fair measure of the amount to be added to the plaintiff's award.

Based on those findings of fact, the trial court concluded *inter alia* that:

> North Carolina General Statute § 136-113 providing for interest at the statutory legal rate from the date of the taking to the date of judgment does not provide plaintiff in this case with just compensation under the Constitution of the United States and the Constitution of North Carolina, because the statutory legal rate is less than the reasonable and just fair market rate of interest between the date of taking and the date of judgment, which is reflective of the cost value of the use of such interest in property or money substitute therefor.
>
> North Carolina General Statute § 136-113 as applied to the facts of this case violates the Constitution of the United States and the Constitution of North Carolina.
>
> The owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value had it been paid contemporaneously with the taking. Interest at the rate of 11% per annum is a good and fair measure of the amount to be added to make the award a full and adequate equivalent of the property taken.

Accordingly, the trial court awarded the plaintiff additional compensation in an amount equal to interest at 11% per annum for the time between the taking and the judgment awarding compensation. On 5 November 1985, we allowed the defendant's petition for discretionary review of the judgment of the trial court.

The defendant BOT concedes that Lea Company is entitled to additional compensation for delay in payment. The principle is long-standing that when the taking of property by the State precedes the payment of compensation, the owner is entitled to additional compensation for the delay in payment. *DeBruhl v. State Highway Commission*, 247 N.C. 671, 102 S.E. 2d 229 (1958). The fifth and fourteenth amendments to the Constitution of the United States and article I, section 19 of the Constitution of North Carolina require this additional payment as a part of just compensation. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 81 L.Ed. 2d 1 (1984); *Shoshone Tribe v. United States*, 299 U.S. 476, 81 L.Ed. 360 (1937); *Jacobs v. United States*, 290 U.S. 13, 78 L.Ed. 142 (1933); *Phelps v. United States*, 274 U.S. 341, 71 L.Ed. 1083 (1927); *Seaboard Air Line Co. v. United States*, 261 U.S. 299, 67 L.Ed. 664 (1923); *Airport Authority v. Irvin*, 306 N.C. 263, 293 S.E. 2d 149 (1982); *DeBruhl v. Highway Comm.*, 247 N.C.

671, 102 S.E. 2d 229 (1958). "The additional sum awarded for delay in payment of the value for the property taken is not interest *eo nomine*, but interest is a fair means for measuring the amount to be arrived at of such additional sums." *Airport Authority v. Irvin*, 306 N.C. at 272, 293 S.E. 2d at 155.

BOT relies heavily on *DeBruhl* to support its argument that the statutory or "legal" interest rate of 8% per annum is a sufficient measure to satisfy the requirement of just compensation. This Court stated in *DeBruhl*:

> Ordinarily, the legal rate of interest, where the condemned property is located, upon the original sum fixed as compensation for the fair market value of the property on the taking date, is considered a fair measure of the amount to compensate the owner for the delay in paying the award, so as to make just compensation.

247 N.C. at 687, 102 S.E. 2d at 241. In response to this language in *DeBruhl*, the General Assembly in 1959 first enacted N.C.G.S. § 136-113 which now provides that:

> To said amount awarded as damages by the commissioners or a jury or judge, the judge shall, as a part of just compensation, add interest at the legal rate as provided in G.S. 24-1 on said amount from the date of taking to the date of judgment; but interest shall not be allowed from the date of deposit on so much thereof as shall have been paid into court as provided in this Article.

N.C.G.S. § 136-113 (Cum. Supp. 1985). At the time of the enactment of N.C.G.S. § 136-113, the legal rate of interest as provided by N.C.G.S. § 24-1 was 6% per annum. In 1979, the General Assembly raised the statutory rate to 8% per annum.

The issue before this Court is whether N.C.G.S. § 136-113, which in effect provides interest of 8% per annum as the measure to apply in calculating compensation for delay in payment, is constitutional as applied to the facts of the case *sub judice*. The trial court found the statute to be unconstitutional as applied and substituted an interest rate of 11% per annum. We affirm.

Our research has not uncovered any other North Carolina case in which a party has challenged the constitutionality of using

the statutory rate of interest as the measure of additional compensation for delay in payment in condemnation actions. *See generally,* Note, *Eminent Domain—Interest as an Element of Just Compensation,* 38 N.C. L. Rev. 89 (1959). Therefore, we are compelled to consider cases from other jurisdictions in resolving this issue of first impression.

When private property is taken for public use, the landowner is entitled to "the full and perfect equivalent of the property taken." *Seaboard Air Line R.R. v. United States,* 261 U.S. 299, 304, 67 L.Ed. 665, 669 (1923). In awarding just compensation for the property taken, "the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Id.; Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 81 L.Ed. 2d 1 (1984). "As a matter of just compensation and due process under the federal and state constitutions, a landowner cannot be denied interest on the unpaid part of the award during the time he is deprived both of the use of land and of the money representing its value." *Arkansas State Highway Comm. v. Vick,* 284 Ark. 372, 375, 682 S.W. 2d 731, 732 (1985). "This is true because he who pays $1.00 tomorrow to discharge a debt of $1.00 due and payable today, pays less than he owes." *United States v. Blankenship,* 543 F. 2d 1272, 1275 (9th Cir. 1976).

Since the ascertainment of just compensation is a judicial function and compensation for delay in payment is a part of just compensation, determining the amount of additional compensation for delay in payment is also a judicial function. *Seaboard Air Line R.R. v. United States,* 261 U.S. 299, 67 L.Ed. 664 (1923); *United States v. Blankenship,* 543 F. 2d 1272 (9th Cir. 1976); *Washington Metro Area T.A. v. One Parcel of Land,* 706 F. 2d 1312 (4th Cir. 1983); *Miller v. United States,* 620 F. 2d 812 (Ct. Cl. 1980); *Township of Wayne v. Cassatly,* 137 N.J. Super. 464, 349 A. 2d 545 (1975); *Matter of City of New York,* 58 N.Y. 2d 532, 462 N.Y.S. 2d 619, 449 N.E. 2d 399 (1983). *See generally,* Note, *Interest Rates in Eminent Domain: Is 6% Just Compensation in a 12% World?,* 12 Loyola L.A. L. Rev. 721 (1979).

Several jurisdictions have applied an interest rate set by statute if that interest rate satisfies the requirement that just compensation be paid for a taking. *E.g., Miller,* 620 F. 2d at 837; *Matter of City of New York,* 58 N.Y. 2d at 537, 462 N.Y.S. 2d at

621, 449 N.E. 2d at 401. "[T]he rate of interest set by a statute can be applied to a claim for just compensation if such rate is reasonable and judicially acceptable." *Miller*, 620 F. 2d at 837.

In *Matter of City of New York*, the court held that the legislature may fix a prima facie measure of the proper interest rate to be applied in condemnation proceedings. *Matter of City of New York*, 58 N.Y. 2d at 537, 462 N.Y.S. 2d at 621, 449 N.E. 2d at 401 (1983). The statutory rate is presumptively reasonable, but the landowner may rebut the rate's reasonableness by introducing evidence of prevailing market rates. The landowner must demonstrate that a higher interest rate for delay in payment is required as an integral part of just compensation. *Id.* The statutory rate will constitute a floor for the interest rate to be used in awarding additional compensation when the State delays its payment to the landowner. *See Washington Metro Area T.A. v. One Parcel of Land*, 706 F. 2d at 1322; *Miller*, 620 F. 2d at 839; *United States v. 319.46 Acres of Land*, 508 F. Supp. 288 (W.D. Okla. 1981).

[1] We adopt and apply in this case the foregoing guidelines set forth in *Matter of City of New York*. The General Assembly has enacted N.C.G.S. § 136-113 which provides for the legal rate as a prima facie rate to be imposed for delay in compensation. This statutory rate is deemed presumptively reasonable. However, the landowner may rebut the rate's reasonableness by introducing evidence of prevailing market rates and demonstrating that the prevailing rates are higher than the statutory rate.

Having decided that the landowner must be allowed to introduce evidence to rebut the presumption of reasonableness of the statutory interest rate, our inquiry turns to the question of what prevailing interest rates should be considered. The jurisdictions that have addressed this issue are not in complete agreement. Some have held that the proper interest rate to be applied is the rate applicable to other obligations of the government, a low-risk debtor. *United States v. Blankenship*, 543 F. 2d 1272 (9th Cir. 1976). However, we agree with the language in *Miller v. United States* that:

> No reasonable investor would purchase an obligation with both an uncertain date of maturity and an uncertain amount of principal payment at maturity. Plaintiffs had their business property involuntarily converted into an extremely illiq-

> uid claim against the United States. Since plaintiffs' options for other investments were effectively cut off, just compensation in this case should include payments for delay of compensation measured by the interest rates prevailing between the taking and payment dates. The Government, not the unwilling condemnee, should be the one to bear the risk of any fluctuations in interest rates.

620 F. 2d 812, 839 (Ct. Cl. 1980). *See also, Georgia Pacific Corp. v. United States*, 640 F. 2d 328 (Ct. Cl. 1980); *Pitcarin v. United States*, 547 F. 2d 1106 (Ct. Cl. 1976); *Redevelopment AG. of C. of Burbank v. Gilmore*, 38 Cal. 3d 790, 214 Cal. Rptr. 904, 700 P. 2d 794 (1985). We reject the view that interest rates on government obligations are the proper measure of just compensation.

The United States Court of Claims has utilized Moody's Composite Index of Yields on Long Term Corporate Bonds to establish binding rates applicable in all cases for particular calendar years. *Georgia Pacific v. United States*, 640 F. 2d 328 (Ct. Cl. 1980); *Miller v. United States*, 620 F. 2d 812 (Ct. Cl. 1980); *Tektronix, Inc. v. United States*, 575 F. 2d 832 (Ct. Cl. 1978); *Pitcarin v. United States*, 547 F. 2d 1106 (Ct. Cl. 1976). But commercial interest rates are in a constant state of flux and time periods differ in every condemnation case. The actual available rate of return will vary from case to case. Therefore, we decline to follow the Court of Claims in setting a standard interest rate applicable for particular years.

The remaining jurisdictions have considered a composite of interest rates on different types of securities. *E.g., United States v. 429.59 Acres*, 612 F. 2d 459 (9th Cir. 1980); *United States v. 319.49 Acres*, 508 F. Supp. 288 (W.D. Okla. 1981); *Township of Wayne v. Cassatly*, 137 N.J. Super. 464, 349 A. 2d 545 (1975); *Gilmore*, 38 Cal. 3d at 803, 214 Cal. Rptr. at 914, 700 P. 2d at 804. These jurisdictions have applied the "prudent investor" standard in determining the appropriate interest rate to be used in calculating additional compensation for delay. The test to consider is the rate which would have been earned by "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal." *Washington Metro Area v. One Parcel of Land*, 706 F. 2d 1312, 1322 (4th Cir. 1983); *429.59 Acres of Land*, 612 F. 2d 459 (9th Cir. 1980); *Gilmore*, 38 Cal. 3d at 803,

214 Cal. Rptr. at 913-14, 700 P. 2d at 804. "Since a prudent investor would diversify his interest portfolio, . . . the trial court should consider prevailing rates, during the period of delay, for investments of varying lengths and risk. Typically, these have included short, medium, and long-term government and corporate obligations." *Gilmore*, 38 Cal. 3d at 803, 214 Cal. Rptr. at 914, 700 P. 2d at 804.

[2] We adopt the "prudent investor" standard. Accordingly, we hold that in cases of delayed payment, our trial courts shall consider any evidence introduced as to the prevailing interest rates for investments varying in length and risk during the period of delay. When such evidence is introduced the trial court shall consider it in arriving at an interest rate by which to calculate compensation for delay and to satisfy the right to just compensation for property taken for public use.

[3] In order to promote the expeditious administration of justice, we elect to exercise the rarely used general supervisory powers given this Court in article IV, section 12(1) of the Constitution of North Carolina and choose to address two collateral issues not raised by the parties. *See State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975). The first is whether the trial court rather than the jury may determine the rate of interest. N.C.G.S. § 136-113 allows the trial court to add interest to the damages awarded as just compensation. We conclude that the trial court may determine the proper rate of interest and the amount to be added to the property owner's award to compensate for loss due to delay. The standard practice in North Carolina is to allow the trial court "to add interest based on the jury's verdict." *Airport Authority v. Irvin*, 306 N.C. 263, 274, 293 S.E. 2d 149, 157 (1982). "The sole function of the jury . . . [is] to find the amount of damages (compensation) to which the owner was entitled at the time the land was taken. All other matters of adjustment of award between the owner and the condemnor . . . [are] for the court." *Arkansas-Missouri Power Co. v. Hamlin*, 288 S.W. 2d 14, 18 (Mo. 1956).

[4] The second collateral issue is whether compound interest rather than simple interest should be used in measuring the amount by which the award should be adjusted due to delayed payment. Several jurisdictions have allowed the imposition of compound interest. *United States v. 429.59 Acres*, 612 F. 2d 459

(9th Cir. 1980); *United States v. Blankenship*, 543 F. 2d 1272 (9th Cir. 1976); *United States v. 319.49 Acres*, 508 F. Supp. 288 (W.D. Okla. 1981); *United States v. 164.25 Acres*, 159 F. Supp. 728 (D.N.H. 1957); *United States v. Northern Pacific R.R. Co.*, 51 F. Supp. 749 (E.D. Wash. 1943).

In *DeBruhl*, this Court stated that "[i]n the absence of statutory authority, compound interest should not be awarded." *DeBruhl v. Highway Comm.*, 247 N.C. 671, 687, 102 S.E. 2d 229, 241 (1958). We decline to follow that language in *DeBruhl*, however, as the opinion in that case assumed that the statutory interest rate would always apply. Since this Court had now adopted the "prudent investor" standard, compound interest should be allowed for delayed payment in condemnation cases if the evidence shows that during the pertinent period the "prudent investor" could have obtained compound interest in the market place. The use of compound interest as a measure in calculating additional compensation for delay is a matter which will turn upon the evidence in each case and must be decided on a case-by-case basis.

We turn finally to the trial court's findings of fact and conclusions of law in the present case. From the record, it is evident that the trial court correctly applied the "prudent investor" standard and considered evidence of a proper composite of prevailing interest rates to arrive at an "average interest rate for the period of delay." The trial court's conclusions are supported by its findings of fact which are supported by substantial competent evidence. The judgment of the trial court is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. ABDUL MALIK MUTAKBBIC

No. 547A84

(Filed 2 July 1986)

1. Rape and Allied Offenses § 19— indecent liberties with child—testimony that victim's grandmother bore animosity to defendant—not admitted

The trial court did not err in the prosecution of defendant for first degree rape and taking indecent liberties with his niece by marriage by refusing to

admit testimony showing that the victim's grandmother, with whom she lived, bore animosity for defendant and testimony that defendant believed the grandmother coerced the victim to accuse him of rape. The grandmother was not the prosecuting witness and there was no competent evidence that she instigated the prosecution; all of the evidence showed that the prosecution was initiated after a social worker reported the matter to the district attorney following her own independent investigation.

2. **Criminal Law §§ 102.6; 128.1— the State's closing argument—facts not in evidence—mistrial denied—no error**

The trial court did not err in denying defendant's motion for a mistrial following the State's closing argument in a prosecution for rape and taking indecent liberties where the prosecution argued that the victim's grandmother first reported the sexual assaults on 22 July, the social worker's testimony had been contrary to that argument, but the victim's grandmother, called by defendant, gave testimony which tended to support the argument. The prosecution may properly argue facts in evidence or reasonable inferences therefrom regardless of whether the State or defendant introduced those facts, defendant failed to register an objection during the argument, and rulings on mistrial motions are for the trial court's discretion. N.C.G.S. § 7A-544 (1985 Cum. Supp.).

3. **Criminal Law § 101.4— motion to reopen evidence during deliberations—denied—no error**

The trial court did not err in a prosecution for rape and taking indecent liberties with a child by denying defendant's motion to reopen the evidence during jury deliberations to permit introduction of the original neglect report. The matter was within the trial court's discretion, there was ample support for his decision in that no effort was made by defendant during trial to have the report introduced even though defendant knew of its existence, and the evidentiary conflict defendant sought to resolve by introducing the document was relatively insignificant.

4. **Criminal Law § 101.4— motion to inquire into which document the jury was inquiring about—denied—no error**

The trial court did not err in a prosecution for rape and taking indecent liberties with a child by denying defendant's motion to inquire of the jury which document not in evidence it had inquired about; assuming the document was a neglected child report to social services, the document was relatively insignificant and was not in evidence.

5. **Criminal Law § 126— motion to poll jury to determine whether they had considered particular evidence—denied**

The trial court did not err in a prosecution for rape and taking indecent liberties with a child by denying defendant's motion to poll the jurors after the verdict to determine whether they had considered whether the victim's grandmother had made a neglected child report to social services and whether the report contained allegations of possible child abuse. N.C.G.S. § 15A-1240(a).

APPEAL by defendant from judgments by *Ellis (B. Craig), J.*, at the 11 June 1984 Criminal Session of WAKE County Superior

Court, sentencing him to two consecutive life terms, a third concurrent life term, and three concurrent ten-year terms, upon his convictions of three counts of first degree rape and three counts of taking indecent liberties with a child. This Court allowed defendant's petition to bypass the North Carolina Court of Appeals as to his appeals from the indecent liberties convictions.

Lacy H. Thornburg, Attorney General, by James E. Magner, Jr., Assistant Attorney General, for the state.

William G. Ransdell, Jr. for defendant appellant.

EXUM, Justice.

The victim in this case was an eight-year-old child in July 1983, the time of the offenses alleged in the indictments. She lived with her maternal grandmother, Betty Veal; but for one week during July 1983 Veal arranged for her to stay with the child's mother, Jewel Upchurch. Upchurch lived in a rooming house two to four blocks from the house where defendant lived with his wife Brenda, who was Upchurch's sister. Defendant is thus the victim's uncle by marriage.

Defendant's appeal presents questions relating first to the admissibility of evidence tending to show animosity toward defendant by Veal, who was not a state's witness but who reported the incidents out of which the prosecutions arose to the Social Services Department, and second to various rulings of the trial court concerning the state's closing jury argument and the jury's possible consideration of a Social Services Department report reduced to writing but not offered into evidence in the case. We find no error in the trial.

I.

The child testified that on several occasions during the week she spent with her mother in the summer of 1983, when defendant was alone with her after they had taken defendant's wife to work, defendant would remove their clothes and force her to engage in vaginal and anal intercourse. He occasionally gave her money in return. The child said she told her grandmother Veal about these incidents when she returned to Veal's home. She also related the incidents to Frederica McKeithan of the Wake County

Department of Social Services, and to Dr. Jerry Bernstein, both of whom testified for the state.

Frederica McKeithan, a child protective services investigator with the Wake County Department of Social Services, testified she first became involved with this case when a neglect report received by a colleague on 22 July 1983 was forwarded to her. McKeithan first spoke with Veal on 4 August 1983 by telephone regarding that report. During this conversation Veal mentioned to McKeithan possible sexual molestation of her granddaughter by defendant. An appointment for McKeithan to interview the child on 8 August was then made. According to McKeithan, no references to sexual molestation appeared in the 22 July 1983 report. McKeithan interviewed the child on 8 August 1983 to investigate the reports of abuse and neglect. McKeithan testified that it was a "long interview" in which she had to spend a lot of time with the child before the child "would start telling me these things that she evidently was not real open about." Finally, the child told her about having had vaginal and anal sexual intercourse with her uncle, Abdul Mutakbbic. During her interview McKeithan was able to establish the dates on which these events occurred as being 17, 18 and 19 July 1983, the dates eventually set out in the bills of indictment. Based upon what the child told her, McKeithan made an appointment for the child to be examined by Dr. Jerry Bernstein, a Raleigh pediatrician and child medical examiner. Dr. Bernstein's 10 August 1983 examination of the child revealed a much larger vaginal opening than is normal for the child's age. Armed with Dr. Bernstein's findings and the information gained in her interviews with the child, McKeithan reported the matter to the district attorney's office because, in her words, "that is the law."

Defendant and various family members and friends testified they had been at defendant's home over the entire period when the victim claims the sexual assaults took place. They all saw the girl only once that week for a short time when she was looking for her mother. On cross-examination defendant, thirty years old at trial, admitted he had pleaded guilty in March 1974 to attempted rape and had been convicted in June 1981 in Wake County District Court of assault on his wife Brenda.

Defendant called as his witness Veal, whose testimony substantially corroborated the victim's. Veal, on direct examination by defendant, testified that when she brought the child back to her home from Upchurch's house in July 1983, the child behaved strangely but would not say what was troubling her. Finally after a "couple of days," while the two were watching television in the evening, the following conversation between them occurred:

> [S]he [the child] said, 'Grandma, I love you.' I said, '. . . do you have anything you want to tell me?' She said, 'No'; I said, 'O.K., we are going to sit here and look at television and if you have anything you want to tell me, go ahead, I'm listening.' So she set there about five minutes, and so she said, 'If I tell you, can you keep a secret?' I said, 'Yes, I can keep a secret.' I said, 'What is the secret?' She said, 'I'm afraid to tell.' I said, 'Well, you don't have to be afraid to tell me.' I said, 'You can tell me.' So then she told me she said, 'My Mama sent me down to Brenda's.' I said, 'I told her not to send you down there.' She said, 'Well, she sent me down there.' And she hesitated, and she said, 'Abdul did something.' I said, 'What did he do?' And she said, 'I'm scared to tell.' I said, 'Well, you don't have to be scared to tell me.' And she told me, said, 'He did like that'; I said, 'Did what like that?' And she said, 'He put his privates in me.'

Veal said she called McKeithan "the next day." Regarding what she told McKeithan, Veal testified as follows:

> Q. O.K., and when you talked to Ms. McKeithan, did you talk about Abdul?
>
> A. Talk about Abdul?
>
> Q. Yes, did you mention Abdul to Ms. McKeithan?
>
> A. I'm not certain. I know I told her what [the child] had said. I might have. I had to explain to her what [the child] said to me in order for her to understand what I was getting at.
>
> Q. So you did tell Ms. McKeithan that [the child] had told you Abdul had put his privates in her?

A. Like I said, I'm not certain. I might have. I had to explain to her so she would come out and help me with the problem.

When asked if she had ever had an "argument, disagreement, a falling out" with defendant, her reply and the succeeding colloquy was as follows:

I wouldn't say exactly a falling out. I had some trouble with him about beating my daughter up in my house and I asked him whenever he decided to do it, to do it at his own house, not mine.

Q. Did you ever tell him you would get him?

A. Get him about what?

Q. About an argument you all had at a birthday party at his house?

A. No.

During the presentation of defendant's evidence he sought unsuccessfully to offer testimony from Veal's daughters, Upchurch and Brenda Mutakbbic, regarding certain threats Veal had made against them and against defendant. He also sought unsuccessfully to testify himself about his beliefs and opinions concerning Veal's attitude toward him and his belief that Veal had encouraged the child to testify against him. Defendant brings forward an assignment of error directed to the trial court's rulings that this evidence was inadmissible.

After the state's closing argument defendant moved for a mistrial on the ground portions of the argument were not supported by the evidence. The motion was denied. During jury deliberation, the jurors inquired of the court whether it is "permissible to receive a copy of [a] document referred to in the testimony so we might read information originated on it, etc.?" The court after a bench conference with counsel for the state and defendant informed the jurors that only documents introduced into evidence could be viewed by them. It agreed to allow the jury to see the only document offered into evidence the following morning after the evening recess. The following morning defendant moved the court to inquire of the jury what document not in evidence it had inquired about the previous afternoon. The motion

was denied. Thereafter while the jury was deliberating defendant moved to reopen the evidence in order that the 22 July 1983 report to the Social Services Department might be offered into evidence and the jury permitted to see it. The motion was denied. Finally after the verdict defendant moved that the jurors be polled as to whether in reaching a verdict they considered that the 22 July 1983 report to the Social Services Department was made by Veal and, if so, that the report contained information from Veal that defendant had molested the child. The motion was denied. Defendant brings forward assignments of error directed to each of the foregoing rulings of the trial court.

II.

[1] Defendant first argues the trial court committed reversible error in refusing to admit the testimony of Brenda Mutakbbic and Upchurch tending to show their mother Veal bore animosity for defendant and defendant's testimony that he believed Veal coerced her granddaughter to accuse him of rape.

Judge Ellis sustained the state's objections to Brenda Mutakbbic's proffered testimony that Veal had threatened "to get [defendant] one way or the other" when the two were present in Mrs. Mutakbbic's hospital room in 1981, and had told defendant at Veal's son's birthday party at defendant's home on 23 April 1983, "I'm still going to get you." On cross-examination, Mrs. Mutakbbic admitted that Veal's statements followed a 1981 incident when she was hospitalized as a result of a beating defendant inflicted and for which he was convicted of assault. Judge Ellis found these alleged threats irrelevant and too remote, and declined to admit that testimony. Judge Ellis also excluded Upchurch's proffered testimony that in late 1982 at her cousin's trailer Veal threatened to kill defendant and on other occasions Veal said she did not like defendant.

Judge Ellis permitted defendant to testify on direct examination to the above-mentioned threats by his mother-in-law but refused to allow defendant to testify before the jury as follows:

> Q. Do you know of any reason why she [the prosecuting witness] would tell?

A. [She] would not tell this if someone would not be telling her to do this and I do believe that Ms. Betty told her to say this.

Q. Tell us why you believe Ms. Betty told her to do this?

A. This is a way of getting me out of the way.

. . . .

Q. Well, what has Ms. Betty ever said to you to cause you to think she might do this to you?

A. 'Cause she had constantly said she would get me back no matter what it takes; she would break me no matter what it cost, she would do it.

Q. How many times has she told you that?

A. She's told me this when we was living in—with Johnny Veal, her first husband; Johnny Veal told me, "Abdul." Well, anyway, Ms. Betty have told me on many occasions in Durham, here in Raleigh, and Wakefield Apartments, over to her home, to Lillian, to, I can't call her name that well, it was relatives, you know, and also I was over to Ms. Ella McLean, Brenda's grandmother, and she made threats over there about getting rid of me.

Defendant relies first on the principle that a criminal defendant may offer evidence of declarations made by the prosecuting witness which tend to show animosity or bias toward defendant. *State v. Wilson*, 269 N.C. 297, 152 S.E. 2d 223 (1967) (incest prosecution; error to exclude evidence of declaration of defendant's daughter, the prosecuting witness, that her father was "too tight on her" and she could "have a lot more fun if her daddy wasn't at home"). He also relies on *State v. Flowers*, 184 N.C. 688, 114 S.E. 289 (1922) (an embezzlement prosecution) for the principle that a criminal defendant may offer evidence that a prosecution against him was actually instigated by someone other than the prosecuting witness because of the instigator's personal bias against the defendant.

Neither of these cases controls us here. Veal was not the prosecuting witness nor is there any competent evidence, proffered or admitted, that Veal instigated the prosecution. Defend-

ant's "belief" or surmise that she did is not competent. Witnesses must testify to facts, not beliefs or surmises. All the competent evidence both for the state and defendant demonstrates, in fact, that Veal did *not* instigate the prosecution. The child first volunteered the information about the sexual assaults to Veal. Veal, rather than reporting the incidents to law enforcement authorities in order to begin a criminal prosecution, contacted a social worker, McKeithan, to obtain assistance for her granddaughter. Subsequently, McKeithan conducted an independent investigation. McKeithan's independent investigation, not anything Veal reported, caused McKeithan to report the matter to the district attorney who, in turn, made a decision to prosecute.

Judge Ellis properly excluded evidence purporting to show Veal's bias against defendant because Veal neither testified for the state nor instigated defendant's prosecution. The proffered evidence thus was irrelevant. He also properly excluded defendant's "belief" about Veal's motives and actions because this constituted mere speculation and conjecture, not facts.

III.

Defendant's three remaining arguments all relate to the 22 July 1983 report made to the Department of Social Services. Social worker McKeithan testified a colleague in her office received this report. She refused to divulge the reporter's name or the contents of that report or other reports based on her subsequent investigations.[1] She relied on N.C.G.S. § 7A-544, which reads in pertinent part as follows: "All information received by the Department of Social Services shall be held in strictest confidence by the Department." McKeithan did say the 22 July 1983 report did not mention sexual abuse; she first learned of that possibility in her telephone conversation with Veal on 4 August 1983. Veal, when called by defendant, testified that although "not certain,"

1. The trial court, in order to preserve Ms. McKeithan's report for the appeal, sealed a copy of the report and had it delivered to this Court with the record on appeal.

she "might have" told McKeithan in July several days after the child's return to her home about the possible sexual assaults.[2]

A.

[2] After the state's closing argument, which was not transcribed and is not brought forward on appeal, defendant moved for a mistrial apparently because the prosecutor had argued to the jury that Veal had first reported the sexual assaults described by the child on 22 July 1983. Defendant says the argument was unfair, contrary to the state's own evidence, and not supported by any other evidence in the case. He argues the denial of his motion constitutes reversible error.

We disagree. First, we note defendant failed to register an objection at any time during the prosecutor's argument. Second, the prosecutor properly may argue to the jury facts in evidence and reasonable inferences therefrom, regardless of whether the state or defendant introduced those facts into evidence. Here, although McKeithan, the state's witness, testified contrary to the state's jury argument, Veal, called by defendant, gave testimony which tends to support the argument. Finally, rulings on mistrial motions based on trial error are matters for the exercise of the trial court's discretion. *State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986). The ruling here was well within the discretionary ambit of the trial court.

B.

[3] We likewise find no merit to defendant's argument that denial of his motion to reopen the evidence to permit introduction of the 22 July 1983 report while the jury was deliberating constituted reversible error. Again, this is a discretionary ruling. *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206 (1971). Judge Ellis's decision not to reopen the case to admit additional evidence, ". . . being a matter within his discretion, will not be disturbed unless

2. In connection with these arguments, defendant moves this Court to amend the record on appeal to add a photograph of a chalkboard drawing used by the jury during its deliberations. The drawing represents the calendar for the last two weeks in July and the first two weeks in August 1983. It shows the jury identified 17, 18 and 19 July as the dates of the offenses charged. For 22 July it wrote "contact with S. Services"; for 4 August, "appointment"; for 8 August, "S. worker"; for 10 August, "doctor"; and for 11 August, "arrest." Defendant's motion is allowed.

it is 'manifestly unsupported by reason,' *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 832 (1985), or 'so arbitrary that it could not have been the result of a reasoned decision,' *State v. Wilson*, 313 N.C. 516, 538, 330 S.E. 2d 450, 465 (1985)." *State v. Parker*, 315 N.C. 249, 258-59, 337 S.E. 2d 497, 502-03 (1985). A trial judge's decision only amounts to an abuse of discretion if there is "no rational basis" for it. *Id.*

We find ample support for Judge Ellis's decision not to reopen the case and allow the report into evidence. First, no effort was made by defendant during trial to have the report introduced, although defendant knew then of its existence. Second, the evidentiary conflict defendant sought to resolve by introducing the document was relatively insignificant. It concerns whether Veal first mentioned the sexual abuse of her granddaughter to McKeithan on 22 July or on 4 August 1983. The state's case was not based on what Veal knew or reported. It was based on the child's testimony, McKeithan's independent investigation of all the circumstances, and the testimony of Dr. Bernstein.

C.

[4] We find no reversible error in the trial court's denial of defendant's motion to inquire of the jury which document not in evidence it had inquired about. Assuming, arguendo, this was the 22 July 1983 report, we have already noted the relative insignificance of this report. The jury could not have seen it because it was not in evidence. To ask the jury whether it inquired about the report would have been a needless and fruitless exercise.

D.

[5] Finally, the trial court properly denied defendant's motion to poll the jurors after verdict to determine whether they had considered that Veal had made the 22 July 1983 report and whether it contained allegations of possible child abuse. N.C.G.S. § 15A-1240(a) states:

> Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

This statute provides firm ground for the trial court's denial of defendant's motion.

In this trial we find

No error.

STATE OF NORTH CAROLINA v. TERRY LEE MOORE

No. 25A86

(Filed 2 July 1986)

1. Criminal Law § 138.28— admission of unprosecuted felonies—considered as character evidence—proper aggravating factors

The trial court did not err in a prosecution for second degree murder by sentencing defendant to more than the presumptive term where defendant had admitted under cross-examination that he had been in possession of LSD, that he had sold marijuana, and that he had committed several breaking and enterings and larcenies. The aggravating factor of acknowledged participation in felonies need not have been characterized by the Court of Appeals as a "conviction punishable by more than 60 days' confinement" because, given defendant's character evidence, it was more natural to view defendant's admissions as pertaining to his character; the trial court's assessment of character evidence has been consistently approved for purposes of sentencing; defendant's admissions on the stand as to participation in felonies satisfied the statutory requirements of credible evidence for the purpose of proving character; and defendant's evidence of good character did not cancel out the evidence of bad character since the weighing of factors is in the discretion of the trial judge. N.C.G.S. § 15A-1340.4(a).

2. Criminal Law § 138.35— murder—seventeen-year-old defendant—age not a mitigating factor

The trial court did not abuse its discretion when sentencing a seventeen-year-old defendant for second degree murder by refusing to find defendant's age as a mitigating factor. Age alone is insufficient to support the factor, and it is wholly within the trial court's discretion to assess conditions and circumstances in determining whether defendant's immaturity reduced his culpability. N.C.G.S. § 15A-1340.4(a)(2)(e).

Justice EXUM dissenting.

Justices MITCHELL and FRYE join in the dissenting opinion.

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 78 N.C. App. 77, 337 S.E. 2d 66 (1985), which found no error in the trial and conviction of defendant before *Strickland, J.*, at the 16 April 1984 session of CARTERET Superior Court. Heard in the Supreme Court 10 June 1986.

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

Tharrington, Smith & Hargrove, by Roger W. Smith, for defendant.

MARTIN, Justice.

The body of Angela Ballard was found partially buried in sand at the base of an Atlantic Beach sand dune on the morning of 9 July 1982. Angela's pantsuit was tangled around her feet, and her mouth and throat were packed with sand. A forensic pathologist testified that he observed bruises and scrapes on Angela's face, neck, and chest, and opined that these had been caused by the blows of a blunt object, such as a fist. The pathologist believed the cause of Angela's death to have been asphyxiation, from either the compression of her neck by an arm or the obstruction of the airways by sand, or from a combination of these. An examination of the victim's genital area revealed neither injuries nor the presence of sperm; however, the pathologist testified that such findings did not preclude the possibility that the victim had experienced sexual activity or penetration before her death.

Defendant and his companion, Lee Johnson, testified that they had been with Angela in the wee hours of the ninth and had engaged in sexual intercourse with her near the spot where her body was found. Defendant asserted on the stand that, after Lee had left them, he and Angela had been interrupted by two abusive intruders, one of whom had "jumped on" Angela. He further testified that, even though the other intruder did not defend himself, he attacked the other intruder and punched him. Defendant then blacked out. When defendant regained consciousness, he stumbled upon Angela's body, whereupon he ran off in a panic.

Under cross-examination, defendant admitted to having used a panoply of drugs, to having sold drugs, and to having broken into motel rooms at the beach three or four times in order to steal cash and goods to fund his drug use. Counterpoint to these

admissions was provided by testimony from a number of defendant's neighbors and friends from Garner, N.C., where he had been raised and had still lived with his parents until his arrest for Angela's murder. These witnesses attested to defendant's good moral character and sound reputation in that community.

The jury found defendant guilty of murder in the second degree. Defendant was sentenced to forty-five years' imprisonment, being more than the presumptive term stated for a Class C felony in the Fair Sentencing Act, N.C.G.S. § 15A-1340.4(f). The trial judge found as an aggravating factor that

> defendant acknowledged under oath the following criminal offenses all of which carry sentences in excess of 60 days:
>
> A. Possession of a schedule I controlled substance, L.S.D.[,] a Class H felony.
>
> B. Sale of a schedule VI controlled substance, marijuana, a Class I felony.
>
> C. Breaking and Entering and Larceny, Class H felonies.

As mitigating factors, the trial judge found that defendant had no record of criminal convictions and that he had been a person of good character or had had a good reputation in the community in which he lived.

Two issues concerning the Fair Sentencing Act are before us in defendant's appeal. First, defendant contends that the trial court erred in sentencing him to imprisonment for a period longer than the presumptive term because no aggravating factor other than defendant's acknowledgment of participation in felonious activities was indicated in the judgment and because defendant rejects these admissions as an aggravating factor "reasonably related to the purposes of sentencing." N.C.G.S. § 15A-1340.4(a) (1983). Second, defendant insists that his age of seventeen at the time of the offense was a factor the trial court should have found in mitigation as "immaturity . . . significantly reduc[ing] culpability for the offense." N.C.G.S. § 15A-1340.4(a)(2)(e).

[1] A majority of the Court of Appeals found no error in defendant's trial or sentencing, holding as to the issue of defendant's immaturity that "a person at 17 years of age should be as well aware as any person of the wrong involved in the commission of

murder." 78 N.C. App. at 83, 337 S.E. 2d at 69. We accepted discretionary review of this issue. The court below divided, however, regarding whether defendant's acknowledgment of involvement in felonious activity could support the trial court's finding of an aggravated factor. The majority considered these admissions to be subsumed in N.C.G.S. § 15A-1340(a)(1)(o): whether "[t]he defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement." *Id.* However, Judge Becton dissented on this issue, rejecting the majority's "implicit premises that an uncorroborated admission—without evidence aliunde—is legally sufficient and that a defendant's characterization of conduct as criminal—without regard to whether the conduct was justifiable or excusable—is conclusive." 78 N.C. App. at 84, 337 S.E. 2d at 70.

It is our view that the aggravating factor of acknowledged participation in felonies found by the trial court need not have been characterized "a conviction punishable by sixty days' confinement," as the majority of the Court of Appeals termed it. Given the stream of character witnesses marshalled by defendant, it is more natural to view the substance of defendant's admissions as pertaining to his character than to force them to fit the prior-conviction factor. In fact, the trial court listed these acts as a nonstatutory aggravating factor. N.C.G.S. § 15A-1340.4(a). Before and since the passage of the Fair Sentencing Act, this Court has consistently approved the trial court's assessment of character evidence for purposes of sentencing.

> In determining the proper sentence to impose upon a convicted defendant, it is appropriate for the trial judge to inquire into such matters as the age, character, education, environment, habits, mentality, propensities, and record of the person about to be sentenced.

State v. Smith, 300 N.C. 71, 81-82, 265 S.E. 2d 164, 171 (1980). *Accord, State v. Stafford*, 274 N.C. 519, 164 S.E. 2d 371 (1968); *State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966); *State v. Cooper*, 238 N.C. 241, 77 S.E. 2d 695 (1953). As defendant had placed his character directly in issue, 1 Brandis on North Carolina Evidence § 108 (1982), specific wrongful acts of the defendant may be brought out to show his character, 1 Brandis § 111. It is within the discretion of the trial court to use any factors, in addition to

those specified in the statute, which are supported by the preponderance of the evidence and which are reasonably related to the purposes of sentencing. N.C.G.S. § 15A-1340.4(a); *State v. Setzer*, 61 N.C. App. 500, 301 S.E. 2d 107, *cert. denied*, 308 N.C. 680 (1983).

There is no reason why defendant should have expected that his admission of participation in several felonies would fall upon deaf ears. It was defendant's right to invoke his fifth amendment privilege against self-incrimination; but having failed to do so, the substance of his testimony was correctly taken into account by the sentencing judge. *See State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164. Further, because these criminal acts were not elements of the offense, their consideration for sentencing purposes was otherwise constitutionally proper. *See State v. Denning*, 316 N.C. 523, 342 S.E. 2d 855 (1986). *See also State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986) (theft of a firearm, which defendant admitted but with which he had not been charged, was properly considered an aggravating factor in sentencing).

In *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), this Court affirmed that portion of the Court of Appeals' opinion holding that the defendant's admissions as to his prior convictions elicited upon cross-examination sufficed to satisfy proof of such convictions for the purposes of the Fair Sentencing Act. We hold that admissions on the stand as to participation in felonies may likewise satisfy the statutory requisites of credible evidence—*not*, under the circumstances of this case, for the purpose of proving convictions, but for the purpose of proving character.

Defendant's cohort of character witnesses from Garner presents no impediment to the trial court's finding an aggravating factor based upon defendant's admitted felonious conduct in Atlantic Beach. Evidence of good character and reputation in Garner, in Wake County, does not cancel out evidence of bad character in Atlantic Beach, in Carteret County. The factors are not mutually exclusive, nor are they quantifiable. Even if they were, the weighing of one factor against the other is entirely within the sound discretion of the sentencing judge. *State v. Blackwelder*, 309 N.C. 410, 419, 306 S.E. 2d 783, 789 (1983). Defendant's felonious acts were proved, via admission, by a prepon-

derance of the evidence. The trial court correctly determined these acts to be reasonably related to sentencing. As such, these acts were appropriately considered an aggravating factor in the determination of defendant's sentence.

[2] Included among the specified mitigating factors in the Fair Sentencing Act is the following: "The defendant's immaturity or his limited mental capacity at the time of the commission of the offense significantly reduced his culpability for the offense." N.C.G.S. § 15A-1340.4(a)(2)(e). This factor includes two inquiries—one as to immaturity (or mental capacity) and one as to the effect of such immaturity upon culpability. Clearly, age alone is insufficient to support this factor, not only because of the legislature's deliberate choice of the word "immaturity," but also because of the second part of the inquiry. Case law from this and other jurisdictions sheds no light on the significance of "immaturity" in regard to adult sentencing: the term appears to be unique in sentencing acts nationwide. However, the fact that North Carolina's statutory provisions for sentencing in capital cases, which antedate the Fair Sentencing Act, cite the defendant's "age" as a mitigating circumstance, indicates that, in drafting the latter Act, the legislature had in mind an inquiry into immaturity broader than mere chronological age. *Compare* N.C.G.S. § 15A-1340.4(a)(2)(e) *with* N.C.G.S. § 15A-2000(f)(7) (1983). This indication is reinforced by comparing the "immaturity" mitigating factor to other provisions in the General Statutes that designate specific ages for special treatment. Provisions regarding youthful offenders, for example, under N.C.G.S. §§ 148-40.10 to .16 (1983), target individuals under the age of twenty-one for alternative sentencing treatment at the option of the trial judge. And delinquent juveniles, defined as youths below the age of sixteen who have committed a criminal offense, are treated differently than adult offenders solely because of their age. *See* N.C.G.S. §§ 7A-516 to -758 (1981). Also supporting this conclusion is the fact that the second part of the factor requires a determination of the *effect* of immaturity on culpability. It appears more likely that the legislature was concerned with all facts, features, and traits that indicate a defendant's immaturity and the effect of that immaturity on culpability—rather than with the less directly pertinent element of chronological age. Consistent with this view, we are unwilling to say that a defendant's age of seventeen at the time of the offense classifies him as

"immature" within the meaning of the statute. Here, as in capital cases, "[a]ny hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances." *State v. Oliver*, 309 N.C. 326, 372, 307 S.E. 2d 304, 333 (1983).

It was wholly within the trial judge's discretion to assess such conditions and circumstances in determining whether the defendant's immaturity, whatever its most influential source—intellect, emotional development, or chronological age—significantly reduced his culpability for the charged offense. We find no abuse of that discretion in the trial court's refusal to find defendant's age a mitigating factor.

"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." *State v. Locklear*, 294 N.C. 210, 213-14, 241 S.E. 2d 65, 68 (1978). None of these abuses is apparent from the record of the case at bar, and we accordingly modify and affirm the finding of no error by the Court of Appeals.

Modified and Affirmed.

Justice EXUM dissenting.

The majority correctly concludes that a defendant's acknowledgment of past, unprosecuted criminal wrongdoing at a sentencing hearing under the Fair Sentencing Act is not the equivalent of the statutory aggravating factor defined by section 15A-1340 (a)(1)(o) of the Act, *i.e.*, "defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement." Judge Becton, dissenting in the Court of Appeals, demonstrates persuasively why such an acknowledgment should not be treated the same as if defendant had been convicted for his wrongdoing.

Yet the record reveals, I think beyond argument, that the sentencing judge treated this defendant's acknowledgment precisely as if the statutory prior conviction aggravating circumstance were present. Indeed, he was careful to note that the acts

of wrongdoing were "criminal offenses all of which carry sentences in excess of 60 days." He then proceeded to list each offense in language suitable for an indictment, specifying the class into which the offense falls under the Fair Sentencing Act. The Court of Appeals accurately assessed the sentencing judge's action. It affirmed on the ground defendant's acknowledgment *was* the equivalent of prior convictions under section 15A-1340(a)(1)(o), saying:

> If the fact of a defendant's prior convictions punishable by 60 days' confinement is reasonably related to the purposes of sentencing, we believe the fact of a defendant's admitted commission of prior criminal offenses also punishable by 60 days' confinement is reasonably related to the purposes of sentencing.

This, I think, is the error committed at sentencing which entitles defendant to a new sentencing hearing. As the majority seems to recognize, defendant's acknowledgment of past wrongful acts bears on sentencing, not as if these acts were prior convictions but only as evidence of defendant's character. That defendant committed the acts tends to rebut the evidence he offered of his good character. On the other hand defendant's voluntary *acknowledgment* of his past wrongdoing could indicate that defendant was at least truthful, willing to admit his past wrongs, and perhaps ready to mend his ways and lead a better life. This acknowledgment could thus be some evidence of present good character.

The point is that however this aspect of the case is considered, it goes to the question of defendant's character. This is how defendant's acknowledgment should have been, but was not, regarded by the trial judge. The crucial question for purposes of sentencing in this case is whether defendant is a Dr. Jekyll or a Mr. Hyde. Is he a person of good character or bad character? Do his past wrongful acts demonstrate his bad character or does his acknowledgment of them demonstrate present good character? Is he entitled to have his sentence mitigated because he is a person of good character or aggravated because he is a person of bad character? The trial judge never answered these questions. In mitigation he found defendant to be a person of good character or reputation in his community and one with no prior criminal con-

victions. Yet he determined to aggravate the sentence as if defendant had been criminally convicted in the past.

The majority recognizes that a sentence may be set aside if it is imposed under "circumstances which manifest inherent unfairness and injustice or . . . which [offend] the public sense of fair play." I believe the sentence before us was imposed under such circumstances. My vote is to reverse the Court of Appeals and remand the matter for a new sentencing hearing to be conducted consistently with the principles the majority recognizes but does not apply in this case.

Justices MITCHELL and FRYE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. WENDELL MASON

No. 351A85

(Filed 2 July 1986)

1. Rape and Allied Offenses § 6; Robbery § 5.2— knife with three or four-inch blade—instruction that knife deadly weapon—no error

The trial court did not err in a prosecution for first degree rape, first degree kidnapping, and armed robbery by instructing the jury that a knife was a deadly weapon where there was evidence that the blade was three or four inches long and was held at various times to the victim's throat, side and stomach; defendant threatened to cut off the victim's clothing with the knife; and defendant threatened to cut the victim's throat from ear to ear if she did not comply with his demands.

2. Criminal Law § 102.8— jury argument—State's case uncontradicted—not an impermissible comment on defendant's failure to testify

The State's closing argument in a prosecution for rape, kidnapping, and armed robbery did not constitute an impermissible comment on defendant's failure to testify where the prosecutor stated that the State's case was "uncontradicted," that there was "nothing else from this witness stand to show otherwise," and the prosecutor asked the jury to consider the absence of alibi witnesses.

3. Criminal Law § 102.6— prosecutor's jury argument—workload of law officers—no error

The State's jury argument in a prosecution for kidnapping, rape and armed robbery referring to the workload of law enforcement officers was not improper where the argument was obviously directed to the anticipated argument by the defendant that the jury should not convict defendant because the

State failed to produce certain scientific evidence tying defendant to the crime and the remarks were designed to urge the jury to convict on the basis of the evidence presented even if the investigation was not perfect and did not produce all the evidence which a perfect investigation might have produced.

4. **Criminal Law § 102.6— jury argument—rights of victims—no prejudice**

The State's argument to the jury on the rights of victims in a prosecution for kidnapping, rape and armed robbery was not of such gross impropriety as would be likely to influence the verdict of the jury.

5. **Kidnapping § 1.3— original instruction on facilitation of felony—repeated instruction on flight—no prejudicial error**

The trial court did not commit prejudicial error in a prosecution for kidnapping, rape and armed robbery when it first instructed the jury that the State had to prove that defendant confined or restrained the victim for the purpose of facilitating rape and robbery, then, in response to a request for repeated instructions on kidnapping, included facilitation of flight in the instruction. Neither party had requested special instructions at the charge conference; the indictment alleged kidnapping for the commission of a felony and to facilitate flight; it was apparent from the prosecutor's argument and defendant's lack of objection that both parties expected an instruction on facilitating commission of felonies and flight; and the instruction did not change the instructions discussed at the charge conference or the possible verdicts of the jury. N.C.G.S. § 15A-1221, N.C.G.S. § 15A-1443(a).

6. **Kidnapping § 2; Rape and Allied Offenses § 7— first degree kidnapping and first degree rape—separate punishment—double jeopardy violation**

Double jeopardy principles preclude separate punishment for first degree rape and first degree kidnapping where the rape is the sexual assault used to elevate kidnapping to first degree.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Wright, J.* at the 11 February 1985 Criminal Session of Superior Court, ONSLOW County.

Defendant was convicted of first degree rape, first degree kidnapping, and robbery with a dangerous weapon. He received consecutive sentences of life imprisonment for the rape, forty years for the kidnapping and forty years for the armed robbery. Heard in the Supreme Court on 11 March 1986.

The State's evidence tended to show that on 11 April 1984, the victim was employed as a cab driver in Jacksonville, North Carolina. At approximately 9:30 that morning as she was leaving a McDonald's restaurant, the victim picked up a passenger who indicated that he wanted to be taken to Walden Drive. The passenger, whom the victim later identified as the defendant, became

"fidgety" and subsequently pulled out a pocketknife and said "Take it easy. All I want is your money. This is a robbery." The defendant then directed the victim to drive to a remote area where he ordered her to stop the car and remove her clothing. After taking $12.00 belonging to the cab company and $30.00 belonging to the victim, the defendant instructed the victim to climb into the back seat where he raped her. During this entire period of time, the defendant continued to threaten the victim with the pocketknife.

Following the rape, the defendant forced the victim into the trunk of the car. She was able to locate a tire tool which she used to pry open the trunk. She dressed, walked to the nearest house, and called law enforcement officials.

The victim described her assailant as a black male, between 5′8″ and 5′11″ in height, weighing between 165 and 180 pounds. He was wearing a dark blue jacket, blue jeans, a black belt, a fishing cap, and white hightop basketball-type shoes. The victim identified a cap found in her car as that worn by her assailant. There was also testimony at trial that shoe prints found in the area around the car matched those of a pair of white tennis shoes taken from the defendant and identified by the victim as those worn by her assailant.

The victim selected defendant's photograph during a pre-trial photographic line-up and made a positive in-court identification of the defendant as her assailant.

Lacy H. Thornburg, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

BILLINGS, Justice.

On appeal defendant assigns error to certain portions of the trial court's instructions to the jury and to portions of the prosecutor's closing argument. For the reasons set forth below, we find no error on these issues. The case must be remanded for a new sentencing hearing, however, as a result of defendant's convic-

tions and sentences for both first degree rape and first degree kidnapping based on the rape.

[1] Defendant first contends that by instructing the jury that "a knife . . . of three or four inches in length is a deadly weapon," the trial judge erroneously created a mandatory presumption, thereby removing a question of fact from the jury and relieving the State of its burden of proving beyond a reasonable doubt an essential element of both first degree rape and armed robbery. We disagree.

This issue was recently raised and fully addressed in *State v. Torain*, 316 N.C. 111, 340 S.E. 2d 465 (1986). In *Torain* we noted that "[i]t 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)." *Id.* at 119, 340 S.E. 2d at 470. In *Torain* we held that a utility knife with a one-inch razor blade, held to the victim's throat and used to cut the straps off her bathing suit, was a dangerous or deadly weapon *per se.*

The evidence in the present case fully supports the trial judge's instruction that the pocketknife used to threaten the victim was a dangerous or deadly weapon likely to produce death or great bodily injury. There was evidence that the blade was three to four inches long and was held at various times to the victim's throat, side and stomach. Defendant threatened to cut off the victim's clothing with the knife and to cut her throat from "ear to ear" if she did not comply with his demands. There is little doubt that a knife with a three to four inch blade is a weapon capable of inflicting serious injury upon the victim when used in the manner threatened.

Defendant next contends that he was "substantially" prejudiced by the prosecutor's "grossly improper" closing argument. Defendant specifically challenges what he characterizes as an improper reference to defendant's failure to testify, the prosecutor's appeal to the "fears and frustrations of the jurors," inviting them "to do justice" in this case, and the prosecutor's references to the "rights of victims."

[2] The defendant offered no evidence at trial. During her closing argument, the prosecutor stated that the State's case was "uncontradicted," that there was "nothing else from this witness stand to show otherwise," and asked the jury to consider the absence of alibi witnesses. The defendant objected and, following a hearing outside the presence of the jury, the trial judge overruled the objection.

A similar challenge was made to the prosecutor's closing argument in a recent case involving this defendant (*State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986)). In that case, while acknowledging that "a prosecutor may not make any reference to or comment on a defendant's failure to testify," 315 N.C. at 732, 340 S.E. 2d at 436, we also recognized that a defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument, citing *State v. Jordan*, 305 N.C. 274, 280, 287 S.E. 2d 827, 831 (1982). Here, as in the earlier *Mason* case, we find that the prosecutor merely argued the absence of exculpatory evidence and therefore her statements did not constitute an impermissible comment on defendant's failure to testify.

[3] We also find defendant's challenge to the prosecutor's allegedly impermissible appeal to the jurors' "fears and frustrations" to be without merit. The portion of the argument at issue was as follows:

> You know, I wish that I could even have a carload of nuns or the minister of the First Baptist Church come here and say to you that they saw this happen, but they didn't because that kind of evidence just doesn't exist. We work with what we have to work with, and I can certainly assure you that law enforcement here in Onslow County is excellent. We have a good group of law enforcement officers and the Onslow County Sheriff's Department, who is headed up by Mr. Woodward, who is your elected Sheriff, he heads up an excellent team of law enforcement officers, men and women in this county and the Chief of Police here in Jacksonville heads up an excellent group of men and women who are trained law enforcement officers to uphold the laws in this county, but they like everybody else, are limited in number,

> limited in time and limited in resources just like I am. You know, every time I come into court to try a case, I always think of something I wish I had done but I didn't. No matter how much time I spend preparing. We're just all human beings. There are some things that just aren't humanly possible. The evidence you have is what's before you, and I don't understand what more the State of North Carolina could produce to convince you that the defendant is guilty.

Defendant contends that these comments "convert[ed] the presumption of innocence into a presumption of guilt" by "imploring [the jurors] to do their part for law enforcement . . . ." Defendant failed to object during trial.

This argument was obviously directed to the anticipated argument by the defendant that, because the State had failed to produce certain scientific evidence tying the defendant to the crime, the jury should not convict the defendant.

The defendant, appearing *pro se* at trial, thoroughly cross-examined all witnesses for the State. His strategy was to apprise the jury that the State had failed to produce evidence of the results of a rape examination done on the victim, of fingerprints, or of hair samples taken from the cap found in the car.

The prosecutor's remarks were designed to urge the jury to convict on the basis of the evidence presented if it convinced them beyond a reasonable doubt of the defendant's guilt, even if the investigation was not perfect and did not produce all evidence which a perfect investigation might have produced. We cannot say that such an argument is improper; it clearly was not so grossly improper as to have required the trial judge to intervene *ex mero motu. See State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430.

[4] Defendant's final challenge to the prosecutor's closing argument concerns certain comments she made concerning the rights of the victim. After reviewing for the jury the rights of the defendant to jury trial, to confront and cross-examine witnesses, and to be represented by an attorney, the prosecutor continued:

> But put yourself in the place of [the victim], also. You know, like all of the victims, she's not had any rights. In every case that you ever see tried in a criminal courtroom, it's never really the defendant that's on trial; it's usually the

victim that's on trial, especially so in rape cases. I've seen it every time; the rape victim is the one that's always on trial. They don't have any rights. Victims don't have any rights. [The victim] on April the 11th, 1984 was doing what she was supposed to be doing, which was out trying to earn a living just like every single one of you was doing on that day. She was given no rights by the defendant when he got into her cab and he pulled a knife on her and he directed her where to go. She was given no rights when the defendant directed her down this dirt path in an isolated area of Onslow County, and holding the knife at her side, demanded that she give him her money. [The victim] was given no rights when the defendant held a knife at her throat and threatened to cut her throat from ear to ear. She was given no rights when the defendant, at knifepoint, ordered her to take her clothes off. She was given no rights when the defendant ordered her at knifepoint to crawl across the seat of her cab. She was given no rights when the defendant, at knifepoint, raped her. And she was given no rights when the defendant ordered her at knifepoint to get out of the car, go around to the back of the car, get in the trunk and shut the trunk lid of [sic] her. That woman was scared to death. She thought she was going to die. If you watched her testify from this witness stand, you could see the fear in her eyes. She was scared on that day and she was scared yesterday, and she's scared today, and the reason, part of the reason she's scared is because she has no rights and she knows that. She had to come in this courtroom yesterday and face the man that had raped her, robbed her and shut her up in the trunk of her own car. She had no choice in the matter at all. [The victim] had to get on this witness stand and describe to you everything in detail that happened on April 11, 1984. She had no choice. She had no rights. She had to do that. [The victim] had to allow herself to be cross-examined by the defendant himself and have him challenge her. She had no choice. She had to do that. She's had no choice at all since, in this entire ordeal. She's had no rights and what's so—somewhat upsetting about the whole thing is that she's done nothing wrong.

Defendant views this portion of the argument as a "play to pit the victim against a defendant, asking the jury, in effect, to

assuage the victim's suffering by convicting someone, rather than convicting an accused based solely on the evidence after proof beyond a reasonable doubt." Defendant further argues that the prosecutor turned the case "into a referendum on victim's rights." Defendant failed to object to the prosecutor's comments at trial and we do not find the remarks to be of such gross impropriety as would be likely to influence the verdict of the jury. *See State v. Covington*, 290 N.C. 313, 328, 226 S.E. 2d 629, 640 (1976) (finding no gross impropriety in the district attorney's statement that "everybody is concerned about the rights of the defendants . . . when in God's name are we going to start getting concerned about the rights of the victims?"). As was the case in *Covington*, the prosecutor's argument in the case *sub judice* was merely a request to the jury that it give equal consideration to the State and the defendant.

The assignment of error is overruled.

[5] Defendant's next assignment of error concerns the trial judge's instructions to the jury on the kidnapping charge. The trial judge's initial instruction said, in pertinent part, that the State had to prove that the defendant "confined or restrained [the victim] for the purpose of facilitating his rape or his robbery." Following a request by the jury for clarification, the trial judge again instructed

> . . . that the defendant confined in the trunk or restrained [the victim] along the road for the purpose of facilitating his commission of rape or robbery and I have previously defined rape and robbery to you, and I charge you on that issue that confining her in the trunk as to element one, you might or you might not find that that fits this third element. I charge you that this third element would apply very directly to whether or not he put a knife to her and forced her to go along the road to a place of his designation to thereby rob her and rape her.

After the jury had reached its verdicts in the charges of rape and robbery, it once again requested that the instructions on kidnapping be repeated. The trial judge responded by offering, in pertinent part, the following explanation of the elements of kidnapping:

> Third, that the defendant confined [the victim] in the trunk of her car for the purpose of facilitating his flight after committing rape or robbery. I have previously defined rape and robbery for you, and you will remember those instructions. Let me go over the third one again. Third, that the defendant confined [the victim] in his trunk, in the trunk of her, the cab, for the purpose of facilitating his flight after committing rape or robbery.

Defendant contends that the charge "patently changed the purpose from facilitating the commission of a felony to facilitating flight from a felony—a purpose not articulated or explained in the prior sets of instructions," thereby violating N.C.G.S. § 15A-1234(c) (1985). N.C.G.S. § 15A-1234 outlines the procedures to be employed for giving additional instructions, and subsection (c) provides as follows:

> Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

It is obvious that the trial judge failed to comply with the statute, for the record does not indicate that he informed the parties of the additional instructions he intended to give or gave them an opportunity to be heard. However, before the defendant is entitled to any relief on appeal, he must show that he was prejudiced by the error. N.C.G.S. § 15A-1443(a).

Prior to arguments, the trial judge conducted a charge conference as required by N.C.G.S. § 15A-1231. He informed the parties that he would permit the jury to consider verdicts of either guilty or not guilty of each of the three offenses, first degree rape, first degree kidnapping and robbery with a dangerous weapon. Neither party requested special instructions or asked whether the judge intended to include other particular instructions in his charge. The indictment for first degree kidnapping charged that the defendant had restrained and removed the victim "for the purpose of facilitating the commission of a felony" and "facili-

tating the flight of Wendell Mason following his participation in the commission of a felony, to wit: first degree rape and robbery with a dangerous weapon." Therefore, the trial judge should have instructed the jury originally on both purposes for the kidnapping alleged in the indictment. In fact, it is apparent that the parties expected an instruction on both the purpose of facilitating commission of the felonies and the purpose of facilitating flight, for the prosecutor, without objection, argued both. The defendant's argument was that he was not the person who committed the offenses; he made no argument related to the proof of the purpose or purposes for the kidnapping.

Although the trial judge did not instruct the jury in his original instruction that they could consider the purpose of facilitating flight, that omission was error favorable to the defendant, for the indictment and the evidence both supported the instruction. It was, therefore, not error for the trial judge to correct his instruction before the jury rendered its verdict on the kidnapping charge. *State v. Jones*, 267 N.C. 434, 148 S.E. 2d 236 (1966). Because the State was entitled to the instruction and the instruction did not in any way change any instructions discussed at the charge conference, the defendant has failed to demonstrate how he was prejudiced by the correction or by the failure of the trial judge to inform him of his intention to give the instruction. Also, the corrected instruction did not change the possible verdicts of the jury and therefore did not trigger the right of the parties to make additional arguments upon request.

This assignment of error is overruled.

[6] By his final assignment of error defendant contends that double jeopardy principles preclude his convictions for both first degree rape and first degree kidnapping since the former offense is a necessary element of the latter offense. We agree. Under our holding in *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986), defendant may not be separately punished for the offenses of first degree rape and first degree kidnapping where the rape is the sexual assault used to elevate kidnapping to first degree. *See State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430. Therefore defendant is entitled to a new sentencing hearing. The trial court may arrest judgment on the first degree kidnapping conviction and re-

sentence for second degree kidnapping, or it may arrest judgment on the rape conviction.

New sentencing hearing.

STATE OF NORTH CAROLINA v. ERIC LEE GILLIAM AND JEFFERY JEROME BATTLE

No. 704A85

(Filed 2 July 1986)

1. Constitutional Law § 60; Jury § 7.14— jury selection—peremptory challenges—removal of black veniremen

The decision of *Batson v. Kentucky*, 476 U.S. ---, 90 L.Ed. 2d 69, holding that a defendant can establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at his trial, does not apply retroactively to a case in which the jury was selected prior to the filing of *Batson*. Furthermore, defendants failed to show that the prosecutor's use of peremptory challenges to excuse blacks from the venire violated the test set forth in *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759. Amendment XIV to the U.S. Constitution; Art. I, Sections 19 and 24 of the North Carolina Constitution.

2. Criminal Law §§ 33.1, 42.4— kidnapping, rape, robbery—knives not identified by victim—introduction no error

The trial court did not err in a prosecution for kidnapping, rape, and robbery by allowing the State to introduce into evidence a straight razor and several knives found in the car in which they were arrested or on the person of another occupant of the car where the State produced evidence that one of the defendants had threatened the victim with a knife when they abducted her; one of the three assailants had told her that he liked her, would be back for her, and that she would be shot if she reported the crimes; defendants came to her apartment around 1:00 a.m. approximately five nights after the assaults; they beat on the door and attempted to open it before leaving when a neighbor stepped outside his apartment; and the knives and razor were found when the car was stopped by sheriff's deputies a short distance from the apartment. Defendants made identity an issue by pleading not guilty and denying that they were the assailants; therefore the State was entitled to introduce any evidence of other crimes by defendants which would tend to establish their identity as the perpetrators of the kidnapping and the sexual assaults committed against the victim. N.C.G.S. § 8C-1, Rule 401, N.C.G.S. § 8C-1, Rule 404(b).

3. Criminal Law § 102.6— kidnapping, rape, robbery—prosecutor's argument concerning knives and a razor—no error

The trial judge in a prosecution for kidnapping, rape, and robbery did not err by permitting the prosecutor to refer to several knives and a straight razor found in defendants' possession at the time of their arrest where the knives were admissible as evidence tending to identify defendants as the assailants and the prosecutor's argument in context did not invite the jury to speculate as to which of the five knives and straight razor was the weapon involved in the kidnapping and sexual assaults.

APPEAL by defendants pursuant to N.C.G.S. § 7A-27(a) from the judgments entered by *Johnson, J.*, at the 24 June 1985 Criminal Session of CUMBERLAND County Superior Court. We allowed defendants' motions to bypass the Court of Appeals on the Class D felonies.

Both defendants were convicted of one count of first degree rape, first degree sexual offense, robbery with a dangerous weapon, and first degree kidnapping. Each received a life sentence for first degree rape and a consecutive life sentence for first degree sexual offense. They also received two forty-year terms for robbery with a dangerous weapon and first degree kidnapping, those sentences to run consecutively to the sentences of first degree sexual offense.

The State's evidence tends to show that on 17 June 1984 Sharon Maness, while attempting to exit her car, was abducted in front of her apartment by two black males. One of the assailants demanded money and produced a knife which Ms. Maness described as very pointed, with a slope and curve. Ms. Maness handed over her wallet which contained approximately $75.00. The assailants then entered the car and drove to a secluded area where each of them, and a third man who met them shortly after they arrived, sexually assaulted Ms. Maness.

Following the assaults one of the assailants told Ms. Maness that if she reported the assaults she would be in danger because they (the assailants) had friends and that she would be shot within two days. He also told her that he liked her and would be back for her. The assailants then told Ms. Maness to wait ten minutes before leaving, and left in the third man's car.

Ms. Maness waited as she had been ordered before driving back to her apartment. The next day she called the Sheriff's Department and gave descriptions of the three men.

Approximately five nights after the assaults someone knocked on the door of Ms. Maness's apartment at around 1:00 a.m. Ms. Maness looked out the window and saw defendants Gilliam and Battle whom she recognized as being the two men who had abducted her. Ms. Maness then called the Sheriff's Department.

Defendants were observed knocking on Ms. Maness's door by Deputy Mobley who was watching her apartment. Deputy Mobley testified that one of the defendants banged on the door, turned the doorknob, and shook the door. After a neighbor came out to talk to the defendants they returned to their car and attempted to drive away. Several deputies stopped the car, which was being driven by defendant Gilliam, and arrested the defendants and two other men who were in the car. The deputies then searched the four men and the car.

A pocketknife, a straight edge razor, and a handcuff key were found on a passenger named Raymond Eugene Brown who was charged along with defendants Gilliam and Battle. A Rapela fillet knife was found in the pocket of the driver's door, and a Schrade lockblade knife was found under the driver's seat. A small black-handled case knife was found in the rear floorboard, and a buck pocketknife was found on the console of the vehicle.

The knives and straight razor were admitted into evidence over defendants' objections.

Defendants offered no evidence.

Lacy H. Thornburg, Attorney General, by Ann Reed, Special Deputy Attorney General, for the State.

Jay Trehy, Assistant Public Defender, for defendant-appellant Gilliam.

John G. Britt, Jr., Assistant Public Defender, for defendant-appellant Battle.

BRANCH, Chief Justice.

[1] Defendants' first assignment of error concerns the use of peremptory challenges by the prosecutor to remove blacks from the venire. They argue that the prosecutor excused qualified blacks from the venire solely on account of their race and thereby violated the defendants' rights to due process of law and equal protection of the law under the fourteenth amendment to the Federal Constitution and Article I, Sections 19 and 24 of the North Carolina Constitution.

In the recent case of *Batson v. Kentucky*, 476 U.S. ---, 90 L.Ed. 2d 69, 54 U.S.L.W. 4425 (filed 30 April 1986), the United States Supreme Court overruled the requirement of *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, *reh'g denied*, 381 U.S. 921, 14 L.Ed. 2d 442 (1965), that a black defendant must show that prosecutors in the judicial district in which he was tried had over a period of time systematically used peremptory challenges to remove blacks from petit juries. Under the rule laid down by *Batson*

> a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.
>
> . . . .
>
> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.

Batson, 476 U.S. at ---, 90 L.Ed. 2d at 87, 54 U.S.L.W. at 4430 (citations omitted).

The record reveals that the prosecutor in this case challenged peremptorily five of the six blacks called to the jury. One black, a retired noncommissioned army officer, was seated on the jury. Prior to the impaneling of the jury counsel for both defendants moved to strike the entire venire or those jurors who had been passed. These motions were denied by the trial judge. At the end of the State's case, these motions were renewed in the form of motions for mistrial and were again denied. The prosecutor did not provide any reason for his peremptory challenges of black veniremen.

In the recent case of *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814 (1986), we examined the rulings of the United States Supreme Court on the retroactivity of decisions of that Court affecting rights secured by the Federal Constitution and held that the ruling in *Batson v. Kentucky* applied only to those cases in which jury selection occurred after the *Batson* decision was rendered. *State v. Jackson*, 317 N.C. at 21, 343 S.E. 2d at 826. Since jury selection in the instant case occurred prior to the filing of *Batson*, that decision is inapplicable. Therefore, to establish that the prosecutor's use of peremptory challenges to excuse blacks from the venire deprived them of the equal protection of the law, defendants must meet the test set out in *Swain v. Alabama*. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, *Carter v. North Carolina*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976). *See also State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980). This they have failed to do.

Defendants have asked this Court to hold that the use of peremptory challenges by the prosecutor in this case to remove blacks from the venire violates Article I, Sections 19 and 24 of the North Carolina Constitution. However, they have cited no authority nor made any arguments based on the language of the pertinent constitutional provisions to support their position. Questions raised by assignments of error but not presented and discussed in a party's brief are deemed abandoned. N.C. R. App. P. 28(a). Thus, defendants have abandoned any question concerning the North Carolina Constitution.

This assignment of error is overruled.

[2] By their remaining assignments of error which were briefed and argued, defendants contend that the trial judge committed

prejudicial error by allowing the State to introduce into evidence the straight razor and knife found on the person of Raymond Eugene Brown and the knives found in the car occupied by defendants at the time of their arrest. Because Ms. Maness never identified any of the weapons as the one used by her assailants, defendants argue that the only reason for the introduction of these weapons was to impeach their character by showing them to be guilty of having concealed weapons in their automobile and to generally arouse the emotions of the jury against them. Also, defendants argue that the trial judge committed prejudicial error by allowing the prosecutor to refer to the knives and razor in his closing argument.

N.C.G.S. § 8C-1, Rule 404(b), states that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

This is essentially a codification of the rule announced in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). "If . . . there is evidence that the crime charged and another offense were committed by the same person, and identity is an issue, evidence of the other offense is admissible for the purposes of establishing the identity of the defendant as the perpetrator of the crime charged." *State v. Williams*, 308 N.C. 357, 359-60, 302 S.E. 2d 438, 440 (1983).

In the instant case the State produced evidence that one of the defendants had threatened Ms. Maness with a knife when they abducted her and that one of the three assailants had told her that he liked her and would be back for her and that she would be shot if she reported the crimes. Approximately five nights after the assaults defendants Gilliam and Battle came to Ms. Maness's apartment around 1:00 a.m. They beat on the door and attempted to open it before leaving when a neighbor stepped outside his apartment. When their car was stopped by Sheriff's deputies a short distance from the apartment and its occupants were arrested and searched, Brown was found to have a knife and straight razor concealed on his person, three other knives were

found concealed in various locations in the car, and one was found on the console.

By entering pleas of not guilty and denying that they were Ms. Maness's assailants, defendants have made identity an issue in this case. *State v. Perry*, 275 N.C. 565, 570, 169 S.E. 2d 839, 843 (1969). Therefore, the State was entitled to introduce into evidence any evidence of other crimes by defendants which would tend to establish their identity as perpetrators of the kidnapping and sexual assaults committed against Ms. Maness. *State v. Williams*, 308 N.C. 357, 359-60, 302 S.E. 2d 438, 440. Their action in coming to her apartment heavily armed just a few days after the kidnapping and sexual assaults and then attempting to gain entry to her apartment raises a reasonable inference that they were "coming back for her" or had returned to carry out the threat that Ms. Maness would be harmed if she reported the crimes committed against her. This evidence clearly bears on the issue of identity. It is relevant evidence under N.C.G.S. § 8C-1, Rule 401 and is a recognized exception to the prohibitions set forth in N.C.G.S. § 8C-1, Rule 404(b). Therefore, we hold that the trial judge did not err in admitting the knives and razor into evidence.

[3] We next consider defendants' objection to the prosecutor's reference to the knives and razor in his final argument. They contend that his argument invited the jury to speculate as to which, if any, of the weapons were involved in the crime and that it likely caused the jurors to be less able to give a reasoned consideration to the evidence.

"Arguments of counsel are largely in the control and discretion of the trial court." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). "The trial judge's decision to allow improper argument will not be reversed unless the impropriety of the remarks is extreme and is clearly calculated to prejudice the jury. The parties may argue to the jury the facts and all reasonable inferences to be drawn therefrom." *State v. Mason*, 315 N.C. 724, 736-37, 340 S.E. 2d 430, 438 (1986) (citations omitted).

The statement of which defendants complain and relevant preceding portions of the prosecutor's argument are as follows:

So let's take a look at the evidence. Miss Maness told you what happened to her and she gave descriptions of the people involved. And the descriptions she gave with regard to number one was [sic] written up by Detective Wiggs.

He [sic] said number one was age twenty-two. When Eric Gilliam was arrested he was age twenty. Not much diference [sic] there at all.

He was a black male, height five eleven. A two inch difference. Weight, one sixty-five to one seventy. He weighs one seventy-one.

When asked to describe number two she says he is twenty-two to twenty-three years old. Sure enough he is twenty-two years old. Black male, six foot or over. He is six foot three. Weight, one ninety to one ninety-five. A little off on the weight. But you've got to consider her situation. She is comparing people of different sizes and that sort of thing.

You may be a good judge of weight yourself. But I dare say if you discussed it back there you would find some among your crowd that is [sic] not.

But more particularly the other descriptions given. She talks about a purple or burgandy jogging suit with stripes down the side and a hat to match it. When they are picked up, what is this defendant, Battle, wearing?

She talks about sunglasses being on one of them. Sure enough, what is found in the car?

She talks about them having—one of them having handcuffs. And what is found in the car?

She was assaulted with a knife. Well, folks, take your pick: one, two, three, four, five knives and a straight razor.

MR. BRITT: Objection. And move to strike.

COURT: Objection is overruled. And motion to strike is denied.

When the prosecutor's final statement is viewed in context it is clear that he was not inviting the jury to speculate as to which of the five knives and straight razor was the weapon involved in

the kidnapping and sexual assaults. The theme of this portion of the prosecutor's argument was that Ms. Maness's identification of defendants and Brown as her assailants was trustworthy because it was based on accurate descriptions of their age, clothing, physical characteristics, and objects in their possession when they were arrested. Because the circumstances of defendants' arrest near Ms. Maness's apartment tend to identify them as her assailants the prosecutor was entitled to refer to the fact that a handcuff key had been found on Brown and that knives were found in defendants' possession at the time of their arrest to corroborate Ms. Maness's statements to law enforcement officials that she was threatened with a knife and that one of her assailants had a pair of handcuffs. The prosecutor was merely inviting the jury to draw the reasonable inference that defendants' possession of the knives corroborated Ms. Maness's statements and testimony, particularly her identification testimony. *State v. Mason*, 315 N.C. 724, 736-37, 340 S.E. 2d 430, 438; *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122. Since the knives were admissible as evidence tending to identify defendants as Ms. Maness's assailants the prosecutor's statement concerning them was entirely proper. Though there was no evidence that a razor was used during the kidnapping and sexual assaults the prosecutor's statement that Ms. Maness was assaulted with a knife made it clear that the razor could not have been the weapon defendants used during the commission of those crimes. His technically improper reference to the razor was not calculated to prejudice the jury, and the trial judge did not abuse his discretion in overruling defendants' objections. *State v. Mason*, 315 N.C. 724, 736-37, 340 S.E. 2d 430, 438; *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122. Therefore, we hold that the trial judge did not err in overruling defendants' objections to the prosecutor's argument.

For the reasons stated, defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. W. D. HOPE

No. 625A85

(Filed 2 July 1986)

Robbery § 4.3— robbery with a firearm—use of force—evidence sufficient

The State introduced sufficient evidence to permit a rational trier of fact to find beyond a reasonable doubt that defendant committed the offense of armed robbery where defendant entered a store, took off his blue coat and tried on a tan or beige coat that belonged to the store; defendant never offered to pay for the coat and was told that the store did not trade coats; one attendant at the store, Barringer, told defendant to stop as defendant started to walk out of the store with the coat; a second attendant, Williamson, discreetly pointed out a gun in defendant's waistline; Barringer told Williamson to call the police; defendant told Barringer to be quiet or he would be killed; defendant told Williamson, referring to Barringer, "I'll kill him, I'll kill him"; Williamson was too afraid to call the police while defendant was in the store; and defendant was allowed to take the coat from the store only because he had a gun and had threatened to kill Barringer. N.C.G.S. § 14-87(a).

APPEAL by the State under N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 77 N.C. App. 338, 335 S.E. 2d 218 (1985), reversing the defendant's conviction of robbery with firearms and other dangerous weapons, N.C.G.S. 14-87 (a), and ordering a new trial. Heard in the Supreme Court on 11 March 1986.

Lacy H. Thornburg, Attorney General, by Dolores O. Nesnow, Associate Attorney, for the State-appellant.

Malcolm R. Hunter, Jr., Appellate Defender, for the defendant-appellee.

MITCHELL, Justice.

The defendant was convicted of robbery with firearms or other dangerous weapons (armed robbery) upon a proper indictment and was sentenced to imprisonment for a term of twenty-five years by *Barnette, J.*, on 24 May 1984 in Superior Court, SCOTLAND County. The defendant appealed to the Court of Appeals.

The majority of the panel in the Court of Appeals concluded that the evidence was insufficient to support a finding of the element of taking by the use or threatened use of a dangerous weap-

on. It viewed the taking in the present case as a discrete event that was completed before any threats were made and therefore concluded that the element of force was not precedent to or concomitant with the taking as is required for robbery. As a result, the Court of Appeals reversed and ordered a new trial at which the defendant would be tried for misdemeanor larceny. Having ordered a new trial, the Court of Appeals did not reach the issue of ineffective assistance of counsel raised by the defendant. We reverse the decision of the Court of Appeals and remand this case to that court for its consideration and decision as to the remaining issue.

The State's evidence at trial tended to show that on 31 January 1984, Larry Williamson and Donald Barringer were working at Ned's Outlet and Texaco in Laurinburg, North Carolina. Around 3:00 p.m. the defendant entered the store wearing a long blue coat. Williamson testified that the defendant walked to the back of the store and "when he came back through, he had on a long, tan coat." The defendant made no attempt to purchase the tan coat which belonged to Barringer. The defendant's blue coat was in the back of the store on a guitar amplifier. Williamson stopped the defendant and told him that the coat he was wearing was not his. The defendant stated that it was. Williamson escorted the defendant to the back of the store where he had left the blue coat. Williamson then took the defendant to talk with Barringer and returned to the cash register.

Approximately thirty seconds later the defendant "started back out toward the front and . . . [Barringer] started yelling at him, telling him that was . . . [Barringer's] coat," and that it belonged to the store. The defendant was still wearing the tan coat as Barringer was yelling and he "kept walking, just like he didn't hear it." Barringer stopped the defendant, and Williamson discreetly pointed out to Barringer a gun in the defendant's waistline. Barringer told Williamson to call the police, but Williamson was afraid to dial the telephone. The defendant told Barringer to be quiet or he would kill him. Barringer then ran to the back of the store, and the defendant told Williamson, referring to Barringer, "I'll kill him, I'll kill him." When he said this, his gun was still visible. The defendant then backed out of the store, and Williamson called the police. Neither Williamson nor Barringer

ever gave the defendant permission to take the coat, and they allowed him to do so only because he had a gun.

Barringer also testified. He corroborated much of Williamson's testimony. He testified that the defendant wanted to "trade his coat," but that he told the defendant he did not trade coats. The defendant then started walking out of the store with the beige coat. Barringer saw a gun stuck in the defendant's pants. At least one-half of the gun was visible. Barringer testified that when he told Williamson to call the police, the defendant said "he was going to kill me if . . . I wasn't quiet." Barringer stated that he never gave the defendant permission to take the coat. He did not prevent the defendant from taking it because he was afraid that the defendant would shoot him.

Sergeant Ben McNeill of the Laurinburg Police Department also testified. He stated that on 31 January 1984, he answered a call concerning a possible robbery at Ned's Outlet. Near the store he spotted the defendant. At that time he heard Barringer yell, "That's the man and he has a gun." McNeill ordered the defendant to freeze, searched him, and discovered a loaded gun in his beltline. The defendant was wearing a long beige coat.

The defendant testified in his own defense. He testified that on 31 January 1984, he had a loaded gun in his possession and was "wearing a long blue maxi coat." He entered Ned's Outlet and went to the back of the store and was "trying on a beige coat" when Williamson asked him if he needed assistance. The defendant said no, and Williamson returned to the front of the store. The defendant then testified that: "I took my coat off and laid it on the guitar rack and put on his coat and buttoned it up and started out the door." When he got to the door, Barringer asked what he had under the coat. The defendant testified that he "told him none of his damn business . . . ." Barringer then turned around and walked to the back of the store, and the defendant ran out of the door and across the street where he met Sergeant McNeill. The defendant denied making any threats while in the store.

The State contends that the Court of Appeals erred in reversing the defendant's conviction for armed robbery and ordering a new trial of the defendant for misdemeanor larceny. For the reasons stated herein, we agree.

At the close of the State's evidence and at the close of all the evidence, the defendant moved to dismiss the charge against him. This Court has repeatedly stated the test for determining whether a motion to dismiss should have been granted. In *State v. Riddick*, 315 N.C. 749, 759, 340 S.E. 2d 55, 61 (1986), we recently stated the test as follows:

> When a defendant moves under N.C.G.S. § 15A-1227(a)(2) for dismissal at the close of all the evidence, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." The trial court is to view all of the evidence in the light most favorable to the State and give it all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. "The trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." The trial court must determine as a matter of law whether the State has offered "substantial evidence of all elements of the offense charged so any rational trier of fact *could find* beyond a reasonable doubt that the defendant committed the offense." (Emphasis added.)

(Citations omitted.)

We have said that under N.C.G.S. § 14-87(a), armed robbery is: "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Beatty*, 306 N.C. 491, 496, 293 S.E. 2d 760, 764 (1982). In *State v. Richardson*, 308 N.C. 470, 477, 302 S.E. 2d 799, 803 (1983) this Court said that "the defendant's use of force or intimidation must necessarily precede or be concomitant with the taking before the defendant can properly be found guilty of armed robbery. That is, the use of force or violence must be such as to *induce* the victim to part with his or her property." It has also been held that "the exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one

continuing transaction amounting to armed robbery with the elements of violence and of taking so joined in time and circumstances as to be inseparable." *State v. Lilly*, 32 N.C. App. 467, 469, 232 S.E. 2d 495, 496-97, *cert. denied*, 292 N.C. 643, 235 S.E. 2d 64 (1977). This Court applied the same "continuous transaction" theory in *State v. Fields*, 315 N.C. 191, 201-02, 337 S.E. 2d 518, 525 (1985) and *State v. Handsome*, 300 N.C. 313, 318, 266 S.E. 2d 670, 674 (1980). In this jurisdiction to be found guilty of armed robbery, the defendant's use or threatened use of a dangerous weapon must precede or be concomitant with the taking, or be so joined with it in a continuous transaction by time and circumstances as to be inseparable. *State v. Fields*, 315 N.C. at 201-02, 337 S.E. 2d at 525; *State v. Richardson*, 308 N.C. at 476-77, 302 S.E. 2d at 803; *State v. Handsome*, 300 N.C. at 318, 266 S.E. 2d at 674. *State v. Lilly*, 32 N.C. App. at 469, 232 S.E. 2d at 496-97.

Applying the foregoing principles, we conclude that the State introduced sufficient evidence in the case *sub judice* to permit a rational trier of fact to find beyond a reasonable doubt that the defendant committed the offense of armed robbery. The evidence tended to show one continuous transaction with the element of use or threatened use of a dangerous weapon so joined in time and circumstances with the taking as to be inseparable.

The defendant entered the store, took off his blue coat and tried on a tan or beige coat that belonged to the store. The defendant never offered to pay for the coat. When the defendant told Barringer he wanted to trade coats, Barringer told the defendant he did not trade coats. When the defendant started to walk out of the store with the beige coat, Barringer told him to stop. Williamson discreetly pointed out to Barringer a gun in the defendant's waistline. Barringer told Williamson to call the police, and the defendant told Barringer to be quiet or he would be killed. The defendant then told Williamson, referring to Barringer, "I'll kill him, I'll kill him." Williamson testified that he was too afraid to call the police while the defendant remained in the store. Although nothing in evidence indicated that the victims cared if customers tried clothing on inside the store, neither Williamson nor Barringer gave the defendant permission to take the coat from the store. They allowed him to do so and parted with the coat only because they were afraid since he had a gun and threatened to kill Barringer. Therefore, the evidence was suf-

ficient to support a jury finding that the defendant's use or threatened use of the gun was inseparable from the taking and induced the victims to part with the coat.

This case is easily distinguishable from *State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799, relied upon by the majority in the Court of Appeals. As we pointed out in *Richardson*, the undisputed evidence in that case showed that as a result of an altercation between the victim and the defendant, the defendant struck the victim with a stick. The victim threw his duffle bag containing his wallet at the defendant solely in an effort to protect himself from further injury during their fight. The evidence conclusively showed that the defendant had no intent at that time to deprive the victim of his property and did not at that time "take" the property from him. It was only later after the victim had left the scene that the defendant went through the duffle bag and discovered the wallet. At that time, well after his use of a dangerous weapon, he first formed the intent to permanently deprive the owner of his property. We pointed out that a "defendant must have intended to permanently deprive the owner of his property *at the time the taking occurred* to be guilty of the offense of robbery." 308 N.C. at 474, 302 S.E. 2d at 802. We indicated that the use of the dangerous weapon by the defendant in *Richardson* was entirely separate from and unrelated to the taking of the victim's property by the defendant because the "defendant's initial threats were not made to *induce* [the victim] to part with his property." 308 N.C. at 477, 302 S.E. 2d at 803. As a result, we concluded that the evidence did not support a conviction of armed robbery. The facts in *Richardson* simply were not similar in any significant way to the facts presented by this case.

The majority in the Court of Appeals also relied upon *State v. John*, 50 N.C. 163 (1857) which we find inapplicable under the facts of the present case. In *John* the defendant placed his hand in the victim's pocket. The victim grabbed the defendant by the arm and a scuffle ensued during which the victim fell out of the wagon in which the two were sitting. All of the evidence tended to indicate that any violence on the part of the defendant in *John* was solely for the purpose of pulling away from the victim who had grabbed the defendant by the arm. In *John* we stated quite clearly that: "There was no violence—no circumstance of terror resorted to for the purpose of inducing the prosecutor to part

with his property for the sake of his person." *State v. John*, 50 N.C. at 167. In the present case, however, the State's evidence tended to show that the defendant's threatened use of the gun was for the purpose of inducing the victims to part with the coat and allow him to take it from the store.

The defendant's motion to dismiss in the present case was without merit. The majority in the Court of Appeals erred by reaching a decision and holding to the contrary.

Finally, in the Court of Appeals the defendant argued that he was entitled to a new sentencing hearing because his attorney failed to provide effective assistance of counsel during the sentencing hearing in the present case. Since the Court of Appeals granted the defendant a new trial, it did not reach this issue. 77 N.C. App. at 339-40, 335 S.E. 2d at 219. Because we reverse the decision of the Court of Appeals, the ineffective assistance of counsel issue must be addressed. In deference to the authority of the Court of Appeals to render the first appellate consideration of this issue, we remand this case to that court with instructions to reinstate the defendant's appeal and proceed to a consideration of the ineffective assistance of counsel issue raised there by the defendant. *See, e.g., State v. Snyder*, 311 N.C. 391, 394, 317 S.E. 2d 394, 396 (1984); *State v. Nickerson*, 308 N.C. 376, 377, 302 S.E. 2d 221, 222 (1983).

Reversed and remanded.

STATE OF NORTH CAROLINA v. FREDRICK NEIL SAUNDERS, AKA NEAL SAUNDERS

No. 581A85

(Filed 2 July 1986)

1. Homicide § 21.5— first degree murder—evidence of deliberation—sufficient

There was sufficient evidence of deliberation to carry a charge of first degree murder to the jury where the evidence revealed a minimum of provocation on the part of the deceased; defendant had become suspicious that the deceased was an informant working with local law enforcement agencies; there was substantial evidence of statements made by defendant after the killing relating to the part he played in the crime; there was evidence of threats

made against the victim by defendant prior to the homicide; and there was evidence that the deceased was shot in the back of the head at close range with a .12 gauge sawed-off shotgun, and the body pushed into the trunk of a car and dumped several hours later in a creek in South Carolina.

2. Homicide § 15.4— first degree murder—pathologist's testimony—defendant's account inconsistent with wound—admissible

The trial court did not err in a prosecution for first degree murder by overruling defendant's objections to the testimony of a pathologist that the defendant's account of the manner in which the shooting occurred was inconsistent with the type of wound suffered by the victim and that the wound was not a self-defense type of wound. Even though self-defense was an ultimate issue in the case, the pathologist who performed the autopsy was clearly in a position to assist the jury in understanding the nature of the deceased's wound and in determining whether defendant acted in self-defense. N.C.G.S. § 8C-1, Rule 704 (Cum. Supp. 1985).

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment entered by *Preston, J.*, at the 20 May 1985 Criminal Session of Superior Court, CUMBERLAND County, upon a jury verdict of guilty of murder in the first degree. Heard in the Supreme Court 11 February 1986.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

James C. MacRae, for defendant-appellant.

FRYE, Justice.

Defendant contends that the trial court committed two errors in his trial. First, defendant argues that the trial court erred in denying his motion to dismiss, contending that there was insufficient evidence of deliberation to support the charge of murder in the first degree. Second, defendant contends that the trial court erred in overruling his objections to the medical expert witness' testimony concerning the inconsistency in defendant's account of the killing and the nature of the deceased's wound. After carefully reviewing the record, the relevant law, and the parties' briefs, we find no error in the trial proceedings leading to defendant's conviction.

Defendant was charged with murder in the first degree. Evidence for the State tended to show that defendant met the deceased, Willie Thomas "Tommy" Wilson, in December of 1983 and began committing housebreakings with him. In late December

1983, defendant, Wilson, and Larry Joe Wade broke into the McCaskill residence in Hope Mills and stole a red bedspread, video reels and cassette tapes, and a coin collection. On 26 December 1983, defendant, Wilson, and Wade broke into the residence of defendant's former employer and stole some guns, including a twelve-gauge pump shotgun. The men took the guns to Wade's house and sawed off the barrel of the twelve-gauge shotgun.

On 27 December 1983, defendant and Wilson put the stolen guns in the back seat of Wilson's car and drove around trying to sell them. After being unsuccessful in this endeavor, they drove to Carl Gardner's house to attend a pig picking. Around 9:00 p.m., defendant and Wilson left Gardner's house together in Wilson's car to locate a floor jack and to steal some tires. After locating a floor jack, the men drove to a wooded area near Shaw Road to look for the tires. At this time, defendant suggested that they remove the stolen guns from the back seat and place them in the trunk. Both men proceeded to do so. Wilson walked to the back of the car, leaned into the trunk, and deposited some guns. As Wilson raised himself out of the trunk area, defendant stepped behind him and shot him in the back of the head at close range with a twelve-gauge pump sawed-off shotgun. Defendant pushed Wilson's body into the trunk of the car and drove around attempting to locate Larry Joe Wade. After locating Wade, defendant asked Wade to ride with him to an undisclosed destination. The men drove to an area off Interstate 20 near Columbia, South Carolina, and dumped Wilson's body into a creek. They also threw into the creek a red bedspread, some video reels and cassette tapes, and a coin collection. On their return to North Carolina, their car broke down, and the men abandoned it after hiding the stolen guns in a wooded area near Interstate 20. They rode a bus back to Fayetteville.

Upon arrival in Fayetteville, defendant hid himself from the police for a couple of days. He then stole a car, painted it, and drove back to South Carolina to retrieve the guns that he had hidden days earlier. Defendant returned to North Carolina, sold some of the guns, and fled to Lafayette, Louisiana.

On 17 January 1984, Phillip Brooks, Richland County Sheriff's Department, Columbia, South Carolina, received a report that a citizen had seen a body in a creek near Interstate 20. The body

removed from the creek had a wound two inches in diameter and four inches from the right ear on the right side of the lower part of the back of the head. An autopsy performed in South Carolina on 18 January 1984 disclosed that a shotgun wound was the cause of death. The body was later identified as that of Willie Thomas Wilson.

The South Carolina police officers also recovered from the creek a red bedspread, a variety of collector's coins, video reels and cassette tapes, and some personal papers. On one piece of paper was the name McCaskill and two telephone numbers. A South Carolina officer called the numbers and learned that the McCaskill's home in Hope Mills had recently been burglarized, and that the items recovered from the creek had been taken from their home.

On 20 January 1984, the Cumberland County Sheriff's Department picked up Larry Joe Wade as a suspect in the burglary of the McCaskill residence. Wade told the officers that on the night of 27 December 1983, defendant asked him to ride with him to an undisclosed location, and that defendant told Wade that he had shot "Tommy" Wilson and put him in the trunk of the car. Wade stated that he and defendant dumped Wilson's body into a creek in South Carolina.

On 17 February 1984, defendant was arrested in Lafayette, Louisiana. At the time of his arrest, Louisiana police found a twelve-gauge pump sawed-off shotgun in defendant's bedroom under the bed. Defendant waived extradition and was returned to North Carolina.

Defendant testified in his own behalf at trial. His account of the events leading to Wilson's death was consistent with the evidence offered by the State with one exception. Defendant testified that he acted in self-defense when he shot Wilson. According to defendant, after Wilson leaned over and put some guns in the trunk of the car, Wilson pulled out a pistol and pointed it at defendant. Defendant stated that "I saw the gun, that's whatever [sic] I stepped behind him and shot him."

The jury returned a verdict of guilty of murder in the first degree.

I.

[1] Defendant first assigns as error the denial of his motions to dismiss made at the close of the State's evidence and at the close of all the evidence. It is defendant's position that there was not sufficient evidence of deliberation to carry the case to the jury on the charge of murder in the first degree. Defendant concedes that the State has offered evidence sufficient to go to the jury on the question of premeditation.

After the denial of defendant's motion to dismiss at the close of the State's evidence, defendant proceeded to offer evidence, thereby waiving his motion to dismiss at the close of the State's evidence. *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631 (1980). We, therefore, only consider defendant's motion to dismiss at the close of all the evidence. *Id.*

In considering defendant's contentions, we must apply the established rule that upon a motion for dismissal 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. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). If there is substantial evidence of each essential element of the charged offenses, and of defendant being the perpetrator of the offense, the motion is properly denied. *Id.*

"Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Calloway*, 305 N.C. 747, 751, 291 S.E. 2d 622, 625 (1982). Premeditation is defined as "thought beforehand for some length of time no matter how short." *Id.* Deliberation means an "intention to kill executed by the defendant in a 'cool state of blood' in furtherance of a 'fixed design to gratify a feeling of revenge, or, to accomplish some unlawful purpose.'" *Id.* "'Cool state of blood' as used in connection with premeditation and deliberation does not mean absence of passion and emotion but means that an unlawful killing is deliberate and premeditated if executed with a fixed design to kill notwithstanding defendant was angry or in an emotional state at the time." *State v. Ruof*, 296 N.C. 623, 636, 252 S.E. 2d 720, 728 (1979).

Ordinarily, premeditation and deliberation must be proved by circumstantial evidence. Some circumstances to be considered are:

"(1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by defendant, (4) ill will or previous difficulty between the parties, and (5) evidence that the killing was done in a brutal manner." *State v. Calloway*, 305 N.C. 747, 751, 291 S.E. 2d 622, 625-26 (1982).

When the evidence is considered in the light most favorable to the State, it discloses that the trial judge properly denied defendant's motion. (1) The evidence reveals a minimum of provocation on the part of the deceased. There was some evidence at trial that, prior to the homicide, defendant became suspicious that the deceased was an informant working with local law enforcement agencies. (2) There was substantial evidence of statements made by defendant after the killing relating to the part he played in the crime. Several witnesses testified that in the days following Wilson's death defendant stated, in effect, that they didn't have to worry about Wilson anymore because defendant had killed him. (3) In addition, there was evidence of threats made against victim by defendant prior to the homicide. One witness testified that he overheard defendant say that he was going to kill Wilson because he was a "snitch." Another testified that defendant, after discussing whether Wilson was a "snitch," stated that he "would take care of it." (4) While there was no significant evidence of previous difficulty between defendant and the deceased, there was evidence that defendant believed Wilson was a "snitch" working with local law enforcement agencies, and evidence that defendant had threatened bodily harm to Wilson because of his alleged involvement with the police. (5) The evidence reveals that Wilson was killed in a brutal manner. While Wilson unsuspectingly stood at the trunk of his car, defendant stepped behind him and shot him at close range in the back of the head with a twelve-gauge pump sawed-off shotgun. After defendant shot Wilson, defendant pushed the body into the trunk of the car and several hours later dumped the body into a creek in South Carolina. We hold that there was substantial evidence which would permit the jury to draw reasonable inferences that defendant acted with premeditation and deliberation when he shot and killed the deceased. Therefore, the judge did not err in denying defendant's motion to dismiss made at the close of all the evidence.

II.

[2] Defendant next contends that the trial court erred in overruling his objections to the testimony of Dr. William Armstrong, an expert in pathology, that defendant's account of the manner in which the shooting "went down" was inconsistent with the type of wound suffered by victim, and that the wound was not a self-defense type wound. Defendant argues that the expert witness' testimony expressed an opinion on the issues to be decided by the jury, and therefore invaded the jury's province.

In *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978), this Court held that admissibility of expert opinion depends not on whether it would invade the jury's province, but rather on "whether the witness . . . is in a better position to have an opinion . . . than is the trier of fact."

N.C.G.S. § 8C-1, Rule 702, provides that:

> 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.

Dr. Armstrong's expert testimony is evidence properly admitted under this rule. His opinion as to the nature of the deceased's wound was based upon his examination of the entrance wound in the deceased's head and the path the shotgun pellets traveled after entry. As the pathologist who performed the autopsy, Dr. Armstrong was clearly in a position to assist the jury in understanding the nature of the deceased's wound and in determining whether defendant, in fact, acted in self-defense when he shot the deceased. Therefore, he was properly allowed to testify to these matters in the form of an opinion. This is true even though self-defense was an ultimate issue in the case. N.C.G.S. § 8C-1, Rule 704 (Cum. Supp. 1985). The trial judge did not err in overruling defendant's objections to the pathologist's testimony.

In defendant's trial we find

No error.

STATE OF NORTH CAROLINA v. MORRIS RAY DAVIS

No. 157A85

(Filed 2 July 1986)

1. Criminal Law § 97.2— refusal to reopen evidence—no abuse of discretion

The trial judge did not abuse his discretion in a murder prosecution by refusing to reopen the evidence to permit defendant to play a tape recording of the prosecuting witness's first statement to the police where counsel for the defense failed to timely produce the necessary equipment to play the tape after more than adequate opportunity and the same evidence was placed before the jury through the use of a transcription. N.C.G.S. § 15A-1226(b) (1983).

2. Homicide § 30— first degree murder—refusal to submit second degree murder —no error

The trial court did not err in a prosecution for first degree murder by failing to instruct the jury on second degree murder where the State's evidence established that the defendant, jealous of his ex-lover's relationship with the victim, threatened to kill the victim; obtained a rifle and called his ex-lover several times on the night of the shooting; entered her apartment with a key he had managed to obtain; shot the victim once; and, while the unarmed victim staggered out of bed, shot him again with the fatal shot. This evidence belies anything other than a premeditated and deliberate killing.

PURSUANT to N.C.G.S. § 7A-27(a), defendant appeals his conviction for first degree murder for which he received a sentence of life imprisonment. The case was tried before *Smith, J.*, at the 8 October 1984 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court on 14 April 1986.

On appeal defendant brings forth two assignments of error. The first concerns denial of the defendant's request to be allowed to reopen his case in order to play for the jury a tape recording of a witness's statement made shortly after the murder. The second concerns the denial of defendant's request for a jury instruction on second degree murder. For the reasons set forth below, we find no error.

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

James L. Blackburn for the defendant-appellant.

BILLINGS, Justice.

According to the evidence at trial, the victim, Curtis Winston, was a captain with the Raleigh Police Department. Shortly after midnight on 12 May 1984, Captain Winston and Karen Brown were together in the bedroom of Ms. Brown's apartment. According to Ms. Brown, she heard her apartment door open and almost immediately saw the defendant standing at her bedroom door. The defendant was pointing a rifle at Captain Winston. She heard a shot, covered her face, and, as Winston was climbing out of bed, she heard a second shot. Captain Winston died of a gunshot wound which entered his left lung, penetrated his heart and passed through his right lung.

Ms. Brown testified that she had known the defendant for a number of years and that they had lived together until March of 1984 when she had asked the defendant to move out of her apartment. After the defendant moved out, she had the locks to her apartment changed and had two sets of keys made, one of which she kept. Her apartment manager was given the other set.

For several months prior to March, Ms. Brown and the defendant had not been getting along well and Ms. Brown had begun dating Captain Winston. The defendant had been jealous of the relationship between Ms. Brown and the victim and, just prior to moving out, had threatened Ms. Brown with a gun and had beaten her. Ms. Brown also testified that defendant accosted her one morning after he had moved out, forced her into her apartment, and sexually assaulted her.

The defendant testified at trial. His recollection of the events was substantially different from Ms. Brown's. According to the defendant, Ms. Brown's relationship with Captain Winston was not good; Captain Winston had sexually assaulted her and was treating her badly; the defendant, even after he moved out of the apartment, continued to see Ms. Brown on a regular basis. On the night in question, the defendant was required to work a full shift at Central Prison where he was employed as a prison guard. Upon arriving "home" to the apartment, he let himself in with a key which Ms. Brown had given him. As he entered the bedroom, he saw a man "on top of" Ms. Brown. The man jumped up, grabbed him, and they fought for several minutes. He heard a gunshot. The man staggered to the living room, and the defend-

ant heard a second shot. Defendant maintained at trial that Ms. Brown fired the shots which killed Captain Winston but that "she didn't mean to do it."

The State introduced numerous witnesses whose testimony substantiated Ms. Brown's version of the events. In the months prior to the shooting, the defendant had written threatening notes, one of which was found on Ms. Brown's windshield and which stated: "Karen, if you care anything at all about us I ask that you please leave this nigger alone or he will destroy us forever and not ever a [sic] return. Morris." Ms. Brown had discussed her fears of the defendant with her family after defendant had beaten her and with a co-worker after the defendant had sexually assaulted her. When police officers arrived at Ms. Brown's apartment after the shooting, they found no physical evidence of a struggle, nor was there evidence when defendant was taken into custody that he had been involved in a struggle. An autopsy on the body of the victim indicated no evidence of a struggle.

[1] Defendant first contends that the trial judge committed prejudicial error in denying his motion to reopen the evidence in order to play a tape recording of Ms. Brown's first statement to police officers given to Officer Szymkewicz on 12 May 1984. During her testimony, Ms. Brown identified State's exhibit 75 as a reasonably accurate transcription of the tape recorded conversation. Following Ms. Brown's testimony, Officer Szymkewicz took the stand on Tuesday, 16 October 1984. He had with him the actual tape recording, but the tape player which he had brought with him would not play the tape. He testified that defendant's exhibit 9 was an accurate transcription of the tape recording and was identical to State's exhibit 75. Judge Smith allowed a recess which lasted about an hour during which defense counsel was unable to produce a suitable tape player. The State rested its case before lunch that day. The defense began putting on evidence that afternoon and rested its case during the morning of 17 October. The defense introduced the tape recording into evidence, but defense counsel had not made arrangements for a tape player to play the tape. The State put on its rebuttal evidence and concluded its case at about 3:30 on the afternoon of 17 October. Defense counsel was given another opportunity to play the tape, but he still had not secured a tape player. The defense rested its

case. Arguments of counsel were scheduled for 9:00 a.m. the following day. The next morning defense counsel moved to reopen the evidence for the purpose of playing the tape, and the motion was denied.

The defendant contends that the trial judge abused his discretion in denying his motion to reopen the evidence in order to permit the jury to hear this tape recording. He argues that "[t]he significance of the tape recording simply cannot be underestimated." The taped statement would, according to the defendant, corroborate his version of the events and would contradict Ms. Brown's trial testimony in the following respects: In the taped statement, Ms. Brown stated that the two men actually struggled, that she did not know "who pushed whom against the door," and that she did not remember if the defendant had a gun.

Counsel for the defense was given a transcription of the tape-recorded statement at issue which he used during an extensive cross-examination of the witness. Defense counsel eventually obtained a tape player which would accommodate the tape and actually played it during the sentencing phase of the defendant's trial. The defendant does not suggest that the transcription which was provided to him was not an accurate transcription of the tape.

During cross-examination, Ms. Brown explained that she was distraught at the time she was questioned and that in using the term "struggle," she was referring to the noises she heard as the victim staggered and fell after being shot. She also admitted during direct and cross-examination that she had covered her eyes or her face after the first shot.

We do not believe that the trial judge abused his discretion in denying defendant's motion to reopen the evidence to allow the jury to listen to this tape. The trial judge has inherent authority to supervise and control trial proceedings. The manner of the presentation of the evidence is largely within the sound discretion of the trial judge and his control of a case will not be disturbed absent a manifest abuse of discretion. *See State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983) (no abuse of discretion where trial judge read victim's statement to the jury); *State v. Goldman*, 311 N.C. 338, 317 S.E. 2d 361 (1984) (trial judge has discretion to allow either party to recall witnesses to offer additional evidence, even

after jury arguments); *see also*, N.C.G.S. § 15A-1226(b) (1983) (trial judge may, in his discretion, "permit any party to introduce additional evidence at any time prior to verdict"). In the present case, the trial judge acted within his authority, in the interests of expediting the proceedings, where counsel for the defense, after more than adequate opportunity, failed timely to produce the necessary equipment to play the tape. Furthermore, counsel was in possession of a transcription of the tape which he used extensively during cross-examination of the witness. Inasmuch as substantially the same evidence was placed before the jury at trial through use of the transcription as would have been produced by playing the tape, defendant has failed to show prejudice by the exclusion of the tape. *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); 1 *Brandis on North Carolina Evidence*, § 30 (1982).

This assignment of error is overruled.

[2] Defendant next contends that the facts of this case compelled the trial judge to instruct the jury on second degree murder. We disagree. In *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983), this Court, in overruling prior decisions, held that an instruction on second degree murder was necessary only when the evidence supported such a charge. In *Strickland*, we established the following standard:

> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Id. at 293, 298 S.E. 2d at 658.

Defendant's version of the murder was calculated to convince the jury that Ms. Brown shot Captain Winston. He denied any culpability. Had the jury believed defendant, it would have been incumbent upon them to find the defendant not guilty. The State's case, if believed, compelled a verdict of first degree murder. Although Ms. Brown referred to a "struggle" in her initial statement to the police, that statement was used in an attempt to impeach her trial testimony and was not substantive evidence. *State*

v. Tolley, 290 N.C. 349, 226 S.E. 2d 353 (1976). *See* N.C.G.S. § 8C-1, Rules 801 and 802. The only version of the events, other than the defendant's totally exculpatory version, presented by substantive evidence at trial was of a deliberate, unprovoked killing. Not only did Ms. Brown's testimony establish each and every element of first degree murder, including premeditation and deliberation, but the State also produced numerous other witnesses to corroborate its theory. Defendant was portrayed as a jealous ex-lover. He had threatened Captain Winston by letter prior to the shooting. He had written threatening notes to Ms. Brown. He had made threatening remarks to Ms. Brown's brother. Just prior to shooting Captain Winston, defendant stated, "I told you I was going to kill you." After the shooting, defendant told Ms. Brown that Winston was "no damn good." He told Ms. Brown that the shooting was all her fault and asked her if it was worth it. Defendant also commented to a medical technician at the scene that he had "shot the son of a bitch . . . . I told him to quit f------ around."

In summary, the State's evidence established that the defendant, jealous of his ex-lover's relationship with Captain Winston, threatened to kill the victim. He obtained a rifle and, after calling Ms. Brown several times on the night of the shooting, entered her apartment with a key he had managed to obtain. He shot the victim once and, while the unarmed victim staggered out of bed, shot him again with the fatal shot. This evidence "belies anything other than a premeditated and deliberate killing." *Id.*

This assignment of error is overruled.

Defendant received a fair trial free of prejudicial error.

No error.

LINDA CADE WATTS, KIM WATTS, AND GEORGE WATTS v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC.; DR. JAMES ASKINS; DR. RALPH MORESS; NORTH CAROLINA BAPTIST HOSPITALS, INC.; DR. VICTOR KERANEN; DR. W. C. MILLER; DR. MENNO PENNICK; DR. EBAN ALEXANDER, JR.; DR. JAMES TOOLE; AND DAN HALL

No. 383A85

(Filed 2 July 1986)

Fraud § 12; Physicians, Surgeons and Allied Professions § 16.1— fraudulent concealment by marriage and family counselor—insufficient evidence

Summary judgment was properly granted for defendant Hall on a claim that he assisted plaintiff's physicians in fraudulently concealing from her the true nature of her injuries in an effort to cover up earlier malpractice where plaintiff was in an automobile accident on 7 June 1974; she was treated in an emergency room and released the same day; she has continued to suffer pain since the accident and has been treated by numerous physicians in several hospitals in at least four states; until 1979 she was consistently told that she had no discoverable organic problem that would explain her persistent back and neck pain; in 1979 a doctor performed a CT-scan that revealed what the doctor thought were residual changes from fractures in two lumbar vertebrae; the doctor also told plaintiff that he checked the X-rays taken of her neck immediately following the accident and that these showed fractures in that area; the doctor's diagnosis was not confirmed by any of the other physicians who treated plaintiff and was later retracted by that doctor after a second CT-scan; plaintiff consulted a new doctor in 1981 who told her she was developing arachnoiditis, probably caused by multiple myelograms; plaintiff began to see defendant Hall in late 1974 in an attempt to obtain his assistance in dealing with her husband's drinking problem and in dealing with the emotional aspects of the pain she suffered after her accident; defendant Hall consistently tried to persuade plaintiff to accept that her pain had an emotional rather than a pathological origin; he admittedly consulted with her physicians about her condition; defendant told plaintiff that he had seen her "file"; and defendant attempted to dissuade plaintiff from consulting new doctors in later years.

APPEAL by defendant Dan Hall from a decision of the Court of Appeals, 75 N.C. App. 1, 330 S.E. 2d 242 (1985) (*Wells, J.*, dissenting), reversing summary judgment for defendant Hall entered by *Bowen, J.*, at the 28 November 1983 Civil Session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 12 March 1986.

No counsel contra for plaintiff-appellee Linda Cade Watts.

Nance, Collier, Herndon, Wheless, Guthrie and Jenkins, by Rodney A. Guthrie, for defendant-appellant Dan Hall.

FRYE, Justice.

This is a companion case to *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E. 2d 879 (1986). The sole issue presented on this appeal is whether the Court of Appeals erred in reversing the trial court's entry of summary judgment for defendant Hall on plaintiff Linda Watts' claim that defendant Hall assisted her physicians in fraudulently concealing from her the nature of her physical condition. For the reasons set forth below, we hold that the Court of Appeals erred in reaching its conclusion.

Plaintiff Linda Watts, her husband, and her daughter brought suit against two hospitals, several physicians, and defendant Hall, a marriage and family counselor, alleging that defendant hospitals and physicians had failed to diagnose correctly injuries she suffered in an automobile accident in 1974, and seeking damages on a variety of theories. This appeal relates to the claims made against defendant Hall. These were three-fold: plaintiffs alleged first that Hall's action in revealing confidential information disclosed to him during his treatment of plaintiff Linda Watts to her various physicians constituted malpractice; second, that Hall negligently conducted his counseling of her and exceeded the proper parameters of his role; and third, that he had intentionally assisted her physicians in fraudulently concealing from her the true nature of her injuries in an effort to cover up the earlier malpractice of her original doctors. Plaintiffs' original complaint was filed sometime in June 1982; they filed an amended complaint on 19 August 1982. Defendant Hall answered and subsequently filed a motion for summary judgment on 3 November 1983 on the alternative grounds that the complaint as to him failed to state a claim upon which relief could be granted and that all claims were barred by the statute of limitations. After hearing oral arguments on the motion, the trial court granted it. Plaintiff Linda Watts alone appealed to the Court of Appeals, which reversed the trial court's ruling with Wells, J., dissenting as to the fraudulent concealment claim. Defendant Hall appealed on the basis of Judge Wells' dissent; accordingly, plaintiff's claim against him for fraudulent concealment is the only one before this Court.

The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judg-

ment as a matter of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh'g denied*, 281 N.C. 516 (1972). As this Court remarked in *Koontz*, "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz*, 280 N.C. at 518, 186 S.E. 2d at 901. All inferences are to be drawn against the moving party and in favor of the opposing party. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379; *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh'g denied*, 281 N.C. 516. We find that under the facts of this case, defendant Hall has met this burden with respect to plaintiff's fraudulent concealment claim.

Considered in the light most favorable to the plaintiff, the record discloses the facts set forth herein. Plaintiff was in an automobile accident on 7 June 1974. Following the accident, she was treated in the emergency room at Cape Fear Valley Hospital and released the same day. She has continued to suffer pain since this accident and has been treated by numerous physicians in several hospitals in at least four states. Until 1979, she was consistently told that she had no discoverable organic problem that would explain her persistent back and neck pain. In 1979, Dr. Gene Coin performed a CT-scan on her back that revealed what Dr. Coin thought were residual changes from fractures in two of plaintiff's lumbar vertebrae. Dr. Coin also told plaintiff that he checked the X-rays taken of her neck immediately following the accident and that these showed fractures in that area also. Dr. Coin's diagnosis was not confirmed by any of the other physicians who treated plaintiff and was later retracted by Dr. Coin himself in 1981 after a second CT-scan. Plaintiff consulted a new doctor in 1981 who told her that she was developing arachnoiditis, probably caused by the multiple myelograms given to plaintiff in attempts to discover an organic cause for her back pain.

Plaintiff claims that she did in fact suffer spinal fractures in the lumbar and cervical regions in the 1974 automobile accident. She alleges that the physicians who treated her at that time negligently failed to discover these fractures, and those who have treated her since knew about these fractures and "covered up" for the original doctors' negligence. Her claim against her physi-

cians for fraudulent concealment is discussed and rejected in *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E. 2d 879, where her medical history is set forth in more detail.

Plaintiff also claims that defendant Hall intentionally assisted her physicians in this "cover up." She began to see defendant Hall in late 1974 in an attempt to obtain assistance in dealing with her husband's drinking problem. As a collateral matter, she also sought help in dealing with the emotional aspects of the pain she suffered after her accident. She continued to see Hall until July 1981.

In support of her fraudulent concealment claim against defendant Hall, plaintiff has offered very little evidence even when viewed in the light most favorable to her. Hall consistently tried to persuade her to accept that her pain had an emotional rather than a pathological origin. He admittedly consulted with her physicians about her condition; plaintiff denied ever giving him permission to do so. He also told her that he had seen her "file."[1] In later years, he attempted to dissuade her from consulting new doctors.

As we said in *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E. 2d 879, both constructive and actual fraud are implicated in plaintiff's allegations. To show constructive fraud, plaintiff must allege facts and circumstances that created a relationship of trust and confidence and that led up to and surrounded the consummation of the transaction in which defendant allegedly took advantage of this position of trust to the hurt of plaintiff. When a fiduciary relationship exists between the parties to a transaction, a presumption of fraud arises when the superior party obtains a possible benefit, but this presumption disappears if that party can show, for instance, that the other party acted on independent advice. *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E. 2d 879.

We believe that here, as in the companion case, the evidence "amply demonstrated that plaintiff sought and received a number of second opinions as to the source of her complaints." *Id.* This history dispels any presumption that might arise from her rela-

1. From context, it is clear that plaintiff meant her medical records.

tionship with defendant Hall, and plaintiff must show sufficient facts to support a claim of actual fraud.

Proof of actual fraud requires that plaintiff show the existence of five essential elements:

1) false representation or concealment of a material fact,

2) likely to deceive,

3) intended to deceive,

4) which does in fact deceive,

5) resulting in injury to plaintiff.

Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974).

Even taken in the light most favorable to the plaintiff, the facts presented in the record are insufficient to show that defendant Hall intentionally assisted plaintiff's physicians in a fraudulent concealment of her true condition. First, as we held in *Watts v. Cumberland County Hosp. System*, there is insufficient evidence to sustain plaintiff's fraudulent concealment claim against her physicians. *Watts*, 317 N.C. 110, 343 S.E. 2d 879. Second, there is insufficient evidence to suggest that even if they did, defendant Hall was aware of this concealment. While plaintiff says that Hall consulted with her physicians, she does not allege that they told him she had a broken back. His access to her medical records is not a sufficient indication; all he would have found was Dr. Coin's original and corrected reports, already known to plaintiff, and an X-ray report from Baptist Hospital made in 1981 referring to "compression fractures unchanged since 1976." He would also have found the 1976 X-ray report which makes no mention of any fractures of any type, and numerous diagnoses from several different sources of minor ailments with some psychological overlay. As plaintiff herself says, defendant has no medical knowledge. The facts as alleged fail to support any of the elements of actual fraud.

The decision of the Court of Appeals is reversed with respect to plaintiff's claim against defendant Hall for fraudulent concealment, and the case is remanded to that court for further remand to the Superior Court, Cumberland County, for reinstatement of

summary judgment as to plaintiff's fraudulent concealment claim against defendant Hall.

Reversed and remanded.

STATE OF NORTH CAROLINA v. BETTY LOU EVANS

No. 249A85

(Filed 2 July 1986)

Parent and Child § 2.2; Homicide § 21.9— death of child—evidence sufficient

There was sufficient evidence in a prosecution for involuntary manslaughter from which a jury could find beyond a reasonable doubt that death resulted from the child's having been violently handled or shaken, and that defendant was the child's exclusive custodian at the time the injuries causing death occurred.

BEFORE *Allsbrook, J.*, at the 5 March 1984 Criminal Session of NASH County Superior Court, defendant was convicted of involuntary manslaughter and sentenced to the presumptive three years' imprisonment. A divided panel of the Court of Appeals found no error in the trial in a decision reported at 74 N.C. App. 31, 327 S.E. 2d 638 (1985). Appeal by defendant pursuant to N.C.G.S. § 7A-30(2).

Lacy H. Thornburg, Attorney General, by George W. Boylan, Assistant Attorney General, for the state.

Ralph G. Willey, III, for defendant appellant.

PER CURIAM.

We conclude the decision of a majority of the Court of Appeals panel should be affirmed.

We disagree with the view of the dissenter below that the state's evidence is insufficient to show the cause of death. The pathologist who performed the autopsy described in detail a number of "superficial" injuries he found to the child's body, including scratches and abrasions of her forehead, neck, cheek, mouth, arms, shoulder, buttock, upper thigh, and in and around her ear. Some of these were "pattern-type injuries, the indication being

that although they are not continuous, they may all have been caused at the same time . . . ." The pathologist also found a subdural hematoma, or bleeding inside the skull, which in his opinion could have been caused by someone having shaken the child. In the pathologist's opinion death was caused by a "combination of these bruises and injuries, soft tissue and blunt-type injuries, specifically an injury to the head." He said the subdural hematoma "was a direct and significant cause of death." Clearly this is substantial evidence from which a jury could find beyond a reasonable doubt that death resulted from the child's having been violently handled, or shaken, an act which produced both the pattern-type bruises and abrasions and the subdural hematoma.

We also disagree with the dissenter below that the state's evidence is insufficient to show defendant had exclusive custody of the child when the fatal injuries were inflicted. On this point the state offered defendant's out-of-court statement that she was alone with the child on 10 August 1983 at approximately 3 p.m. when she discovered the child in distress. The child's eyes "didn't look right," and the child "was not breathing." Defendant's efforts to revive the child being unsuccessful, she called her husband to come home. He returned and they both took the child to the hospital. Defendant had been alone with the child that day since around 10:30 or 11 a.m. when she was with the child and her husband at Greenfield Apartments where her husband worked. Another witness, Edel Elsayed, who managed the apartments, observed the child with defendant in the morning of 10 August 1983 in his office for approximately ten to fifteen minutes. The child appeared normal. Elsayed observed no scratches, bruises, or other injuries on the child. Elsayed also observed defendant leave the apartments with the child "going to the store," unaccompanied by defendant's husband who remained at the apartments on his job. Later that afternoon at about 3 p.m., Elsayed observed defendant's husband leave the apartments early "because something happened to the little girl." This evidence is quite sufficient to permit a jury to find beyond a reasonable doubt that defendant was the child's exclusive custodian at the time the injuries causing death occurred.

We note defendant has not been accused or convicted of intentionally killing the child. She has been accused and convicted only of involuntary manslaughter, which is the unintentional kill-

ing of another (1) by an unlawful act not amounting to a felony or (2) by an act or omission amounting to culpable negligence. *State v. Wilkerson,* 295 N.C. 559, 247 S.E. 2d 905 (1978).

Accordingly, the decision of the Court of Appeals is

Affirmed.

WILLIAM DOUGLAS VICK AND PATRICIA VICK v. DARRELL ST. CLAIR DAVIS

No. 654A85

(Filed 2 July 1986)

Appeal and Error § 46— evenly divided court—Court of Appeals decision affirmed—no precedent

Where one member of the Supreme Court recused himself, and the remaining members of the Supreme Court were evenly divided, the decision of the Court of Appeals was affirmed but stood without precedential value.

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. 359, 335 S.E. 2d 197 (1985), which affirmed default judgment against defendant signed by *Brannon, J.*, on 18 December 1984, in Superior Court, WAKE County. Heard in the Supreme Court 12 March 1986.

Sanford Adams McCullough & Beard, by Charles C. Meeker and Cynthia Leigh Wittmer, for plaintiff-appellees.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by George R. Ragsdale, Nancy Dail Fountain, and Jane Flowers Finch, for defendant-appellant.

PER CURIAM.

Justice Martin having recused, the Court is evenly divided. Under these circumstances, following the uniform practice of this Court, the decision of the Court of Appeals is affirmed, not as

precedent but as the decision in this case. *Lynch v. Hazelwood*, 312 N.C. 619, 324 S.E. 2d 224 (1985).

Affirmed.

STATE OF NORTH CAROLINA v. CHARLES LEE ALLEN

No. 140A86

(Filed 2 July 1986)

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 79 N.C. App. 280, 339 S.E. 2d 76 (1986), which reversed the judgment against the defendant entered by *Collier, J.*, on 14 March 1985, in Superior Court, UNION County. Heard in the Supreme Court 9 June 1986.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Robin E. Hudson, Assistant Appellate Defender, for the defendant-appellee.

PER CURIAM.

Affirmed.

PIEDMONT BANK AND TRUST COMPANY v. OBIE STEVENSON AND SHIRLEY M. STEVENSON

No. 139A86

(Filed 2 July 1986)

DEFENDANT Shirley M. Stevenson appeals as a matter of right, pursuant to N.C.G.S. § 7A-30(2), from the decision of a divided panel of the Court of Appeals, 79 N.C. App. 236, 339 S.E. 2d 49 (1986). Heard in the Supreme Court 10 June 1986.

Clontz and Clontz, by Ralph C. Clontz, III, for plaintiff-appellee.

Roger Lee Edwards, for defendant-appellant.

PER CURIAM.

The trial court entered judgment on 23 August 1984, granting defendant's motion for directed verdict made at the close of plaintiff's evidence. A divided panel of the Court of Appeals held that the directed verdict was improvidently granted and ordered a new trial. Defendant Shirley M. Stevenson appealed to this court as a matter of right.

The decision of the Court of Appeals is affirmed.

Affirmed.

BARBARA KIRKLAND McCOMBS, RICKY DALE KIRKLAND AND BOBBY GENE KIRKLAND, BY HIS GUARDIAN AD LITEM v. ENOCH KIRKLAND

No. 568PA85

(Filed 2 July 1986)

ON plaintiffs' petition for writ of certiorari to review the decision of the Court of Appeals, 76 N.C. App. 336, 332 S.E. 2d 513 (1985), affirming order entered by *Carpenter, J.*, at the April 1984 session of District Court, GASTON County, granting defendant's motion for summary judgment and dismissing plaintiffs' action. Heard in the Supreme Court 9 June 1986.

Rankin & Stancil, by James W. Stancil, for plaintiff-appellants.

Harris, Bumgardner & Carpenter, by Don H. Bumgardner, for defendant-appellee.

PER CURIAM.

Petition for writ of certiorari improvidently allowed.

ANCHOR PAPER CORP. v. ANCHOR CONVERTING CO.

No. 156P86.

Case below: 79 N.C. App. 144.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 July 1986.

BLACK v. CARLTON YARN MILLS

No. 99P86.

Case below: 79 N.C. App. 176.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 July 1986.

BROWN v. BROWN

No. 262P86.

Case below: 80 N.C. App. 166.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

BURCH v. BURCH

No. 279P86.

Case below: 80 N.C. App. 166.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 July 1986.

CENTRAL CAROLINA BANK & TRUST CO. v.
FAWN VENDORS, INC.

No. 256P86.

Case below: 79 N.C. App. 755.

Petition by third party plaintiffs for discretionary review under G.S. 7A-31 denied 2 July 1986.

CONCRETE SERVICE CORP. v. INVESTORS GROUP, INC.

No. 260P86.

Case below: 79 N.C. App. 678.

Petition filed by defendant (Timothy E. Oates) for writ of certiorari to the North Carolina Court of Appeals denied 2 July 1986.

CRUMP v. BD. OF EDUCATION

No. 239P86.

Case below: 79 N.C. App. 372.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 July 1986.

DURING v. SERVICE SYSTEMS CORP.

No. 240P86.

Case below: 79 N.C. App. 369.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 July 1986.

F. RAY MOORE OIL CO., INC. v. STATE OF N. C.

No. 277P86.

Case below: 80 N.C. App. 139.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 July 1986.

FREEMAN v. SPINNAKER POINT, LTD.

No. 228P86.

Case below: 79 N.C. App. 570.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 2 July 1986.

HOGAN v. FORSYTH COUNTRY CLUB CO.

No. 227P86.

Case below: 79 N.C. App. 483.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

IN RE APPEAL FROM ENVIRONMENTAL MANAGEMENT COMM.

No. 275P86.

Case below: 80 N.C. App. 1.

Petition by Cane Creek Conservation Authority and Teer Farms, Inc. for discretionary review under G.S. 7A-31 denied 2 July 1986.

IN RE APPEAL OF K-MART CORP.

No. 257PA86.

Case below: 79 N.C. App. 725.

Petition by K-Mart Corporation for discretionary review under G.S. 7A-31 allowed 2 July 1986.

IN RE COMPUTER TECHNOLOGY CORP.

No. 101P86.

Case below: 78 N.C. App. 402.

Petition by Computer Technology under G.S. 7A-31 and writ of supersedeas and temporary stay denied 2 July 1986. Notice of appeal by Computer Technology under G.S. 7A-30 dismissed 2 July 1986.

IN RE DIGITAL DYNAMICS CORP. AND CARPHONICS, INC.

No. 102P86.

Case below: 78 N.C. App. 442.

Petition by Digital Dynamics and Carphonics for discretionary review and writ of supersedeas and temporary stay denied 2 July 1986. Notice of appeal by Digital Dynamics and Carphonics under G.S. 7A-30 dismissed 2 July 1986.

JOYCE v. CLOVERBROOK HOMES, INC.

No. 421P86.

Case below: 81 N.C. App. 270.

Petition filed by defendant (Cloverbrook Homes, Inc.) for temporary stay allowed subject to continuance of $62,000 cash bond 15 July 1986.

KENDRICK v. CITY OF GREENSBORO

No. 291P86.

Case below: 80 N.C. App. 183.

Petition by defendants for discretionary review under G.S. 7A-31 denied 2 July 1986.

MAINOR v. K-MART CORP.

No. 199P86.

Case below: 79 N.C. App. 414.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

NATIONWIDE MUTUAL INS. CO. v. LAND

No. 58PA86.

Case below: 78 N.C. App. 342.

Petition by several defendants for discretionary review under G.S. 7A-31 allowed 2 July 1986.

NELSON v. CHANG

No. 65P86.

Case below: 78 N.C. App. 471.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 July 1986.

OLIVETTI CORP. v. AMES BUSINESS SYSTEMS, INC.

No. 418P86.

Case below: 81 N.C. App. 1.

Petition by plaintiff for temporary stay allowed 9 July 1986.

PARKER MARKING SYSTEMS, INC. v.
DIAGRAPH-BRADLEY INDUSTRIES, INC.

No. 266P86.

Case below: 80 N.C. App. 177.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

PERRY v. PERRY

No. 282PA86.

Case below: 80 N.C. App. 169.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 2 July 1986.

ROANOKE CHOWAN HOUSING AUTHORITY
v. VAUGHAN

No. 413P86.

Case below: 81 N.C. App. 354.

Petition by defendants for writ of supersedeas and temporary stay denied 9 July 1986.

STATE v. BAILEY

No. 380PA86.

Case below: 80 N.C. App. 678.

Petition by the State for discretionary review under G.S. 7A-31 allowed 2 July 1986. Petition by the State for writ of supersedeas and temporary stay denied 2 July 1986.

STATE v. BLACKMON

No. 61PA86.

Case below: 78 N.C. App. 442.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 2 July 1986.

STATE v. BRITT

No. 287P86.

Case below: 80 N.C. App. 147.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

STATE v. CARAWAN

No. 265P86.

Case below: 80 N.C. App. 151.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

STATE v. CHESSON

No. 288P86.

Case below: 80 N.C. App. 167.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

STATE v. CHILDERS AND STATE v. THOMPSON

No. 296P86.

Case below: 80 N.C. App. 236.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

STATE v. DYE

No. 253P86.

Case below: 78 N.C. App. 807.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 July 1986.

STATE v. EPPS

No. 176P86.

Case below: 78 N.C. App. 807.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 July 1986.

STATE v. FARROW

No. 67P86.

Case below: 78 N.C. App. 443.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

STATE v. FREEMAN

No. 264P86.

Case below: 79 N.C. App. 177.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 July 1986.

STATE v. GLADNEY

No. 314P86.

Case below: 80 N.C. App. 337.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 July 1986.

STATE v. JOHNSON

No. 400P86.

Case below: 81 N.C. App. 454.

Petition by the Attorney General for discretionary review under G.S. 7A-31 denied 9 July 1986. Petition by the Attorney General for writ of supersedeas and temporary stay denied 9 July 1986.

STATE v. LITTLE

No. 386P86.

Case below: 80 N.C. App. 687.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986. Petition by defendant for writ of supersedeas and temporary stay denied 26 June 1986.

STATE v. McLAURIN

No. 249PA86.

Case below: 80 N.C. App. 167.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 14 July 1986. Petition by defendant for writ of supersedeas and temporary stay allowed upon reconsideration 14 July 1986.

STATE v. RAINES

No. 427P86.

Case below: 81 N.C. App. 299.

Petition by defendant for temporary stay allowed 15 July 1986.

STATE v. SHIELDS

No. 286P86.

Case below: 80 N.C. App. 168.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

STATE v. SHOEMAKER

No. 243P86.

Case below: 80 N.C. App. 95.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986. Motion to dismiss appeal for lack of substantial constitutional question filed by the State allowed 2 July 1986.

STATE v. SWEATT

No. 343P86.

Case below: 74 N.C. App. 207.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 July 1986.

STATE v. TAYLOR

No. 233P86.

Case below: 79 N.C. App. 635.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

STATE v. VAUGHT

No. 351PA86.

Case below: 80 N.C. App. 486.

Petition by the State for discretionary review under G.S. 7A-31 allowed 2 July 1986. Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

STATE v. WILLIAMS

No. 285P86.

Case below: 80 N.C. App. 168.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986.

STATE v. WILLIAMS

No. 378P86.

Case below: 81 N.C. App. 158.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1986. Petition by defendant for writ of supersedeas and temporary stay denied 8 July 1986.

STATE v. WORTHAM

No. 289PA86.

Case below: 80 N.C. App. 54.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 2 July 1986.

STEVENS v. SETZER

No. 278P86.

Case below: 80 N.C. App. 338.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 July 1986. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 2 July 1986.

UZZELL v. INTEGON LIFE INS. CORP.

No. 369P86.

Case below: 78 N.C. App. 458.

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 2 July 1986.

VICK v. VICK

No. 379P86.

Case below: 80 N.C. App. 697.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 July 1986. Petition by defendant for writ of supersedeas and temporary stay denied 2 July 1986.

PETITION TO REHEAR

DAVIDSON v. U.S. FIDELITY AND GUAR. CO.

No. 13A86.

Case below: 316 N.C. 551.

Petition by plaintiff denied 2 July 1986.

STATE OF NORTH CAROLINA v. BOBBY RAY JOHNSON, JR.

No. 525A83

(Filed 12 August 1986)

1. **Homicide §§ 18, 15.4— murder—expert testimony on intent—no prejudice**

The trial court erred in a murder trial which occurred before the effective date of N.C.G.S. Ch. 8C by permitting the State's expert to testify that in his opinion defendant was able to form the specific intent to kill on the night of the murder; however, defendant was convicted of first degree murder on the theories of premeditation and deliberation and felony murder, and the guilty verdict based on felony murder remained unsullied. Judgment on the underlying felony was arrested.

2. **Criminal Law § 75.1— questioning by officers—no seizure under Fourth Amendment—confession admissible**

Defendant's confession in a prosecution for murder, rape, and kidnapping was properly admitted where defendant was not deprived of his freedom or restrained in such a manner as to constitute being seized for purposes of Fourth Amendment analysis. Defendant was asked on a public street to accompany officers to the police station as a possible witness; defendant was not frisked before getting in the car; he sat alone in the back seat of the unmarked car while detectives rode in front; the detectives did not ask defendant to empty his pockets or frisk him in the interview room; the door to the interview room was not locked; defendant was told several times that he would be taken home; detectives provided defendant with cigarettes and coffee; defendant was allowed to go unescorted to the bathroom and to make two telephone calls; defendant was left alone and unsupervised in the interview room; the detectives questioning him never raised their voices, never talked in a loud, threatening manner, and never called him a liar; one detective stated that he had wanted to meet defendant because he wanted to meet a cold-blooded killer; and defendant acknowledged that he had been arrested several times previously and had known, understood, and waived his rights, although he thought that when he was read his rights it meant he was going to jail.

3. **Criminal Law § 91.2— pretrial publicity—continuance denied—no error**

The trial court did not err in a prosecution for kidnapping, rape, and murder by denying defendant's motion for a continuance based on pretrial publicity concerning defendant's effort to avoid a death sentence by pleading guilty. The standard of showing prejudice is the same for a continuance as for a change of venue; both defense counsel and defendant stated affirmatively that they were satisfied with the jury as chosen; and the three jurors who stated that they had read either or both of the newspaper articles stated unequivocally that their exposure would not affect their ability to determine defendant's guilt or innocence based solely on the evidence introduced at trial.

4. **Criminal Law § 106.4— confession—corpus delicti—evidence aliunde sufficient**

The trial court did not err by refusing to dismiss charges of rape and kidnapping because the State failed to establish the *corpus delicti* of either crime

where there was sufficient extrinsic evidence to support the jury's findings that the crimes charged occurred.

5. **Criminal Law §§ 91.11, 91.12— Speedy Trial Act—time for mental examination and discovery—properly excluded**

The trial court did not err by denying defendant's motion to dismiss under N.C.G.S. § 15A-701 to 704 where defendant was tried well within 120 days of indictment if the periods during which he was being examined at Dorothea Dix Hospital and during which the State sought to comply with his discovery request are excluded.

6. **Criminal Law §§ 33.4, 68— admission of cast of defendant's teeth and bite marks on victim—defendant did not dispute biting—probative value outweighs prejudicial effect**

The trial court did not err in a prosecution for kidnapping, rape and murder by admitting into evidence plaster casts of defendant's teeth and indentations on the deceased's breast and by allowing a demonstration of how defendant's teeth matched the bite marks. The evidence was relevant to show whether the deceased had been the victim of a violent sexual attack, whether it was defendant who had inflicted the injury, and as corroboration of defendant's confession; defendant may not preclude introduction of additional corroborative evidence by failing to contest facts contained in his extrajudicial confession.

7. **Constitutional Law § 63— death-qualified jury—constitutional**

The trial court did not err in a prosecution for kidnapping, rape and murder by death qualifying the jury.

8. **Jury § 7.12— death-qualified jury—defendant denied opportunity to rehabilitate—no error**

The trial court did not err by excusing a potential juror who expressed a clear refusal to invoke the death penalty before defendant had the opportunity to question and rehabilitate her; moreover, the juror was properly excluded under the *Wainwright* standard in light of her unequivocal initial and final statements that she would refuse to impose the death penalty regardless of the circumstances despite some confusion regarding her role as a juror in following the instructions of the trial judge.

9. **Jury § 7.8— jury selection—refusal to determine guilt of another—properly challenged for cause**

The trial court properly excused for cause a potential juror who clearly expressed her feeling that she would be unable to determine the guilt of another regardless of the circumstances. N.C.G.S. § 15A-1212(8) and (9).

10. **Jury § 5.2— irregularities in compiling jury list—underrepresentation of blacks—no error**

The defendant in a prosecution for kidnapping, rape, and murder was not denied his constitutional right to a trial by an impartial jury composed of a fair cross-section of the community where one of three duly-appointed jury commissioners was murdered four days before the Commission was required to submit a new list of potential jurors and the two remaining members proceeded

without waiting for a replacement; the data base adopted by the Commission did not include a list of licensed drivers residing in the county as required by N.C.G.S. § 9-2(c) because compatible computer software was not immediately available; and blacks represented 25.4 percent of the population of Guilford County but only 14.6 percent of the disputed venire. Defendant did not demonstrate that the two-person Commission acted with corrupt intent or that the use of a two-person Commission resulted in either systematic discrimination or irregularities affecting the actions of the jurors actually drawn and summoned; N.C.G.S. § 9-2(c) was not in effect when the jury list was compiled; the disparity of 10.8 percent between the county's black population and representation on the venire was not unfair or unreasonable; and defendant did not show that the Jury Commission's actions were representative of a systematic exclusion of blacks from the jury process. N.C.G.S. § 9-1. Sixth Amendment to the United States Constitution.

11. Jury § 6— voir dire—question concerning mitigating factor—disallowed

The trial court did not err in a prosecution for kidnapping, rape and murder by not permitting defense counsel to ask prospective jurors how they gauged the importance of the parent-child relationship and whether they could consider evidence of child abuse as a mitigating circumstance for sentencing purposes. Defendant was allowed to pose a similar question to potential jurors; mitigating circumstances submitted during the sentencing phase included that defendant was abused and neglected as a child and that he came from a broken home; the jurors found the existence of one mitigating factor; and the question was struck on the grounds that it was designed to elicit in advance what the jurors' decision would be under a given state of the facts.

12. Criminal Law § 102.6— opening argument—reference to codefendant—no prejudice

The trial court did not err by permitting a prosecutor during an opening argument to refer to a codefendant where the prosecutor stated that the codefendant's case was separate from defendant's and would not be a matter for the jury's concern. The comment in no way suggested that defendant was guilty, did not have the potential to affect the jury's deliberative process, and defendant failed to show that a different result would have been reached in the absence of this alleged error. N.C.G.S. § 15A-1443(a) (1983).

13. Criminal Law § 6— instruction on intoxication by drugs not given—no error

The trial court did not err in a prosecution for kidnapping, rape and murder by failing to give an instruction on intoxication by drugs where defendant could support his assertion that he was under the influence of PCP on the night of the murder only with a letter he had written which referred to buying "dust" but did not indicate that defendant had consumed the dust or was under its influence at the time of the murder. Moreover, defendant was given the benefit of a general instruction on voluntary intoxication as it related to premeditation and deliberation. N.C.G.S. § 15A-1232.

14. Criminal Law § 114.2— final instructions—one portion of facts repeatedly recited—no expression of opinion

The trial court did not improperly convey an opinion while instructing the jury on possible verdicts in a prosecution for kidnapping, rape and murder by

repeatedly reciting one portion of the facts regarding the rape and murder. N.C.G.S. § 15A-1232 does not preclude a thorough application of the facts to the law.

15. Constitutional Law § 80— death penalty statutes—constitutional

The Supreme Court declined to reevaluate decisions upholding the constitutionality of the North Carolina death penalty statutes. N.C.G.S. § 15A-2000 to 2003.

16. Criminal Law § 73.1— telephone conversations—hearsay—no prejudice from exclusion

There was no prejudicial error in a prosecution for kidnapping, rape and murder in the exclusion of telephone conversations between defendant's foster mother and mother as hearsay. Even if the conversations were admissible to show the attitude of defendant's mother toward defendant, there was ample other testimony revealing defendant's mother's attitude toward him.

17. Criminal Law §§ 34, 89.10— kidnapping, rape, murder—testimony of prior fight with others—no prejudice

There was no prejudice in a prosecution for kidnapping, rape and murder from the admission of testimony from defendant's sister about a fight between defendant's mother, sister, and others and defendant's girlfriend in which defendant had drawn a knife but had not pointed it at anyone. Testimony concerning the witness's role in the altercation was admissible to impeach her testimony and, while testimony concerning defendant's use of a knife should not have been admitted, the fact that he used it apparently in an effort to protect or aid a victim of physical assault may have impressed the jury favorably. Moreover, there was evidence in the case quite persuasive of defendant's guilt.

18. Criminal Law § 169.3— psychiatrist's opinion as to motive—admitted elsewhere—no error

There was no prejudice in the penalty phase of a prosecution for kidnapping, rape and murder in the exclusion of a psychiatrist's opinion as to defendant's motive in the killing because the same evidence was later given in the hearing of the jury.

19. Criminal Law § 102— first degree murder—effect of jury disagreement on death sentence—argument not permitted

The trial court did not err in a prosecution for first degree murder by refusing to allow defense counsel to read and argue to the jury N.C.G.S. § 15A-2000(b), which provides a life sentence if the jury cannot unanimously agree on a sentence recommendation.

20. Criminal Law § 135.7— murder—instruction on weighing aggravating and mitigating circumstances—no error

The trial court did not err in a first degree murder prosecution by instructing the jury that if it found that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty then it would be the jury's duty to recommend that defendant be sentenced to death.

21. Criminal Law § 135.9— murder—mitigating factors—conjunctive instruction on intoxication and emotional disturbance—no error

The trial court did not err in a prosecution for kidnapping, rape and murder in its instructions on mitigating factors by its conjunctive, simultaneous references to both defendant's intoxication and atypical dissociative disorder where evidence of defendant's intoxication had originally been presented as a mitigating circumstance in conjunction with defendant's emotional history; moreover, the court's instruction regarding substantial impairment by alcohol reflected the proper legal standard and cannot reasonably be interpreted as a comment on the evidence.

22. Criminal Law § 135.9— murder—mitigating circumstance of age not submitted—no error

The evidence did not require the trial court to submit the mitigating circumstance of age when the opinions of defendant's foster parents that he was emotionally immature are balanced against defendant's chronological age of twenty-three, his apparently normal physical and intellectual development, and his level of experience. N.C.G.S. § 15A-2000(f)(7).

23. Criminal Law § 135.8— murder—especially heinous, atrocious or cruel—supported by evidence

The evidence supported the submission to the jury in a first degree murder prosecution of the possible aggravating circumstance that the crime was especially heinous, atrocious or cruel where defendant and a companion sought the victim out and returned to pick her up for the express purpose of raping her; the victim's protestations once she realized their intentions were met with hostility and physical violence; defendant's confession and bloodstains in the car indicated that the victim was stabbed at least once and struck across the eye in the car; the victim was dragged from the car, bruised and bleeding, her clothing was ripped from her body, and she was stabbed in the arm; she was then thrown to the ground and sexually assaulted by defendant as his companion held her down; defendant savagely bit her on the left breast; the victim was conscious, in pain, and aware that she was engaged in a life and death struggle; defensive wounds in her hand indicated that she attempted to fend off the knife attack; defendant ultimately inflicted fifty-five stab wounds upon the victim; and perhaps fifteen to twenty minutes elapsed between the time the victim was first stabbed in the car and the time she finally died. Defendant's preliminary acts of violence were all a part of the same transaction and may properly be considered.

24. Criminal Law § 135.10— first degree murder—erroneous aggravating circumstance—new sentencing hearing

A defendant was entitled to a new sentencing hearing on his conviction of first degree murder where he was convicted of first degree murder based on premeditation and deliberation and based on felony murder, the verdict of guilt based on premeditation and deliberation was set aside, the verdict of guilty was therefore based only on felony murder with rape as the predicate felony, and it was therefore error to submit as an aggravating circumstance that the murder was committed while defendant was engaged in the commission of rape. N.C.G.S. § 15A-1443(b) (1985).

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

APPEAL from judgments entered by *Albright, J.*, 18 October 1983 in Superior Court, GUILFORD County. Defendant was convicted by a jury of murder in the first degree, rape in the first degree, and kidnapping in the first degree. Defendant was sentenced to death for the murder conviction, life imprisonment for the rape conviction, and forty years' imprisonment for the kidnapping conviction, all sentences to run consecutively. Defendant appealed the murder and rape convictions pursuant to N.C.G.S. § 7A-27(a). On 6 January 1984, we allowed defendant's motion to bypass the Court of Appeals on the kidnapping conviction. Heard in the Supreme Court 12 March 1985.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the state.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Charles A. Lloyd, Martha E. Johnston, John A. Dusenbury, Jr., Donnell Van Noppen III, and Davison M. Douglas, and Stephen S. Schmidly for defendant.

MARTIN, Justice.

For the reasons set forth below, we arrest judgment on the rape charge. In addition, defendant is granted a new sentencing hearing on his conviction of murder in the first degree. We find no error in the kidnapping trial or sentencing.

On 3 December 1982 the body of Donna Phillips was discovered near a turnaround area on Rock Quarry Road in Guilford County. The body was lying on its left side, the victim's midsection bare, with a sweater, vest, and bra lying around her neck, and her jeans and underclothing near her ankles.

An autopsy was performed by Dr. John Butts, associate chief medical examiner for the state. He discovered approximately fifty-five separate stab wounds on the torso, right arm, thigh, and back, with thirty-eight of these being in the chest area, passing from the left of the left breast to below the right breast. The blade used, he testified, was approximately one-half inch wide and three to four inches long. One stab wound which passed complete-

ly through the right hand was, in his opinion, a defensive wound. He also found, among other injuries, a recent bruise on the right eye, scratches, and human bite marks on both the left thigh and the left breast. In his opinion, any one of approximately twenty stab wounds which punctured the lungs, abdominal cavity, or heart could have caused the victim's death, which resulted from bleeding into the chest cavities or from an interruption of the heart rhythm.

In the course of the autopsy, Dr. Butts also found that the deceased had a blood alcohol level of .15 percent, and he discovered the presence of occasional sperm in the victim's vagina, consistent with having had intercourse resulting in incomplete ejaculation within two or three days, although he detected no trauma to that area.

Based on information they had received that Bobby Ray Johnson, Jerry Williams, and a female had been seen leaving a bar called the "Rock" with Donna Phillips on the night of the killing, Guilford County Sheriff's Department officers located defendant and Williams on 4 December 1982 and requested that they come to headquarters to be questioned concerning the last known whereabouts of the victim. Initially, Johnson and Williams, who were interviewed separately, told the detectives that they had met Donna Phillips at the Rock on 2 December and had taken her part of the way home, but the last time they had seen her was when they had let her out of the car. Eventually, defendant confessed to the killing, rape, and kidnapping of Donna Phillips.

With respect to defendant's confession, the state presented the testimony of Lt. James Sheppard and detectives Jonathan Jacobs, A. J. Dunevant, and Richard Jackson of the Guilford County Sheriff's Department. Their testimony tended to establish the following: After being told by Johnson's mother and sister that Bobby would likely be walking home, Jacobs and Dunevant parked in a parking lot along the route to wait for defendant. When they spotted defendant walking down the street at 2:18 p.m., they approached him and asked him if he would accompany them to the sheriff's department to talk with them about an incident that had occurred the previous night. Neither detective was wearing a law enforcement uniform. Detective Jacobs told Johnson that after they finished their discussion he would be happy to

drive Johnson back home. After asking Detective Jacobs a second time what it was about, Johnson said he would go with them, and the three got into the detectives' unmarked car, with the officers in the front seat and Johnson in the back. Johnson was neither frisked, touched, threatened, told he was under arrest, read his Miranda rights, nor told he had to go with them. On the way to headquarters, Johnson once more asked why the officers wanted to question him, and again they told him they wanted to talk to him because he might have information concerning the events of the previous morning. The officers testified that defendant was not a suspected perpetrator of the crime, but was considered merely a possible witness.

Upon their arrival at the station, the officers recounted that the three went into an interview room. Jacobs and Dunevant testified that they read the defendant his rights, even though at that time he was considered merely a witness and not a suspect. Defendant signed a written waiver of his rights. Between 2:40 and 5:55 p.m., Johnson was questioned by Jacobs, Dunevant, and a Detective Shaver, who again read the defendant his rights. Once more, the defendant waived his rights. During the afternoon defendant's movement was not restricted, and he was freely allowed to use the telephone and restroom without being monitored or guarded in any way. Defendant was cooperative during the entire interview; he never indicated he wanted to leave and never indicated he wanted to be taken home. The detectives testified that although Johnson adhered to his story that the last time he had seen Donna Phillips was when she was let out of the car, there was a discrepancy between Johnson's and Williams' accounts of exactly where she was let out.

At 5:55 p.m., Lt. Sheppard entered the interview room with Detective Jackson, who said he merely wanted to meet Bobby Johnson. After introductions were made, Detective Jackson asked Johnson whether he knew and understood his rights, and defendant replied "yes." Jackson then said, "I just wanted to meet a cold-blooded killer." Johnson responded, "Now wait a minute, I have already talked to the other officers and have told them my story." Jackson answered that he knew what Johnson had told the other officers, but he knew the truth and the truth was that Johnson was a cold-blooded killer. Johnson then began to cry and said that the police never understood him. When Jackson said he

was willing to listen to him and that everybody had a good side to him, Johnson began talking about his mother. He said that his mother did not understand him, that she was always interfering with his girlfriends by running her mouth to them, and that she kept on running her mouth. Jackson said, "Sort of like Donna?" and the defendant said "yes." "Was Donna running her mouth?" Jackson inquired, and defendant said "yes." "Did you shut Donna up?" Jackson asked, and defendant said "yes" and began to cry again. When Jackson asked Johnson if he wanted to start at the beginning and tell his side of it, defendant said he did and thereupon made a full confession. After Johnson was placed under arrest, he stood up, reached in his pocket, handed Jackson a knife, and said, "I guess you will want this, the murder weapon." He then pointed to some blood on his shoes and said, "I guess you will want the tennis shoes." Sheppard also testified that defendant had told him that he thought it would never have happened had the victim not cursed at him and that he was sorry it had happened.

Defendant's confession showed that in the late evening on 2 December 1982 Bobby Ray Johnson and two companions, Jerry Williams and Cheryl Cassaro, went to a bar called the "Rock" (now known as the Country Playground) on Burlington Road in Guilford County. While there, they ran into Donna Phillips, with whom defendant had been acquainted since childhood. The four of them played pool and drank beer together. At about 1:15 a.m., Donna told Johnson that the friends with whom she had arrived had left her and asked if he thought Williams would give her a ride to a friend's house where she had left her car. When defendant said "sure," Donna and defendant got in the back seat and Williams and Ms. Cassaro sat up front. En route, defendant asked Donna if she wanted to spend the night with him at Williams' house, and she replied that she didn't. Shortly thereafter Cheryl and Donna began arguing over which of them should be taken home first. Finally, Donna requested that she be let out immediately. Williams pulled over on Burlington Road, let Ms. Phillips out, and proceeded to the Cassaros' house. After Cheryl got out, she told the two men, "Don't go back and pick that girl up." As they drove away, Williams said to defendant, "We should go back and get us some." The two men then talked about raping Donna and drove around on Wendover and Bessemer Avenues until they

saw Ms. Phillips walking down the street. They stopped and asked her if she wanted a ride. When she said she did, Johnson got out and let her in the front seat between himself and Williams. As soon as they were all inside the car, Williams turned the car around and headed out Burlington Highway towards McLeansville, away from where Donna had said she had left her car. Donna demanded to know where they were going and began to curse the two men. When defendant refused her demand to be let out of the car, she began hitting and cursing him. Johnson then hit her in the face, throwing her down onto the seat. When she continued to yell and began kicking at the steering wheel and at Williams, the defendant took out his knife and stabbed her in the leg while Williams attempted to hold her legs down across his lap. At some point defendant also knocked her across the face with his elbow.

At a store off Highway 70, they turned onto a dead-end dirt road and stopped. Defendant got out of the car, dragging Ms. Phillips with him. Williams got out, held Donna's arms behind her back, and told defendant to "go ahead and kill her." Instead, Johnson tore her sweater and bra off, forced her down to the ground, and raped her. When he had finished, he asked Williams if he "wanted some" also. Williams replied, "No. Go ahead and kill her." Johnson then took his knife and began stabbing Ms. Phillips.

When Donna, still breathing, got quiet and lay still, the two men got in the car and went to a car wash. They washed the blood off themselves, the car, and the knife. After buying some cigarettes at a convenience store, Johnson realized he had lost his hat. Thinking he might have left it where they had taken Ms. Phillips, they drove back to look for it. After an unproductive search for the hat, they went over to the victim's body, picked it up by one arm, and then dropped it to see if she was dead. Williams took a set of keys from Donna's coat, and defendant took her belt out of her pants, which he said he wanted to give to his girlfriend for Christmas. The two men left. On the way back to Greensboro, Williams threw the keys and belt out the car window.

Dr. Forrest Irons, a forensic odontologist, testified that at the request of Dr. Butts he had made a flexible cast of contusions and indentations on decedent's left breast as well as impressions of both Johnson's and Williams' teeth. After these exhibits were

introduced into evidence, Dr. Irons demonstrated to the jury that the mold of defendant's teeth matched the indentations on the cast of the deceased's breast. The fact that they matched gave rise to his opinion that Bobby Johnson had bitten Donna Phillips on the breast.

In addition to defendant's confessions, the murder weapon, and other physical evidence introduced at trial, the state also introduced into evidence twenty-three of approximately forty letters written by defendant to his girlfriend between 4 December 1982 and 4 March 1983 while he was in jail. These letters corroborated in harrowing detail the statements by the defendant, as well as other evidence concerning the crime.

The defense presented the testimony of Cheryl Cassaro to the effect that she believed the defendant to be intoxicated on the night of the murder, even more drunk than Donna Phillips. On cross-examination, over objection, the district attorney was permitted to elicit her opinion that Bobby Ray Johnson was not so drunk that he could not form the specific intent to kill. The defendant did not testify.

In rebuttal, the state called the bar manager of the Country Playground where defendant and his friends had been drinking. In her opinion, neither Johnson nor Donna Phillips was drunk because the bar did not sell beer to people who were visibly intoxicated. The state also called Dr. Bob Rollins, a forensic psychiatrist employed by the state and appointed by the court to examine the defendant. He testified that he had examined and evaluated the defendant and was of the opinion that Johnson was able to form the specific intent to kill Donna Phillips.

On 13 October 1983, the jury found defendant guilty of murder in the first degree on the basis of malice and premeditation and deliberation as well as under the felony murder rule. The jury also found the defendant guilty of rape in the first degree and kidnapping in the first degree.

In the sentencing phase for murder in the first degree, Doris Stanley testified that defendant was her foster child when he was between the ages of sixteen and eighteen because his mother was in jail for drunk driving and child abuse and Johnson had been out on the streets and into trouble. She said that he was im-

mature, starved for attention, and had marks on him as a result of the physical abuse inflicted by his mother. Johnson had told Mrs. Stanley that his mother had bitten him, called him names, and abused him in many other ways. Defendant's sister and his foster father also testified to episodes of neglect and violence by defendant's mother and about times when she had bitten, struck, kicked, and verbally abused Bobby Johnson. Defendant's sister also testified that in October 1982, during an altercation involving herself, her mother, and defendant's girlfriend, defendant had pulled a knife from his pocket.

Defendant also introduced the testimony of Dr. Rollins and of Dr. Allen Sherrow, a Greensboro psychiatrist in private practice. Dr. Rollins' opinion was that a combination of defendant's use of alcohol and the effects of defendant's abused and neglected childhood caused the defendant to kill Donna Phillips but that neither of these elements alone would have been sufficient. Dr. Rollins also repeated the testimony he had given at the guilt-innocence phase that he considered defendant to have been able to form the specific intent to kill on the night of the murder. Dr. Sherrow stated it was his opinion that at the time of the killing defendant was suffering from an atypical dissociative disorder as well as from alcohol intoxication. A fight defendant had had with his girlfriend, the fact that defendant came from a broken home and had a background of abuse and neglect, the influence of alcohol, and the provocation by the victim all combined to influence the defendant's actions in the early morning of 3 December, Dr. Sherrow said. Both Drs. Rollins and Sherrow stated that they believed that defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired at the time he killed Donna Phillips.

Several statutory and nonstatutory circumstances were submitted to the jury to be considered in mitigation:

(1) This murder was committed while Bobby Ray Johnson, Jr. was under the influence of mental or emotional disturbance.

(2) The capacity of Bobby Ray Johnson, Jr. to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

(3) The defendant aided in the apprehension of another capital felon.

(4) The defendant was abused and neglected as a child.

(5) The defendant came from a broken home.

(6) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury found at least one of these circumstances to exist but did not specify which one(s). The jury also found the following circumstances in aggravation: the murder was committed while the defendant was engaged in the commission of first degree rape, and the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(5), (9) (1983). Upon unanimously finding beyond a reasonable doubt that the mitigating circumstance(s) were insufficient to outweigh the aggravating circumstances and that the circumstances in aggravation were sufficiently substantial so as to call for the imposition of the death penalty, the jury recommended a sentence of death. Judgment of execution was entered on 18 October 1983.

I. GUILT-INNOCENCE PHASE

[1] Defendant first argues that the trial court erred in allowing two witnesses to testify that defendant was able to form the specific intent to kill Donna Phillips. This argument is based on defendant's contention that evidence of a defendant's mental capacity or incapacity to form the specific intent to kill is not admissible in North Carolina courts as it constitutes opinion evidence and invades the province of the jury.

During the guilt phase of the trial, defendant presented testimony of Cheryl Cassaro to the effect that shortly before the killing defendant was more drunk than Donna Phillips. Autopsy revealed that Donna Phillips' blood alcohol content was 0.15 percent. On cross-examination and over objection, the prosecuting attorney was permitted to elicit testimony from Cassaro that even though defendant had some difficulty walking, he was talking in a normal manner, and that she could not say he was unable to form the specific intent to kill Ms. Phillips. Later, in rebuttal, the state offered the testimony of a forensic psychiatrist, Dr. Rollins, who testified:

Q. Based on your examination of this particular Defendant, do you have an opinion satisfactory to yourself as to whether or not this Defendant would have been able to form the specific intent on December the 3rd, 1982, to kill Donna Phillips?

MR. SCHMIDLY: Object.

THE COURT: Overruled.

THE WITNESS: I have an opinion.

Q. What is that opinion, Doctor Rollins?

A. My opinion, he was able to form that specific intent.

On cross-examination, the defense attorney asked:

Q. Doctor Rollins, you said he was able, in your opinion.

A. Yes.

Q. Do you know whether he did?

A. Did what?

Q. Did form the specific intent?

A. Well, it's my assessment he did.

Defendant submits that this Court has held for many years that testimony of a defendant's ability to form an intent to kill is to be excluded from evidence. He argues that the opinion evidence invaded the province of the jury and should have been excluded. *State v. Matthews*, 226 N.C. 639, 39 S.E. 2d 819 (1946) (rule allowing opinion evidence on defendant's sanity does not permit witness "to testify whether defendant had mental capacity to commit the particular act charged"). *See State v. Hauser*, 202 N.C. 738, 164 S.E. 114 (1932). *Cf. State v. Harris*, 213 N.C. 648, 197 S.E. 142 (1938) (lay opinion testimony admissible when no better evidence is available as to the subject matter being investigated).

Preliminarily, we note that the trial of the instant case occurred before the effective date of Chapter 8C of the North Carolina General Statutes, the codification of North Carolina Rules of Evidence. While under these new rules expert opinion of a defendant's ability to form specific intent to kill may be admissi-

ble evidence, in this opinion we are constrained to determine whether the trial court erred in applying the law of evidence as it existed at the time of trial. In the 1978 case of *State v. Wilkerson*, this Court remarked that:

> [I]n determining whether expert medical opinion is to be admitted into evidence the inquiry should be not whether it invades the province of the jury, but whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact. The test is as stated in *State v. Powell*, *supra*, 238 N.C. at 530, 78 S.E. 2d at 250, whether the "opinion required expert skill or knowledge in the medical or pathologic field about which a person of ordinary experience would not be capable of satisfactory conclusions, unaided by expert information from one learned in the medical profession."

295 N.C. 559, 568-69, 247 S.E. 2d 905, 911. *Accord*, *e.g.*, *State v. Ford*, 314 N.C. 498, 334 S.E. 2d 765 (1985). Under the facts of the present case and under the law of evidence in effect at the time of trial, we hold that it was error to have permitted the state's expert to testify that, in his opinion, on the night of the murder defendant was able to form the specific intent to kill Ms. Phillips.

Although Dr. Rollins was an admitted expert in the field of forensic psychiatry, he examined defendant "sometime in September of 1983," some ten months after the killing. Beyond this examination, the length and scope of which are not identified in the record, his information concerning the events of the night of the crime was little different, if any, than that presented to the jury. In this respect the expert was in no better position than any lay juror when it came to determining whether defendant was able to form the specific intent to kill on the night of the murder. *See Com. v. Weinstein*, 499 Pa. 106, 118, 451 A. 2d 1344, 1350 (1982) ("The element of specific intent in the first degree murder statute is a legal construct which bears only a coincidental resemblance to psychiatric definitions of mental illness."). As several courts have acknowledged:

> "We do not quarrel with the notion that psychiatric testimony is of general relevance to the issue of responsibility.

> . . . Care must be exercised, however, to distinguish such general relevancy from the unwarranted additional assumption that the psychiatric sciences are capable of direct proof of the existence of the necessary mental state as defined by law."

Steele v. State, 97 Wis. 2d 72, 94, 294 N.W. 2d 2, 12 (1980) (quoting *Bethea v. United States*, 365 A. 2d 64, 86 n.46 (D.C. 1976)). In *Steele*, the Supreme Court of Wisconsin quoted the following remark with approval when ruling that psychiatric evidence of a defendant's specific intent to kill is neither competent, relevant, nor probative during the guilt phase of a murder trial: "In general, it is not at all apparent that psychiatrists know any more than does the layman about whether the defendant had an intent to kill when the act causing death was committed." 97 Wis. 2d at 95, 294 N.W. 2d at 12. This is in accord with the reasoning behind the relevant North Carolina case law in effect during the trial of this case, *State v. Matthews*, 226 N.C. 639, 39 S.E. 2d 819 (expert opinion testimony on whether criminal defendant had mental capacity to commit crime ruled inadmissible); *State v. Hauser*, 202 N.C. 738, 164 S.E. 114 (evidence that defendant had sufficient mental capacity to form plan of murder inadmissible). *See State v. Journegan*, 185 N.C. 700, 117 S.E. 27 (1923). *See generally* Annot., *Admissibility of Expert Testimony as to Whether Accused Had Specific Intent Necessary for Conviction*, 16 A.L.R. 4th 666, § 4[a] (1982).

We hold that the admission of Dr. Rollins' testimony with respect to defendant's specific intent was reversible error. Such an error would normally require that defendant receive a new trial. However, as the jury in this case found that defendant was guilty of murder in the first degree both under the theory of premeditation and deliberation and under the theory of felony murder, we set aside only the jury's finding that defendant is guilty of murder based on premeditation and deliberation. The verdict of guilty based on the felony murder rule remains unsullied. *See State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983). Because the felony undergirding the felony murder theory in this case was the rape of Donna Phillips, we hereby arrest the judgment sentencing defendant for the crime of rape. *E.g.*, *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972).

We now turn to defendant's remaining assignments of error.

Defendant next argues that allowing Dr. Rollins to offer his opinion at the guilt-innocence phase of the trial that the defendant was able to form the specific intent to kill constituted a violation of the defendant's privilege against self-incrimination under the United States and North Carolina Constitutions. U.S. Const. amends. V and XIV; N.C. Const. art. I, § 23. As we have determined that this testimony was inadmissible on other grounds, we do not reach the issue of its constitutionality.

[2] Defendant's next contention is that his confession was improperly admitted into evidence on the grounds that it was made after he had been illegally seized by law enforcement officers without probable cause, in violation of the fourth and fourteenth amendments to the United States Constitution. Defendant also maintains that all evidence discovered as a result of his confession is "fruit of the poisonous tree" and is therefore also inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441 (1963). *See, e.g., State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827, *cert. denied*, 446 U.S. 986, 64 L.Ed. 2d 844 (1980). The state argues that defendant had not been "seized" within the meaning of the fourth amendment's prohibition against unreasonable searches and seizures. We agree with the state's position and find no error in the trial court's denial of defendant's motion to suppress.

Defendant's argument is based largely on the case of *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 829 (1979), in which the United States Supreme Court held that police may not seize a person, transport him to a police station, and subject him to interrogation based upon a mere "reasonable suspicion" that he is in some way implicated in a crime. 442 U.S. at 216, 60 L.Ed. 2d at 838. In general, the Court said, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 442 U.S. at 207 n.6, 60 L.Ed. 2d at 832 n.6 (quoting *Terry v. Ohio*, 392 U.S. 1, 16, 20 L.Ed. 2d 889, 903 (1968)). In other words, "[o]nly when [a police] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. at 20 n.16, 20 L.Ed. 2d at 905 n.16. *Accord United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497 (1980). Certain narrowly prescribed invasions of an individual's liberty

have been permitted without the prerequisite of probable cause. *E.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed. 2d 607 (1975) (limiting questioning of those in car stopped by border patrol permitted without probable cause to arrest); *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889 (weapons' search based on reason to believe detainee is armed and dangerous). However, "any further detention or search must be based on consent or probable cause." *Dunaway v. New York*, 442 U.S. at 212, 60 L.Ed. 2d at 835 (quoting *United States v. Brignoni-Ponce*, 422 U.S. at 882, 45 L.Ed. 2d at 617 (1975)). Although the defendant in *Dunaway* had not been told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, the Court found as a matter of law that Dunaway had been involuntarily detained and that "such differences in form must not be exalted over substance." 442 U.S. at 215, 60 L.Ed. 2d at 838.

The characterization of a seizure of a person by law enforcement officials was discussed further in *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497. There, the Court reemphasized that "[t]he question whether the respondent's consent to accompany the agents was, in fact, voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances ...." 446 U.S. at 557, 64 L.Ed. 2d at 511. The Court went on to state:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. See *Terry v. Ohio, supra*, at 19, n.16, 20 L.Ed. 2d 889, 88 S.Ct. 1868, 44 Ohio Ops 2d 383; *Dunaway v. New York*, 442 U.S. 200, 207, and n.6, 60 L.Ed. 2d 824, 99 S.Ct. 2248; 3 W. LaFave, Search and Seizure 53-55 (1978). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

446 U.S. at 554-55, 64 L.Ed. 2d 509-10 (footnote omitted). In finding that respondent Mendenhall had not been seized by Federal Drug Enforcement Agency agents who approached her in a Los Angeles airport, the Court noted that Mendenhall was not informed that she must accompany officers but was merely asked if she would; neither threats nor a show of force was made by officers; defendant was twenty-two years old; the events took place in a public concourse; the officers wore no uniforms and displayed no weapons; and Mendenhall accompanied the agents voluntarily and in a spirit of apparent cooperation. Thus, the Court concluded, the possibility that she reasonably could have considered the police conduct to be coercive was minimal.

As in *Dunaway* and *Mendenhall*, the defendant in the case before us alleges that he was coerced into accompanying law enforcement officials and that he involuntarily submitted to what he considered to be custodial interrogation. At the suppression hearing, he testified that he did not think he had any choice about going downtown with the detectives because every time he was read his rights he went to jail. The test we must apply in determining whether the trial court was correct in concluding that defendant was not seized is not, however, whether defendant subjectively believed he was not free to go, but whether a reasonable person would have believed he was free to go. *State v. Davis*, 305 N.C. 400, 410, 290 S.E. 2d 574, 580-81 (1982). Upon an examination of all of the evidence that was before the trial court, we conclude that the trial court's determination that defendant was not seized within the meaning of the fourth amendment is amply supported by the evidence and is therefore binding upon appeal. *E.g., State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983); *State v. Chamberlain*, 307 N.C. 130, 297 S.E. 2d 540 (1982). The evidence supporting the trial court's finding includes the following testimony of defendant:

[ON DIRECT EXAMINATION]

Q. Tell us about the first time you talked to Detective Jacobs.

A. I was walking down High Point Road, Detective Jacobs approached me from the right. He showed me identification, told me his name, and *asked me* if I would accom-

pany him downtown to get a statement about a homicide. [Emphasis supplied.]

. . . .

Q. Did you agree to go downtown with him?

A. Yes sir.

. . . .

[ON CROSS-EXAMINATION]

Q. . . . And you don't have any recollection, then, as to whether or not you had any awareness as to whether or not your freedom of movement was restricted in any way; is that your testimony?

. . . .

A. From my understanding, everytime somebody has ever read me my rights, that meant I was going to jail.

. . . .

Q. [Y]ou thought, then, that you were placed under arrest out on High Point Road; is that right?

A. Yes sir.

Q. I see. And did Detective Jacobs tell you on that occasion that you were under arrest?

A. No.

Q. He didn't. You told Judge Albright that you saw a gun on that occasion; is that right?

A. Yes, to the best of my knowledge.

Q. I see. And did he point that gun at you?

A. No, sir.

Q. Did he had the gun in a holster?

A. No sir.

Q. Well, where was the gun when you saw it?

A. I believe it was under his jacket.

. . . .

Q. Tell Judge Albright what, if anything, Detective Jacobs did on that occasion to cause you to believe in your mind that if you didn't get in the car or if you turned away that he would shoot you.

A. I didn't say he would definitely shoot me, you know. He done told me, "We want to get a statement about a homicide." In my *law* [sic], if I would have refused or tried to leave, he would have probably pulled it on me.

Q. And that's what you expected he would do; is that right?

A. Yes, sir.

Q. Did he do anything on that occasion that led you to believe that he would do that?

A. No, sir. When he asked me, he wanted a statement about a homicide, that's what come to my mind.

Q. Well, of course, at that time you were somewhat nervous about being asked about any homicide because you knew what you had been involved in about twenty-four hours earlier, isn't that right?

. . . .

A. Yes sir.

. . . .

Q. [Y]ou were apprehensive about talking to them about anything because of what you knew you had been involved in?

. . . .

A. Yes, sir.

. . . .

Q. Well, did Detective Jacobs do anything to indicate to you that he was prepared to use force?

A. No, sir.

. . . .

Q. I'm asking what, if anything, did Detective Jacobs do on that occasion to cause you to believe that he was going to use force to put you in that car against your will?

A. Nothing . . . .

. . . .

Q. [Y]our recollection of what he said to you was that "I want to talk to you about a homicide"; is that right, Mr. Johnson?

A. No, sir. He wanted to get my statement about a homicide.

. . . .

Q. . . . [T]he only thing that you're saying occurred is that he pulled up, identified himself as a Police officer—

A. Yes, sir.

Q. —told you he wanted to take a statement and told you to get in the car; is that right?

A. He asked me to get in the car.

Q. He asked you to get in the car. Well, did he ask you in a threatening manner?

A. No, sir.

. . . .

Q. And the fact of the matter is that you got in the car of your own free will; isn't that right?

A. Yes, sir.

. . . .

Q. Well, did either Detective Jacobs or Detective Dunevant talk to you in any kind of threatening manner?

A. No, sir.

Q. Were they hostile or angry or aggressive toward you?

A. No, sir.

Q. Did they treat you in any bad fashion, talk ugly to you, use any profanity?

A. No, sir.

. . . .

Q. And when you got out of the car, did either one of them put their hands on you?

A. No, sir.

Q. Did either one of them take you by the arm or – Did they even do that out on High Point Road?

A. No, sir.

Q. There was no touching you whatsoever, was there?

A. No, sir.

Q. All right. And when you got up to the Sheriff's Department, did they start ordering you around and start being aggressive towards you?

A. No, sir.

. . . .

Q. Now you're saying that the mere fact that you got a ride from High Point Road downtown, you thought you were under arrest; is that right?

. . . .

A. I didn't necessarily think it then, but I knew I was going to be under arrest.

. . . .

Q. Well, that was because you were concerned that whole period of time, were you not, that these officers were going to find out about your involvement in the death of Donna Phillips, right?

A. Yes, sir.

Q. And that was your conscience bothering you and it wasn't anything that any of these officers had done to you; isn't that right?

. . . .

A. Yes, sir.

Defendant further testified that before getting in the car he was not frisked; that he sat alone in the back seat of the unmarked car while the detectives rode in the front; that they did not ask him to empty his pockets nor did they frisk him in the interview room; that the detectives provided him with cigarettes and coffee; that he was allowed to go unescorted to the bathroom and to make two telephone calls; that he was left alone and unsupervised in the interview room; that the detectives questioning him never raised their voices, never talked in a loud, threatening manner, and never called him a liar. In addition, defendant aknowledged that he had been arrested several times previously, that he knew and fully understood what his rights were and that he waived them at the police station. The following dialogue also occurred between the prosecutor and the defendant during the suppression hearing.

Q. I will ask you if you didn't testify on Direct Examination that you said to them, "You either charge me or you let me go home"?

A. Yes.

Q. So, you knew that there weren't any charges pending against you at that time, right?

A. I didn't know if there was going to be any.

. . . .

Q. Now, you knew at that time that there weren't any charges pending against you, right?

A. Yes, sir.

Q. And you knew that you weren't under arrest; isn't that right?

(Pause.)

A. Yes sir.

. . . .

Q. You knew they didn't have any warrant, right?

A. Yes, sir.

Q. And you were calling their bluff, weren't you?

. . . .

A. Yes, sir.

Q. And you were trying to find out whether or not they had anything on you; isn't that right?

A. Yes, sir.

. . . .

Q. And up to that point in time, Mr. Johnson, nobody had even accused you of the murder, had they?

A. No, sir.

Q. Not one officer had even implied to you that you were involved in the murder, only that you and Jerry had given the girl a ride and were the last people that the State knew about that had seen her alive; isn't that right?

A. Yes, sir.

Additional evidence supporting our conclusion includes the facts that Johnson was told several times that he would be brought home and that once he arrived at the station the interview room door was never locked.

The facts in the instant case are similar to those in *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981). In *Simpson*:

> The evidence presented indicated that as part of an investigation into the homicide of Willie Kinlaw, Philadelphia Police Detective Daniel Rosenstein went to the Wyneva Hotel in Philadelphia on the morning of 12 April 1976 to locate defendant for questioning. Upon finding defendant at the hotel the officers requested that he come to the Police Administration Building to answer questions concerning the Fayetteville murder. Defendant agreed to accompany the officers and was driven to the Police Administration Building in a police vehicle, arriving at approximately 9:15 a.m. He was taken to an interrogation room and left alone until 9:30 a.m., at which

> time Detective Rosenstein advised him of his constitutional *Miranda* rights. Several officers testified that defendant was not locked in the interrogation room or deprived of his liberty in any way at this time; he was free to leave upon request. Defendant was again informed of his constitutional rights at about 10:10 a.m., after which he was interviewed by Detective Rosenstein and two officers of the Fayetteville Police Department until 11:25 a.m. At that time, defendant requested and was allowed to use the bathroom, and was subsequently questioned until 1:25 p.m. Defendant was then offered food, which he refused, and was questioned until 2:45 p.m. During these interviews defendant continued to deny any participation in or knowledge of the murder of Willie Kinlaw. He was not handcuffed, arrested, or restrained of his liberties during this time. Defendant then accompanied officers to a cafeteria located within the building, returning to the interrogation room at about 3:10 p.m. He then signed a form consenting to a search of his hotel room, and signed a typewritten transcript of his exculpatory statements at approximately 5:15 p.m. The officers continued to interview defendant until 7:00 p.m., at which time defendant requested and was furnished drinking water.

303 N.C. at 444, 279 S.E. 2d at 545-46. Sometime later Simpson was formally arrested pursuant to a warrant. In rejecting Simpson's claim that for purposes of fourth amendment analysis he had been "arrested" when asked to accompany officers for questioning, this Court stated:

> In the present case, there is competent evidence which indicates that defendant voluntarily agreed to accompany law enforcement officers to the Police Administration Building on the morning on [sic] 12 April 1976. The officers did not frisk or handcuff defendant at that time. Defendant was not subjected to any physical contact with the officers until after he had made an incriminating statement. During his interrogation the officers honored each of defendant's requests for food, water, or the use of the bathroom facilities. He was not treated as though he was incarcerated. Several officers testified that had defendant asked to leave before Officer Dupe informed them that he had a warrant for defendant's arrest, he would have been allowed to go as he pleased. Thus, there is

> sufficient evidence in the record to support the trial judge's conclusion that defendant was not under arrest until Officer Dupe appeared with a warrant for his arrest, and defendant's contentions to the contrary are without merit.

Id. at 445-46, 279 S.E. 2d at 546-47. Such is also true in the instant case.

We recognize that Detective Jackson's statement to defendant that "I just wanted to meet a cold-blooded killer," when viewed in isolation, might lead one to believe he was indeed under arrest and not free to go. However, considering the totality of the circumstances, this one statement by Jackson does not alter the voluntary nature of defendant's initial consent to accompany officers and to be questioned. For example, in *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574, a similarly situated defendant was shown photographs of the crime scene including several of the body of the deceased. Davis indicated that he could not look at the photographs, stated that he did not want to discuss the case, and began to cry. Police declined to remove the photographs and defendant subsequently made a confession. We ruled this confession constitutional. In an even more difficult case, *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134, police presented a cooperative interviewee with falsified evidence until they elicited a confession. This confession was also determined admissible by this Court. In each case one might argue that the police conduct displayed a varying "quality of purposefulness" which was undertaken "in the hope that something might turn up." *Dunaway v. New York*, 442 U.S. at 218, 60 L.Ed. 2d at 839 (quoting *Brown v. Illinois*, 422 U.S. 590, 605, 45 L.Ed. 2d 416, 428 (1975)). Yet in each situation the defendant voluntarily spoke with law enforcement officials after having voluntarily accompanied them to law enforcement facilities.

Similarly, in the present case we hold that under all the circumstances defendant was not deprived of his freedom or restrained in such a manner as to constitute being seized for purposes of fourth amendment analysis. The trial court properly admitted defendant's confessions.

[3] Defendant next argues that he was denied due process when the trial court denied his motion to continue his trial in the face of allegedly prejudicial pretrial publicity. Defendant's motion was

filed in response to the publication of two articles in Greensboro newspapers which revealed that during the suppression hearing on his confession which was held one day before the selection of the jury, defense counsel had offered to have defendant plead guilty in exchange for a lengthy term of imprisonment in an effort to avoid a possible death sentence. The first article, headlined "Johnson's Attorneys Offered To Have Him Make Guilty Plea," appeared the afternoon before jury selection. The second was published on the following morning and was entitled, "Defense Team Judged Plea of Guilty Wise." Defendant argues that the content and timing of the articles require this Court to assume the existence of prejudice because several potential jurors admitted having read them and were questioned about the articles' content before the entire venire panel. Of the potential jurors who read the articles and who were not dismissed for cause, three were ultimately accepted for the petit jury after having denied that their exposure would affect their impartiality. For the following reasons, we reject defendant's contention that he is entitled to a new trial under these circumstances.

It is elemental that "due process requires that the accused receive a trial by an impartial jury free from outside influences." *State v. Boykin*, 291 N.C. 264, 269, 229 S.E. 2d 914, 917 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362, 16 L.Ed. 2d 600, 620 (1966)); *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339. "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *State v. Richardson*, 308 N.C. 470, 478, 302 S.E. 2d 799, 804 (1983) (quoting *Sheppard*, 384 U.S. at 363, 16 L.Ed. 2d at 620). It is also well settled that the trial court's decision will not be disturbed on appeal unless defendant shows a gross abuse of discretion by the trial court. *State v. Gardner*, 311 N.C. 489, 497, 319 S.E. 2d 591, 598 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985); *State v. Dobbins*, 306 N.C. 342, 344, 293 S.E. 2d 162, 164 (1982). The burden is on the defendant to show "so great a prejudice . . . that he cannot obtain a fair and impartial trial." *Richardson*, 308 N.C. at 478, 302 S.E. 2d at 804 (quoting *Boykin*, 291 N.C. at 269, 229 S.E. 2d at 917-18).

Defendant first points out that unlike most cases involving alleged prejudicial pretrial publicity, he moved not for a change of

venue but only for a continuance. He maintains that a continuance constitutes a lesser intrusion upon the judicial process and upon the recognized interests of local citizens in the administration of justice than does a change of venue and argues that the showing necessary to mandate the granting of a continuance should, then, be lower than that requiring a change of venue. We disagree. As *Sheppard*, 384 U.S. 333, 16 L.Ed. 2d 600, and *Richardson*, 308 N.C. 470, 302 S.E. 2d 799, illustrate, a continuance and change of venue have traditionally been recognized as alternative responses to adverse pretrial publicity. The appropriateness of each varies depending on the situation, but each is triggered by the same level of potential danger and the granting of each is left to the sound discretion of the trial judge. We see no reason why the standard to be met should not be the same for each.

We also do not agree that the trial court erred under the traditional standard of review. Our cases illustrate that for defendant to prevail on the grounds that pretrial publicity precluded him from receiving a fair trial, he must first "show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury." *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E. 2d 339, 348; *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162; *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325, *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1211 (1976). Of these factors, defendant has not shown that a juror objectionable to defendant sat on the jury. In his brief defendant does note that three of the jurors who were seated and decided the case indicated that they had read the newspaper articles at issue here. However, after thorough examination of the jurors passed on by the state and defense counsel, both defense counsel and the defendant personally stated affirmatively that they were satisfied with the jury as chosen. The alternate jurors selected were also passed upon without objection by defendant or his counsel. Because defendant has failed to show that an objectionable juror decided his case, defendant has not met the threshold test noted above.

Further, we do not accept defendant's contention that we must nevertheless assume prejudice given the content of the articles in question. In determining the existence of prejudice, it is significant but not dispositive that a juror has been exposed to information which would be inadmissible at trial. *Cf., e.g., State v.*

Oliver, 302 N.C. 28, 274 S.E. 2d 183 (1981), *appeal on other grounds*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *Dobbins*, 306 N.C. at 345, 293 S.E. 2d at 164 (no abuse of discretion in denying motion for a change of venue when pretrial publicity consists of factual accounts of pretrial proceedings and the commission of the crime). In the present case, it is particularly significant that the seated jurors who had read either or both of the articles had stated unequivocally that their prior exposure would not affect their ability to determine defendant's guilt or innocence based solely on the evidence introduced at trial. *Richardson*, 308 N.C. at 480, 302 S.E. 2d at 805. Under these circumstances we therefore conclude that defendant has failed to show that the trial judge abused his discretion in denying defendant's motion to continue.

[4] The next argument advanced by defendant is that the trial court erred in refusing to dismiss the charges of rape and kidnapping at the close of all the evidence because the state failed to establish the corpus delicti of either crime.

As stated in *State v. Franklin*, 308 N.C. 682, 693, 304 S.E. 2d 579, 586 (1983), "[t]he corpus delicti rule is based on the hesitancy of the law to accept, without adequate corroboration, the extrajudicial confession of a defendant and to avoid convicting a person, solely out of his own mouth, of a crime that was never committed or was committed by someone else." Until recently, in North Carolina the corpus delicti rule entailed that " 'a conviction cannot be sustained upon a naked extra-judicial confession.' . . . Even though the defendant's confession identifies him as the person who committed the [crime], the State must first establish the *corpus delicti* . . . ." *State v. Brown*, 308 N.C. 181, 183, 301 S.E. 2d 89, 90 (1983) (citations omitted). The corpus delicti rule therefore required the state to offer into evidence "sufficient extrinsic corroborative circumstances as will, when taken in connection with an accused's confession, show that the crime was committed and that the accused was the perpetrator . . . ." *State v. Thompson*, 287 N.C. 303, 324, 214 S.E. 2d 742, 755 (1975), *death sentence vacated*, 428 U.S. 908, 49 L.Ed. 2d 1213 (1976); *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773 (1954).

In our recent case of *State v. Parker*, 315 N.C. 222, 337 S.E. 2d 487 (1985), however, this Court held that

> in non-capital cases . . . 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.

Id. at 236, 337 S.E. 2d at 495. Although the rule in *Parker* was expressly limited to noncapital cases, the facts in the instant case do not require us to decide whether the *Parker* rule applies in capital cases. In *State v. Trexler*, 316 N.C. 528, 532, 342 S.E. 2d 878, 880 (1986), we determined that "[t]he 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."

In the case sub judice, the pre-*Parker* rule applies because there is some evidence *aliunde* defendant's confession tending to support a finding that the rape and kidnapping occurred. Concerning the kidnapping conviction, the testimony of Cheryl Cassaro establishes that Donna Phillips had asked for a ride from the Rock to her car. The last Ms. Cassaro saw of the victim was when Ms. Phillips was let out on the side of the road, having expressed her desire and intention to go home. The facts that Ms. Phillips' body was found on a narrow road miles from her home, her car, the place where she was let out, and the bar from which they all started, that bloodstains were found in the car and on defendant's clothing, and that bruises were found on Ms. Phillips' face, clearly corroborate defendant's admission that he and Williams picked up the victim, forcibly restrained her, and transported her away from town against her will.

With regard to the first-degree rape charge, in addition to the stab wounds there was a bruise on the victim's face and bite marks over her left breast and thigh. The pattern of bloodstains in the car suggests that she was dragged out of it. Her clothes were found pulled and torn in a fashion which left her body exposed from her neck to her ankles. The small amount of semen found in her vagina was consistent with defendant's statement that he penetrated Ms. Phillips but did not complete ejaculation. The fact that defendant possessed a knife with traces of blood on it which could have produced the stab wounds corroborates his

admission that the knife was the one he used to stab Ms. Phillips. We hold that there was sufficient extrinsic evidence admitted at trial to support the jury's findings that the kidnapping and rape occurred in the instant case.

[5] Next, defendant contends that the trial court violated the Speedy Trial Act, N.C.G.S. 15A-701 to -704, by refusing to grant his motion to dismiss for failure to begin the trial within 120 days from the date of indictment.

The Speedy Trial Act provides that "[t]he trial of the defendant charged with a criminal offense shall begin . . . [w]ithin 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). Additionally, statutorily enumerated and judicially recognized periods of exclusion will be factored out of any computation. *State v. Marlow*, 310 N.C. 507, 514, 313 S.E. 2d 532, 537 (1984). These periods include any delay resulting from a mental examination of defendant, N.C.G.S. 15A-701(b)(1)(a), hearings on any pretrial motions, N.C.G.S. 15A-701(b)(1)(d), and any "delay resulting from a defendant's request for discovery." *Marlow*, 310 N.C. at 515, 313 S.E. 2d at 537. Thus,

> the statutory time, within which the trial of a criminal case must begin, must cease to run until the occurrence of the earlier of the following events: (1) the completion of the requested discovery; (2) the filing by the defendant of a confirmation of voluntary compliance with the discovery request; or (3) the date upon which the court, pursuant to N.C. Gen. Stat. § 15A-909, has determined that discovery would be completed.

Id. at 515, 313 S.E. 2d at 538.

Defendant was indicted on 3 January 1983. He does not dispute his unavailability for trial while he was being examined at Dorothea Dix Hospital for a period of thirty-five days. Thus, we need only consider that period of time in which the state sought to comply with defendant's discovery request in order to conclude that defendant was tried within 120 days of indictment. On 17 January 1983, defendant wrote a discovery letter to the district attorney and personally served it on him on 19 January 1983. The

state responded to defendant's discovery request in a complete fashion in a letter dated 15 July 1983 and filed 19 July 1983, and defendant does not argue that discovery had been or reasonably should have been completed earlier. According to defendant's own calculation, then, the Speedy Trial Act was tolled for a period of 179 days, leaving a time period well within 120 days between defendant's 3 January indictment and his 3 October trial date. We do not consider defendant's urging that we reconsider *Marlow* warranted and, accordingly, this assignment of error is overruled.

[6] Defendant next argues prejudicial error in the trial court's allowing the introduction of plaster casts of defendant's teeth and of indentations on the deceased's left breast and in further allowing a demonstration of how the cast of defendant's teeth matched the bite marks by simulating its biting action against the breast cast. Defendant bases his argument on the fact that he did not dispute that he bit Ms. Phillips and therefore the introduction and display of this demonstrative evidence served to deprive him of his right to due process on the grounds that its prejudicial effect outweighed its probative value.

It is generally accepted that relevant evidence will not be excluded simply because it may also tend to prejudice a defendant. Such evidence is properly excluded only where it is completely lacking in probative value or, if probative, its value is outweighed by its prejudicial effect. *E.g., State v. Johnson,* 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Swift,* 290 N.C. 383, 226 S.E. 2d 652 (1976) (teeth found at crime scene); *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). The evidence in the present case was clearly admissible. The evidence was relevant for the purpose of showing whether Ms. Phillips had been the victim of a violent sexual attack and whether it was defendant who had inflicted the injury. The evidence also corroborated defendant's confession. *See State v. Trexler,* 316 N.C. 528, 342 S.E. 2d 878. In this regard defendant is in error when he suggests that by failing to contest facts contained in his extrajudicial confession he may preclude the introduction of additional corroborative evidence. We hold that the probative value of the evidence at issue outweighed any prejudicial effect it may have had and that it was properly admitted at trial.

[7] Defendant next sets forth several assignments of error concerning the "death qualification" procedure of potential jurors.

See Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 2d 776 (1968). Defendant first contends that death qualification is unconstitutional, arguing that a death-qualified jury is more conviction prone than a non-death-qualified jury and therefore its use deprived him of his rights under the sixth, eighth, and fourteenth amendments to the Constitution of the United States. The practice of "death qualifying" the jury in a capital case has recently been held to violate neither the United States Constitution, *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed. 2d 137 (1986), nor article I, section 19 of the North Carolina Constitution, *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986). *Accord, e.g., State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984). Accordingly, we overrule this assignment of error.

[8] Defendant also contends that he was prejudiced by the exclusion of one potential juror, Mrs. Harrison, who expressed a clear refusal to invoke the death penalty and who was therefore successfully challenged for cause by the state before defendant was given the opportunity to question her. In effect, defendant maintains that he should have been allowed to "rehabilitate" this potential juror through additional voir dire. We adhere to our prior rejections of this argument, *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Bock*, 288 N.C. 145, 217 S.E. 2d 513 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1209 (1976), on the grounds that when a potential juror has expressed a clear and unequivocal refusal to impose the death penalty under all the circumstances, any additional cross-examination by defense counsel "would thwart the protective purposes of N.C.G.S. 9-21(b) [and] would be a purposeless waste of valuable court time . . . ." *Bock*, 288 at 156, 217 S.E. 2d at 520. We reject defendant's argument.

Defendant alternatively argues that this same potential juror, Mrs. Harrison, was improperly excused for cause in violation of *Witherspoon*, because although she ultimately expressed an ineluctable commitment to vote against a penalty of death in all circumstances, she initially expressed some doubt as to whether she would follow the law of sentencing. Applying the standard set forth in *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed. 2d 841 (1985), which allows a prospective juror to be excluded for cause if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his in-

structions and his oath," *id.* at 424, 83 L.Ed. 2d at 851-52, we find that Mrs. Harrison's exclusion was proper. As defendant correctly asserts, one must consider the entire examination of a potential juror contextually. *E.g., Darden v. Wainwright,* --- U.S. ---, 54 U.S.L.W. 4734 (filed 23 June 1986); *State v. Pinch,* 306 N.C. 1, 292 S.E. 2d 203, *cert. denied,* 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). Our review of the record reveals that Mrs. Harrison initially stated that her views on capital punishment would not affect her ability to reach a decision at the guilt-innocence phase of the trial. She then indicated that she would not, under any circumstances, later vote to impose the death penalty at the sentencing phase. Upon further examination she equivocated, but this hesitation was clearly based on her uncertainty regarding her role as a juror in following the instructions of the trial judge. This confusion was clarified in the following exchange during which Mrs. Harrison adequately revealed the basis for the successful challenge against her:

> MR. COMAN: All right. So, you're saying, then, that if the State proved these factors beyond a reasonable doubt and you listened to the instructions of law from the Judge and if you found beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that the death penalty was appropriate, you could return a verdict of death penalty; is that right?
>
> MRS. HARRISON: Un-hun. No, no.
>
> MR. COMAN: You couldn't?
>
> MRS. HARRISON: No.
>
> MR. COMAN: Okay. Are you saying that you could never return a verdict of the death penalty—
>
> MRS. HARRISON: No.
>
> MR. COMAN: —regardless of any circumstance?
>
> MRS. HARRISON: That's right.
>
> MR. COMAN: Did you say "That's right"?
>
> MRS. HARRISON: Uh-huh.

In light of the unequivocal nature of Mrs. Harrison's initial and final statements that she would refuse to follow the law and im-

pose the death penalty regardless of the circumstances, we find that she was properly excluded under the *Wainwright* standard. Her temporary confusion does not support defendant's contention that she was impermissibly removed from the panel.

[9] Nor was another juror, Miss Rumley, improperly excused for cause. In examining Miss Rumley, the prosecution never reached the issue of her views on imposing the death penalty. To the contrary, Miss Rumley was excused because after a thorough examination she said she did not believe that she could, in the words of the prosecutor, "pass judgment on another human being" or "render a verdict with respect to the charge in accordance with law." Miss Rumley was therefore properly excluded under N.C.G.S. § 15A-1212(8) and (9) which provide that a challenge for cause to an individual juror is justified if that potential juror "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina," or "[f]or any other cause is unable to render a fair and impartial verdict." There was no error in dismissing Miss Rumley for cause as she clearly expressed that she felt herself unable to determine the guilt of another regardless of the circumstances.

[10] Defendant's next two assignments of error address the procedures by which the state compiled the jury list from which defendant's grand and petit juries were drawn. Defendant made and the trial court denied a motion to quash based upon the failure of the Guilford County Jury Commission to comply with statutory procedures which allegedly resulted in a jury underrepresenting blacks. Defendant alleges that he was thereby denied his constitutional right to trial by an impartial jury composed of a fair cross-section of the community.

Specifically, defendant contends that the Guilford County Jury Commission did not comply with the procedures mandated by sections 9-1 and -2(c) of our General Statutes. N.C.G.S. § 9-1 requires that the jury commission in each county consist of three persons who shall serve two-year terms. In this case, one of the three duly appointed commissioners was murdered on 20 November 1981, four days before the Commission was required to submit a new list of potential jurors qualified to serve in the biennium governing the instant case. Because of the imminent

deadline for submitting the list of names, the remaining two members of the jury commission decided to proceed without waiting for a replacement for the deceased commissioner. N.C.G.S. § 9-2(c) requires that all jury lists prepared on or after 1 July 1983 include as a source of names the list of licensed drivers residing in the county for which the jury list is being prepared. The data base adopted by the Commission in this case did not include the list of licensed drivers residing within the county. The trial court found that at its 23 November 1981 meeting the Commission had voted to incorporate this list into the data base but was prevented from so doing because of the immediate unavailability of computer software compatible with the Guilford County computer system. As a result, the pool for the entire biennium beginning 1 January 1982 was derived solely from the county's voter registration list.

We do not agree that these alleged statutory irregularities tainted the process by which the jury list used in this case was prepared. This Court has held that deviations from the statutory norm do not automatically constitute reversible error absent an express statutory provision to the contrary. *State v. Vaughn,* 296 N.C. 167, 175, 250 S.E. 2d 210, 215 (1978), *cert. denied,* 441 U.S. 935, 60 L.Ed. 2d 665 (1979). *See Carter v. Jury Commission,* 396 U.S. 320, 24 L.Ed. 2d 549 (1970) (states are free to formulate reasonable requirements for juror qualification); *Taylor v. Louisiana,* 419 U.S. 522, 42 L.Ed. 2d 690 (1975) (same). In order to justify a motion to quash an indictment upon grounds that statutory procedures were violated in the compilation of the jury list, a party must show corrupt intent, systematic discrimination in the compilation of the list, or irregularities which affect the actions of the jurors actually drawn and summoned. *Vaughn,* 296 N.C. at 175, 250 S.E. 2d at 215. Because he failed to present any evidence that the two-person Commission acted with corrupt intent, or that the use of a two-person instead of three-person commission resulted in either systematic discrimination in the compilation of the jury list or irregularities which affect the actions of the jurors actually drawn and summoned, defendant has not met his burden of proof with respect to his motion based on N.C.G.S. § 9-1.

We also reject defendant's argument based on the Commission's alleged failure to comply with N.C.G.S. § 9-2(c). N.C.G.S.

§ 9-2(c) was not in effect at the time the jury list used in the instant case was compiled. N.C.G.S. § 9-2(a) and (c) provide:

> (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). Instead of providing a list for an entire biennium, the commission may prepare a list each year if the senior regular resident superior court judge requests in writing that it do so.
>
> (c) Effective July 1, 1983, the list of licensed drivers residing in each county, as supplied to the county by the Division of Motor Vehicles pursuant to G.S. 20-43.4, shall also be required as a source of names for use by the commission in preparing the jury list.

In accord with N.C.G.S. § 9-2(a), the jury list for Guilford County for the biennium beginning 1 January 1982 was compiled 23 and 24 November 1981. At this time N.C.G.S. § 9-2(c) was not in effect, and therefore the Commission was not required to use as a source of names the list of licensed drivers residing in Guilford County. As the trial in the instant case began in October 1983, the jurors who served were chosen from the jury list prepared for the biennium beginning 1 January 1982. There was no irregularity and no violation of N.C.G.S. § 9-2 in this procedure.

Having discussed the statutory grounds for defendant's assignment of error, we now turn to the argument that the procedures used for selection of the jury venire in this case violated defendant's constitutional right to a jury composed of a fair cross-section of the community.

The United States Supreme Court has held that in order to establish a prima facie violation of the sixth amendment fair cross-section requirement, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 58 L.Ed. 2d 579, 587 (1979); *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985); *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984); *State v. Price*, 301 N.C. 437, 272 S.E. 2d 103 (1980). As to the first prong of the *Duren* test, there is no doubt that "blacks are cognizable as a distinctive group for the purposes of fair cross-section analysis." *Price*, 301 N.C. at 446, 272 S.E. 2d at 109. Defendant has failed, however, to establish either of the remaining elements.

Concerning the second prong, the record reveals that blacks represented 25.4 percent of the population of Guilford County, but only 14.6 percent of the disputed venire, which was drawn from the county's voter registration list. The motor vehicles registration list, defendant insists, is more highly representative of the county's black population. Although in this case the difference of 10.8 percentage points on an absolute scale is disparate, *Price*, 301 N.C. at 447, n.2, 272 S.E. 2d at 110 n.2 (stating it is appropriate to consider absolute rather than comparable disparity), we do not consider this figure to be unfair or unreasonable. "[A] criminal defendant is not entitled to a jury of any particular composition, nor is he entitled to be tried before a jury which mirrors the presence of various and distinctive groups within the community." *Id.* at 448, 272 S.E. 2d at 110-11 (citing *Apodaca v. Oregon*, 406 U.S. 404, 32 L.Ed. 2d 184 (1972)). An analysis of earlier cases clearly indicates that the present figures are within the permissible range. *See, e.g., State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (9.6 percent deviation); *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (absolute disparity of 7.8 percent); *Price*, 301 N.C. 437, 272 S.E. 2d 103 (1980) (no error as a matter of law where blacks, representing 31.1 percent of the county population, made up only 17.1 percent of the applicable jury pool); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980) (entire black population of 24 percent compared with a 15 percent representation within the jury pool permissible).

As to the third prong of the *Duren* test, defendant has failed to show that the jury commission's actions were representative of a systematic exclusion of blacks from the jury process. There is no evidence that by not using lists of licensed drivers the Commission intended systematically to exclude blacks from the jury list. Further, defendant has failed to include comparable data from other years which would aid in an evaluation of the alleged

systematic nature of the underrepresentation. In fact, even the racial composition of defendant's own jury does not appear in the record. We therefore hold that defendant has not met his burden of proving that there has been any violation of constitutional principles in the preparation of the jury list used in this case.

[11] Defendant next argues that during the voir dire examinations of prospective jurors the trial court committed error in not permitting defendant to ask the potential jurors how they gauged the importance of the parent-child relationship and whether they could consider evidence of child abuse as a mitigating circumstance for sentencing purposes. The record shows that defense counsel asked the first twelve juror candidates the following question:

> Ladies and gentlemen of the Jury, if the evidence in this case shows you that Bobby Ray Johnson did not have a good relationship with his parents and was, in fact, an abused and neglected child, could you all consider that evidence in determining the sentence in this case if we get to the sentencing phase of the case?

After the state's objection to this question was sustained, defense counsel was nevertheless permitted to ask, over the state's objection, if "any member of this panel [has] ever worked with or been involved with abused or neglected children."

We find defendant's assignment of error to be groundless. Although wide latitude is given counsel in voir dire examination of jurors, the form and extent of the inquiry rests within the sound discretion of the court. *E.g., State v. Taylor,* 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied,* 463 U.S. 1213, 77 L.Ed. 2d 1398 (1983); *State v. Banks,* 295 N.C. 399, 245 S.E. 2d 743 (1978). "[I]n order for a defendant to show that the court's regulation of jury selection constitutes reversible error, he must establish both that the trial judge abused his discretion and that he suffered prejudice as a result of such abuse." *Banks,* 295 N.C. at 407, 245 S.E. 2d at 749. In the case before us defendant has shown neither. First, defendant was allowed to pose a similar question to potential jurors which would have elicited much of the information defendant desired to obtain on that issue. Second, at the conclusion of the sentencing phase the jurors found the existence of at least one mitigating circumstance, and among those submitted for

their consideration were that "defendant was abused and neglected as a child" and "defendant came from a broken home." Finally, the first question of defense counsel was properly struck on the grounds that it constituted an impermissible hypothetical question "designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts." *State v. Vinson*, 287 N.C. 326, 336, 215 S.E. 2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976).

[12] Defendant next argues that the trial court erred in overruling defendant's objection to the prosecutor's reference to Jerry Williams and his status as a codefendant. During the state's voir dire examination of the jury, the district attorney asked: "And do you understand that the comments that you heard in the courtroom previously that there is a codefendant who is also charged with first degree murder, first degree rape, kidnapping, and that his case is separate from this defendant's [and] will be heard by another jury—." Defendant first makes the argument that this pretrial statement was factually inaccurate for the reason that after defendant's trial was concluded Williams pled guilty under a plea agreement with the state. According to defendant, this inaccuracy required the trial court to give a cautionary instruction to the entire panel. This assignment of error lacks merit. This case is not one where jury members had been told that potential codefendants had already pled guilty to the same charge. *E.g.*, *State v. Campbell*, 296 N.C. 394, 250 S.E. 2d 228 (1979) (evidence of guilt of codefendant not competent evidence of guilt of defendant); *State v. Atkinson*, 25 N.C. App. 575, 214 S.E. 2d 270 (1975). *But see State v. Rothwell*, 308 N.C. 782, 303 S.E. 2d 798 (1983) (evidence of a testifying codefendant's guilty plea is admissible if introduced for a legitimate purpose). *Accord State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532. Nor is this a case where a deadlocked jury was improperly told that another jury may have to decide this case. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). The comment in this case in no way suggested that defendant was guilty, nor did it have the potential to affect the jury's deliberation process. Moreover, before the court ruled on defendant's objection to the prosecutor's remark, the prosecutor was allowed to finish the remark by adding "and that, therefore, the matters that will be before this jury relate only to Bobby Johnson and the

matter of the co-defendant should not be a matter for this jury's concern." Even assuming arguendo that the trial court erred in failing to sustain defendant's objection, defendant has completely failed to show that a different result would have been reached in the absence of this alleged error. *See* N.C.G.S. § 15A-1443(a) (1983). We reject defendant's assignment of error.

[13] Defendant next contends that the trial court erred in failing to instruct the jury on intoxication by drugs. Under N.C.G.S. § 15A-1232 it is the duty of the court to instruct the jury on all substantial features of a case, but this duty extends only to those features which are raised by the evidence. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982); *State v. Jones*, 300 N.C. 363, 266 S.E. 2d 586 (1980). There is no evidence which supports defendant's assertions that he was under the influence of "dust" ("angel dust"), or PCP, on the night of the murder. Defendant can only refer to one letter he had written to his girlfriend which contained the following statements: "Lucy, moma got drunk and I took some money out of her pocketbook the night before. That's how I bought the dust." This letter does not indicate that defendant consumed this "dust" or was under its influence at the time of the murder. Neither did Ms. Cassaro nor defendant, through his confession, ever assert that he had consumed anything other than alcohol. Moreover, defendant was given the benefit of a general instruction to the jury on the issue of voluntary intoxication as it related to the elements of premeditation and deliberation in the crime of murder in the first degree. There was no error in the trial judge's decision that a specific instruction on intoxication by drugs was not required.

[14] Defendant next alleges that the trial judge effectively denied him a fair trial by improperly conveying an opinion of defendant's guilt while instructing the jury on possible verdicts appropriate to the case. N.C.G.S. § 15A-1232 (1983). In support of his argument defendant specifically contends that Judge Albright unduly emphasized the state's evidence on the rape charge and the first degree murder response on the verdict form by repeatedly reciting one portion of the facts. While applying the facts to possible verdicts of felony murder, rape in the first degree, and attempted rape in the first degree, the court repeated, with minor variations, that such charges may be appropriate if the jury found that the defendant "engaged in vaginal intercourse

with Donna Phillips and that he did so by hitting her with his fists, stabbing her with a knife, commanding her to get on the ground, forcibly tearing or cutting her bra and pulling her pants and undergarments down and biting her breast and that this was sufficient to overcome any resistance . . . ." Defendant insists that the court went beyond what was necessary in applying the law of rape in the first degree to the evidence and that the court's actions in "unduly stressing" this evidence served to indirectly convey an opinion that defendant was guilty. We disagree.

N.C.G.S. 15A-1232 provides that a judge is forbidden from expressing an "opinion whether a fact has been proved." *See, e.g., State v. Staley,* 292 N.C. 160, 232 S.E. 2d 680 (1977); *State v. Freeman,* 280 N.C. 622, 187 S.E. 2d 59 (1972); *State v. Morrison and State v. Templeton,* 63 N.C. App. 125, 303 S.E. 2d 849 (1983). This statute does not, however, attempt to enforce the guarantee of impartiality required of every judicial officer by precluding a thorough application of the facts to the law in the court's charge to the jury. N.C.G.S. § 15A-1232 provides that the judge "is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence." *Cf. State v. Hewett,* 295 N.C. 640, 247 S.E. 2d 886 (1978). Upon contextually examining the court's statement, we find no expression of opinion by the trial court. This assignment of error is overruled.

II. SENTENCING PHASE

[15] Defendant concedes that his constitutional challenges to the North Carolina death penalty statutes, N.C.G.S. §§ 15A-2000 to -2003, have been considered and rejected by this Court on numerous occasions. As he has not presented us with sufficient or compelling reasons to justify reevaluation of these decisions, we decline to do so. *See, e.g., 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) (death penalty statute not unconstitutionally vague or applied in an arbitrary or discriminatory manner); *State v. Jerrett,* 309 N.C. 239, 307 S.E. 2d 339 (death penalty statute not violative of a defendant's constitutional right to privacy).

[16] Defendant next argues that during the trial's sentencing phase, defendant's foster mother, Delores Stanley, was improperly denied the opportunity to relate and detail the contents of certain telephone conversations between Mrs. Stanley and defend-

ant's mother. Defendant claims that this evidence was relevant to three of the mitigating circumstances submitted to the jury for its consideration during sentencing. The record reveals that these conversations properly were not permitted before the jury because they were hearsay. *See generally* 1 Brandis on North Carolina Evidence §§ 138, 139 (1982 & Supp. 1986). Assuming, arguendo, that these conversations were admissible to explain defendant's mother's attitude towards defendant, we find that any error in excluding this testimony would have been harmless, given the ample other testimony before the jury revealing defendant's mother's attitude towards him.

[17] Defendant next maintains that the trial judge committed error in admitting certain testimony of defendant's sister, Diane Johnson. Defendant contends this testimony was "improper, irrelevant, and prejudicial." After testifying on direct examination as to incidents of abuse and violence inflicted by their mother on defendant during defendant's and her childhood, Diane was questioned on cross-examination about an incident involving a fight between Diane and defendant's girlfriend, Lucy Turner. The prosecutor elicited testimony from Diane to the effect that on 10 October 1982, defendant's mother, Diane, Jerry Williams, and Diane's friend Gene Bailey went to the motel room which defendant and Lucy were sharing. Diane struck Lucy in the face, pulled her down onto a bed, and held her there while Lucy was assaulted by defendant's mother. Defendant asked the four visitors to leave, pulled his sister off Lucy, and tried to pull his mother off. When this happened, Jerry jumped into the affray, and, Diane testified, "[a]fter Jerry had jumped in, Bobby had pushed Jerry aside, and then Gene jumped in and Gene was pushed to the side; and by that time mama was still on Lucy." The following exchange then occurred:

BY MR. COMAN:

Q. Were any weapons drawn at that time?

MR. SCHMIDLY: Object.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. COMAN:

Q. Tell the ladies and gentlemen of the Jury who drew a weapon.

A. My brother.

Q. And tell the ladies and gentlemen of the Jury what type of weapon was drawn.

MR. SCHMIDLY: Object.

THE COURT: Overruled.

THE WITNESS: A knife.

BY MR. COMAN:

Q. And tell the ladies and gentlemen of the Jury what, if anything, he did with it.

A. He cut his finger.

Q. What else happened?

A. Then we left.

Diane then testified that defendant merely took the knife out of his pocket, held it at his side, and told them to leave, but that he at no time pointed the knife at anyone. Thereafter, the prosecutor obtained an admission from Diane that on 10 July 1982, Diane had also assaulted one Maxine Branton by striking her in the face with her hands and fists and pulling her hair.

Defendant argues that all of the above testimony was remote and collateral and thus was irrelevant for impeachment purposes. He alleges that the testimony about defendant's pulling the knife also violated the prohibition in *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), against cross-examination of a defendant's character witness with respect to specific acts of misconduct of defendant.

We do not find error in the admission of the testimony elicited from Diane on cross-examination concerning her part in the altercation in the TravelLodge on 10 October 1982. This testimony was competent to impeach Diane's testimony. *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982); *see generally* 1 Brandis on North Carolina Evidence § 43 (1982 & Supp. 1986). We do,

however, find error in the state's cross-examination of Diane concerning defendant's use of a knife during the fracas. "[C]ross-examination of a criminal defendant's character witness may not extend to particular instances of misconduct [of defendant]." *State v. Oliver,* 309 N.C. 326, 374, 307 S.E. 2d 304, 334; *State v. Wilkerson,* 295 N.C. 559, 573-74, 247 S.E. 2d 905, 913. Under the facts of the instant case, such testimony did not constitute prejudicial error. If anything, Diane's testimony that defendant first asked the visitors to leave, pulled his sister off his girlfriend, attempted to pull his mother off Lucy, and resorted to drawing his knife only after his pleas and interventions were ineffectual and the two male intruders jumped into the fight, shows that defendant was merely trying to protect and rescue someone who was being attacked. Diane's testimony indicated only that defendant found it necessary to display a knife as a last resort in order to break up the fracas which she and her mother initiated. The fact that defendant used the knife apparently in an effort to protect or aid a victim of physical assault may actually have impressed the jury favorably. For this reason and because of the "presence in the case of evidence quite persuasive of defendant's guilt," we hold that the error was not prejudicial. *Wilkerson,* 295 N.C. at 573, 247 S.E. 2d at 913.

[18] Defendant's next assignment of error concerns opinion testimony of Dr. Sherrow. During the penalty phase, the prosecutor attempted to show that defendant may have killed Ms. Phillips in an effort to avoid later identification and apprehension. In an effort to rebut this argument, defendant tried to elicit from Dr. Sherrow an opinion regarding defendant's motive in the killing. Defendant contends that it was error for the trial court to exclude the expression of this opinion, alleging that Dr. Sherrow's response would have excluded any motive to avoid detection and countered Dr. Rollins' testimony that defendant was able to form the specific intent to kill.

Our review of the record reveals that only moments before the objected-to exchange, the defense attorney had asked Dr. Sherrow if he had an opinion "as to whether when Bobby Ray Johnson killed Donna Phillips, he committed that act so that she would not be able to identify him?" The trial judge overruled the district attorney's objection to this question, and Dr. Sherrow replied, "No, I don't have an opinion." When defense counsel then

asked, for the second time, "Do you have an opinion that . . . he did do that so that she would not be able to identify him," the trial judge sustained the prosecutor's objection. Defense counsel then asked, "Do you have an opinion as to whether or not Bobby Ray Johnson acted out of any motive when he killed Donna Ray Phillips?" The trial judge sustained the district attorney's objection to this question, then held a brief bench conference on the matter. After the discussion off the record, Dr. Sherrow was permitted to state for the record, out of the hearing of the jury:

> I have an opinion. The opinion regards the mental state at the time of the offense. The opinion is that his thinking was jumbled and lacking in logical substance and guided by blind rage and fury at what he misinterpreted as significant provocation.

The defense attorney then asked the witness within hearing of the jury if he had an opinion "as to what Bobby Johnson's mental state was at the time that he killed Donna Ray Phillips," and the witness answered in a manner which substantially mirrored the statement previously excluded. We therefore find this assignment meritless.

[19] Defendant next contends that the trial court erred in refusing to allow defense counsel first to read and then make argument to the jury based on the last paragraph of N.C.G.S. § 15A-2000(b). The relevant part of that subsection provides:

> If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

Defendant contends that the court's denial of his request violated his right to inform the jury of the punishment prescribed for the offense charged, *State v. Walters*, 294 N.C. 311, 240 S.E. 2d 628 (1978); *see* N.C.G.S. § 84-14 (1985), and his right to advise the jury as to the result of its failure to reach unanimity in its sentencing recommendation. *Cf. State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979) (in jury argument in sentencing phase of capital case, counsel may read or state to jury any rule of law or statute relevant

to the case, but error to allow reference to appellate review); *Caldwell v. Mississippi*, 472 U.S. ---, 86 L.Ed. 2d 231 (1985) (death sentence imposed by jury which was led to believe by prosecutor's argument that responsibility for determining the appropriateness of a death sentence rested not with the jury but with an appellate court, held invalid under eighth amendment). We find this contention to be without merit. This Court has repeatedly held that an instruction "that a sentence of life imprisonment would be imposed upon the defendant in the event that the jury was unable to reach unanimous agreement on the proper sentence" would be improper "because it would be of no assistance to the jury and would invite the jury to escape its responsibility to recommend the sentence to be imposed by the expedient of failing to reach a unanimous verdict." *State v. Williams*, 308 N.C. 47, 73, 301 S.E. 2d 335, 351-52, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983). *Accord, e.g., State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985); *State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324 (1985). We hold this is true whether such a statement is read by counsel or contained within the instructions of the trial court. The court did not err by denying defendant's request.

[20] In his next assignment of error, defendant argues that it was error for the trial court to instruct the jury that if it found aggravating circumstances to outweigh mitigating circumstances and that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty, then it would be the jury's duty to recommend that defendant be sentenced to death. We have held this instruction not to be erroneous in numerous cases and affirm this holding. *E.g., State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189; *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197; *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203. This assignment of error is overruled.

[21] Defendant further complains of the manner in which the court instructed the jury with respect to two of the six statutory mitigating circumstances submitted to the jury: 15A-2000(f)(2), "The capital felony was committed while the defendant was under the influence of mental or emotional disturbance," and N.C.G.S. § 15A-2000(f)(6), "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the re-

quirements of law was impaired." Specifically, defendant's objections arise out of the manner in which the court described the evidentiary bases for the submission of these factors. In instructing the jury on the issue of whether defendant's capacity to appreciate and conform to the law was impaired, the court stated, in pertinent part:

> Again, the Defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of atypical dissociative disorder and intoxication is lessend [sic] or diminished because of such atypical dissociative disorder and intoxication.
>
> Now, generally, voluntary intoxication is no excuse for crime. However, you would find this mitigating circumstance if you find that Bobby Ray Johnson, Junior, suffered from atypical dissociative disorder and that during the evening hours before the killing had consumed such quantity of alcohol that he was at the time of the killing substantially impaired by and under the influence of a large amount of alcohol which exacerbated his mental disorder and that these factors in combination impaired his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

The court gave a similar instruction on the issue of whether defendant was under the influence of a mental or emotional disturbance at the time of the crime, charging:

> For this mitigating circumstance to exist, it is enough that the Defendant's mind or emotions were disturbed from any cause; and that he was under the influence of the disturbance when he killed Donna Phillips. Generally, voluntary intoxication is no excuse for crime. However, members of the Jury, you would find this mitigating circumstance if you find that the Defendant suffered from an atypical dissociative disorder, felt provoked by interaction with Donna Phillips on the night and at the time in question; had a neglected and abused background and was substantially under the influence of a large amount of alcohol and that these factors acted in combination to produce escalating rage in the Defendant culminating in the killing of Donna Phillips and that as a result, Bobby Ray Johnson, Junior, was under the influence of mental disturbance when he killed Donna Phillips . . . .

Defendant's first objection is based on the court's conjunctive, simultaneous references to both defendant's intoxication and the atypical dissociative disorder allegedly resulting from his background of abuse and neglect. Defendant argues that the court's instructions improperly tended to suggest to the jury that defendant's intoxication in itself was not significant and that only if the jury considered it in combination with defendant's emotional disorder could the jury legitimately find his intoxication to be a factor in mitigation. He insists that the trial judge should have given a separate instruction on intoxication as requested. We find this contention meritless.

Under some circumstances, evidence of a defendant's intoxication at the time of the crime may properly be evaluated by the jury as a mitigating circumstance under N.C.G.S. § 15A-2000(f)(6). *E.g., State v. Moose,* 310 N.C. 482, 313 S.E. 2d 507 (1984); *State v. Irwin,* 304 N.C. 93, 282 S.E. 2d 439 (1981); *State v. Goodman,* 298 N.C. 1, 257 S.E. 2d 569 (1979). In the case sub judice, evidence of defendant's intoxication was originally presented as a mitigating circumstance in conjunction with defendant's emotional history. Cheryl Cassaro testified that earlier in the evening of 2 December 1982 defendant had been so intoxicated that he was stumbling. Defendant's own expert psychiatric witness, Dr. Sherrow, testified however that evidence of intoxication alone could not explain defendant's behavior. In his opinion, the effects of the alcohol, taken in combination with defendant's other emotional problems, triggered defendant's rage. The trial court's instructions were supported by the relevant evidence presented and were not erroneous.

Defendant also objects to a second aspect of the same instructions quoted above. He alleges that the trial court improperly suggested that the jury must find defendant to have been "substantially" impaired by the effects of alcohol at the time of the commission of the crime. This language, defendant contends, was not justified by the evidence presented and therefore constituted an opinion by the court in violation of N.C.G.S. § 15A-1222. This contention is wholly without merit. "When the defendant contends that his faculties were impaired by intoxication, such intoxication must be to a degree that it affects defendant's ability to understand and control his actions before subsection (f)(6) is applicable." *State v. Goodman,* 298 N.C. at 33, 257 S.E.

2d at 589. The trial court's instruction reflected the proper legal standard and cannot reasonably be interpreted as a comment on the evidence.

[22] Defendant next argues that the trial court erred in refusing defendant's request that it submit defendant's age to the jury as a possible mitigating circumstance. N.C.G.S. § 15A-2000(f)(7) (1983). At the time of the commission of the crimes, defendant was twenty-three years old, but evidence presented by lay witnesses at the sentencing hearing was to the effect that defendant was emotionally immature for his age. Defendant correctly points out that "the chronological age of a defendant is not the determinative factor under G.S. § 15A-2000(f)(7)." *State v. Oliver*, 309 N.C. 326, 372, 307 S.E. 2d 304, 333 (no error in trial court's failure to peremptorily instruct that defendant's age, nineteen years eleven months, was a mitigating factor). However, in *Oliver*, the Court, quoting *Giles v. State*, 261 Ark. 413, 421, 549 S.W. 2d 479, 483, *cert. denied*, 434 U.S. 894 (1977), said, "Any hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances." 309 N.C. at 372, 307 S.E. 2d at 333.

Our recognition of this flexible and relative concept of age under N.C.G.S. § 15A-2000(f)(7) does not lead us to conclude that the trial court committed prejudicial error in the instant case. Defendant presented two witnesses, his foster parents, who offered largely conclusory statements that defendant was emotionally immature for his twenty-three years. Their opinions were founded primarily on their observations of defendant during the two years in which defendant lived with them from the time he was sixteen until he was almost eighteen years old. The factors supporting the Stanleys' assertions of immaturity were defendant's bedwetting, "emotional" behavior, and being fired from his first full-time job. These factors cannot be viewed in isolation, particularly in light of defendant's other more mature qualities and characteristics to which the Stanleys testified. When balanced against defendant's chronological age of twenty-three, his apparently normal physical and intellectual development, and his level of experience, the evidence did not require the trial court to submit the mitigating circumstance listed at N.C.G.S. § 15A-2000(f)(7). *Cf. Eddings v. Oklahoma*, 455 U.S. 104, 115-16, 71 L.Ed. 2d 1, 11-12

(1982) (defendant's chronological age of sixteen, when combined with severe emotional disturbance, constituted a factor in mitigation); *Oliver*, 309 N.C. at 372, 307 S.E. 2d at 333.

[23] Next, defendant contends that the evidence introduced did not justify the trial court's submission to the jury of the possible aggravating circumstance that defendant's crime was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1983). The evidence clearly reveals that defendant's acts upon the victim were characterized by "excessive brutality, physical pain and psychological suffering not normally present in a first degree murder case." *State v. Stanley*, 310 N.C. 332, 336, 312 S.E. 2d 393, 403 (1984); *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). The evidence shows that defendant and Williams sought Donna Phillips out and returned to pick her up for the express purpose of raping her. Once Ms. Phillips realized their intentions, her protestations were met with hostility and physical violence. Defendant's confession, corroborated by bloodstains in the car, indicates that she was stabbed at least once in the leg in the car, and there was also evidence that she was struck across the eye. Bruised and bleeding, she was dragged from the car, her clothing was ripped from her body, and she was stabbed in the arm. She was then thrown to the ground and sexually assaulted by defendant as Williams held her down. Defendant savagely bit her on the left breast, leaving a clear wound. All the while, Ms. Phillips was conscious, certainly in pain and aware that she was engaged in a life-and-death struggle, as she heard Williams urge defendant to "[g]o ahead and kill her." Defensive wounds on her hand indicated that she had attempted to fend off the knife attack. Defendant ultimately inflicted fifty-five stab wounds upon his victim, with perhaps fifteen to twenty minutes elapsing between the time Ms. Phillips was first stabbed in the car and the time she finally died. In sum, the facts are so egregious as to merit an instruction to the jury that it may find defendant's crime to have been especially heinous, atrocious, or cruel. *See, e.g.*, *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983) (defendants tried to rob their drunken victim, found no money, then stabbed her thirty-seven times despite her pleas for her life).

Defendant attempts to isolate the circumstances of his final fatal attack from those injuries and events which immediately

preceded it. According to defendant, the killing was "a separate act resulting from the peculiar nature of the defendant's own psyche." This argument is unconvincing. The cruelty and brutality of a particular crime is determined by looking at the facts as a whole. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203. The pain and terror experienced by Ms. Phillips during the attack upon her was not excused by "the peculiar nature of the defendant's own psyche." Defendant's preliminary acts of violence upon Ms. Phillips were all a part of the same transaction and may properly be considered in determining the propriety of the trial court's submission of the particular aggravating circumstance. This assignment of error is overruled.

[24] Finally, because in this opinion we set aside the verdict of defendant's guilt of murder in the first degree based on premeditation and deliberation, we hold that defendant's conviction of murder in the first degree is supported only by the jury's verdict of guilty based on felony murder, with rape constituting the predicate felony. Therefore, it was error to have submitted to the jury the aggravating circumstance: "Was this murder committed while Bobby Ray Johnson, Jr. was engaged in the commission of First Degree Rape?" *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980). Considering all the evidence in the case, we cannot say that the erroneous submission of this aggravating circumstance was harmless error beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1985). *See Cherry*, 298 N.C. 86, 257 S.E. 2d 551. Because of this error, we hold that defendant is entitled to a new sentencing hearing on his conviction of murder in the first degree.

The result is:

No. 82CRS64664—first degree kidnapping—no error.

No. 82CRS64665—first degree rape—judgment arrested.

No. 82CRS64663—first degree murder—new sentencing hearing.

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

STATE OF NORTH CAROLINA v. SHERMAN LEE YOUNG

No. 612A84

(Filed 12 August 1986)

1. **Criminal Law § 75.7— in-custody statement—failure to give Miranda warnings —absence of interrogation**

Defendant was not subjected to custodial "interrogation," and defendant's in-custody statement to an officer was not rendered inadmissible by the officer's failure to inform defendant of his *Miranda* rights, where the officer served a nontestimonial identification order on defendant at the jail; while the order was being served, defendant asked the officer why he believed the victim's story rather than his own; the officer responded that his belief was based on the evidence and the fact that defendant had lied about his whereabouts on the night in question; and defendant then stated that "I lied because I knew you wouldn't believe the truth about me falling asleep in the car while she went off with another man at the Day's Inn Motel that night." Defendant was not subjected to the functional equivalent of questioning since the officer's comment did not require or call for a response on the part of defendant and it cannot be said that the officer should have known that the statement was reasonably likely to elicit an incriminating response from defendant.

2. **Criminal Law § 75.4— invocation of right to counsel—subsequent in-custody statement—conversation not initiated by officer**

An officer did not initiate a conversation with defendant after defendant had previously invoked his right to counsel within the meaning of *Edwards v. Arizona*, 452 U.S. 973 (1981), by going to the jail and presenting defendant with a nontestimonial identification order. Nor did the officer initiate a conversation with defendant by explaining the purpose of the nontestimonial identification order in response to defendant's inquiry as to what the order was "about." Furthermore, since the officer did not interrogate defendant before defendant made an incriminating statement, admission of the statement did not violate defendant's Fifth Amendment right to have counsel present and his Sixth Amendment right to counsel.

3. **Criminal Law § 75.4— statement during service of nontestimonial identification order—no statutory right to counsel**

A statement made by defendant to an officer without the presence of counsel was not required to be suppressed under N.C.G.S. § 15A-279(d) where, at the time the statement was made, defendant was not undergoing any nontestimonial identification procedures but was merely being served with a copy of an order requiring submission to nontestimonial identification procedures.

4. **Criminal Law § 34.4— other crimes—competency to show will overcome by fear**

In a prosecution for kidnapping, rape and sexual offenses, testimony by the victim that she had hidden her jewelry in a car trunk during her confine-

ment there because defendant had assaulted her and taken her jewelry on a prior occasion was competent to explain the victim's unusual behavior and was probative on the issue of whether her will had been overcome in part by fears for her safety. N.C.G.S. § 8C-1, Rule 404(b).

5. **Criminal Law § 102.8— jury argument—no comment on failure to testify**

Challenged portions of the prosecutor's jury argument did not amount to an impermissible comment on defendant's failure to testify but merely referred to his failure to contradict evidence presented by the State or to produce witnesses to corroborate the truth of an *alibi*.

6. **Rape and Allied Offenses § 6— knife as dangerous weapon—instruction proper**

The trial court's instruction in a prosecution for first degree rape and first degree sexual offense that "a knife is a dangerous weapon" did not constitute plain error where a pocketknife was used by defendant not only to procure the submission of his victim but also to cut the clothing off her body prior to committing sexual acts, and where the knife was also used to inflict a laceration inside the victim's vagina. The fact that the victim's injuries did not require her admission to the hospital did not prohibit the pocketknife from being characterized as a dangerous or deadly weapon.

ON appeal by the defendant as of right pursuant to N.C.G.S. § 7A-27(a) from the imposition of consecutive sentences of life imprisonment upon his convictions of rape and sex offense entered by *Ross, J.*, at the 3 September 1984 Criminal Session of Superior Court, GUILFORD County. Upon jury verdicts of guilty of first-degree kidnapping, rape, and two counts of first-degree sexual offense, defendant was sentenced to concurrent sentences of life imprisonment for rape and twelve years for kidnapping and two additional life imprisonment sentences for sexual offenses to run concurrently with each other but consecutive to the life term for rape. On 29 October 1985, this Court allowed the defendant's petition to bypass the Court of Appeals on his appeal from the imposition of the sentence to a term of twelve years upon his conviction for kidnapping.

Lacy H. Thornburg, Attorney General, by Kaye R. Webb, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

Defendant assigns as error the trial court's failure to suppress statements he made to a police detective, testimony by a

witness offered by the State that the defendant had assaulted and robbed her, certain statements made by the prosecutor in his argument to the jury, and the trial judge's jury instructions to the jury that a knife was a deadly weapon as a matter of law. We find no error in defendant's trial or in the sentences imposed.

The State's evidence tended to show that, in the early morning hours of Saturday, 17 March 1984, Peggy Jenkins arrived at the emergency room of the Community General Hospital in Thomasville, North Carolina. Her face was bloody, and she had numerous bruises on her body. While she was being examined by the emergency room staff, she told the nurse that she had been beaten and raped by her ex-husband, who had brought her to the emergency room. A member of the emergency room staff called the police. Detective A. W. Odum of the Guilford County Sheriff's Department arrived at the hospital at 10:13 a.m. and spoke to Ms. Jenkins. Shortly thereafter, he located the defendant in the lobby of the hospital and arrested him. The defendant was originally arrested on charges of kidnapping and rape, but was subsequently charged in four, single-count indictments with kidnapping, rape, and two charges of sexual offense.

At trial, the victim, Ms. Peggy Jenkins, testified that she was twenty-four years old; that she and the defendant had been married on 5 September 1981; and that they had divorced in January 1984, following a year's separation. Ms. Jenkins and the defendant had a three-year-old son, Derek Joshua Young.

Ms. Jenkins testified that on Friday, 16 March 1984, she drove to the defendant's place of work at Guilford Mills to obtain a child support payment from the defendant. She drove the defendant to a store to get a money order and then drove him to his home in Thomasville, leaving him at approximately 4:00 p.m. She then drove to her home in High Point, but left again later that evening and drove to a convenience store to get a drink. Ms. Jenkins testified that, as she was preparing to get out of the car, the defendant suddenly entered the passenger side, slid over beside her, and pulled out a knife, which she described as a "small pocketknife." The defendant held the knife to her throat and told her that he had some things to say to her and that she was going to listen to him. Holding the knife to Ms. Jenkins' throat, the defendant told her to drive to the mobile home of a friend, Jenni-

fer Hoots. Upon arriving at the Hoots' mobile home, the defendant tied Ms. Jenkins' hands to the steering wheel and went inside. After a couple of minutes, he came back to the car, untied Ms. Jenkins, and told her to drive to Greensboro. At this time, the defendant placed his arm around Ms. Jenkins and once more held the knife to her throat.

On the way to Greensboro, the defendant told Ms. Jenkins that he wanted her to come back to him. He also told her that he wanted custody of his son and was going to get his son, one way or the other. The defendant also argued with Ms. Jenkins concerning the fact that she was dating another man. Jenkins testified that, during this period, the defendant was extremely upset.

Ms. Jenkins testified that, upon arriving in Greensboro, the defendant demanded that they go to the Taco Bell to eat, and they did so. The defendant warned Ms. Jenkins not to try anything or he would kill her. At this time, the defendant had the knife in his pocket. Although they were inside the Taco Bell for approximately fifteen minutes, Ms. Jenkins testified that she made no attempt to escape or to alert anyone because she was afraid of the defendant. They drove to a bar and pool hall in Greensboro which the defendant frequented. Once again, the defendant threatened to kill Ms. Jenkins if she tried to get away. They stayed at the bar and pool hall about two hours. Ms. Jenkins did not attempt to escape or to alert anyone at the bar and pool hall because she felt the people at the bar were all friends of the defendant.

Ms. Jenkins and the defendant then left for Thomasville with Ms. Jenkins driving. On the way, the defendant told Ms. Jenkins that he wanted her to come back to him and that he did not want the man she had been seeing to have her. At one point, the defendant told Ms. Jenkins that if he could not have her back, he would kill her. They stopped several times on the way to High Point at the defendant's insistence. Eventually, they stopped in High Point.

Ms. Jenkins further testified that once they arrived in High Point, the defendant directed Ms. Jenkins to turn down a road off Highway 68 and pull off the road. At this point, the defendant slapped Ms. Jenkins, hit her in the chest, and told her that she was going to die and would not live to see the morning. Holding

the knife in his hand, the defendant instructed Ms. Jenkins to get out of the car. They proceeded to the rear of the car, where the defendant hit Ms. Jenkins in the face and stomach with his fist. Once again, the defendant told her that she was going to die. He then opened the trunk and told her to get in. Ms. Jenkins complied. The defendant then shut the trunk and started driving. After fifteen or twenty minutes of driving, the defendant stopped the car and opened the trunk. The defendant struck her in the face again and ordered her to remove her clothes. As she was disrobing, the defendant became impatient and used the knife to cut off Ms. Jenkins' bra and camisole and cut the front of her blue jeans open. He then removed her clothes, struck her in the face again, and forced her out of the trunk. At this point, Ms. Jenkins' nose was bleeding. The defendant continued arguing about his son and the man Ms. Jenkins was dating. The defendant told Ms. Jenkins that if she "wanted something up inside [her] so bad, he would give [her] something." At that time, the defendant inserted the blade of the pocketknife into Ms. Jenkins' vagina. She testified that this caused a "stinging, burning sensation." She identified a knife identified as State's Exhibit No. 2 as resembling the knife which the defendant had. The knife was admitted into evidence to illustrate her testimony.

Ms. Jenkins further testified that after the defendant removed the knife from her vagina, he forced her to perform fellatio on him. The defendant then pulled her up by the hair and struck her in the face and stomach. At this time, Ms. Jenkins collapsed on the ground. The defendant kicked her in the ribs, pulled her back up, and hit her in the face. He then pushed her over the trunk. He used Ms. Jenkins' shirt to tie her hands behind her back. The defendant engaged in anal and vaginal intercourse with Ms. Jenkins. During this entire period, the defendant had the knife in his hand. After engaging in vaginal intercourse with Ms. Jenkins, the defendant struck Ms. Jenkins and placed her back in the trunk. The defendant tied Ms. Jenkins' hands behind her with her pantyhose and used her shirt as a gag over her mouth. He also tied her ankles together. The defendant then closed the trunk and drove off.

Ms. Jenkins eventually managed to untie herself. She then hid her jewelry in the trunk lid. The defendant subsequently stopped the car and upon discovering that Ms. Jenkins had freed

herself from her bonds, struck her again, pulled her out of the trunk, and forced her into the front seat of the car. Seeing that Ms. Jenkins' face had stopped bleeding, the defendant said he "couldn't have that" and struck her in the face once again. The head wound reopened and blood splattered on the side windows of the car. After driving further, the defendant stopped the car and once again forced Ms. Jenkins at knifepoint to perform fellatio. Ms. Jenkins testified that the defendant continued to tell her that she was not going to live, and he stated that she had to die because he was not "going back to prison." The defendant again engaged in vaginal intercourse with Ms. Jenkins. Ms. Jenkins soon became sick and began to vomit. She asked the defendant to take her to a hospital because she was a diabetic and needed insulin. He told her that if she would lie down for awhile, she would be all right. Ms. Jenkins continued to request that the defendant take her to a hospital. She promised that she would come back to the defendant and that she would tell the hospital personnel that she had been in a fight somewhere else. Eventually, the defendant agreed to take Ms. Jenkins to his house, clean her up, and then take her to the hospital. They drove to Jennifer Hoots' mobile home, arriving in the early morning. The defendant carried Ms. Jenkins inside and cleaned her with a washcloth.

Ms. Jenkins testified that she did not say anything to Ms. Hoots because Ms. Hoots was the defendant's friend, and she did not know if she could trust her. She asked Ms. Hoots to go to the hospital with her, but Ms. Hoots refused. After spending approximately twenty minutes at the mobile home, the defendant took Ms. Jenkins to the hospital. Once inside the hospital, Ms. Jenkins told the nurses that she had been cut, beaten, and raped by the defendant. Ms. Jenkins described her injuries as swelling in her face; cuts, scrapes, and bruises on her arms, legs, and stomach; a fractured bone in her nose; a cut inside her vagina; and black eyes.

There was also testimony concerning Ms. Jenkins' condition at the hospital from an emergency room nurse and the emergency room physician. Barbara Yandle testified that she was the emergency room nurse who saw Ms. Jenkins on 17 March 1984. She stated that Ms. Jenkins told her that the defendant had forced her to engage in oral, anal, and vaginal intercourse against her will. She described Ms. Jenkins' injuries and stated that she

prepared an SBI rape kit. Dr. Jasper Jeffries testified that he was the emergency room physician who saw Ms. Jenkins. His examination revealed that she was badly bruised all over, that she had a bruised rectum consistent with some blunt object being forced in, that she had suffered rope burns on her ankles, that she had a swollen and bruised labia minora, and that there was a horizontal laceration 1.5 centimeters long on the inside of her right lower labia.

Jennifer Hoots testified that the defendant arrived at her mobile home between 6:30 and 7:00 a.m. on 17 March 1984. She stated that the defendant was carrying Ms. Jenkins. Ms. Hoots stated that Ms. Jenkins had been beaten up quite badly. The defendant told Ms. Hoots that Ms. Jenkins had been involved in a fight in a Greensboro bar. After the defendant cleaned up Ms. Jenkins, they prepared to go to the hospital. Ms. Hoots testified that Ms. Jenkins asked her to go with them, but the defendant refused to allow her to go. Ms. Hoots further testified that later that morning the defendant called her and instructed her that if anyone inquired as to where he was Friday night, she was to say that he was with her. When Ms. Hoots asked why he wanted her to say that, the defendant said, "because Peggy had called the High Point Police and the Thomasville Police." On Sunday afternoon, Ms. Hoots found a blouse, a bra, a pair of underwear, and a sock in a trash can behind her mobile home. She also discovered a knife in her bathroom. She identified the knife as belonging to Allen Berrier. The items of clothing found in the trash can were identified by Ms. Jenkins as being the clothing which she had been wearing on the night of 16 March.

Both Ms. Hoots and Frank Overman (the victim's former husband) testified that Ms. Jenkins had called them and told them that the defendant had kidnapped, assaulted, and raped her.

Detective Ronnie Whitt testified that he received the rape kit at the Thomasville hospital. He also received a pair of blue jeans from the defendant. Whitt searched Ms. Jenkins' car and found a bloodstain on the passenger window, a sock in the trunk, and some jewelry hidden in the trunk lid. He also collected hair and fabric samples from the passenger area and trunk of the car and hair samples from the defendant. These samples were sent to the SBI laboratory.

Brenda Bissette, an SBI forensic serologist, testified that although she found spermatozoa in the vaginal swabs from the rape kit, she was unable to draw any conclusions as to the donor of the semen. Bissette testified that she found human blood on the car window and on the blue jeans, socks, blouse, bra, and camisole, but could not identify the type due to the fact that the samples had not been sent to her until approximately four months after the alleged incident.

Scott Worsham, an SBI hair examiner, testified that hair found in the trunk of the car was consistent with that of Ms. Jenkins and that this hair appeared to have been forcibly removed from the scalp. He also testified that a pubic hair combed from Ms. Jenkins' pubic region was consistent with that of the defendant.

John Bendure, an SBI fiber analyst, testified that he examined the socks, blouse, camisole, and bra, as well as fiber samples from the trunk. He stated that the sock from Ms. Hoots' trash can matched the sock in the trunk and that fibers in the trunk matched fibers from Ms. Jenkins' clothing.

Detective A. W. Odum of the Guilford County Sheriff's Department testified that he questioned the defendant on the afternoon of 17 March 1984. After being advised of his constitutional rights and executing a standard waiver form, the defendant gave a statement in which he said that he and Ms. Jenkins had gone out on a date on Friday evening. After going to a bar in Greensboro, they went to Jennifer Hoots' mobile home. The defendant stated that after staying approximately thirty minutes, Ms. Jenkins left the mobile home alone. Ms. Jenkins returned at approximately 7:30 a.m. the next morning, her face covered with blood. The defendant took Ms. Jenkins to the hospital. The defendant stated that Ms. Jenkins did not tell him what had happened to her. In a continuation of the statement later that afternoon, the defendant said that he and Ms. Jenkins had been getting along well. He further stated that he and Ms. Jenkins had engaged in consensual sex the previous evening.

Detective Odum further testified that on 4 April 1984, he served a nontestimonial identification order on the defendant at the jail. Odum stated that, while serving the order, the defendant asked him why he believed Ms. Jenkins' story rather than his

own. Odum responded that his belief was based on the evidence and the fact that the defendant had lied about his whereabouts on the night in question. Odum testified that the defendant replied, "I lied because I knew you wouldn't believe the truth about me falling asleep in the car while she went off with another man at the Days Inn Motel that night."

The defendant presented evidence which tended to show that he met Ms. Jenkins at the home of Allen Berrier on the evening of 16 March 1984. Approximately twenty minutes later, the defendant and Ms. Jenkins left together. The defendant also produced a witness who testified that he saw the defendant in a Greensboro bar with a woman on the night of 16 March.

Based on this and other evidence, the jury convicted the defendant of first-degree kidnapping, first-degree rape, and two counts of first-degree sexual offense.

I.

The defendant initially contends that the trial court erred by permitting Detective Odum to testify concerning the statement made to him by the defendant on 4 April 1984. The defendant argues that this statement was obtained in violation of his fifth amendment rights as set out in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, *reh'g denied*, 385 U.S. 890, 17 L.Ed. 2d 121 (1966); in violation of his sixth amendment right to counsel; and in violation of N.C.G.S. § 15A-279. We conclude that the statement in question was properly admitted and therefore overrule this assignment of error.

Prior to trial, the defendant filed a motion to suppress the statement which he made to Detective Odum on 4 April 1984. The motion was heard at the 26 July 1984 Session of Superior Court, Guilford County. At the hearing, Detective Odum testified that on 4 April 1984, he served a nontestimonial identification order on the defendant at the High Point jail and was with him for about fifteen minutes. The following exchange then took place between the prosecutor and Detective Odum:

> Q. And during the course of service of that non-testimonial identification order, did you have occasion to interrogate Sherman Young in any way?

A. No, sir, I did not.

Q. Did you ask him any questions at all during the course of service of that order?

A. No, sir, I did not.

Q. Did you have any conversation with Sherman Young?

A. Yes, sir. I served the order and read it to him, the defendant, at which time he made several statements to me. It was during the attempt to get him to sign that he received service of the order, and he was very reluctant to sign because he was upset about me not believing his statement.

Q. Did he tell you that?

A. Yes, sir.

Q. And did he make any of these statements to you in response to any questions by yourself?

A. No, sir, not for that purpose.

Q. All right. Just go ahead and tell his honor, if you would, Detective Odom [sic], exactly what was said during the period of time that you were with Sherman Young.

A. As I stated, he became very upset, and asked me why he was still in jail and why did I believe her story instead of his. I told him that I believed her because of the evidence and because he lied to me about where he was that night.

He replied by stating, "I lied because I knew you wouldn't believe the truth about me falling asleep in the car while she went off with another man at the Day's Inn Motel that night."

On cross-examination, Detective Odum acknowledged that he may have told the defendant that if he (the defendant) wanted to tell the truth, he (Odum) would be willing to listen.

The defendant also testified at the suppression hearing. He stated that upon receiving the nontestimonial identification order, he asked Detective Odum what it "was all about." The defendant testified that Odum explained it to him and stated that it was either to help him (the defendant) or to aid the police in determin-

ing whether he had committed the crimes. The defendant stated that he asked Odum why he believed Jenkins rather than him. Odum stated that his belief was based on the evidence and the fact that the defendant had lied to him. The defendant stated that, at that time, Detective Odum stated that if the defendant "really wanted to—If I wanted the truth to be known," he would be willing to listen. The defendant then told Odum that he had fallen asleep in the car while Ms. Jenkins met a man at the Days Inn.

Based on this evidence, the trial court found that the following conversation occurred at the time the defendant was served with the nontestimonial identification order:

> "Defendant: What's this about?
>
> ["]Detective Odom [sic]: This is to help you or to help us (the prosecution).
>
> ["]Defendant: Why did you (Detective Odom [sic]) believe her story instead of his [sic]?
>
> ["]Detective Odom [sic]: I believed her because of the evidence and because you lied to me about where you were that night.
>
> ["]Defendant: I lied because I knew you wouldn't believe the truth about me falling asleep in the car while she met another man in a car. (Detective Odom's [sic] written statement records the defendant's statement to the effect that she went off with another man at the Day's Inn Motel that night.)
>
> ["]Detective Odom [sic]: ([The following is q]uoted by defendant[,] and Detective Odom's [sic] testimony is that he might have made this statement.) If defendant want[s] to tell the truth, he (Detective Odom [sic]) would listen to him.
>
> ["]Defendant: I fell asleep in the car. She met another man in a car.["]

The trial court also found that Detective Odum did not inform the defendant of his *Miranda* rights; that no promises or threats were made to the defendant in order to induce him to make the statement; and that, although the defendant was at the time represented by counsel, he did not request the presence of counsel when

talking with Odum. The trial court then concluded as a matter of law that the defendant's statement was made "freely, voluntarily, and understandingly by him in the course of his questioning [of] Detective Odum"; that the defendant was in full understanding of his constitutional rights to remain silent and to counsel; and that he intelligently, voluntarily, and knowingly waived these rights by speaking with Detective Odum in this manner. The trial court thereupon denied the defendant's motion to suppress.

A.

[1] The defendant makes three arguments concerning the denial of his motion to suppress. First, he contends that the admission of this statement was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694. *Miranda* held that statements made by an accused in response to custodial interrogation by law enforcement officers are inadmissible against him unless he has been explicitly warned of his fifth amendment rights to remain silent and to counsel and has made a voluntary, knowing, and intelligent waiver of these rights. The defendant argues that since the trial court found that Odum failed to inform him of his *Miranda* rights again on 4 April, the statement should have been suppressed. We do not agree.

As *Miranda* and its progeny made clear, the *Miranda* protections apply only where an accused is subjected to custodial interrogation. *E.g., Minnesota v. Murphy*, 465 U.S. 420, 79 L.Ed. 2d 409, *reh'g denied*, 466 U.S. 945, 80 L.Ed. 2d 477 (1984); *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297 (1980); *Orozco v. Texas*, 394 U.S. 324, 22 L.Ed. 2d 311 (1969); *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694. In this case, there is no question that the defendant was in custody at the time the statement was made. The key inquiry therefore becomes whether the defendant was "interrogated" by Detective Odum.

In *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297, the Supreme Court defined the term "interrogation" for purposes of the *Miranda* decision. The Court stated that interrogation means not only express questioning by the police, but also includes any words or actions on the part of law enforcement officials which they "should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301, 64 L.Ed. 2d at 308 (footnotes omitted). The Court went on to say that with regard to

these other words or actions, also referred to as the "functional equivalent of questioning," the focus is on the perceptions of the suspect rather than the intent of the law enforcement officials. *Id.*

In the case *sub judice*, there was competent evidence to support the trial court's finding as to how the conversation between Detective Odum and the defendant unfolded. An examination of the conversation clearly shows that the statement was not elicited from the defendant as the result of questioning by Detective Odum. Detective Odum posed no questions to the defendant. Moreover, we do not feel that the defendant was subjected to the "functional equivalent of questioning." The defendant's statement —"I lied because I knew you wouldn't believe the truth about me falling asleep in the car while she met another man in a car"— was made in response to Detective Odum's comment that he believed Ms. Jenkins because of the evidence and the fact that the defendant had lied to him about his whereabouts on the night in question. Odum's comment did not require or call for a response on the part of the defendant. It simply cannot be said that Detective Odum should have known that this statement was reasonably likely to elicit an incriminating response from the defendant. Since the defendant was not "interrogated," Detective Odum's failure to inform the defendant of his *Miranda* rights does not render the statement in question inadmissible. The trial court's conclusion that the defendant's statement was made "freely, voluntarily, and understandingly" is supported by the findings of fact, which are in turn supported by the evidence.

B.

[2] The defendant next argues that this statement was obtained in violation of his fifth amendment right to have counsel present at a custodial interrogation and his sixth amendment right to counsel. Specifically, he contends that Odum's actions ran afoul of the dictates of *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984 (1981). In *Edwards*, the Supreme Court held that once a suspect invokes his right to counsel, he may not be questioned further without the presence of counsel unless the defendant initiates the conversation with law enforcement authorities, at which time he may waive his right to have his attorney present. The defendant was appointed counsel on 19 March 1984. The defendant argues that since he had

invoked his right to counsel prior to 4 April, Odum's discussion with him violated his right to counsel, and the statement which he made must be suppressed. We do not agree.

Initially, we reject the defendant's argument that Detective Odum initiated the conversation by going to the jail, presenting the defendant with the nontestimonial identification order, and explaining the purpose of the order. It cannot be said that the fact that Odum went to the High Point jail and presented the defendant with the nontestimonial identification order constituted an "initiation" of conversation within the meaning of *Edwards*. The authorities were required to serve the order on the defendant. N.C.G.S. § 15A-277 states that an order to submit to nontestimonial identification procedures *must* be served at least seventy-two hours in advance of the time of compliance and may be served by a law enforcement officer. The fact that the service of the order occurs subsequent to the invocation of the right to counsel does not affect the routine nature of the service of the order nor does it constitute the initiation of conversation. *See State v. Williams*, 314 N.C. 337, 333 S.E. 2d 708 (1985) (holding that a law enforcement officer's delivery of a seizure inventory form did not constitute the initiation of conversation). Furthermore, since Detective Odum's explanation of the purpose of the nontestimonial identification order was made in response to the defendant's inquiry as to what the order was "about," it is clear that those particular comments were not an initiation of communication.

Furthermore, as noted above, the defendant was not interrogated by Detective Odum on 4 April. As the United States Supreme Court stated in *Edwards*:

> Had Edwards initiated the meeting . . . nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. *Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver.*

Edwards v. Arizona, 451 U.S. at 485-86, 68 L.Ed. 2d at 387 (emphasis added). Since the defendant was not subjected to custodial interrogation, his fifth amendment right to have counsel present was not violated. Similarly, since there was no interrogation, the defendant's sixth amendment right to counsel was not violated. *See Brewer v. Williams,* 430 U.S. 387, 51 L.Ed. 2d 424, *reh'g denied,* 431 U.S. 925, 53 L.Ed. 2d 240 (1977).

C.

[3] Finally, the defendant contends that the admission of this statement violates the provisions of N.C.G.S. § 15A-279. This statute addresses the implementation of orders requiring submission for nontestimonial identification procedures. N.C.G.S. § 15A-279(d) provides:

> Any such person is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. 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.

The defendant argues that since the statement was made without the presence of counsel, its suppression was mandated by this provision. In order to obtain the suppression of his statement under N.C.G.S. § 15A-279(d), a defendant must show: (1) that the statement was made during nontestimonial identification procedures, and (2) that the statement was made without the presence of counsel. "Nontestimonial identification procedures" are those procedures by which a suspect's fingerprints, palm prints, footprints, measurements, blood specimen, urine specimen, saliva sample, hair sample, handwriting exemplar, voice sample, or photographs are obtained. *See* N.C.G.S. § 15A-271. At the time the statement in question was made, the defendant was not undergoing any nontestimonial identification procedures, but was merely being served with a copy of the order requiring submission to

nontestimonial identification procedures.[1] Since the statement was not made during any nontestimonial identification procedure, its suppression was not required by N.C.G.S. § 15A-279(d).

For the above stated reasons, the trial court did not err in denying the defendant's motion to suppress the 4 April statement to Detective Odum. This assignment of error is overruled.

II.

[4] The defendant next assigns as error the trial court's admission, over objection, of the victim's testimony indicating that the defendant had assaulted her on some prior occasion. During direct examination, Ms. Jenkins testified that she had hidden her jewelry in the trunk of the car during her confinement there. The following exchange ensued:

> Q. Why did you do that?
>
> A. Because Sherman has assaulted me before—
>
> MR. JOSEPH: Objection, Your Honor.
>
> MR. KIMEL: We contend that would be competent and proper to show animosity or ill-will on behalf of the defendant.
>
> THE COURT: Overruled. EXCEPTION NO. 29
>
> Q. Go ahead. You can finish answering.
>
> A. He had taken—he assaulted me before and taken my jewelry and—and sold it.

The defendant contends that this testimony was not admissible to show ill-will or animosity on his part, but instead constituted an attack on his character by placing before the jury evidence of prior crimes of assault and robbery. Thus, the defendant contends that the trial court's admission of this testimony was in violation of N.C.G.S. § 8C-1, Rule 404(b), which provides:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the

1. The defendant failed to object to either the issuance of the nontestimonial identification order or the service of the order upon him. We therefore do not address these questions.

> character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Rule 404(b) codifies the longstanding rule in this jurisdiction that evidence of other offenses is inadmissible on the issue of guilt if its *only* relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact,[2] it will not be excluded merely because it also shows him to have been guilty of an independent crime. 1 Brandis on North Carolina Evidence § 91 (1982). The defendant's general objection to the victim's response is ineffective unless there is no proper purpose for which the evidence is admissible. *State v. McKoy*, 317 N.C. 519, 347 S.E. 2d 374 (1986). The burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted. *Id.*

The defendant contends that "animosity or ill-will" had no relevancy to any issue in this case since he was not on trial for felonious assault or murder. We cannot agree that animosity and ill-will are states of mind limited to murderers or perpetrators of felonious assaults, or are relevant only to those offenses. The State's evidence tended to show that the defendant was angry and frustrated with the victim as a result of custody disputes in the past involving their young son and that the defendant was resentful of the victim's dating another man to whom the defendant repeatedly referred during the night in question.

More importantly, the question posed by the prosecutor which prompted the victim's objected-to response was, "Why did you do that [hide the jewelry]?" It appears that the purpose of the question, at least originally, was to have Ms. Jenkins explain her own unusual behavior in defense of her property—hiding her jewelry in the trunk of the car—in order to demonstrate to the jury that she did indeed have reason to fear the defendant.

2. We have noted that the second sentence of Rule 404(b) contains a list of theories of relevancy which is neither exclusive nor exhaustive. *State v. Morgan*, 315 N.C. 626, 637, n. 2, 340 S.E. 2d 84, 91, n. 2 (1986).

The defendant had told Detective Odum that he and the victim had engaged in consensual sexual relations on the night in question, and defendant's witnesses at trial testified that Ms. Jenkins and the defendant had gone out on a date that evening. The victim's testimony was to the effect that she consented neither to accompany the defendant around Guilford County nor to have sexual relations with him.

Ms. Jenkins had earlier testified that prior to entering the Taco Bell that evening, the defendant "told me not to try anything and not to act stupid because he would kill me right there if I did." She explained that the reason she did not attempt to alert anyone of her peril once inside the restaurant was "[b]ecause with past experience with Sherman, I was scared of him and I was afraid that he would do it." In addition, Ms. Jenkins later testified without objection that when the defendant had discovered that she had thrown her clothes out of the trunk, the defendant said, " 'Okay. . . . Let's have it,' and I asked him what. And he said, 'The rocks.' He was talking about my jewelry. I told him I had thrown them out too, because he wasn't going to get them this time."

We have held that evidence of a victim's awareness of prior crimes allegedly committed by the defendant may be admitted to show that the victim's will had been overcome by her fears for her safety where the offense in question requires proof of lack of consent or that the offense was committed against the will of the victim. *See, e.g., State v. See*, 301 N.C. 388, 392, 271 S.E. 2d 282, 285 (1980); *State v. Taylor*, 301 N.C. 164, 172-73, 270 S.E. 2d 409, 415 (1980). Each of the offenses for which the defendant was on trial and for which he was convicted requires proof beyond a reasonable doubt that the offenses were committed against the will of the victim or without her consent. N.C.G.S. §§ 14-27.2(a)(2) (first-degree rape), 14-27.4(a)(2) (first-degree sexual offense), 14-39 (first-degree kidnapping) (1981 and Cum. Supp. 1985).

In this context, we cannot agree that the *only* relevance of the brief reference to a prior assault was to show a disposition to commit offenses similar to those for which the defendant was on trial. The challenged testimony was competent to explain Ms. Jenkins' unusual defensive behavior and was probative on the issue of whether her will had been overcome in part by her fears for

her safety. The defendant has failed to carry his burden of showing that there was no proper purpose for which this testimony was admissible and has failed to convince us that its prejudicial effect substantially outweighed its probative value. N.C.G.S. § 8C-1, Rule 403 (Cum. Supp. 1985). This assignment of error is overruled.

III.

[5] Defendant next assigns as error the trial court's failure to intervene *ex mero motu* during the prosecutor's final argument to the jury when the prosecutor allegedly made improper references to the defendant's failure to testify. The prosecutor had argued that neither of the defendant's statements to Detective Odum were believable, and he then stated, "More about his story, or lack of a story, later." True to his word, the prosecutor later argued to the jury:

> Did anybody, Mr.—Mr. Young never put on anybody from the Days Inn Motel and says that Miss Young [Jenkins] was there, checked in, had a room receipt, got a key. Anybody check in with a party of two that night? It didn't happen.

In his brief on appeal, the defendant has provided an accurate statement of the applicable rules of law:

> While a prosecutor is permitted, consistent with a defendant's right not to testify, to comment on the failure of a defendant to produce witnesses to corroborate the truth of an alibi, *e.g.*, *State v. Jordan*, 305 N.C. 274, 287 S.E. 2d 827 (1982); *State v. Thompson*, 293 N.C. 713, 239 S.E. 2d 465 (1977), or even to comment on a defendant's failure to produce evidence to rebut or contradict the State's case, *e.g.*, *State v. Foust*, 311 N.C. 351, 317 S.E. 2d 385 (1984); *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977); *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10 (1976); *State v. Farrow*, 66 N.C. App. 147, 310 S.E. 2d 418 (1984), the prosecutor commits error of constitutional dimension by remarking directly on the defendant's failure to testify, *e.g.*, *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

The defendant's exceptions of record and assignments of error identify no portion of the prosecutor's argument in which he

remarked "directly on the defendant's failure to testify." The statements complained of by the defendant amount merely to the prosecutor's comment on the defendant's failure to produce witnesses to corroborate the truth of a pretrial alibi.

As we stated in *State v. Jordan*, 305 N.C. 274, 287 S.E. 2d 827 (1982):

> Although the defendant's failure to take the stand and deny the charges may not be the subject of comment, the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977); *see State v. Bryant*, 236 N.C. 745, 73 S.E. 2d 791 (1953). The prosecutor's remark here was directed solely toward the defendant's failure to offer evidence to rebut the State's case, not at defendant's failure to take the stand himself; as such, the statement did not constitute an impermissible comment on defendant's failure to testify. *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433.

Id. at 280, 287 S.E. 2d at 831.

Defendant made no objection to the prosecutor's argument at trial. Ordinarily, objection to the prosecutor's jury argument must be made prior to the verdict in order for the alleged impropriety to be reversible on appeal. *State v. Jones*, 317 N.C. 487, 346 S.E. 2d 657 (1986); *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982). Failure to lodge an objection constitutes a waiver of the alleged error. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566. We have held today in *State v. Jones*, however, that even in non-capital cases, appellate review may be had of a prosecutor's argument for *gross* impropriety in the absence of an objection at trial. Our review of the prosecutor's argument in this case convinces us that the challenged portions did not amount to an impermissible comment on the defendant's failure to testify, but merely referred to his failure to contradict evidence presented by the State or to produce witnesses to corroborate the truth of an alibi. As such, the trial judge did not err in failing to intervene *ex mero motu*.

IV.

[6] By his next assignment of error, the defendant contends that the trial court's instruction that "a knife is a dangerous or deadly weapon" constituted "plain error" because the instruction incorrectly stated the law, created an irrebuttable mandatory presumption violating due process, and was an improper judicial comment on a question of fact for the jury.

Ms. Jenkins testified that throughout the all-night ordeal to which he subjected her, the defendant made use of a "small pocketknife" which he held at her neck, used to cut her undergarments off her body and to cut the front of her jeans, and inserted into her vagina causing a laceration. The State introduced a knife found by Ms. Hoots on her vanity which was identified by the victim as similar to the one which the defendant continuously had in his possession during the night in question, and the knife was received for illustrative purposes at trial and exhibited to the jurors. Hoots discovered the knife subsequent to the defendant's presence at her mobile home. There was testimony that the knife belonged to Allen Berrier, that it was ordinarily kept at Berrier's home, and that the defendant had ready access to the knife. In his instruction to the jury on the offenses of first-degree rape and first-degree sexual offense, the trial judge charged the jury that in order to convict the defendant of these offenses, it must find beyond a reasonable doubt that the defendant "employed or displayed a dangerous or deadly weapon," and he instructed that "a knife is a dangerous or deadly weapon." The defendant did not object at trial to any of the trial court's jury instructions regarding the knife. Therefore, the defendant has waived his right to assign this instruction as error on appeal unless he can show that the instruction was "plain error" as that term has been defined by this Court. *State v. Torain*, 316 N.C. 111, 116, 340 S.E. 2d 465, 468 (1986).

Defendant filed his brief in this case prior to our filing of the opinion in *Torain*, in which we considered the arguments advanced here by the defendant and concluded that the trial court's instruction in *Torain* that "a utility knife is a dangerous or deadly weapon" was not error. There we reiterated the rule 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." *Id.* at 119, 340 S.E. 2d at 470; *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924); *State v. West*, 51 N.C. 505 (6 Jones 1859). A pocketknife has been recognized in this state as a deadly or dangerous instrumentality as a matter of law. *See State v. Collins*, 30 N.C. 407 (8 Ired. 1848); *State v. McKinnon*, 54 N.C. App. 475, 283 S.E. 2d 555 (1981).

In the instant case, as in *Torain*, the weapon was used by the defendant not only to procure the submission of his victim, but also to cut the clothing off her body prior to committing sexual acts. Unlike *Torain*, however, in the present case, the defendant apparently used the knife directly to inflict an injury on his victim; here, the evidence is uncontroverted that a small laceration was found inside the victim's vagina, tending to corroborate her testimony that the defendant had inserted the pocketknife into her vagina. The defendant's argument that the victim's injuries did not require her admission to the hospital misses the point. In order to be characterized as a "dangerous or deadly weapon," an instrumentality need not have actually inflicted serious injury. A dangerous or deadly weapon is "any article, instrument or substance which is *likely* to produce death *or* great bodily injury." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E. 2d 719, 725 (1981) (emphasis added). This assignment of error is overruled.

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

No error.

STATE OF NORTH CAROLINA v. JULIUS CEDRICK JOHNSON

No. 506A84

(Filed 12 August 1986)

1. Criminal Law § 34.5— evidence of other crimes—competency to show identity of defendant

In a prosecution for three counts of first degree rape and three counts of armed robbery, evidence relating to four other rapes and robberies committed earlier in the year was admissible to prove defendant's identity as the

perpetrator of the crimes charged where all of the rapes occurred in the vicinity of Wendover Road; defendant identified himself to the three victims in this case as the "Wendover rapist"; and the four prior rapes were interrelated by a number of unusual and peculiar circumstances which together logically tended to show that the same assailant committed all the crimes.

2. Jury § 7.7— denial of challenge for cause—appellate review—necessity for peremptory challenge

A party who has a peremptory challenge available when a challenge for cause of a prospective juror is denied must then exercise a peremptory challenge to remove the unwanted juror in order to preserve his right to appeal the unsuccessful challenge for cause. N.C.G.S. §§ 15A-1214(h)(2), (i)(1) and (2).

3. Rape and Allied Offenses § 6— instruction defining vaginal intercourse—penetration of female sex organ

The legislature did not intend to alter the penetration required for the offense of rape when it employed the term "vaginal intercourse" in N.C.G.S. § 14-27.2. Therefore, the trial court did not err in instructing the jury that vaginal intercourse is penetration, however slight, of the female *sex organ* by the male sex organ rather than giving defendant's requested instruction that vaginal intercourse is the slightest penetration of the female *vagina* by the male sex organ.

4. Rape and Allied Offenses § 6.1— first degree rape—necessity for instruction on attempted rape

The trial court in a first degree rape case erred in failing to instruct the jury on attempted first degree rape with respect to one victim where there was conflicting evidence as to penetration in her case.

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

APPEAL by defendant under N.C.G.S. § 7A-27(a) from judgments of *Ferrell, J.*, returned at the 8 May 1984 Criminal Session of MECKLENBURG County Superior Court, where defendant was convicted of three counts of first degree rape and three counts of armed robbery and was sentenced to life for each first degree rape conviction and forty years for each armed robbery conviction, all sentences to run consecutively.

Lacy H. Thornburg, Attorney General, by George W. Lennon, Assistant Attorney General, for the state.

Isabel Scott Day, Public Defender, by Marc D. Towler, Assistant Public Defender, for defendant appellant.

EXUM, Justice.

The questions presented in this appeal are whether the trial court erred in (1) admitting evidence of crimes other than those

being tried; (2) denying defendant's motion to excuse a juror for cause; (3) its instructions on the meaning of "vaginal intercourse"; and (4) refusing to instruct on the lesser included offense of attempted first degree rape. We find reversible error only in Judge Ferrell's failing to instruct the jury on attempted first degree rape as to one of the victims. Accordingly, we grant defendant a new trial on the charge of first degree rape as to this victim. We leave undisturbed defendant's remaining convictions and judgments entered thereon.

I.

The state produced evidence which tended to show that on the morning of 23 December 1983 Hope Untener and Sonia Hasbun were packing to move out of their apartment at 1536 Delane Avenue in Charlotte. Their friend Kelly Gallant arrived at the apartment around 6:30 a.m. to carry Hasbun to the airport. Soon after she arrived, a man wearing a stocking over his head, a blue glove with red leather on it and carrying a double-barreled shotgun entered the apartment. Gallant recognized the glove and the stocking as items she had left in her car.

The intruder pointed the shotgun at the three women, threatened to kill them if they did not stop screaming, and demanded money. The women obtained their wallets and placed them on the floor in front of them.

After asking who lived in the apartment, to whom the car belonged and whether they were moving in or out, the man announced, "We've got some business to take care of." He asked, "Do you know who I am?" In response to their answer they did not, he said, "Are you stupid or something? . . . I'm famous . . . . I'm the Wendover rapist . . . . I'm on TV every day of the week. They know about me. I'm on Crime Stoppers."

The man ordered the women to strip. Untener told him she had friends coming over to take them to the airport but the man was not dissuaded and said, "I don't care. It won't take long."

The intruder ordered the women to perform manual and oral sex acts on each other while he watched. Stating it was his turn and up to him to finish the rest, he made the women lie side by side on the floor. He first got atop Hasbun and told her, "Put

your hand around my penis and put me in." The assailant then went to Untener and Gallant in succession and instructed each likewise to "put it in," which they did. After finishing, the man announced they were going to do it again.

The man went back to each woman in the same order as the first time. After a second round of similar sexual assaults, the assailant put his pants on and ordered Gallant to pick up the money. As she did, she noticed beside her a black wallet she did not recognize. After pocketing the money, the man herded the three women into Hasbun's bathroom and left.

All three women were unable to recognize their assailant. They observed he was wearing brown shoes, beige pants, an orange windbreaker and green shirt with a beige collar. They also observed he was black, 5 feet 10 inches and about 170 pounds.

The police arrived at the scene of the attack and found a black wallet lying on the floor which contained a driver's license bearing defendant's name and photograph, as well as a Kroger card with defendant's name on it.

Defendant was arrested at 815 Villa Court, his mother's home, on 23 December 1983. He was wearing brown pants, a beige shirt and brown shoes. Two shotgun shells and $22 in change were taken from his pants pocket. Defendant's clothes were seized and pubic hair combings, head hair, pubic hair and saliva samples were also taken. A red and blue glove also was taken from the trunk of his mother's car.

Louis Portis, Ph.D., a criminologist, examined the clothes taken from defendant and discovered three fibers on the inside of the pants leg and one fiber each on a sock and the right shoe. He compared them to a carpet sample from 1536 Delane Avenue and fibers found on the red and blue glove seized from defendant's mother's car. He concluded all the fibers came from the same run of carpet. Dr. Portis also observed that the glove seized was a right glove while the glove remaining after the attack in Gallant's car was a left glove; both were made of 100 percent acrylic nylon. Finally, Dr. Portis compared a pubic hair sample from Gallant with a Caucasian pubic hair combed from defendant and found the two to be consistent.

After defendant's rights were explained to him and he agreed to talk, the police asked why the crimes happened. Defendant responded that he had a problem and knew something was wrong with him; but if he told why, he would be admitting it. He stated as long as he did not admit it, his mother might believe he was innocent. Defendant interjected, "Besides, you don't even have the shotgun, do you?" According to the interrogating officer, defendant had not been told a shotgun was involved. Defendant also offered to confess to the 23 December 1983 crimes if the police would not charge him with others. The officer denied having told defendant he was a suspect in any other crimes. Asked how many crimes there were, defendant looked into the air and started counting, stopping at eight. Defendant also stated he knew who the "Wendover rapist" was but had to think of what his family would think.

In addition to this evidence relating to the offenses committed on 23 December, the state also introduced evidence regarding four other rapes and robberies committed earlier in the year. Defendant filed motions in limine to exclude the evidence, but the trial court denied the motions.

Defendant offered no evidence.

II.

[1] Defendant assigns error to the trial court's admission of evidence relating to four other rape and robbery offenses in addition to those charged in this case for the purpose of proving defendant's identity as the perpetrator of the offenses charged. We find no error.

The other crimes evidence was as follows:

Beth Thrift testified that on 17 June 1983 around 2:30 a.m. a young black male between 18 and 24 years old, about 5 feet 9 inches tall and weighing 160 pounds, jumped on top of her as she lay sleeping in her condominium on 920 Hollywood Drive. The man placed a knife to her throat and threatened to kill her and her son if she said a word. Thrift testified her son was not sleeping in the condominium that evening and nothing visible in the child's room would have distinguished the sex of the child as a boy. After again threatening to kill Thrift and her son, the man

unzipped his jeans, lowered them slightly and lay on top of her. He took her left hand, clasped it around his penis, and ordered, "Put it in." After she complied, the man began intercourse and made several comments to her. He asked, "When is your man going to be home?" and instructed her to kiss him. When she refused, he said, "What's the matter; don't your man do it this way?" and "Why don't you move? Don't you enjoy it?" After he ejaculated, the man got off Thrift and asked further questions about when her man was coming home and where her telephone was. He threatened once more to kill her and her son if she said a word, then went downstairs. Thrift heard him jingle some keys or money in the kitchen before he left. She waited awhile and then ran next door to her neighbor, Melinda Sikes Fare, whose roommate notified the police. Ms. Thrift was unable to identify her assailant. The police took the sheet from a bed. Dr. Portis found two Negroid pubic hairs which he compared with hairs taken from defendant. In his opinion they were consistent. The police dusted for fingerprints on two windows Thrift had left open before going to bed but found none.

Linda Norden testified that on 4 July 1983 her roommate was at the beach and she was sleeping alone in her duplex at 809 Bertonly Avenue. Sometime after she retired around 1:30 a.m., she was awakened by the glass in her back door shattering. A slim black male about 5 feet 10 inches tall in his early 20's appeared in her bedroom. After questioning Norden about where her roommate and dog were and going into the kitchen and her roommate's bedroom, the man climbed up on her bed armed with a knife. Norden began struggling and screaming and the man struck her several times, splitting her eye and lip and bruising her. She ceased struggling and told the man she had venereal disease. Undeterred, the man began to rape her. During the act, the man asked when was the last time she had been with her man and how he made love. He asked her to participate. When the man finished, he got off the bed and asked for money. The intruder brought Norden her pocketbook and took out her wallet using a handkerchief. When he discovered she had only a dollar, he threatened to kill her if he saw a police car and left.

Deborah Imbriano, aged 26, testified that as she was preparing to leave her apartment at 924-A North Wendover Road to go jogging about 6:30 a.m. on 13 August 1983, she noticed a black

man looking in her window for three or four seconds. He ducked and went around the corner of the building. Imbriano went out the door and saw the same man standing against the building. He said, "Oh, excuse me, I thought you were Susan." The man, with whom she was face-to-face for several seconds, was wearing blue jeans and a blue shirt with a blue collar.

Imbriano went jogging and returned to her apartment about twenty minutes later. When she entered her apartment she noticed her clothes strewn on the floor and a black man standing in her bedroom. The intruder pulled her to the floor before she could flee. He had a knife and a rag in his hand and tried to stuff the rag in Imbriano's mouth when she started screaming. The man said, "Shut up or I'll kill you." The intruder asked Imbriano, "Don't you know about me?" He said, "The police know about me around here" and "You're the third one." Imbriano offered the man $100 and the man walked her to the bedroom, holding the knife either at her abdomen or the side of her neck the whole time. When they got to the bedroom he said she only had $20 and he had already taken that. The man pushed her to the floor of the bedroom and ordered her to remove her clothes. As she did, she told the intruder she was pregnant in an attempt to discourage him, but he responded, "That's okay . . . . The last one told me she had V.D., and I didn't get anything yet."

The intruder ordered Imbriano to lie in the middle of the bed, removed his clothes and climbed on top of her. He forced her hand around his penis and told her to "put it in." While he was raping her, he asked her whether she ever had sex with a black man before, if she had sex the night before and if that was how her husband did it. The intruder next ordered Imbriano to turn over and again forced his penis into her vagina. He then asked if she ever had oral sex, climbed on her chest and forced his penis into her mouth. The assailant then picked the knife up and put on his clothes.

Imbriano had an AM/FM radio laying on the floor beside the bed, and the assailant said he was going to take her "box." Although she was not married, Imbriano told the intruder to leave because her husband would be returning soon. After asking questions about where she and her husband worked and how long they had lived there, the intruder said, "Am I going to have to

cut your wires?" The intruder made Imbriano give him jewelry and her name and telephone number before leaving. A few minutes later the man called Imbriano on the phone and said he was watching her place and had not seen any cops. He called again a couple of minutes later and complained that the radio did not work.

Imbriano did not recognize the man's features because he had a stocking over his head but she recognized him as the man she had seen outside earlier because he had the same voice and wore the same clothing. Later she picked defendant from a lineup and identified him at trial as the man she had seen outside her apartment and who raped her. The police found a blue stocking belonging to Imbriano outside her apartment on the morning of the offense. Dr. Portis testified he found three Negroid head hairs and one Caucasian head hair in the stocking which he found to be consistent with head hairs taken from defendant and Imbriano. Defendant's employer, Michael Bennett, identified a cassette radio as the one he had seen defendant bring in to work around 23 September 1983. Imbriano identified the radio as her own.

Melinda Sikes Fare, aged 34, testified she was awakened at her apartment at 918 Hollywood Drive at 1:39 a.m. on 4 November 1983 by a persistent knocking on her front door and ringing of her doorbell. Fare lived in the apartment with a roommate who worked a nightshift and came in very late. When Fare answered the door, a black man pushed the door open and came into the apartment. Fare screamed loudly several times and retreated into the apartment area. The intruder pushed her down on the floor and was carrying a knife which he used to cut her fingers and right leg. When Fare told him he had cut her, the man responded, "Well, none of the others ever screamed before."

The intruder got up as if to leave but locked the door from the inside instead. He then put the knife in Fare's abdomen and threatened to kill her. He said, "I'll kill you if you scream any more." The man asked for money which Fare said she would have to go upstairs to get. The intruder went upstairs with Fare into her roommate's bedroom. The intruder told Fare to get in the middle of the bed and to get ready. He lowered his pants, pulled open Fare's two robes and told Fare to put her hand on his penis and put it in her vagina. After raping her, the intruder took

Fare's portable General Electric television. Fare told the intruder her roommate would be home soon, and he instructed her to walk downstairs with him and let him out the back door. A few moments after he left, Fare's roommate arrived home and called the police.

Fare was unable to identify her assailant. She could not see the man that entered her apartment well enough to know whether he had anything obscuring his face other than a toboggan, which was pulled down over his ears and covered most of his hair. The police collected the bedspread of Fare's roommate as evidence. Dr. Portis found a Negroid pubic hair fragment on the bedspread and compared it to a pubic hair from defendant. In his opinion the two were consistent. Dr. Portis also discovered one Negroid pubic hair in the pubic combings taken from Fare and concluded it was also consistent with a sample from defendant's hair. Fare identified a 5-inch black-and-white television set seized from defendant's apartment when he was arrested as her television. Fare's employer, David Bussell, also identified the set as a television he owned and gave to Fare around Christmas of 1982. He recognized the set because of the peculiar way the cord was twisted. A few years before he had worked on the inside of the television and left the battery pack out of it. The battery pack was missing from the inside of the television seized from defendant's home.

Evidence of a defendant's past and distinctly separate, criminal activities or misconduct is generally excluded when its only logical relevancy is to suggest defendant's predisposition to commit the type of offenses he is presently charged with. *State v. Shane*, 304 N.C. 643, 653-54, 285 S.E. 2d 813, 820 (1983), *cert. denied*, 465 U.S. 1104, 80 L.Ed. 2d 134 (1984). Where, however, such evidence reasonably tends to prove a material fact in issue in the crime charged, it will not be rejected merely because it incidentally proves the defendant guilty of another crime. *State v. McClain*, 240 N.C. 171, 177, 81 S.E. 2d 364, 368 (1954). In a criminal case, the identity of the perpetrator of the crime charged is always a material fact though not always is it in issue. *See id.* at 175, 81 S.E. 2d at 367. *McClain* enumerates several categories of cases in which evidence of past and independent criminal activity may be properly admissible in those instances where the identity of the perpetrator and other material facts are disputed.

The categories of cases listed in *McClain*, however, are illustrative and not exhaustive. In circumstances besides those enumerated in *McClain*, evidence implicating a defendant in the commission of other crimes may tend to prove the identity of the perpetrator of the crime charged and in a proper case be admissible.

In this case the state produced strong circumstantial evidence linking the 23 December offenses for which defendant was on trial to defendant. Nevertheless, the identity of the assailant on this occasion remains the principal issue in this case. All the elements of robbery and rape, with one exception in connection with the offense against Hasbun discussed below in Part IV, clearly are present. The evidence implicating defendant in the commission of other crimes challenged by defendant is admissible because it reasonably tends to prove that he was the perpetrator of the crimes for which he was tried. The victims of the 23 December assaults were unable to observe their assailant's face because it was obscured by a stocking, but their attacker identified himself as the "Wendover rapist." Evidence tending to prove that defendant was the "Wendover rapist," therefore, also tended to identify defendant as the 23 December assailant. This evidence was not admissible to demonstrate that defendant had a propensity to commit violent crimes. It was admissible solely for the purpose of establishing that defendant and the self-proclaimed "Wendover rapist" who committed the 23 December assaults were one and the same.

The state introduced evidence pertaining to four offenses other than those with which defendant was charged, all of which were rapes. The state also introduced a map of Charlotte reprinted below which shows the location where the four rapes occurred as being in the vicinity of Wendover Road.

Defendant's residence

Deborah Imbriano

Beth Thrift

Linda Norden

Melinda Sikes Fare

The evidence also tends to show the same person committed all four of the Wendover area rapes. The four offenses are interrelated by a number of unusual and peculiar circumstances, which together logically tend to show the same assailant committed all the crimes. The testimony of Thrift, Imbriano and Fare reveals one such circumstance. Their attacker ordered all three women to place their hand on his penis and "put it in." Defendant argues this fact is inconsequential because in each case the assailant was armed with a knife which would have limited his ability to insert his penis himself. We are not persuaded that the weapon encumbered the assailant and prompted this instruction. In both the Thrift and Imbriano rapes the assailant clasped the victim's hand in his own free hand and forced it around his penis. In the Imbriano rape the assailant was not even holding a knife because he placed it on a nightstand while he raped her. The testimony of Thrift, Norden and Imbriano refers to another peculiar circumstance attending the attacks against these women. Their assailant asked while he was raping them, "Is this how your man does it?" The foregoing circumstances together logically link one man to all four rapes.

Two of the rapes are connected by another unusual circumstance. Norden testified that she tried to discourage her attacker by telling him she had venereal disease. Imbriano, who was raped a month after Norden, testified that she told her assailant she was pregnant, but he expressed disbelief because "the last one told me she had V.D., and I didn't get anything yet." This evidence strongly suggests that the same man committed the Norden and Imbriano rapes.

The assailant also told Imbriano, "You're the third one." Although standing alone this statement does not indicate Thrift was the first one, it strengthens the state's evidence that Thrift was the first of a series of women raped by the same man.

In both the Thrift and Norden rapes the attacker told the victims to participate in the act of intercourse with him. Finally, pubic hairs taken from the beds on which Thrift and Fare were raped were consistent with each other.

We believe the combined effect of all this evidence tends strongly to establish that the same man was responsible for all four of the Wendover area rapes and could, therefore, be characterized as the "Wendover rapist."

Defendant was implicated in the rape of Imbriano by direct evidence. She recognized her assailant's voice as that belonging to the man she saw outside her apartment and who said, "Oh, excuse me, I thought you were Susan." She identified defendant as the same man she saw outside her apartment at a lineup and again at trial. Because the rape of Imbriano was one of a series of rapes committed by one person, the Wendover rapist, Imbriano's identification tended to prove that defendant was that person.

This case is distinguishable from *State v. Breeden*, 306 N.C. 533, 293 S.E. 2d 788 (1982), in which we held inadmissible evidence relating to defendant's alleged commission of a crime independent of that for which he was on trial because defendant was linked to the other crime by circumstantial evidence only and not direct evidence. In that case as in this one the state was attempting to offer evidence of past criminal activity in order to identify the defendant as the perpetrator of the crime for which he was charged and in that case as in this one (except for the rape of Imbriano) the defendant was linked to the other crime by circumstantial evidence only. The two cases differ, however, with respect to the theory relied on by the state to introduce the other crimes evidence.

In *Breeden* the state argued the evidence was admissible on alternative theories, both included in *McClain*, that (1) the circumstances surrounding the commission of the crime charged and another crime are so similar that the same person committed both and (2) the crime charged and another crime are part of a common scheme or plan embracing the commission of both crimes. Even if the crime charged and another crime are so similar that one person committed both crimes or the crime charged and other crimes are part of one scheme, this fact has no tendency to prove that defendant committed the crime charged unless direct evidence links to defendant the other crimes. The theory which justifies admissibility in this case, however, does not depend on the similarity of the crime charged to the other crimes which the state seeks to introduce because the defendant by his statement, "I am the Wendover rapist," has linked the crimes charged to other crimes committed by that person. The state needed to show only that there were a series of crimes committed by one person, the Wendover rapist, and by direct evidence that defendant committed at least one of the crimes in the series. The state having

shown this, the other crimes evidence strongly tends to prove that defendant was the assailant who on 23 December identified himself as the Wendover rapist.

The dangerous tendency of this class of evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts. *State v. McClain*, 240 N.C. 171, 177, 81 S.E. 2d 364, 368 (1954). Even relevant evidence should be excluded where the probative force is weak compared to its likelihood of playing upon the passions and the prejudices of the jury. *Pearce v. Barham*, 267 N.C. 707, 149 S.E. 2d 22 (1966);[1] The trial judge instructed the jury in this case that the state's evidence linking defendant to other rapes in the vicinity of Wendover Avenue was offered solely for the purpose of establishing the identity of defendant as the assailant of 23 December. This limiting instruction blunted to some extent the obvious potential for this evidence to excite unfair prejudice in the minds of the jury against defendant. Furthermore, the probative value of this evidence was substantial. The assailant's announcement that he was the "Wendover rapist" provided an important clue as to his identity. This clue could be unraveled only by the state's admission of evidence relating to other crimes in the Wendover area committed by defendant.

We also do not believe the admittedly strong circumstantial evidence offered by the state against defendant rendered this evidence needlessly cumulative. The identity of the assailant as noted above was the principally contended issue in this case and the state was entitled to muster all the evidence permitted by the rules of evidence to introduce to convince the jury beyond a reasonable doubt that defendant was the assailant.

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1. This case arose before the adoption of the Rules of Evidence which codify the rule established by our cases. N.C. R. Evid. 403 provides:

"Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. 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).

III.

[2] Defendant also assigns error to the trial court's refusal to excuse juror Letitia Miller for cause on the ground there was a "possibility" that sympathy she felt towards the victim as a result of feelings for her own daughter would prevent her from reaching a fair and impartial verdict. Defendant moved to have juror Miller excused for cause on the bases of the responses given by her to the following questions posed by defense counsel:

> Q. Would it be fair to say that based on your considerations regarding your daughter and your granddaughter, those feelings might or could interfere in your ability to be fair to the defendant in this case?
>
> A. I can't tell you. I just don't know.
>
> Q. Okay. I'm not asking for a dead solid prediction, Mrs. Miller. What I am asking is that based on your feelings, is it a reasonable possibility?
>
> A. It is possible.
>
> Q. Okay. What I am hearing you say is that because of your feelings about your daughter, that there exists a possibility that you could not be fair in this case to this defendant. Is that right?
>
> A. I would try, but I could not—I would try, but I can't—I just don't know what my reaction will be.
>
> Q. I understand. All I'm asking is, is that a reasonable possibility under the circumstances?
>
> A. It is a possibility.

The trial court denied defendant's challenge to juror Miller for cause. Defendant at that time chose not to use one of his remaining peremptory challenges to exclude Ms. Miller. After defendant exhausted his peremptory challenges, he requested an additional peremptory challenge stating he would use it to remove Ms. Miller. When this request was denied, defendant made a second motion challenging juror Miller for cause which the trial court again denied.

The state argues defendant failed to preserve for appellate review the challenge to juror Miller for cause. We agree. N.C.G.S. § 15A-1214(h) and (i) provide:

(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

(1) Exhausted the peremptory challenges available to him;

(2) Renewed his challenge as provided in subsection (i) of this section; and

(3) Had his renewal motion denied as to the juror in question.

(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

(1) Had peremptorily challenged the juror; or

(2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

The question raised by defendant's assignment of error is whether in order to preserve his right to appeal an unsuccessful challenge of a juror for cause, a defendant who has peremptory challenges must use one of them to remove the challenged prospective juror.

The statute provides an unambiguous affirmative answer to this inquiry. Subsection (h)(2) requires that the disallowed challenge for cause be renewed as provided in subsection (i). Subsection (i), in turn, provides that the disallowed challenge for cause may be renewed "orally or in writing" by a party who has exhausted peremptories if either of two conditions exist. The first condition is that the party "had peremptorily challenged the person." (i)(1).[2] Clearly that condition is not met here. The second condition is that the party states in his renewal motion that he "would have challenged that juror peremptorily had his challenges not been exhausted." (i)(2). The verb tense in subsection

2. All remaining statutory references in this section will be to subsections of N.C.G.S. § 15A-1214.

(i)(2) refers to a time before the renewal motion is made; it does not refer to the time at which the renewal is being made. Had the legislature intended to refer to the time at which the motion is being made, subsection (i)(2) would read: "States in the motion that he would challenge the juror peremptorily were his challenges not then exhausted." We think it clear that subsection (i)(2) refers back to the time at which the unsuccessful challenge for cause was made. It contemplates a situation where there were no peremptories available at that time.

Reading subsections (i)(1) and (i)(2) together, they require a party who has peremptory challenges available when a challenge for cause is denied then to exercise a peremptory to remove the unwanted juror. A party who fails to do so cannot thereafter bring himself within either subsection (i)(1) or (i)(2).

Since defendant had a peremptory challenge available to him at the time he challenged juror Miller for cause but did not use it, he has not preserved the ruling on the challenge for cause for appellate review. Defendant's assignment of error is overruled.

IV.

[3] Defendant's final two assignments of error relate to the trial court's instructions to the jury. Defendant contends the trial court committed reversible error by instructing the jury that "vaginal intercourse" is defined to be penetration, however slight, of the female *sex organ* by the male sex organ rather than as defendant requested: "the slightest penetration of the female *vagina* by the male sex organ." (Emphasis added.)

Before 1980 the law defined the penetration required for commission of the offense of rape as the slightest penetration of the female sex organ by the male sex organ. The statute defined rape in the following manner:

> § 14-21. Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment

shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.

N.C.G.S. § 14-21 (repealed 1979). Case law interpreted this statutory language as follows:

> 'The terms "carnal knowledge" and "sexual intercourse" are synonymous. There is "carnal knowledge" or "sexual intercourse" in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. G.S. 14-23; *S. v. Monds*, 130 N.C. 697, 41 S.E. 789; *S. v. Hargrave*, 65 N.C. 466; *S. v. Storkey*, 63 N.C. 7; Burdick: Law of Crime, section 477; 44 Am. Jur., Rape, section 3; 52 C.J., Rape, sections 23, 24.' *S. v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107; *S. v. Reeves*, 235 N.C. 427, 70 S.E. 2d 9.

State v. Jones, 249 N.C. 134, 136-37, 105 S.E. 2d 513, 514-15 (1958). In 1979 the legislature enacted N.C.G.S. § 14-27.2 which, repealing § 14-21, defines first degree rape as follows:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (1) With a victim who is a child of the age of 12 years or less and the defendant is of the age of 12 years or more and is four or more years older than the victim; or
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> c. The person commits the offense aided and abetted by one or more other persons.

N.C.G.S. § 14-27.2 (1981). Defendant contends that "vaginal intercourse" requires penetration of the vaginal canal and mere pene-

tration of the female genitalia no longer is sufficient penetration to constitute rape.

We do not believe the legislature intended to alter the penetration required for the offense of rape when it enacted N.C.G.S. § 14-27.2. That statute was a part of a statutory reform in which the legislature created the statutory crime of "sexual offense." N.C.G.S. § 14-27.4 provides:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child of the age of 12 years or less and the defendant is of the age 12 years or more and is four or more years older than the victim; or
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> c. The person commits the offense aided and abetted by one or more other persons.

N.C.G.S. § 14-27.1 states that, " 'sexual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse." The intent of the legislature when it employed the term "vaginal intercourse" in N.C.G.S. § 14-27.2 was not to change the traditional elements of rape but to distinguish that offense from other sexual offenses now included within N.C.G.S. § 14-27.4. Several cases decided under N.C.G.S. § 14-27.2 have stated that "vaginal intercourse" in a legal sense means the slightest penetration of the sexual organ of the female by the sexual organ of the male. *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E. 2d 856, 861 (1984); *State v. Robinson*, 310 N.C. 530, 533-34, 313 S.E. 2d 571, 574 (1984); *State v. Stanley*, 310 N.C. 353, 366, 312 S.E. 2d 482, 490 (1984).

[4] Although the trial court did not err in instructing the jury with respect to the penetration required for the offense of rape, the court did err in failing to instruct the jury on attempted first

degree rape with respect to Sonia Hasbun because there was conflicting evidence of penetration in her case. A trial court must submit a lesser included offense instruction if the evidence would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater. *State v. Strickland*, 307 N.C. 274, 286, 298 S.E. 2d 645, 654 (1983). Instructions pertaining to attempted first degree rape as a lesser included offense of first degree rape are warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences. *State v. Brown*, 312 N.C. 237, 244, 321 S.E. 2d 856, 861; *State v. Wright*, 304 N.C. 349, 353, 283 S.E. 2d 502, 505 (1981).

On direct examination Sonia Hasbun testified that she complied with the assailant's instructions to put his penis into her vagina. After four or five seconds the man got off of her. Hasbun testified that the second time the man came to her, she again put his penis in. Hope Untener also testified that Hasbun twice put the assailant's penis inside Hasbun's vagina.

On cross-examination, however, Hasbun testified that on the morning she was raped, she gave to the police a written statement in which she said, regarding the assailant's first attack, that the man "tried to push it in but couldn't" and that "[h]e tried for maybe fifteen seconds." She said that with respect to the second attack "he tried to penetrate me again" and "[h]e told me to put it in, and I said 'I have.' He tried to get it in but couldn't." Hasbun further testified that everything she told the police after the attack was still correct except that she had been in her bedroom rather than the kitchen when the intruder appeared. Dr. Edward Wase, who examined Hasbun at the hospital, testified that the entrance to Hasbun's vagina was very narrow, admitting only one finger when the vagina of a normal married female would admit two fingers easily. He testified that Hasbun told him she "felt pressure but not penetration" and she was uncertain whether there had been penetration or not. This evidence creates a conflict as to whether penetration occurred which should have been resolved by the jury under appropriate instructions.

The trial court, therefore, committed reversible error by failing to instruct the jury on the lesser included offense of attempted first degree rape with respect to Sonia Hasbun. That the jury

convicted defendant of first degree rape which required it to find penetration does not render the error harmless. The admitted instruction deprived defendant of his right to have the jury consider attempted first degree rape as a possible verdict in addition to the permissible verdicts of guilty or not guilty of first degree rape. "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve doubts in favor of conviction." *State v. Strickland*, 307 N.C. at 286, 298 S.E. 2d at 654, *quoting Beck v. Alabama*, 447 U.S. 625, 635, 65 L.Ed. 2d 392, 401 (1980).

Defendant must therefore receive a new trial on the charge of first degree rape of Sonia Hasbun. We find no error in defendant's other convictions and the judgments based thereon.

Case No. 83CRS86775—No error.

Case No. 83CRS86781—No error.

Case No. 83CRS86782—New trial.

Case No. 83CRS86783—No error.

Case No. 83CRS86784—No error.

Case No. 83CRS86785—No error.

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

ROBERT LEE JOHNSON v. DORIS WILKIE JOHNSON

No. 471PA85

(Filed 12 August 1986)

1. Divorce and Alimony § 30— personal injury settlement—marital or separate property—immateriality of N.C.G.S. § 52-4

The statute entitling each spouse to sue and recover damages for personal injuries in his or her name alone, N.C.G.S. § 52-4, is immaterial for purposes of the distribution of marital property statute, N.C.G.S. § 50-20. Therefore,

§ 52-4 does not govern the determination of whether a personal injury settlement constitutes marital or separate property, and §§ 52-4 and 50-20 are not repugnant to each other.

2. **Divorce and Alimony § 30— personal injury award—separate or marital property—analytic approach**

Courts which employ the analytic approach in determining whether an award for personal injury received during the marriage constitutes marital property consistently hold that the portion of the award representing compensation for non-economic loss, *i.e.*, personal suffering and disability, is the separate property of the injured spouse; the portion of an award representing compensation for economic loss, *i.e.*, lost wages, loss of earning capacity during the marriage, and medical and hospital expenses paid out of marital funds, is marital property.

3. **Divorce and Alimony § 30— personal injury settlement—separate or marital property—adoption of analytic approach**

The Supreme Court adopted the analytic rather than the mechanistic approach for determining whether proceeds representing a settlement recovered by a spouse upon a claim for his or her personal injuries sustained during the marriage of the parties constitutes marital property subject to distribution upon dissolution of the marriage or whether they are the separate property of the injured spouse.

4. **Divorce and Alimony § 30— personal injury settlement—separate or marital property—remand for evidence and findings**

An order of distribution of marital property which found that the proceeds of a $95,000 "net settlement" received by the husband after the separation of the parties upon his claim for personal injuries received during the marriage were the separate property of the injured husband must be reversed and remanded where the record contains no evidence as to what components or elements of recovery were represented by the "net settlement." On remand, the injured husband will have the burden of showing what amount or proportion of the whole represents compensation for loss of, or injury to, his separate property, to wit, compensation for his pain and suffering, disfigurement, loss of earning capacity subsequent to separation, lost wages subsequent to separation, and hospital and medical expenses incurred subsequent to separation. Should the wife claim that any portion of the "net settlement" represents compensation for loss of, or injury to, her separate property, she may attempt to so prove by a preponderance of the evidence if the pleadings are found to allege such a claim.

5. **Divorce and Alimony § 30— personal injury settlement—failure to prove compensation for separate injury**

Proceeds of the husband's $95,000 "net settlement" for personal injuries received during the marriage will be classified as marital property to the extent that the parties fail to prove that the $95,000 compensates for injury to separate property.

6. Divorce and Alimony § 30— no presumption as to marital property

There is no presumption in North Carolina that property acquired during the marriage is marital property.

Justice MARTIN concurring.

ON discretionary review of an opinion of the Court of Appeals, 75 N.C. App. 659, 331 S.E. 2d 211 (1985), affirming the 13 March 1984 equitable distribution order of *Sherrill, J.*, presiding at the 11 July 1983 Civil Non-jury Term, District Court, MECKLENBURG County. Heard in the Supreme Court 15 May 1986.

Wray, Layton, Cannon & Parker, P.A., by John J. Parker, III, and Patricia B. Edmundson, for plaintiff-appellee.

Hamel, Helms, Cannon, Hamel & Pearce, P.A., by Nicki Levine, Thomas R. Cannon, and A. Elizabeth Green, for defendant-appellant.

MEYER, Justice.

By this case, we are confronted with an important question of first impression in this jurisdiction: whether proceeds representing a settlement recovered by a spouse upon a claim for his or her personal injuries sustained during the marriage of the parties constitute marital property subject to distribution upon dissolution of the marriage or whether they are the separate property of the injured spouse.

The panel below, affirming the order of the district court, held that such proceeds are the separate property of the spouse who sustained the personal injuries. The "majority" opinion below, authored by Phillips, J., is grounded on the premise that N.C.G.S. § 52-4 "established beyond dispute that the personal injury recoveries of all married women in this state are their 'sole and separate property'; as, of course, the personal injury recoveries of married men had been since time immemorial." *Johnson v. Johnson*, 75 N.C. App. 659, 660, 331 S.E. 2d 211, 212. Judge Arnold wrote a concurring opinion in which he was joined by Judge Cozort, stating a different basis for the result. The concurring judges found a conflict between N.C.G.S. §§ 52-4 and 50-20. Applying the canon of construction that, where two statutes necessarily are repugnant, the last one enacted shall prevail, the concurring

judges opined that N.C.G.S. § 50-20 governs the case and, since settlement of the personal injury claim was entered and the proceeds were received after the parties had separated, the recovery was not "marital property" within the meaning of N.C.G.S. § 50-20(b)(1).

We reverse and remand.

The plaintiff-husband and the defendant-wife were married in 1957. On 28 February 1981, the husband was involved in a serious motorcycle accident which resulted in a fifty percent permanent disability of his right foot. The parties separated on 5 August 1981. One year later, on 13 August 1982, the husband filed a complaint for divorce based on the one-year separation. At approximately the same time, he received a "net settlement" of his personal injury claim in the amount of $95,000. The wife filed a motion for equitable distribution on 8 September 1982. Each party filed affidavits in support of his or her contentions as to the marital property subject to division. The wife listed the assets resulting from her husband's personal injury settlement as marital property; the husband claimed these assets as his separate property.

The trial court specifically found in its 13 March 1984 order that the $95,000 settlement, its proceeds, and property purchased therewith are plaintiff-husband's separate property as defined by N.C.G.S. § 50-20(b)(1) and (2) and are therefore not subject to distribution. The trial court then found that because the plaintiff-husband had a larger amount of separate property than did the defendant-wife, she should be awarded a larger share of the marital assets. The only marital assets distributed to the husband were a 1971 Ford automobile and an eighteen-foot fishing boat.

Defendant-wife assigns as error the trial court's finding, conclusion, and order that "the personal injury settlement received by the Plaintiff as the result of a motorcycle accident in 1981, its proceeds and property purchased therewith are his separate property as the same is defined in NCGS 50-20(b)(2) free of all claims of the Defendant."

I.

[1] We must first eliminate any confusion engendered by the Court of Appeals' misinterpretation of N.C.G.S. § 52-4 vis-a-vis

§ 50-20 upon which each member of the panel below based his opinion. Section 52-4 neither is dispositive of the issue at bar nor is it inconsistent with or repugnant to § 50-20. The two provisions govern entirely different situations and were enacted for entirely different purposes.

Chapter 52 of our General Statutes is entitled "Powers and Liabilities of *Married* Persons." (Emphasis added.) The predecessor of N.C.G.S. § 52-4, C.S. 2513, was enacted in 1913. 1913 N.C. Sess. Laws ch. 13, § 1. It was amended in 1965 to apply equally to husbands and wives. 1965 N.C. Sess. Laws ch. 878, § 1. As originally enacted, the predecessor to § 52-4 provided:

> The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried.

C.S. 2513 (1919).

As pointed out in *Patterson v. Franklin*, 168 N.C. 75, 79, 84 S.E. 18, 21 (1915) (Clark, C.J., concurring), this provision was apparently enacted in response to *Price v. Charlotte Electric Ry. Co.*, 160 N.C. 450, 76 S.E. 502 (1912). The majority opinion in *Price* intimated that the Martin Act of 1911 ("which practically constitutes married women free traders as to all their ordinary dealings," *id.* at 452, 76 S.E. at 503) did not abrogate the ancient rule that the right of action for a married woman's earnings and for damages resulting from her tortiously inflicted personal injuries belongs to her husband who is a necessary party in a suit to recover those damages or earnings. *See* N.C. Code of Civil Procedure, Title V, § 56 (1868) (when married woman is a party, her husband must be joined unless the action concerns her separate property); *Syme v. Riddle*, 88 N.C. 463 (1883) (husband entitled *jure mariti* to the proceeds of his wife's services (her wages); he alone could sue for and recover these proceeds. He is vested with this right in exchange for his obligation to support his wife and children.). *Cf. Baker v. Jordan*, 73 N.C. 145 (1875) (woman who sold her real property the day *before* her marriage to plaintiff without his knowledge or consent defrauded him). *See generally* Com-

ment, *Domestic Relations—Loss of Consortium from Injury to Spouse*, 29 N.C. L. Rev. 178 (1951).

These antiquated rules were grounded on the theory that a married woman's legal existence merged into that of her husband; she lost all of her property and her legal capacity.[1] By definition, these rules did not apply to single or divorced women. The eventual statutory abrogation of the common law rules finally resulted in *married* women having personal and individual rights, *during coverture*, to their own wages and claims for their personal injuries, and the right to sue for these individually.

In his foresighted opinion recognizing a wife's cause of action for loss of consortium, Chief Justice Clark, an early champion of women's rights, explained the need for, and the result of, the enactment of C.S. 2513, now N.C.G.S. § 52-4:

> At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse . . . or any other property; that is to say by reason of the fact that the wife was his chattel. . . .
>
> . . . .
>
> By the married women's provision in the Constitution of 1868, Art. X, sec. 6, this conception of ownership by the husband whereby upon marriage all the personal property of the wife became the property of the husband and he became the owner of her realty during his lifetime, was abolished. The courts in this State continued for a long while, notwithstanding, to hold that the husband could recover his wife's earnings and the damages for injuries done her; but by the act of 1913, now C.S. 2513, it was provided that her earnings and damages for torts inflicted upon her were her sole and separate property for which she could sue alone.

Hipp v. Dupont, 182 N.C. 9, 12, 108 S.E. 318, 319 (1921). *See also Mims v. Mims*, 305 N.C. 41, 48-49, 286 S.E. 2d 779, 785 (1982);

1. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing . . . ." 1 W. Blackstone, Commentaries *442 (emphasis in original).

Nicholson v. Chatham Memorial Hosp., 300 N.C. 295, 297-98, 266 S.E. 2d 818, 820 (1980).

Chapter 52 has no application to single or divorced men and women.

On the other hand, N.C.G.S. § 50-20, entitled "Distribution by court of marital property upon divorce" (enacted in 1981), which is part of Chapter 50, entitled "Divorce and Alimony," has no application to married people. Equitable distribution of marital property under Chapter 50 takes place between *divorced* spouses. N.C.G.S. § 50-21(a) (1984) ("an equitable distribution of property shall *follow* a decree of absolute divorce. . . . The equitable distribution *may not precede* a decree of absolute *divorce*." (Emphasis added.)).

The North Carolina equitable distribution scheme has been characterized as falling "into what has aptly been characterized as a 'deferred community property law' system." Sharp, *Equitable Distribution in North Carolina: A Preliminary Analysis*, 61 N.C. L. Rev. 247, 249 (1983) (footnote omitted). Pursuant to the "deferred community property" equitable distribution scheme in North Carolina, community property principles do not apply *during* marriage. "If, however, the marriage ends in divorce, the property is distributed according to community property principles." Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 U.C.L.A. L. Rev. 1269, 1282 (1981). *See also* Unif. Marital Prop. Act § 4, 9A U.L.A. 21, 30 comment (1983) ("Those family-law interests set forth in marital property definitions in equitable distribution statutes are delayed-action in nature and come to maturity only during the dissolution process."). *Cf. Mims v. Mims*, 305 N.C. 41, 54, 286 S.E. 2d 779, 788 ("The primary focus of our common law rules is to determine beneficial ownership of property acquired during marriage by giving effect to what was intended at the time the property was acquired. . . . The Equitable Distribution Act is designed, on the other hand, to divide property equitably, based upon the relative positions of the parties *at the time of divorce*, rather than on what they may have intended *when the property was acquired*." (Emphasis added.)).

The most important difference in the community property system and the common law system upon which the North Car-

olina Equitable Distribution Act is superimposed is stated as follows:

> Under the community system, the nonacquiring spouse has a vested, present ownership interest in one-half of the community property. If the same property were similarly acquired in a common-law state, the nonacquiring spouse would have no vested, present interest in the property. At most, such a spouse would have a form of inchoate expectancy in a portion of the property in the event that the acquiring spouse predeceases or a potential right to a portion of the acquiring spouse's property on divorce.

Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility With the Current View of the Marriage Relationship and the Rights of Women*, 13 Creighton L. Rev. 71, 87 (1979).

Under North Carolina's equitable distribution scheme, the fact that legal title to property acquired during the marriage is in one or the other spouse, or in both, is not controlling in the initial classification of property pursuant to N.C.G.S. § 50-20. *See, e.g., Loeb v. Loeb*, 72 N.C. App. 205, 211, 324 S.E. 2d 33, 39, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985); N.C.G.S. § 50-20(b)(2) (1984). Indeed, classification of property by the trial judge is the first step of the three-step equitable distribution procedure. *Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E. 2d 765, 767, *disc. rev. denied*, 315 N.C. 182, 337 S.E. 2d 856 (1985). If, as the majority opinion below suggests, § 52-4 were controlling on the issue at hand, there would be no need for the "classification" step as to earnings or tort recoveries, and as to that property, title would control its distribution just as it did prior to the enactment of our Equitable Distribution Act. Such a result is clearly not intended, nor is it possible, since § 52-4 governs legal interests in that property *during* an ongoing marriage, while § 50-20 governs its disposition *after* divorce.

Therefore, because § 52-4 serves a purpose entirely unrelated to § 50-20, and because the fact that § 52-4 entitles each spouse to sue for and recover damages for personal injuries in his or her name alone is immaterial for purposes of § 50-20, we disavow all suggestion in the majority and concurring opinions below

that § 52-4 governs disposition of this case or that § 50-20 and § 52-4 are repugnant to each other.

II.

Resolution of the issue before us must be based on application of the facts to § 50-20 of our Equitable Distribution Act. In pertinent part, § 50-20 provides:

> § 50-20. Distribution by court of marital property upon divorce.
>
> . . . .
>
> (b) For purposes of this section:
>
> (1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section. . . .
>
> (2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. . . . Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property.

N.C.G.S. § 50-20(b)(1), (2) (1984).

A.

In her brief submitted to the Court of Appeals, defendant-wife contended that the proceeds of her former husband's personal injury settlement are "marital property" because the proceeds are not "separate property" since they were not "acquired by [plaintiff] before marriage or acquired by [plaintiff] by

bequest, devise, descent, or gift during the course of the marriage." N.C.G.S. § 50-20(b)(2). This contention is characteristic of the purely mechanical, or what has been termed the "mechanistic," approach to a resolution of the question whether personal injury awards constitute marital or separate property. 2 Valuation and Distribution of Marital Property § 23.07[1][a] (J. McCahey ed. 1985). The trend evidenced by the relatively few reported cases from equitable distribution jurisdictions is to follow this mechanistic approach to conclude that a personal injury award acquired during marriage is entirely marital property. *See, e.g., Liles v. Liles*, 289 Ark. 159, 711 S.W. 2d 447 (1986); *In re Marriage of Dettore*, 86 Ill. App. 3d 540, 42 Ill. Dec. 51, 408 N.E. 2d 429 (1980) (workers' compensation award); *In re Marriage of Gan*, 83 Ill. App. 3d 265, 38 Ill. Dec. 882, 404 N.E. 2d 306 (1980); *Gonzalez v. Gonzalez*, 689 S.W. 2d 383 (Mo. App. 1985) (F.E.L.A. settlement); *Landwehr v. Landwehr*, 200 N.J. Super. 56, 490 A. 2d 342 (1985); *Bero v. Bero*, 134 Vt. 533, 367 A. 2d 165 (1976). *But see Ettinger v. Ettinger*, 107 Misc. 2d 675, 435 N.Y.S. 2d 916 (N.Y. Sup. Ct. 1981); N.Y. Dom. Rel. Law § 236 (B)(1)(d)(2) (McKinney Supp. 1986) ("the term separate property shall mean . . . compensation for personal injuries").

The mechanistic approach is literal and looks to the general statutory definitions of marital and separate property and concludes that since the award was acquired during the marriage and does not fall into the definition of separate property or into any enumerated exception to the definition of marital property, it must be marital property. 2 Valuation and Distribution of Marital Property § 23.07[1][a] (J. McCahey ed. 1985). *E.g., In re Marriage of Fjeldheim*, 676 P. 2d 1234 (Colo. App. 1983); *In re Marriage of Gan*, 83 Ill. App. 3d 265, 38 Ill. Dec. 882, 404 N.E. 2d 306; *Nixon v. Nixon*, 525 S.W. 2d 835 (Mo. App. 1975); *Maricle v. Maricle*, 221 Neb. 552, 378 N.W. 2d 855 (1985); *In re Marriage of Mack*, 108 Wis. 2d 604, 323 N.W. 2d 153 (Wis. Ct. App. 1982) (result should now be different under Wisconsin's new Marital Property Act; *see infra* note 2).

In their arguments to this Court, however, both parties seem to urge us to adopt what has been characterized as an "analytic" approach to the resolution of the issue. The analytic approach asks what the award was intended to replace, 2 Valuation and Distribution of Marital Property § 23.07[1][a] (J. McCahey ed.

1985), and has been adopted by statute or case law in eight of the nine[2] community property states.[3] Generally, under the analytic approach the personal injury award may be seen as composed of three potential elements of damages: (1) those compensating the injured spouse for pain and suffering, disability, disfigurement, or lost limbs; (2) those compensating for lost wages, lost earning capacity, and medical and hospital expenses; and (3) those compensating the non-injured spouse for loss of services or loss of consortium. *See* Nev. Rev. Stat. § 123.121(a) (1985). *Cf. Amato v. Amato*, 180 N.J. Super. 210, 434 A. 2d 639 (1981) (discussing interest in tort claim).

[2] In this case, plaintiff-husband argues that the settlement proceeds are his separate property because they represent "[p]roperty acquired in exchange for separate property," N.C.G.S. § 50-20 (b)(2): his own personal security and right to be free from pain, suffering, fright, and disability. Peculiar to the injured spouse and not to his or her mate are the entirely subjective sensations of pain, suffering, mental anguish, injury to the body, disability, and embarrassment because of disfigurement or scarring attending bodily injury. Mental injury likewise has this characteristic of being peculiar to the sufferer. However, this is not true as to elements of damage such as lost wages and medical expenses. Those courts which employ the analytic approach consistently

2. Effective 1 January 1986, Wisconsin adopted a version of the Uniform Marital Property Act of 1983 pursuant to which spouses, *during* the marriage, acquire a present undivided fifty percent interest in "marital property." Wisc. Stat. Ann. § 766.31(3) (West Cum. Supp. 1986). Wisconsin has now been classified as a "community property" state by Freed & Walker, *Family Law in the Fifty States: An Overview*, 19 Fam. L.Q. 331, 354-55 (1986) (Table IV).

3. *Arizona: Jurek v. Jurek*, 124 Ariz. 596, 606 P. 2d 812 (1980); *Idaho: Cook v. Cook*, 102 Idaho 651, 653 & n. 3, 637 P. 2d 799, 801 & n. 3 (1981) (workers' compensation context); *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 539 P. 2d 566 (1974); *Louisiana:* La. Civ. Code Ann. art. 2344 (West 1985); *Nevada:* Nev. Rev. Stat. §§ 123.121(1), 123.130(1), (2) (1985); *New Mexico: Luxton v. Luxton*, 98 N.M. 276, 648 P. 2d 315 (1982); *Soto v. Vandeventer*, 56 N.M. 483, 245 P. 2d 826 (1952); *Texas:* Tex. Family Code Ann. § 5.01(a)(3) (Vernon 1975); *Washington: In re Marriage of Brown*, 100 Wash. 2d 729, 675 P. 2d 1207 (1984); *Wisconsin:* Wis. Stat. Ann. § 766.31(7)(f) (West Cum. Supp. 1986) (*see supra* note 2). *But see California:* Cal. Civil Code § 4800(c) (West 1983 & West Cum. Supp. 1986) ("community property personal injury damages shall be assigned to the party who suffered the injuries unless the court . . . determines that the interests of justice require another disposition").

hold that the portion of an award representing compensation for non-economic loss—i.e., personal suffering and disability—is the separate property of the injured spouse; the portion of an award representing compensation for economic loss—i.e., lost wages, loss of earning capacity during the marriage, and medical and hospital expenses paid out of marital funds—is marital property. This analysis, pioneered in *Fredrickson & Watson Constr. Co. v. Boyd*, 60 Nev. 117, 102 P. 2d 627 (1940), and *Soto v. Vandeventer*, 56 N.M. 483, 245 P. 2d 826, was recently employed by the Arizona Supreme Court, sitting *en banc*, and overturning fifty-four years of precedent:

> In the same fashion as pointed out in *Soto*, the body which [the husband] brought to the marriage is certainly his separate property. The compensation for injuries to his personal well-being should belong to him as his separate property. Any expenses incurred by the community for medical care and treatment and any loss of wages resulting from the personal injury should be considered community in nature, and the community is entitled to recover for such losses.

Jurek v. Jurek, 124 Ariz. 596, 598, 606 P. 2d 812, 814. *Accord In re Marriage of Brown*, 100 Wash. 2d 729, 675 P. 2d 1207 (1984) (*en banc*, overturning ninety-two-year-old Washington rule that personal injury recoveries are community property). *See also* W. S. McClanahan, Community Property in the United States § 6.27 (1982); 4A Powell on Real Property § 625.2[2] (1982).

Although the analytic approach is most often associated with community property states, it has been adopted in decisions from equitable distribution jurisdictions. *E.g.*, *Gloria B.S. v. Richard G.S.*, 458 A. 2d 707 (Del. Fam. Ct. 1982); *Campbell v. Campbell*, 255 Ga. 461, 339 S.E. 2d 591 (1986); *In re Marriage of Gerlich*, 379 N.W. 2d 689 (Minn. App. 1986); *Van De Loo v. Van De Loo*, 346 N.W. 2d 173 (Minn. App. 1984); *In re Marriage of Blankenship*, --- Mont. ---, 682 P. 2d 1354 (1984) (by implication; Supreme Court remanded for findings as to purpose and terms of workers' compensation award).

In the very recent case of *Campbell v. Campbell*, 255 Ga. 461, 339 S.E. 2d 591 (1986), the Georgia Supreme Court said this:

> The property which we have found to be outside the marital estate is property which is very personal to the party to whom it belongs and property which was in no sense generated by the marriage. A personal injury claim settlement, to the extent that it represents compensation for pain and suffering and loss of capacity is peculiarly personal to the party who receives it. For the other party to benefit from the misfortune of the injured party would be unfair. However, to the extent that the settlement amount represents compensation for medical expenses or lost wages during the marriage, the settlement may be considered an asset of the marriage.

Id. at 462, 339 S.E. 2d at 593.

On the other hand, at least one equitable distribution state court has expressly rejected the analytic approach rationale in interpreting its statute. *Platek v. Platek*, 309 Pa. Super. 16, 454 A. 2d 1059 (1982) (legislative history compels result).

Our own Court of Appeals was recently presented with the question of whether insurance proceeds, paid to a husband when he was permanently injured in a motorcycle accident during the marriage, were properly classified as marital property. *Little v. Little*, 74 N.C. App. 12, 327 S.E. 2d 283 (1985). In *Little*, the husband had been issued a life insurance policy with accident benefits. After his injury—which left him partially paralyzed from the waist down—and before the parties separated, the insurance company paid proceeds in a lump sum of $100,000 as "Family Accident Benefits" and also paid the husband's medical and hospital expenses. The wife's insurer also paid the medical and hospital expenses.

A unanimous panel of the Court of Appeals seemed to use the mechanistic approach in holding that "[a]s the insurance proceeds were not acquired by bequest, devise, descent, or gift, [N.C.G.S. § 50-20(b)(2)], the legislature did not exempt them from incorporation in the pool of assets denominated 'marital property.'" *Id.* at 16, 327 S.E. 2d at 287. Correctly stating that the "majority rule from other jurisdictions appears to be that absent a statute to the contrary, 'claims and awards for personal injuries resulting from occurrences during the marriage are generally treated as marital property,'" *id.* at 16, 327 S.E. 2d at 287-88, the Court of Appeals in *Little* recognized that "some courts

distinguish between money realized as compensation for pain and suffering as the personal property of the injured spouse, and that portion of an award representing lost wages and medical expenses as marital property." *Id.* at 17, 327 S.E. 2d at 288 (citations omitted). Without rejecting this statement of the analytic approach, the Court of Appeals noted in *Little* that the trial court had made the unexcepted-to finding that: " 'The $100,000 paid to husband for the disability was a sum provided to compensate him for his *lost ability to work* at gainful employment.' " *Id.* (emphasis added). Therefore, the classification of the insurance proceeds as marital property was correct in *Little* under either the mechanistic or the analytic approach, at least to the extent that the recovery compensated for lost earning capacity during the marriage.

We note that the majority opinion of the panel below states a basic premise of the analytic approach in support of its holding:

> The obvious purpose of the Equitable Distribution Act is to require married persons to share their maritally acquired property with each other—it is not to require either party to contribute his or her bodily health and powers to the assets for distribution—and the funds that the appellant [wife] claims to have a right to share in were paid to the appellee [husband] for injuries suffered by his body, which, of course, he had before the marriage.

Johnson v. Johnson, 75 N.C. App. 659, 661, 331 S.E. 2d 211, 212. Indeed, as early as 1921, this Court recognized the uniquely personal aspect of an injured party's action and recovery for pain and suffering incident to negligently inflicted personal injury. Then Chief Justice Clark wrote, "We do not think that the husband could now recover compensatory damages for [his wife's] physical and mental anguish . . . which are matters purely personal to her, and for which she alone can recover." *Hipp v. Dupont,* 182 N.C. 9, 14, 108 S.E. 2d 318, 320.

B.

[3] We have carefully reviewed the reported opinions of the several states which have addressed the issue before this Court, and we have studied the views of the various commentators on the subject. After weighing the relative strengths and weak-

nesses of both the mechanistic and the analytic approaches, we are of the opinion that the latter is the better reasoned.

We recognize that by this decision we assume a minority position among the equitable distribution states which have addressed the issue. However, we are convinced that the analytic approach is consistent with the spirit and letter of our Equitable Distribution Act. Because we agree with the reasoning of those equitable distribution states which have adopted the analytic approach to resolving the issue before us, we also adopt that approach.

> As the New Jersey Superior Court stated in *Amato v. Amato*, 180 N.J. Super. 210, 434 A. 2d 639 (App.Div.1981):
>
> > The literal language of the statute ought not limit our inquiry to the time when the compensation is received. The purpose for which the property is received should control. Insurance funds, for example, paid to replace property destroyed by fire would remain the separate property of a spouse if the destroyed property had been owned by the spouse before marriage. So, too, we must look at the purpose for which the compensation was received during the marriage to determine if it is subject to distribution. If we view the recovery here simply as the replacement or restoration, so to speak, of the physical and mental health a spouse brought to the marriage, it is like an exchange for property possessed before the marriage. Under both the common law and community property systems an injured spouse should keep funds which replace assets brought to the marriage.
>
> *Id.* at 219, 434 A. 2d at 643 (quoting *Harmon v. Harmon*, 161 N.J.Super. 206, 214-218, 391 A.2d 552, 556-57 (App.Div.1978) (Botter, J.A.D., concurring)); *see also Jurek v. Jurek*, 124 Ariz. 596, 598, 606 P. 2d 812, 814 (1980); *Cook v. Cook*, 102 Idaho 651, 653, 637 P.2d 799, 801 (1981).
>
> Characterizing a personal injury recovery based on the purpose for which it was received permits separate treatment of the various components of the recovery.

Van De Loo v. Van De Loo, 346 N.W. 2d 173, 176 (Minn. App. 1984).

C.

[4] The record on appeal in the instant case contains no clue whatsoever as to what "various components" or elements of recovery are represented by the $95,000 "net settlement." The defendant-wife, in her affidavit listing items she claimed to be "marital property," listed a "personal injury settlement" valued by her at $100,000. She did not claim that plaintiff-husband's cause of action for personal injuries was marital property—probably because plaintiff's claim on his cause of action had already been liquidated as the result of his receipt, after the separation of the parties, of a "net settlement" in the amount of $95,000.

To summarily classify the $95,000 as separate property of the plaintiff-husband merely because a check in that amount was received by him after separation of the parties would ignore the classification scheme of our Equitable Distribution Act. In order to classify the $95,000 for equitable distribution purposes, the trial court was required to determine the nature of the asset. Was it a gift? An inheritance? Earnings of a spouse? Proceeds from the sale of marital property? Compensation for injuries to the body of one spouse, as well as for medical expenses and/or lost wages during the marriage? Only after determining the nature of the asset received by one spouse *after separation*, yet claimed by the other to be "marital property," may a classification be made of that asset as between "marital" or "separate" property.

The record is devoid of any evidence or findings of fact as to the actual nature of the $95,000 except for the following stipulation of the parties, apparently entered for purposes of appeal:

> [T]he plaintiff was injured in an automobile accident on February 28, 1981, and as a result, the plaintiff had a cause of action for personal injuries. The plaintiff recieved [sic] a net settlement of $95,000.00, which was paid to him in 1982, after the separation of the parties but before the judgment of divorce was entered.

We have already discussed the well-known fact that awards or settlements arising from a "personal injury" claim frequently are composed of many elements of recovery, some of which represent compensation for injury to, or loss of, marital property and some for injury to separate property of the injured spouse. Many

personal injury recoveries may also include compensation for injury to the separate property of the non-injured spouse, such as the right of consortium, where such injuries have been properly alleged and proved.

In the instant case, the trial court's identically worded conclusion of law and judgment in its equitable distribution order of 13 March 1984 relating to the disputed property states:

> 1. The personal injury settlement received by the Plaintiff as the result of a motorcycle accident in 1981, its proceeds and property purchased therewith are his separate property as the same is defined in N.C. G.S. 50-20(b)(2) free of all claims of the Defendant.

In support of this conclusion and judgment, the trial court entered its "finding of fact" that:

> 5. In 1982, the Plaintiff received the sum of $95,000.00 as a settlement for personal injuries sustained by him as the result of a motorcycle accident in 1981; the said personal injury settlement, its proceeds and all property purchased therewith are not marital property as claimed by the Defendant, but rather, is separate property as those terms are defined by N.C. G.S. Section 50-20(b)(1) and (2) and belongs to the Plaintiff free and clear of any claims of the Defendant.

This record contains no factual basis upon which the trial judge could conclude (as he apparently did) that the $95,000 "net settlement" represented compensation *solely* for loss to the separate property of the plaintiff-husband. There is no indication of what, if any, evidence was produced as to the composition of the "net settlement"; indeed, the defendant-wife admits in her brief that "[w]e do not know how much of the plaintiff's award was for lost wages, medical care or lost services." Therefore, the record "evidence" does not support the trial court's conclusory finding of fact, conclusion of law, and order to the effect that the entire $95,000 is the sole and separate property of the plaintiff-husband. We must therefore remand the matter for proceedings at which evidence will be received and findings of fact and conclusions of law entered as to what elements of recovery are represented by the $95,000 "net settlement" and in what amounts or proportion to the whole.

On remand, the injured spouse, plaintiff-husband, will have the burden of showing what amount or proportion of the whole represents compensation for loss of, or injury to, his "separate property," to wit, compensation for his pain and suffering, disfigurement, loss of earning capacity subsequent to separation, lost wages subsequent to separation, hospital and medical expenses incurred subsequent to separation. He may satisfy that burden by a preponderance of the evidence. Should the defendant-wife claim that any portion of the "net settlement" represents compensation for loss of, or injury to, *her* separate property, she may attempt to so prove by a preponderance of the evidence, if the pleadings are found to allege such a claim.

[5] Because each element of recovery comprising the $95,000 "net settlement" must necessarily compensate for loss of, or injury to, the injured spouse's separate property, *or* the non-injured spouse's separate property, *or* the marital property of the spouses, any portion of the "net settlement" not proved by a preponderance of the evidence to compensate for loss to a spouse's separate property must, necessarily, fall into the category of "marital property." Therefore, *to the extent* that the parties fail to prove that the $95,000 compensates for injury to separate property and is therefore properly classified as separate property in the amounts proved, the proceeds of the plaintiff-husband's personal injury "net settlement" shall be classified as marital property[4] and subject to distribution according to N.C.G.S. § 50-20.[5]

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[6] 4. The Court of Appeals has held that the language of our Equitable Distribution Act "creates a *presumption* that all property acquired by the parties during the course of the marriage is 'marital property.'" *Loeb v. Loeb*, 72 N.C. App. 205, 209, 324 S.E. 2d 33, 38, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985) (emphasis added); *accord McLeod v. McLeod*, 74 N.C. App. 144, 157, 327 S.E. 2d 910, 918, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985). *Contra Wade v. Wade*, 72 N.C. App. 372, 381, 325 S.E. 2d 260, 269, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985). Several equitable distribution states have provided by statute a presumption that property acquired during the marriage is marital property. Colo. Rev. Stat. § 14-10-113(3) (1973); Del. Code Ann. tit. 13, § 1513(c) (1974); Ill. Ann. Stat. ch. 40, § 503(b) (Smith-Hurd Cum. Supp. 1986); Ky. Rev. Stat. Ann. § 403.190(3) (1983); Me. Rev. Stat. Ann. tit. 19, § 722-A(3) (1981); Minn. Stat. Ann. § 518.54(5) (West Cum. Supp. 1986); Mo. Ann. Stat. § 452.330(3) (Vernon 1986); Pa. Stat. Ann. tit. 23, § 401(f) (Purdon Supp. 1986); Va. Code § 20-107.3(A)(2) (Cum. Supp. 1986). The North Carolina General Assembly, unlike legislatures in those states, did not choose to provide such a presumption by statute, and this Court will not infer one by judicial decision. We believe that the legislature's decision not to provide by

The decision of the Court of Appeals is reversed, and the order of equitable distribution entered 13 March 1984 is vacated. The case is remanded to the Court of Appeals for further remand to the District Court, Mecklenburg County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice MARTIN concurring.

I write to state that although the majority does not expressly hold to the contrary, I conclude that the mandate of the statute creates a presumption that a settlement award representing the value of a cause of action which arose during the marriage of the parties and before separation is marital property. N.C.G.S. § 50-20(b)(1)(2) (1985). Additionally, I would like to clarify a premise which the majority relies on but does not discuss. Plaintiff's accident occurred during the course of the marriage and before the parties separated. Because the cause of action was "acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties," it is presumed marital property, N.C.G.S. § 50-20(b)(1), until, as the majority explains, the injured spouse proves by a preponderance of the evidence that all or part of it is separate property. *See* Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. Rev. 247 (1983). This is in accord with judicial interpretations of similar statutes in other states. *See, e.g.*, *Searcy v. Searcy*, 658 S.W. 2d 931 (Mo. App. 1983); *Hemily v.*

statute for a marital property presumption was deliberate. Moreover, we perceive no need for such a presumption, express or implied, in our equitable distribution scheme. Under our statutory scheme, without the aid of any presumption, assets, the classification of which is disputed, must simply be labeled for equitable distribution purposes *either* as "marital" *or* "separate," depending upon the proof presented to the trial court of the nature of those assets.

5. We hasten to note that even if the entire "net settlement" should be classified as marital property, such a result does not necessarily require the *distribution* of any portion thereof to the non-injured spouse. According to N.C.G.S. § 50-20 and cases interpreting that statute, should any portion of the "net settlement" be classified as marital property, the trial court, in its broad discretion, *may* determine that an equal division thereof would be inequitable if such a determination is supported in the order by specific findings of fact. *See generally White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985).

Hemily, 403 A. 2d 1139 (D.C. 1979); *Painter v. Painter*, 65 N.J. 196, 320 A. 2d 484 (1974). *See* Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina* (publication forthcoming in N.C.L. Rev.). *Cf.* N.C.G.S. § 50-20(b)(2) (1985). It is important to note analytically that it is the cause of action, and not its proceeds, which is the property at issue here. The parties stipulated: "[T]he plaintiff was injured in an automobile accident on February 28, 1981, and as a result, the plaintiff had a cause of action for personal injuries." If the cash proceeds were the property sought to be divided, there would be no issue for this Court to decide: the *proceeds* in the present case were received by plaintiff after the date of separation of the parties and, considered alone, would therefore automatically be considered separate property under N.C.G.S. § 50-20(b)(1). Instead, as the majority tacitly acknowledges, the proceeds merely represent the value of the cause of action, which cause was acquired during marriage and before separation.

In addition to the foregoing, I disagree with a minor aspect of the majority's opinion. The majority states that:

> On remand, the injured spouse, plaintiff-husband, will have the burden of showing what amount or proportion of the whole represents compensation for loss of, or injury to, his "separate property," to wit, compensation for his pain and suffering, disfigurement, loss of earning capacity subsequent to separation, lost wages subsequent to separation, hospital and medical expenses incurred subsequent to separation. He may satisfy that burden by a preponderance of the evidence.

While I agree that compensation for pain and suffering, loss of earning capacity subsequent to separation, lost wages subsequent to separation, and hospital and medical expenses incurred by the injured party subsequent to separation may be separate property, I do not agree that compensation for "disfigurement" occurring during marriage and prior to separation should always be considered separate property. Disfigurement distinctly may affect the earning capacity of a marital partner, as is recognized in our workers' compensation statutes. *See* N.C.G.S. § 97-31(22) (1985) (bodily disfigurement). The earning capacity of married persons who are not separated is presumably marital property. Because disfigurement often is accompanied by pain and suffering acutely

personal to the injured party, one could argue that the value of an award compensating a person for disfigurement itself could be divided into components of marital property (the earning capacity aspect) and separate property (the pain and suffering purely personal to the injured party). However, I conclude that any elements of a settlement or award attributable to disfigurement (resulting from a cause of action arising during the marriage but before separation of the parties) should be considered solely representative of the value of loss of earning capacity of the injured spouse. The pain and suffering accompanying disfigurement is properly includable in that part of a settlement or award compensating one for "pain or suffering," which, I agree, may be the separate property of an injured spouse.

Otherwise, I concur with the majority opinion.

STATE OF NORTH CAROLINA v. SUSAN MYRA HICKEY

No. 516A85

(Filed 12 August 1986)

1. Criminal Law § 30— State's announcement of intent to proceed on lesser charge—not binding before jeopardy attaches

The trial court did not err by denying defendant's motion to preclude the State from proceeding on first degree murder where the prosecutor had stated at arraignment that the State did not intend to seek a conviction for first degree murder unless new evidence was discovered. Such an announcement by the district attorney at any time prior to trial does not immediately have the effect of a verdict of acquittal, but becomes binding on the State and tantamount to acquittal only when jeopardy attaches as a result of a jury being impaneled and sworn to try the defendant.

2. Constitutional Law § 31— denial of private investigator—no error

The trial court did not err in a prosecution for first degree murder by failing to appoint an investigator for defendant where defendant argued only that an investigator could investigate the State's key witness and that the investigator could discover facts that might show inconsistencies or corroborating facts or circumstances to buttress defendant's case; moreover, defendant and the key witness both testified about the length and closeness of their friendship and it was unlikely that an investigator would have discovered new evidence. N.C.G.S. § 7A-454, N.C.G.S. § 7A-450(b).

3. Homicide § 30— first degree murder—refusal to instruct on second degree murder or involuntary manslaughter—no error

The trial court did not err in a prosecution for first degree murder by denying defendant's request for jury instructions on the lesser included offenses of second degree murder and involuntary manslaughter where a review of the evidence leads to the conclusion that defendant either premeditated and deliberated and then murdered her husband or accidentally shot her husband as she contended throughout her trial. N.C.G.S. § 14-17.

4. Criminal Law § 102.6— closing argument—prosecutor's comment on conscience of community—not grossly improper

A prosecutor's closing argument in a first degree murder trial was not so grossly improper as to require the trial court to act *ex mero motu* where the prosecutor commented on the conscience of the community and the need for punishment.

5. Criminal Law § 73.1— hearsay—admission not prejudicial

The trial court did not commit reversible error in a prosecution for first degree murder by admitting the hearsay testimony of a friend of the victim that the victim had complained two months before the shooting that defendant had threatened to kill him where other similar evidence of premeditation and deliberation was properly admitted. N.C.G.S. § 8C-1, Rules 803 and 804.

APPEAL by the defendant from judgment entered by *Lewis, J.*, at the 15 April 1985 Criminal Session of Superior Court, MADISON County, after change of venue from MITCHELL County.

The defendant was indicted on 3 July 1984 by the Mitchell County Grand Jury for the murder of her husband, David Hickey. She was tried at the 28 January 1985 Special Session of Superior Court, Mitchell County. Upon determining that the jury was deadlocked, the court declared a mistrial on 20 February 1985. Thereafter, the court ordered a change of venue to Madison County.

The defendant's second trial was held in Madison County and resulted in her conviction of first degree murder. Having determined that there was no evidence of any aggravating factors, the trial court imposed a life sentence. The defendant appealed her conviction for first degree murder and the resulting life sentence to the Supreme Court as a matter of right. Heard in the Supreme Court 14 May 1986.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Malcolm R. Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant has brought forward several assignments of error in which she contends that: (1) the trial court committed reversible error in denying her motions to preclude the State from proceeding on a first degree murder charge; (2) the trial court erred in failing to appoint an investigator to aid in her defense; (3) the trial court committed reversible error in refusing her request for jury instructions on the lesser included offenses of second degree murder and involuntary manslaughter; (4) portions of the prosecutor's closing arguments were grossly improper and substantially prejudiced the defendant; and (5) the trial court committed reversible error in overruling her objections to hearsay testimony of witness Scott Pitman. We find no error.

The defendant, Susan Hickey, and the victim, David Hickey, had been married since 16 August 1980. Two children lived with the couple in a mobile home in Spruce Pine: Jamie, the defendant's eleven-year-old son from a previous marriage, and Charles, the couple's three-year-old son.

The State's evidence tended to show that in the early morning hours of 17 May 1984, the defendant shot her husband, David Hickey, while he was asleep in bed. The victim first was shot in the left side of his chest with a Smith and Wesson .38 caliber revolver. That shot caused a "contact" wound. The bullet penetrated both of the victim's lungs and his heart and lodged in his back. The victim also was shot a second time in the back. The second bullet moved in an upward path toward his neck. Dr. John McLeod opined that death resulted from massive internal bleeding from the chest wound and not from the second gunshot wound.

After the shooting occurred, the defendant did not attempt to assist the victim. She stepped over his body several times while dressing and then took her two children to her mother's house. When the defendant got to her mother's house, she told her mother that an accident had occurred and she thought her husband was dead. The defendant did not seek any emergency assistance for her husband. When the defendant later returned to her home, she checked his pulse and found "no response." She then called the local chief of police.

In her statement to the police, the defendant stated that the victim went to bed and placed a pistol under his pillow. When she thought he was asleep, she walked around to his side of the bed and reached under the pillow to get the pistol. The gun went off as the victim grabbed it and tried to pull it from her. After the gun fired, the victim jumped out of bed and said: "I'll kill Jamie." When he started toward the door, the defendant fired the gun. The victim then fell to the floor.

Ella Jo Teague, the defendant's close friend, testified that she saw the defendant at the police station after the shooting. The defendant told her that she had waited until her husband went to sleep, and then she shot him. A few days later, Teague visited the defendant at her home. On that occasion, the defendant stated that "she had never slept better" and "that if she had to pull any time it was worth it." Teague also testified that in April 1984 the defendant had stated she planned to kill her husband with pills and alcohol and wondered what quantity would be lethal. A few days after that conversation, the defendant stated that her mixture did not work and the victim had only gotten sick.

Bruce Jarvis, the State Bureau of Investigation agent, testified that during his investigation of the bedroom, he discovered a hole with a surrounding burnt area in the top sheet of the bed. He also discovered two holes in a quilt that was on the bed. Steven Carpenter, a firearms expert with the State Bureau of Investigation, testified that the gunshot residue pattern around the holes in the sheet and quilt were characteristic of a contact wound.

The defendant testified at trial that the victim, her husband, returned home in the early morning hours of May 17th. The victim became angry at the defendant's son Jamie and the couple argued. The defendant then went to bed and pretended to be asleep. She heard the victim cock a pistol and place it under his pillow. The defendant waited until he was asleep, walked around to his side of the bed, and attempted to pull the pistol out from under the pillow. As she grabbed the handle and pulled the pistol out, the victim woke up and grabbed the pistol. The pistol then discharged. The defendant testified she had her hand on the handle when the gun discharged. The victim rolled over to the side of

the bed and was sitting on the bed, "crouched over." The victim then said that he was going to kill Jamie. As the victim "started to raise up to go toward the door," the defendant "raised the gun and shot." The defendant took the children to her mother's house because she did not want them to see the victim. She returned and then called Police Chief Ray Gunter. The defendant denied making any of the statements Teague had described. The defendant also denied planning to kill her husband by mixing pills and alcohol.

Other facts pertinent to the determination of the issues raised on appeal are set forth hereinafter as part of the discussion of those issues.

[1] By her first assignment of error, the defendant contends that the trial court committed reversible error in denying her motions to preclude the State from proceeding against her on the charge of first degree murder. We do not agree.

The defendant was indicted on 3 July 1984 for the murder[1] of her husband. On 1 October 1984, the defendant appeared in Superior Court, Mitchell County, for arraignment and for the hearing of pretrial motions. During the arraignment the district attorney announced that the State did not intend to seek a conviction for first degree murder but would seek a conviction for second degree murder, unless new evidence was discovered which would warrant trying the defendant for first degree murder. In light of the prosecutor's announcement, Judge Lamm denied the defendant's motions for individual *voir dire* and sequestration of the jury, but did so without prejudice to the defendant's right to renew the motions should the State notify her of its intent to seek a verdict of guilty of first degree murder. On 27 December 1984, the defendant received written notice from the district attorney that the State intended to bring her to trial for first degree murder.

On 31 December 1984, the defendant filed a "MOTION IN OPPOSITION TO THE STATE'S DESIRE TO PROCEED ON FIRST DEGREE MURDER." A hearing was held on that motion on the same day,

1. The indictment was drawn according to N.C.G.S. § 15-144 and was sufficient to support a verdict of guilty of either first or second degree murder or manslaughter. *State v. Talbert*, 282 N.C. 718, 194 S.E. 2d 822 (1973).

and Judge Gudger entered an order finding *inter alia* that during the October arraignment of the defendant:

> the Court asked the Assistant District Attorney, Mr. Wilson 'Does the State intend to proceed on the charge of second degree murder?' To which, Mr. Wilson, the Assistant District Attorney, answered: 'Your Honor, at this time our intent is to proceed on second degree murder. We would reserve the right that if before the trial new evidence should come to light that we could change our mind upon proper notice to the defendant that we now desire to proceed on first. As of this time, as of this day, Your Honor, we intend now to plead—to proceed on second. Again, we would, if something changed, if new evidence should come forth, then we would reserve the right to give proper notice to the defendant and put them on notice that we did at that time intend to proceed on first.'
>
> . . . .
>
> That subsequent to the October Session of this Court and on or about December 22, 1984, the District Attorney received information indicating the availability of one or more witnesses to threats made by the defendant against the deceased . . . .

Based on such findings, Judge Gudger concluded that the statement of the district attorney "did not amount in law to an election on the part of the State not to proceed to trial on a charge of first degree murder if further evidence was discovered tending to support such charge . . . ." As a result he denied the defendant's motion opposing trial on a charge of first degree murder but ordered that her other pretrial motions be reconsidered in light of his order.

The defendant initially was tried for first degree murder at the 28 January 1985 Special Session of Superior Court, Mitchell County. The jury being unable to agree on a verdict, the trial court declared a mistrial and subsequently ordered a change of venue to Madison County. The defendant was retried for first degree murder at the 15 April 1985 Session of Superior Court, Madison County, and again moved to prevent the State from proceeding against her on the first degree murder charge. Judge

Lewis concluded that the previous order entered by Judge Gudger was the law of the case and denied the motion.

The defendant argues that the district attorney's announcement during the arraignment that the State intended "at this time" to bring her to trial for second degree murder was a binding election by the State and equivalent to a verdict of not guilty on the first degree murder charge. The defendant argues that as a result, considerations of due process and double jeopardy prevented the State from trying her thereafter on the first degree murder charge.

In *State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1966), the defendant was charged with the then capital felony of rape. At arraignment the solicitor[2] announced that the State would not seek a verdict on the capital felony but would only seek to convict the defendant of the lesser included offense of assault with intent to commit rape. The defendant's first trial on the lesser charge ended in a mistrial. At his second trial for the lesser offense, the defendant was convicted. This Court ordered a new trial on the ground that the defendant's confession had been involuntary and improperly admitted into evidence. We also said in *obiter dictum*, however, that:

> When the State, acting through its constitutional officer, the solicitor, made the announcement that the State would not ask the jury to convict of the capital felony but only for the lesser offense of assault with intent to commit rape, the announcement was tantamount to a verdict of not guilty of the capital offense and prevents the State thereafter from prosecuting the prisoner for his life.

266 N.C. at 237, 145 S.E. 2d at 921. In a later case, we unfortunately relied upon that *obiter dictum* in *Pearce* and stated:

> When, upon arraignment, or thereafter in open court, and in the presence of the defendant, the Solicitor announces the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty on a designated and included lesser offense embraced in the bill, and

2. The constitutional office of district attorney was denominated "solicitor" in North Carolina until 1973. *See* N.C.G.S. § 7A-66.1 (1981).

> the announcement is entered in the minutes of the Court, the announcement is the equivalent of a verdict of not guilty on the charge or charges the Solicitor has elected to abandon.

State v. Miller, 272 N.C. 243, 246, 158 S.E. 2d 47, 49 (1967).

The foregoing quoted statements from *Miller* and *Pearce* unfortunately were overbroad and inaccurate, and we now expressly disavow and reject them. We also expressly disavow and reject similar statements in other cases wherein we relied upon the quoted statements from *Miller* and *Pearce* which we now conclude were erroneous. *E.g., State v. Allen*, 279 N.C. 115, 118-19, 181 S.E. 2d 453, 455 (1971); *State v. Rogers*, 273 N.C. 330, 332, 159 S.E. 2d 900, 901 (1968); *State v. Overman*, 269 N.C. 453, 472, 153 S.E. 2d 44, 60 (1967). In so doing, we conclude that other cases decided by this Court—some of them cases relied upon in *Miller*—did not compel the statements in *Pearce* and *Miller* previously quoted in this opinion. *E.g., State v. Locklear*, 226 N.C. 410, 38 S.E. 2d 162 (1946); *State v. Dove*, 222 N.C. 162, 22 S.E. 2d 231 (1942); *State v. Wall*, 205 N.C. 659, 172 S.E. 216 (1934); *State v. Gregory*, 203 N.C. 528, 166 S.E. 387 (1932); *State v. Brigman*, 201 N.C. 793, 161 S.E. 727 (1931); *State v. Spain*, 201 N.C. 571, 160 S.E. 825 (1931); *State v. Hunt*, 128 N.C. 584 (431 in the revision), 38 S.E. 473 (1901); *State v. Sorrell*, 98 N.C. 738, 4 S.E. 630 (1887); *State v. Taylor*, 84 N.C. 773 (1881).

The rule that the State has the authority to make a binding election to abandon the prosecution of some offenses supported by an indictment and to pursue instead other counts in that indictment or lesser degrees of offenses charged in that indictment was first expressly stated in *State v. Taylor*, 84 N.C. 773 (1881). At the close of the evidence at trial in *Taylor*, the solicitor took an untimely *nolle prosequi*[3] as to one of several counts for which the defendant was being tried. This Court stated:

> Strictly, a *nolle prosequi* can only be entered by the prosecuting officer, before the jury are impaneled, or after the ren-

3. A *nolle presequi* was formerly used by a solicitor [now district attorney] to announce that he did not wish to proceed further with a particular prosecution and would not at that time prosecute the defendant on that charge. *Wilkinson v. Wilkinson*, 159 N.C. 265, 266-67, 74 S.E. 740, 741 (1912). *See Klopfer v. North Carolina*, 386 U.S. 213, 18 L.Ed. 2d 1 (1967).

> dition of a verdict against the defendant. During the trial it can only be done with his consent. While then, in strictness, a *nol. pros.* could not be entered, and the count thus reserved for a future prosecution of the defendant . . . the action of the solicitor must be deemed an election to proceed on the other counts and an assent to a verdict of acquittal on that.

Id. at 775. *See State v. Wall*, 205 N.C. 659, 660, 172 S.E. 216, 217 (1934); *State v. Brigman*, 201 N.C. 793, 794, 161 S.E. 727 (1931).

In *State v. Hunt*, 128 N.C. 584 (431 in the revision), 586 (432 in the revision), 38 S.E. 473, 474 (1901), we indicated that when the prosecutor announces at arraignment or any other time prior to trial that he intends to seek a conviction for second degree murder, his announcement is "in effect a verdict of acquittal as to first degree murder." However, in *Hunt* as in the other cases in which similar statements have been made by this Court, the prosecutor had not merely announced prior to trial that he would proceed only on a lesser included offense or on fewer than all counts in the indictment. In those cases the prosecutor had gone further and actually prosecuted the defendant for the lesser offense or for fewer than all counts in the bill. The defendant in each of those cases was *placed in jeopardy* and actually *convicted* of the lesser offense. *E.g.*, *State v. Allen*, 279 N.C. 115, 181 S.E. 2d 453 (1971) (tried for lesser included offense); *State v. Rogers*, 273 N.C. 330, 159 S.E. 2d 900 (1968) (same); *State v. Miller*, 272 N.C. 243, 158 S.E. 2d 47 (1967) (same); *State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1966) (same); *State v. Gregory*, 203 N.C. 528, 166 S.E. 387 (1932) (same); *State v. Brigman*, 201 N.C. 793, 161 S.E. 727 (1931) (tried on less than all counts in the indictment); *State v. Hunt*, 128 N.C. 584 (431 in the revision), 38 S.E. 473 (1901) (tried for lesser included offense, but opinion also discusses situation where defendant tried for less than all the separate counts in an indictment); *State v. Taylor*, 84 N.C. 773 (1881) (tried on less than all counts in the indictment). Therefore, to the extent that statements in our previous opinions can be construed as meaning that such an announcement prior to trial by the prosecutor has the *immediate* effect of a verdict of acquittal of the greater offense charged or acquittal of counts contained in the indictment but not to be prosecuted, those statements are mere *obiter dicta* and not binding authority. The results reached in those cases were required by our longstanding recognition of the rule that:

" 'If the jury find the defendant guilty on one count,' says Mr. Wharton, 'and say nothing in their verdict concerning other counts, it will be equivalent to a verdict of not guilty as to them.' " *State v. Taylor*, 84 N.C. at 775.

Further, at the time the cases relied upon in *Miller* were decided, the question of whether such an announcement by the prosecutor was an *immediately* binding election by the State was a question more theoretical than real. At the time those cases were decided, defendants ordinarily were arraigned immediately prior to the jury being impaneled and jeopardy attaching. More recently, however, our procedures have been amended by statute to expressly provide that: "When a defendant pleads not guilty at an arraignment . . . he may not be tried without his consent in the week in which he is arraigned." N.C.G.S. § 15A-943(b) (1983). As a practical matter under current procedures, the arraignment ordinarily precedes the trial at which the defendant is placed in jeopardy by several weeks or months.

We conclude that justice does not require the rule stated in *Miller* and *Pearce*: that a prosecutor's pre-trial announcement of his election to seek conviction only for some of the offenses charged in the indictment or only for lesser included offenses has the *immediate* effect of an acquittal of the other or greater charges in the indictment. The better rule which we now adopt for this jurisdiction is that such an announcement by the district attorney at any time prior to trial does not immediately or automatically have the effect of a verdict of acquittal. Instead, such an announced election by the district attorney becomes binding on the State and tantamount to acquittal of charges contained in the indictment but not prosecuted at trial *only* when *jeopardy has attached* as the result of a jury being impaneled and sworn to try the defendant. *See State v. Hunt*, 128 N.C. 584 (431 in the revision), 38 S.E. 473 (1901); *State v. Sorrell*, 98 N.C. 738, 4 S.E. 630 (1887); *see also State v. Shuler*, 293 N.C. 34, 42, 235 S.E. 2d 226, 231 (1977). Until that time the district attorney may withdraw his previously announced election and prosecute the defendant for all crimes charged in the indictment. We emphasize, however, that proper notice of the withdrawal and new election to prosecute must be given the defendant sufficiently in advance of trial to insure the defendant's rights of due process and effective representation of counsel. Our trial courts are more than capable

of insuring the protection of such rights and have full authority to grant defendants continuances or take other appropriate actions to see that such rights are scrupulously observed and provided.

Assuming *arguendo* that the trial court's conclusion that the assistant district attorney's announcement in the present case "did not amount in law to an election on the part of the State" was incorrect, the "election" was withdrawn before the defendant had been placed in jeopardy. Actual notice of this fact was received by the defendant more than three months prior to the trial which resulted in her conviction and led to this appeal. The defendant has shown nothing tending to indicate that the State's withdrawal of its "election" with notice to her in any way hampered her defense or denied her due process or effective representation of counsel. To the contrary, the transcript, record and briefs before this Court clearly reveal that she had ample time to prepare her defense and that her representation by counsel, before and during trial and on appeal, was entirely in keeping with the highest standards of the legal profession. This assignment of error is without merit.

[2] By her next assignment of error, the defendant contends that her due process rights guaranteed by the fourteenth amendment to the Constitution of the United States were violated by the trial court's failure to appoint an investigator to aid in her defense. The defendant moved for the appointment of an investigator to investigate the background of the State's key witness, Ella Jo Teague. In support of her motion, the defense counsel argued the investigator was needed to discover "[h]ard core facts . . . that may show extreme inconsistencies, or corroborating facts or circumstances that buttress the case of the Defendant . . . cold hard evidentiary facts of whatever nature, the history of one person, or how one person has either conducted one's self, testified in prior occasions, said things to other people . . . ." We conclude that the trial court properly refused to appoint an investigator for the defendant.

N.C.G.S. § 7A-454 provides that the trial court has the discretion to approve a fee for the service of an expert witness who testifies for an indigent defendant. The State shall pay the fees and expenses of the expert witnesses. N.C.G.S. § 7A-450(b) provides that "[w]henever a person, under the standards and procedures set out in this Subchapter, is determined to be an indi-

gent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation." *See State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986); *State v. Artis*, 316 N.C. 507, 342 S.E. 2d 847 (1986).

The recent case of *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985) dealt with the issue of whether an indigent defendant was constitutionally entitled to the services of an appointed psychiatrist. The Court set forth three factors relevant to the determination of whether "the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense." 470 U.S. at 77, 84 L.Ed. 2d at 62. The three factors to be considered are: (1) the private interest that will be affected by the State; (2) the governmental interest that will be affected if the expert assistance is provided; and (3) the probable value of the assistance that is sought and the risk of an erroneous deprivation of the affected interest if the assistance is not provided. 470 U.S. at 77, 84 L.Ed. 2d at 62; *State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986); *State v. Johnson*, 317 N.C. 193, 344 S.E. 2d 775 (1986).

The *Ake* decision concerns cases in which "the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense." 470 U.S. at 83, 84 L.Ed. 2d at 66. *Ake* is limited to those cases in which the defendant makes a threshold showing of specific necessity for the assistance of the expert he sought to have appointed. *State v. Penley*, 318 N.C. at 51, 347 S.E. 2d at 795; *State v. Johnson*, 317 N.C. at 199, 344 S.E. 2d at 775. The *Ake* decision is consistent with our decisions that hold the defendant must show a particularized need for the requested expert. *State v. Penley*, 318 N.C. at 51, 347 S.E. 2d at 795-796; *State v. Artis*, 316 N.C. 507, 342 S.E. 2d 847 (1986).

In the present case, the defendant has failed to make a threshold showing of specific necessity for the assistance of an investigator. In support of her motion, the defendant argued only that an investigator could investigate the State's key witness, Ella Jo Teague. We assume the purpose of the investigation would be to discover facts that could be used to impeach the

testimony of the witness. Although Teague was a key witness who provided evidence to support the elements of premeditation and deliberation, the mere general desire to search for possible evidence which might be of use in impeaching her was not such a "significant factor" in the defendant's defense under *Ake* as to justify the appointment of an investigator.

The defendant offered only "undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, ---, 86 L.Ed. 2d 231, 236, n. 1 (1985). In support of the motion, the defense counsel argued that the investigator could discover "[h]ard core facts . . . that *may* show extreme inconsistencies, or corroborating facts or circumstances that buttress the case of the Defendant . . . ." (emphasis added). As we have stated previously "Mere hope or suspicion that such evidence is available will not suffice." *State v. Tatum*, 291 N.C. 73, 82, 229 S.E. 2d 562, 568 (1976).

We also note that the defendant and Teague both testified to the length and closeness of their friendship for one another. The defendant was given ample opportunity to cross-examine Teague and did attempt to impeach Teague with evidence of her struggle with anorexia nervosa. Given the length and closeness of the defendant's friendship with Teague, it was most unlikely that the assistance of an investigator would have been of any real value in uncovering new evidence of use in the preparation of her defense. The trial court properly denied the defendant's motion.

[3] By her next assignment of error, the defendant contends that the trial court erred in denying her request for jury instructions on the lesser included offenses of second degree murder and involuntary manslaughter. We find no error.

N.C.G.S. § 14-17 defines murder in the first and second degree. N.C.G.S. § 14-17 provides in pertinent part:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of [specified felonies] . . . shall be deemed to be murder in the first degree . . . All other kinds of murder . . . shall be deemed murder in the second degree . . . .

Involuntary manslaughter is "the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life or (2) by an act or omission constituting culpable negligence." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978).

In *State v. Strickland*, 307 N.C. 274, 290-91, 298 S.E. 2d 645, 656 (1983), we disavowed the rule that the trial court is required to instruct on second degree murder in all first degree murder cases in which the State relies on the elements of premeditation and deliberation. In determining whether the trial court should instruct on lesser included offenses, the test is "whether the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged." 307 N.C. at 283, 298 S.E. 2d at 652. The trial court is required to charge on a lesser offense only when there is evidence to support a verdict finding the defendant guilty of such lesser offense. 307 N.C. at 284, 298 S.E. 2d at 652. "However, when all the evidence tends to show that defendant committed the crime charged and did not commit a lesser included offense, the court is correct in refusing to charge on the lesser included offense." *State v. Gerald*, 304 N.C. 511, 520, 284 S.E. 2d 312, 318 (1981).

In the present case, the defendant failed to give a complete statement of facts as required by our rules. N.C. App. R. 28(b)(4). The State did not choose to "make a restatement" of facts. N.C. App. R. 28(c). After reviewing the entire transcript, we conclude that the evidence required either a verdict of guilty of first degree murder or a verdict of not guilty. Therefore, jury instructions on lesser included offenses would have been improper.

The State's evidence tended to show *inter alia* that the defendant first attempted to kill her husband by giving him a mixture of pills and alcohol. The attempt failed, only making her husband sick. In the early morning hours of May 17th, the defendant's husband was shot twice. The chest wound—a contact wound—was the cause of death. The defendant told her best friend, Ella Jo Teague, that she had waited until her husband was asleep and shot him. She stated she "had never slept better" and if she "had to pull any time it was worth it." The defendant never called any emergency assistance for her husband. After the shooting, she

dressed and took her children to her mother's house. It was only after she returned from her mother's house that she called the police.

The defendant testified at trial that her husband, the victim, had placed a cocked gun under his pillow. He was shot accidentally as the defendant tried to pull the gun from under the pillow. Uncontroverted expert testimony indicated that this shot was the ultimate cause of death. The victim then threatened to kill the defendant's son Jamie. "As he started to raise up to go toward the door, I raised the gun and shot." The defendant testified that she did not recall pulling the trigger. On cross-examination, the defendant stated unequivocally that the second shot was also accidental.

A review of the evidence leads to the conclusion that the defendant either premeditated and deliberated and then murdered her husband, or she accidentally shot her husband as she contended throughout her trial. If the jury disbelieved the defendant's story, the only possible conclusion that could be reached was that she planned to kill her husband, then waited for him to go to bed and killed him in his sleep. The trial court properly refused to submit the lesser included offenses of second degree murder and involuntary manslaughter.

[4] By her next assignment of error, the defendant contends that portions of the prosecutor's closing argument were grossly improper and substantially prejudiced the defendant, requiring a new trial. The defendant complains of the following comments made by the prosecutor:

> I couldn't help but think during this week that as Susan Hickey's team of lawyers stood here before you and they've argued this contention, they've argued that contention, they've argued that you should turn her loose, and the Court sat up here and they've made every effort to protect the rights of this Defendant, to make sure she got a fair trial, everything has been done. Where, where, where, where were David Hickey's lawyers on that night when she executed him? Where was a Judge to sit and determine whether or not she should have executed on him on that early morning? David Hickey didn't have that. He was tried and executed right there.

> *And the conscience of a community and the conscience of a people is outraged it requires punishment, befitting the terrible deed.* If we fail to punish those who have committed terrible outrageous crimes then our society, Ladies and Gentlemen, does not long exist. Our flag will not long stand high. Our streets will not long be safe when we send murderers out of the Courtroom with their guns back in their hand, our society is almost finished.
>
> It's a terrible, terrible thing she did. But it's now up to you. You must be strong. You must do what is necessary. You must reach back for David Hickey now that she can't, and you must demand justice from this woman. Your course is set, your way is clear, justice demands punishment. When our juries stop doing justice, when murderers walk out of the Courtroom free, then we may as well hang a wreath on the Courtroom door, shut it and lock it and go home, because the very basis of our system of living, the government is gone.

(Emphasis added.)

The defendant contends that the prosecutor impermissibly asked the jury to consider the conscience of the community and that the argument traveled outside of the record. The defendant relies on *State v. Scott*, 314 N.C. 309, 333 S.E. 2d 296 (1985) which involved a defendant's trial and conviction for involuntary manslaughter and driving under the influence of alcohol. This Court granted a new trial because the trial court overruled the defendant's timely objection and allowed the prosecutor to improperly appeal to the jury to convict the defendant "because impaired drivers had caused other accidents." 314 N.C. at 312, 333 S.E. 2d at 298. We also interpreted the prosecutor's argument as "telling the jury that the citizens of the community sought and demanded conviction and punishment of the defendant." *Id.*

The defendant is required to object to improper comments made during closing arguments. *State v. Locklear*, 294 N.C. 210, 215, 241 S.E. 2d 65, 68 (1978). Failure to object ordinarily constitutes a waiver. *Id.* However, where the closing remarks are grossly improper, the trial court should correct the abuse *ex mero motu. Id.; State v. Jones*, 317 N.C. 487, 346 S.E. 2d 657 (1986).

Since the defendant in the case *sub judice* failed to object to the prosecutor's comments, our consideration is strictly limited to the question of whether the prosecutor's argument was so grossly improper as to require the trial court to act *ex mero motu.* We do not consider or decide whether it would have been error for the trial court to have overruled an objection to the argument of the prosecutor. We conclude only that the prosecutor's comments did not rise to the level of gross impropriety. *See generally State v. Scott*, 314 N.C. 309, 333 S.E. 2d 296 (1985). We find no error.

[5] By her final assignment of error, the defendant contends that the trial court committed reversible error by admitting the hearsay testimony of Scott Pitman. Pitman, a friend of the deceased victim, testified that two months prior to the shooting, the victim complained that the defendant had threatened to kill him. The trial court immediately instructed the jury that the testimony was offered solely for the purpose of its consideration on the questions of premeditation and deliberation.

The defendant contends that the hearsay testimony does not fall within any of the exceptions to the hearsay rule enumerated in N.C.G.S. § 8C-1, Rule 803 and Rule 804. The defendant further contends that the testimony lacked "substantial guarantees of trustworthiness" to allow its admission under the residual exception of Rule 804(b)(5).

We assume *arguendo* that the trial court erred in allowing the hearsay testimony of Scott Pitman. However, the erroneous admission of hearsay is not always so prejudicial as to require a new trial. *State v. Sills*, 311 N.C. 370, 378, 317 S.E. 2d 379, 384 (1984). The defendant must still show that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed. *State v. Sills*, 311 N.C. at 378, 317 S.E. 2d at 384; *see* N.C.G.S. § 15A-1443(a) (1983).

In the present case, the defendant has not shown how she was prejudiced by admission of the hearsay. The defendant maintained throughout the trial that the shooting was an accident. However, Ella Jo Teague testified to statements made by the defendant that would support the elements of premeditation and deliberation. In light of the other similar evidence of premeditation and deliberation admitted properly against the defendant, we are not persuaded that Pitman's testimony, even if admitted im-

properly, requires a new trial. *Id.* We find no merit in this assignment of error.

For the reasons stated herein, we conclude that the defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. LARRY DARNELL WILLIAMS

No. 175A85

(Filed 12 August 1986)

1. **Criminal Law §§ 102.6, 135.8— jury argument—killing to eliminate potential witness—gross impropriety**

   Comments by the prosecutor during his closing argument insinuating that an armed robbery victim was killed in order to prevent her from identifying defendant as one of the robbers were so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu* to correct the error where the prosecution presented absolutely no evidence whatsoever which showed that the victim's killing was motivated by a desire to eliminate a potential witness, and the prosecutor was put on notice that there was a lack of such evidence by a decision in a prior appeal of this case that the evidence did not justify the submission of an aggravating factor as to whether the murder was committed for the purpose of avoiding arrest or effecting an escape on the theory that the victim was killed to eliminate her as a witness.

2. **Constitutional Law § 80; Criminal Law § 135.8— robbery-murder—pecuniary gain aggravating circumstance—no cruel and unusual punishment**

   Consideration of pecuniary gain as an aggravating circumstance in a robbery-murder case does not violate the Eighth Amendment proscription against cruel and unusual punishment, since the fact that a killing is committed for pecuniary gain is a circumstance which legitimately serves effectively to differentiate between *all* persons convicted of first degree murder and those few who are deserving of the death penalty.

Justice BILLINGS concurring in result.

Justice MITCHELL joins in the concurring opinion.

DEFENDANT appeals from a judgment imposing the death sentence entered by *Freeman, J.*, at the 25 February 1985 Criminal Session of Superior Court, CABARRUS County.

This case came on for resentencing following a decision of this Court reported at 304 N.C. 394, 284 S.E. 2d 437 (1981). At the

first trial, the defendant was convicted of the first-degree murder of Susan Pierce. Ms. Pierce, a clerk at a Seven-Eleven convenience store in Concord, North Carolina, was killed during the course of an armed robbery of the store. Following a sentencing hearing conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended that the defendant be sentenced to death. From the imposition of a sentence of death, the defendant appealed to this Court as a matter of right. Writing for a unanimous Court, Chief Justice Branch found no error in the first-degree murder conviction. However, the Court found error in the sentencing phase of the trial and remanded the case for a new sentencing hearing.

After considering the evidence at the second sentencing hearing, a jury recommended that the defendant be sentenced to death. From the imposition of a sentence of death, the defendant appeals to this Court as a matter of right. N.C.G.S. § 7A-27(a) (1981 and Cum. Supp. 1985). Heard in the Supreme Court 12 May 1986.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, and Jane P. Gray, Special Deputy Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

MEYER, Justice.

Facts pertinent to the guilt-innocence determination phase of the trial are fully discussed in the opinion reported at 304 N.C. 394, 284 S.E. 2d 437 (hereinafter referred to as *Williams I*). As the issues raised on this appeal relate only to the resentencing, we deem it unnecessary to repeat those facts brought out at the guilt-innocence determination phase of the trial.

The State presented evidence at the resentencing hearing which tended to show that Susan Verle Pierce was employed as a clerk at the Seven-Eleven convenience store located at 807 Church Street in Concord, North Carolina. Ms. Pierce was seen alive by a customer shortly after 6:00 a.m. on 3 June 1979. Upon returning to the store approximately twenty minutes later, the same customer discovered Pierce's bloodstained body lying on the floor. Emergency medical personnel, law enforcement officers, and the store manager subsequently arrived at the scene. An ex-

amination ascertained that Pierce was dead. Police observed that a cabinet safe was open and the cover to a floor safe had been removed. The store manager conducted an inventory and determined that $67.27 was missing from the store. The store manager also testified that when a store employee made a roll of coins, the employee would write his name on the roll.

Dr. John Butts, Associate Chief Medical Examiner for the State of North Carolina, performed an autopsy on the body of Ms. Pierce on 3 June 1979. He testified that, in his opinion, Ms. Pierce died as a result of a shotgun wound to the base of the neck which resulted in the perforation of her carotid arteries. Dr. Butts further testified that Ms. Pierce would have died within a minute or two of the shotgun blast. Dr. Butts also opined that the shotgun muzzle was probably within five to six feet from Ms. Pierce when the shot was fired and that it was certainly within the broader range of from three to nine feet when the shot was fired.

The State also presented evidence tending to show that in the spring of 1979, the defendant lived in an apartment with his girlfriend, Linda Massey; her two children; Linda's sister, Annie Brawley; and Brawley's fourteen-year-old son, Darrell. On 4 June 1979, Darrell Brawley was taken into custody on a charge of operating a motor vehicle without an operator's license. At some point, Brawley informed the police that he had information concerning recent shootings which had occurred in Gaston County and Concord. Subsequently, Brawley made statements to the police implicating the defendant in these shootings, and he agreed to testify against the defendant. Brawley's statements concerned four incidents—one in which the possibility of a robbery was foiled by the presence of police officers, one in which the possibility of a larceny of a firearm was abandoned, and two completed armed robberies with a death resulting from each.

Brawley testified that on the evening of 2 June 1979, the defendant, Linda Massey, and he drove to the Freekie Deekie Club in a neighbor's Oldsmobile Delta 88. At some point, the defendant and Massey took some pills and drank beer. They subsequently left the Freekie Deekie Club and drove to a house on Pitts Drive and picked up a man who was introduced to Brawley as Danny Brown. They then returned to the Freekie Deekie Club, staying approximately ten minutes. As they prepared to leave,

Brawley stated to the defendant, "Let's go make some money in Gastonia or Concord." The defendant proceeded to load a sawed-off .20-gauge, single-shot shotgun, and they drove off.

Brawley stated that he then went to sleep and did not awaken until they pulled into a service station. Massey and he went into the station to look around, and when they returned, Massey told the defendant that "the lick is sweet." However, the defendant noticed approximately five state troopers parked at an abandoned service station across the road and therefore drove off. They soon stopped at a roadside cafe. The defendant saw a truck parked outside the cafe; there was a rifle on a rack in the back window of the truck. The defendant remarked that he wanted the rifle. However, the owner of the truck soon came out and moved the truck in front of the cafe window. The defendant and the others then drove off.

Brawley again dozed off. When he awoke, they were stopped at another service station. The defendant and Brown got out of the car and went into the station. The defendant was carrying the shotgun. Brown knocked the attendant to the floor and proceeded to take money from the cash register while the defendant pointed the shotgun at the attendant. Brawley testified that as Brown was running out of the station, he heard a loud "boom" emanating from the station. The defendant then grabbed the money, ran to the car, and they drove off.[1]

Once again, Brawley fell asleep. He was awakened by a loud "boom" and discovered that they had stopped. He saw Brown and the defendant running out of a store. They drove off as soon as Brown and the defendant got in the car. Brawley asked the defendant if he was going to share with him any of the money that had been taken from the store. The defendant responded that since Brawley had not done any of the "work," he was not going to get any "pay." Brawley identified the Seven-Eleven store where Susan Pierce was shot as the one the group had been to on

1. The testimony concerning the events at the service station related to the murder of Eric Joins, the station attendant. The defendant was also tried for that murder. He was convicted and sentenced to death. This Court affirmed the conviction and death sentence 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), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983).

the morning of 3 June 1979. Brawley also stated that he had entered into a plea agreement with the State under which he was allowed to plead guilty to being an accessory after the fact to murder. He was sentenced to a ten-year term of imprisonment for that offense.

Linda Massey testified that she also entered into a plea agreement whereby she was allowed to plead guilty to being an accessory after the fact to murder and that she received a ten-year sentence. Massey testified to facts which were essentially the same as those testified to by Brawley. Additionally, she was able to give a more detailed recitation of the events which occurred at the Seven-Eleven store where Ms. Pierce was shot. She testified that after they stopped at the Seven-Eleven, the defendant went inside the store carrying the shotgun. The other man went in also. Massey was able to see a heavy-set white lady wearing a red or orange jacket in the store. Massey stated that when the defendant went into the store, she closed her eyes and prayed. Subsequently, she heard a loud noise coming from the store and she opened her eyes. At that time, she saw the lady grab her chest. The defendant and the other man then ran out of the store and got in the car. The group proceeded to drive away. Later that day, the defendant gave Massey some dollar bills and several rolls of quarters. Massey used this money to make a car payment on 4 June 1979. Evidence was introduced showing that these rolls of quarters had the victim's name, "Susan Verle," written on them.

The State also offered the testimony of Robert Kindley, who testified that at approximately 6:10 a.m. on 3 June 1979, he and his wife passed the Seven-Eleven store on Church Street in Concord. Kindley stated that he saw a black male sitting on the passenger seat of an automobile in the store's parking lot. The man appeared to be tying his shoes.

Evidence was also presented tending to show that one of the defendant's fingerprints was found on the inside of the rear passenger window of the Oldsmobile allegedly used by the group at the time in question.

The defendant did not testify at the sentencing hearing. However, a former employer testified that the defendant had been a good worker. Also, a Charlotte attorney testified that he

had represented the defendant in a personal injury action and that he had found him to be likable and cooperative. The parties stipulated that the defendant had an IQ of 69.

Based upon the evidence introduced during the sentencing phase of the trial, the trial court instructed the jury on two possible aggravating circumstances: (1) whether the murder was committed for pecuniary gain, and (2) whether the murder was part of a course of conduct in which the defendant engaged which included the commission of other crimes of violence against other persons. The trial court also instructed the jury on four possible mitigating circumstances: (1) whether the defendant was gainfully employed when the offense occurred, (2) whether the defendant had an intelligence quotient of 69, (3) whether the defendant conducted himself in a normal business manner with his attorney in his personal injury case, and (4) whether the defendant was twenty-four years old at the time of the offense. The jury was also instructed as to the statutory "catchall" mitigating circumstance—N.C.G.S. § 15A-2000(f)(9). The jury found both of the aggravating factors and each of the mitigating factors which were submitted. The jury found as an additional mitigating circumstance that the credibility of the prosecution's two star witnesses was questionable. The jury went on to find that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances found. We do not here address the correctness of the mitigating factors submitted to and found by the jury. The jury returned a recommendation that the defendant be sentenced to death. Following the recommendation, the trial court entered judgment sentencing the defendant to death.

[1] The defendant presents a number of assignments of error. The dispositive assignment of error, however, concerns several statements made by the prosecutor during his closing argument which insinuated that Ms. Pierce was killed in order to prevent her from identifying the defendant as the perpetrator of the robbery. In order to analyze this issue, it is necessary to briefly examine this Court's decision in *Williams I.*

In *Williams I,* this Court found no error in the defendant's conviction for the first-degree murder of Ms. Pierce. However, we

vacated the defendant's death sentence and remanded the case for a new sentencing hearing based upon the improper submission of the aggravating circumstance set out in N.C.G.S. § 15A-2000 (e)(4), that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. This aggravating factor was submitted on the theory that Ms. Pierce was killed in order to eliminate her as a witness who could later identify the perpetrators of the armed robbery. *State v. Williams*, 304 N.C. at 424, 284 S.E. 2d at 455. We concluded that the evidence did not raise a reasonable inference that this was a motivating factor in the killing, and therefore the trial court erred in submitting this aggravating factor. *Id.* at 425, 284 S.E. 2d at 456. We also held that the error was so prejudicial as to require that the defendant be afforded a new sentencing hearing. *Id.* at 426, 284 S.E. 2d at 456-57.

At the second sentencing hearing, the State presented virtually the same evidence which was presented at the trial. In particular, there was no additional evidence introduced at the second sentencing hearing which would support the contention that Ms. Pierce was killed in order to prevent her from being able to identify the perpetrators of the armed robbery of the convenience store. Therefore, the trial court correctly refrained from submitting the aggravating factor set out in N.C.G.S. § 15A-2000(e)(4). However, at several points during his closing argument, the prosecutor contended to the jury that Ms. Pierce was killed in order to prevent her from identifying the armed robbers. At one point, the prosecutor was discussing the fact that Ms. Pierce had apparently given the robbers all of the money which she had access to. The prosecutor then stated:

> What purpose then the killing? The same purpose as killing the helpless Eric Joins as he lay face down on the concrete floor. Dead witnesses don't testify.

Later, when discussing the stipulated evidence that the defendant had an IQ of 69, the prosecutor stated:

> He has sufficient intelligence to know [that] when you leave witnesses they can identify you.

Later, the prosecutor argued:

> The only reason he killed her was to get her money. That's a rough aggravating circumstance, no temper, no squabble, no fights, no flash of anger; cold, calculated, premeditated, eliminate the witness.
>
> He did it for her money, for pecuniary gain so that she could not later testify against him when he stole the money she had in her possession.

Still later in his argument, the prosecutor stated:

> He took the life of Susan Pierce without passion, without hate, without anger; merely to make sure she couldn't be a witness.

The defendant failed to object to any of these statements, and the trial court did not intervene *ex mero motu*. The defendant now argues that these comments by the prosecutor insinuating that Ms. Pierce's killing was motivated by a desire to eliminate a potential witness against him were grossly improper and require that he be given a new sentencing hearing. We agree.

It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases. *E.g., State v. Riddle*, 311 N.C. 734, 319 S.E. 2d 250 (1984); *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984); *State v. Whisenant*, 308 N.C. 791, 303 S.E. 2d 784 (1983); *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975). Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. *E.g., State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984); *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Wright*, 304 N.C. 349, 283 S.E. 2d 502 (1981). Conversely, counsel is prohibited from arguing facts which are not supported by the evidence. *E.g., State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980); *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). These principles apply not only to ordinary jury arguments, but also to arguments made at the close of the sentencing phase in capital cases. *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

As noted earlier, the defendant failed to object to any of the comments made by the prosecutor which are now assigned as error. However, as we stated in *State v. Jones*, 317 N.C. 487, 346

S.E. 2d 657 (1986), our appellate courts may, in the absence of an objection by the defendant, review a prosecutor's argument to determine whether the argument was so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu* to correct the error. A careful review of the comments in question, particularly in light of our previous decision in this case, leads to the inescapable conclusion that they were so grossly improper as to have necessitated intervention *ex mero motu* by the trial court and the failure to do so constituted prejudicial error requiring that the defendant be given a new sentencing hearing.

Initially, it is beyond dispute that the prosecutor's insinuations that Ms. Pierce was killed in order to prevent her from identifying the perpetrators of the robbery were improper. The prosecution presented *absolutely no evidence whatsoever* which showed that Ms. Pierce's killing was motivated by a desire to eliminate a potential witness. Furthermore, such a contention is not a reasonable inference from the facts which were introduced. In short, the prosecutor improperly argued facts and inferences which were not supported by the evidence.

Furthermore, we feel that the comments were "grossly" improper. This conclusion is based upon several considerations. First, this Court ordered a new sentencing hearing in *Williams I* based on a finding that the evidence failed to support the aggravating factor that the murder was committed to avoid or prevent a lawful arrest or to effectuate an escape from custody, which was submitted on the theory that Ms. Pierce was killed to prevent her from identifying defendant as one of the armed robbers. At the second sentencing hearing, the State presented virtually the same evidence with respect to the motive behind the murder. The prosecution did not request that this aggravating factor be submitted to the jury, and the trial court did not instruct the jury on this aggravating circumstance.

By virtue of our opinion in *Williams I*, coupled with events transpiring at the second sentencing hearing, the prosecutor was on clear notice that there was a complete lack of evidence that witness elimination was a motivating factor in Ms. Pierce's murder. The prosecutor, however, ignored all of these strong indications that there was no evidence to support the assertion that

Ms. Pierce was murdered in order to prevent her from identifying the robbers and proceeded to argue just such a contention to the jury. Also, it is important to note that the improper comments referred to one of the aggravating factors set out in N.C.G.S. § 15A-2000(e). To some degree, these aggravating factors may be thought of as conduct which is so blameworthy as to naturally provoke and justify the feeling that a defendant should receive a more severe sentence than would ordinarily be the case. Pointed and repeated references to aggravating factors not supported by the evidence would obviously have a strong tendency to prejudice the jury against a defendant. Since we found the improper submission of this aggravating factor to be reversible error in *Williams I*, we have no hesitation in concluding that the prosecution's argument repeatedly referring to this factor rose to the level of a gross impropriety. Finally, we note that the objectionable portion of the argument was not a single, isolated remark. On four separate occasions, the prosecutor insinuated that Ms. Pierce was murdered in order to prevent her from identifying the robbers.

For these reasons, we hold that the prosecutor's closing argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu* to correct the error, as we cannot say that there is not a reasonable possibility that had the argument not been made, a different result would have been reached at trial. The defendant is therefore entitled to a new sentencing hearing.

Our holding on the jury argument issue makes it unnecessary to address the remaining assignments of error brought forward by the defendant. However, one other issue will no doubt recur at the new sentencing hearing and on any subsequent appeal therefrom. Conceding, without deciding, that the issue is not properly before this Court, in the interest of judicial economy and in an effort to provide as clear a body of law as possible in the area of capital sentencing, we elect to address this additional issue under our supervisory powers and under Rule 2 of the North Carolina Rules of Appellate Procedure.

[2] As stated previously, one of the aggravating factors submitted to and found by the jury was the aggravating circumstance set out in N.C.G.S. § 15A-2000(e)(6), that the murder was committed for pecuniary gain. As noted by the defendant, the only evi-

dence that the murder was committed for pecuniary gain was the evidence of the armed robbery, the underlying felony which supported the defendant's conviction for first-degree murder under the felony-murder rule. The defendant argues that the submission of the pecuniary gain aggravating factor was improper.

On several occasions, this Court has upheld the use of the pecuniary gain aggravating factor in felony-murder convictions. *E.g.*, *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983); *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). In those cases, we held that submission of this aggravating circumstance in felony-murder cases did not violate an accused's fifth amendment right to be free from double jeopardy, rejecting the defendants' argument that the fact the felony was committed for pecuniary gain was an essential element of the felony murder. The defendant here, however, takes a different approach. He argues that where there is no evidence that the murder was committed for pecuniary gain other than that evidence necessary to support the first-degree murder convictions obtained under the robbery-felony-murder theory, use of the pecuniary gain aggravating factor violates the eighth amendment's proscription against cruel and unusual punishment.

In *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346 (1972), the United States Supreme Court held that a death sentence will not be sustained where the sentencing procedure in question creates a substantial risk that the death penalty will be imposed in an arbitrary and capricious manner. This holding was reaffirmed four years later in *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859 (1976). At the same time, the Supreme Court has invalidated capital punishment schemes requiring the automatic imposition of the death penalty for specified offenses. *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944 (1976). To pass constitutional muster, a capital punishment procedure must provide a meaningful basis for differentiating between the few cases in which the death penalty is appropriate and the many cases in which it is not. *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398 (1980).

Most states, including North Carolina, have attempted to meet this constitutional requirement through the use of a sentenc-

ing procedure which requires the jury to consider specific aggravating and mitigating factors in order to arrive at a sentencing decision. However, in order to be constitutionally valid, an aggravating factor which would support the imposition of the death penalty must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 77 L.Ed. 2d 235, 249-50 (1983).

The defendant contends that because the pecuniary gain aggravating factor is automatically present in every felony-murder conviction in which the underlying felony is a robbery, the use of the aggravating factor in those cases does not distinguish those cases in which the death penalty is justified from those in which it is not. In support of this argument, the defendant cites the opinion of the United States Eighth Circuit Court of Appeals in *Collins v. Lockhart*, 754 F. 2d 258 (8th Cir.), *cert. denied*, --- U.S. ---, 88 L.Ed. 2d 475 (1985). There, the defendant was convicted in Arkansas of capital felony-murder, with robbery constituting the underlying felony. He was sentenced to death based in part upon a finding by the jury of the aggravating factor that the killing was committed for pecuniary gain. The court concluded that this violated the eighth amendment, stating:

> Every robber-murderer has acted for pecuniary gain. A jury which has found robbery murder cannot rationally avoid also finding pecuniary gain. Therefore, the pecuniary-gain aggravating circumstance cannot be a factor that distinguishes some robber-murderers from others. In effect, a robber-murderer enters the sentencing phase with a built-in aggravating circumstance. Since under Arkansas law and the Eighth Amendment as elaborated by the Supreme Court in *Godfrey v. Georgia*, *supra*, only one aggravating circumstance is required to impose the death penalty, the State has no need to show any additional aggravating circumstances at the sentencing phase. Thus, if no other aggravating or mitigating circumstances are found, the jury is left to decide whether to impose death on a robber-murderer without having made any finding that narrows the class of those who have committed this death-eligible crime.

Id. at 264 (footnote omitted). The defendant asks us to adopt the reasoning in *Collins* and hold that the submission of the pecuniary gain aggravating factor in felony-murder cases predicated on an underlying robbery violates the eighth amendment. Believing that *Collins* was erroneously decided, we decline this invitation.

In our view, the court in *Collins* was incorrect in believing that the eighth amendment requires that an aggravating factor must serve to narrow the class of "robber-murderers" to those few robber-murderers deserving of the death penalty. *See id.* (where the court stated: "Therefore, the pecuniary gain aggravating circumstance cannot be a factor that distinguishes some robber-murderers from others."). In *Zant*, the United States Supreme Court stated that an aggravating factor must work to distinguish between those deserving of the death penalty and "others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877, 77 L.Ed. 2d at 250. It is readily apparent from *Zant* that an aggravating factor will comport with the eighth amendment if it serves to narrow the *entire* class of first-degree murder cases to those in which the death penalty is justified. In North Carolina, the entire class of first-degree murderers includes any person who perpetrates a murder by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempted perpetration of any arson, rape, sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon. N.C.G.S. § 14-17 (1981 and Cum. Supp. 1985). We perceive no constitutional requirement that the smaller sub-class of "robber-murderers" must be further narrowed. The fact that a killing is committed for pecuniary gain is a circumstance which legitimately serves to effectively differentiate between *all* persons convicted of first-degree murder and those few who are deserving of the death penalty. This is not, of course, to say that robber-murderers should be or could be automatically sentenced to death. Such a practice would run afoul of the dictates of *Woodson*. The jury must still engage in the finding and balancing of aggravating and mitigating factors before returning a death sentence. We merely hold that the fact that pecuniary gain may be considered as an aggravating circumstance in a robbery-murder case does not constitute a violation of the eighth amendment.

For the reasons stated herein, the verdict rendered in the sentencing hearing and the judgment of death imposed thereon are vacated, and the case is remanded to the Superior Court, Cabarrus County, for a new sentencing hearing.

Remanded for a new sentencing hearing.

Justice BILLINGS concurring in result.

When *Williams I* (*State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981)) was decided by this Court, I was not a member of the Court and did not participate in the decision that the prosecution had "presented *absolutely no evidence whatsoever* which showed that Ms. Pierce's killing was motivated by a desire to eliminate a potential witness." 317 N.C. 474, 482, 346 S.E. 2d 405, 410. Because my review of the record on this appeal and of *Williams I*, unaided by oral argument, does not convince me that submission of the aggravating factor disapproved in *Williams I* was error, I concur only on the basis that the prior decision of this Court is the law of the case, binding upon the prosecution at the second sentencing hearing. Because the prosecutor clearly violated the mandate of this Court that the jury should not be allowed to consider as an aggravating factor that the victim was murdered in order to prevent her from identifying the robbers, I concur in the Court's conclusion that the trial judge erred to the defendant's prejudice in failing to intervene *ex mero motu*, and the defendant is entitled to a new sentencing hearing.

Justice MITCHELL joins in this concurring opinion.

STATE OF NORTH CAROLINA v. GARY JONES

No. 584A85

(Filed 12 August 1986)

1. **Criminal Law § 30— rape—arraignment on lesser degree—no notice of intent to pursue higher degree before jeopardy attached—lesser degree binding**

The trial court erred by entering judgment of conviction for first degree rape and sentencing defendant therefor where the State made a binding election not to pursue the greater degree of the offense by unequivocably arraign-

ing the defendant on second degree rape and by failing thereafter to give any notice whatsoever of an intent to pursue a conviction for first degree rape prior to the jury being impaneled and jeopardy attaching, even though first degree was arguably supported by the short-form indictment.

2. **Criminal Law § 89.3— consistency of pretrial statements—opinion of officer who heard statements—admissible**

The trial court did not err by admitting the testimony of an officer as to the consistency of various statements made to him by a State's witness where the testimony dealt with pretrial statements rather than a pretrial statement and trial testimony and where the question in context was not posed for the purpose of corroboration but to demonstrate the reasonableness of the State's concessions in entering into a plea agreement with the witness.

3. **Criminal Law § 165— prosecutor's argument—noncapital case—no objection—review for gross impropriety**

Appellate review of a prosecutor's argument for gross impropriety in the absence of an objection at trial is not limited to capital cases, but may be invoked as well in noncapital cases.

4. **Criminal Law § 102.6— prosecutor's argument—reference to sensational event outside evidence—not grossly improper**

A prosecutor's reference in his closing argument in a trial for rape, robbery, murder and breaking and entering to a highly sensational contemporaneous event which was not a part of the evidence and his indirect reference to media coverage was inappropriate but did not require the trial court to intervene *ex mero motu*

5. **Constitutional Law § 63— death qualified jury—not unconstitutional**

Defendant was not entitled to a new trial on the grounds that death qualified juries are unconstitutional.

BEFORE *Llewellyn, J.*, at the 3 June 1985 Criminal Session of Superior Court, WAYNE County, defendant was convicted of second-degree murder, first-degree rape, common law robbery, and breaking or entering. The defendant received a sentence of fifty years on his conviction for second-degree murder. A consecutive sentence of life imprisonment was imposed for the conviction of first-degree rape. A further consecutive sentence of eight years was imposed for the conviction of breaking or entering, and a concurrent eight-year sentence was imposed for common law robbery. 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 as to the remaining convictions was allowed 15 January 1986. Heard in the Supreme Court 9 June 1986.

Lacy H. Thornburg, Attorney General, by Marilyn R. Mudge, Assistant Attorney General, for the State.

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

MEYER, Justice.

The evidence for the State tended to show that 54-year-old Mary Taper was found strangled to death in her room at the Southern Belle Motel in Mount Olive on the morning of 7 June 1984. Ms. Taper, who had worked for five years as a cook at the Southern Belle Restaurant, was the "common law wife" of Aldine Jones, the defendant's father. Ms. Taper was living at the motel while her home was being rebuilt after it was partially destroyed by a tornado.

Ms. Taper was last seen alive at 9:00 p.m. on 6 June 1984 by Ms. Daisy Westbrook, manager of the motel. When Ms. Westbrook returned from church that evening and parked her car in front of Ms. Taper's room, she observed Ms. Taper at the window closing the curtains. Shortly before that time, another employee had seen a black male wearing a cap ride up on a dark colored bicycle and park it near Ms. Taper's room.

When Ms. Taper failed to report for work at 5:30 a.m. on 7 June and did not answer her telephone, Ms. Joyce James, assistant manager of the restaurant, notified the motel manager, who met her at Ms. Taper's room. The dead bolt was not engaged, and Ms. James opened Ms. Taper's door with a key. Inside the room, they found Ms. Taper's body on the floor, her feet parted and her arms stretched above her head. The body was clothed only in a brassiere and blouse; the blouse was pulled up around the shoulders. Ms. Taper's bed appeared not to have been slept in but her pocketbook and personal items were scattered across the bed.

An autopsy conducted by Dr. Robert L. Thompson revealed extensive injuries to Ms. Taper's face and neck consistent with the victim's having been struck several times in the face with a blunt object. Dr. Thompson's opinion was that the cause of death was manual strangulation. Dr. Thompson also noted bruises and tears in the vagina consistent with forceful penetration by a foreign object. Semen was located in the vagina and on the vic-

tim's thigh. Analysis of blood, hair, and semen samples failed to "connect anyone with the crime"; none of the latent fingerprints lifted at the scene proved to be of sufficient quality for comparison.

State's witness Decarol Swinson testified that on 6 June 1984, she was sharing a bedroom in Mount Olive with the defendant, his sister Doris, her boyfriend, and Doris' child. Also living in the house were defendant's mother, grandmother, sister Renee, and Renee's four children. Ms. Swinson testified that defendant was at home during the early evening hours of 6 June but that he left at around 8:00 p.m. on a red ten-speed bicycle; he was wearing a cap. When he returned home at around 11:00 p.m., defendant was carrying a brown paper bag. He told Ms. Swinson that he wanted to talk, and she accompanied him outside to the railroad track in front of the house. The defendant told Ms. Swinson that there was money in the bag and that "him and some friend [Charles Faison] hit somebody up side the head and robbed them." The couple returned to the house and sat on the bed, where defendant counted the money—over one hundred dollars—then placed the bag of money in the bedroom loft. The next morning, 7 June 1984, the defendant told Ms. Swinson that he had strangled Ms. Taper "because she was going to tell on him."

On 4 October 1984, Ms. Swinson gave a statement to Captain Glenn Odom, describing the events of June 6 and 7. She explained that she had waited four months to make a statement because she was afraid of the defendant. When Captain Odom and two other officers arrested the defendant the next day at his home, defendant broke away and fled, but was overtaken and placed in custody.

During December 1984, defendant's second cousin, David McCullen, was confined in the same jail cell with the defendant while McCullen's cell was being painted. Pursuant to a plea agreement, McCullen, who was charged with numerous offenses unrelated to those under consideration here, agreed to testify as to the contents of statements made to him by the defendant while they were in the same jail cell. The defendant told McCullen that he and Joseph Leach had ridden bicycles to the Southern Belle Motel, that he had been there earlier in the day, that on the second occasion they hid the bicycles in the bushes, that they knocked

on Mary Taper's door and asked her about money, that Leach grabbed her around the neck and defendant hit her with his fist, that she passed out and they pulled her into the room and had sexual intercourse with her, that defendant strangled her with his hands, and that they took the money from her pocketbook and later divided it.

Defendant offered witnesses who testified that he had been at home playing cards all evening on 6 June 1984. The defendant did not take the stand.

I.

[1] Defendant first assigns as error entry of the judgment of conviction of *first-degree* rape and imposition of a life sentence therefor. The uncontroverted record indicates that Count II of the four-count indictment was captioned "Second Degree Rape" and that the judge's order for arraignment, as well as the clerk's minutes of arraignment dated 26 March 1985, list Count II of 84CRS13515 as second-degree rape. At arraignment, defendant entered a plea of "not guilty" to second-degree rape. At no time prior to or during the trial did the prosecutor indicate that the State intended to pursue a conviction for first-degree rape.

The first mention of first-degree rape appears in the transcript of a discussion among the trial judge, the prosecutor, and defense counsel after the close of all the evidence. When defense counsel argued that the evidence could at most support second-degree rape because it tended to show that the victim could have been unconscious or dead at the time the alleged rape occurred, the trial judge observed, "Well, that's all the indictment says, second degree." However, after the prosecutor proposed an instruction on first-degree rape, the trial judge denied defendant's motion "to dismiss the indictment because she was dead" at the time the rape occurred and stated, "I think I should or might consider that there was serious personal injury inflicted or[,] taking another prong of the State's evidence[,] was aided or abetted by another person, so that's denied. It's going to be sent in on first and second degree rape." The trial judge reiterated his intent during the charge conference and, indeed, charged the jury as to both degrees of the offense. The jury returned a verdict of guilty of first-degree rape, and the defendant received the mandatory

life sentence to run at the expiration of his fifty-year sentence for second-degree murder.

On this appeal, defendant candidly acknowledged his failure to enter timely objections. However, after the trial, defendant filed a motion for appropriate relief which was properly denied on the grounds that, because it was asserted more than ten days after entry of judgment, jurisdiction for such motion was in the appellate division, pursuant to N.C.G.S. § 15A-1418(a). Although there is no indication of record that such motion was filed in this Court, defendant has excepted to entry of judgment on the conviction for first-degree rape and to imposition of a life sentence. We must therefore examine the question of whether defendant's conviction of first-degree rape and the life sentence imposed therefor were properly entered against him.

Count II of the four-count bill of indictment is captioned "Count II: Second Degree Rape 14-27.3, 1122," and the text of Count II charges defendant in accordance with the short-form rape indictment statute, N.C.G.S. § 15-144.1. The body of Count II alleges:

> COUNT II: AND THE JURORS FOR THE STATE UPON THEIR OATH DO FURTHER PRESENT that on or about the 6th and 7th days of June, 1984 in Wayne County Gary Elwood Jones unlawfully, wilfully, and feloniously did ravish, abuse and carnally know Mary Pearl Taper, by force against the victim's will.

It is now well settled that the short-form indictment is sufficient (1) to protect a defendant's right to be advised of the accusations against him and to avoid double jeopardy and (2) to permit the court to enter the appropriate judgment. *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984); *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978). Thus, the indictment was "*sufficient* in law as an indictment for rape in the first degree" and would support a verdict for any lesser-included offense. N.C.G.S. § 15-144.1(a) (1983) (emphasis added). However, whether the fundamental concerns expressed in *Sills* are protected when the *caption* of a short-form indictment specifies an offense less serious than the maximum offense supported by the indictment and the defendant is nevertheless ultimately convicted of the maximum offense is a question not heretofore addressed by this Court.

Defendant acknowledges that this Court held in *State v. Bennett*, 271 N.C. 423, 156 S.E. 2d 725 (1967), that "[t]he caption of an indictment, whether on the front or the back thereof, is not a part of it and the designation therein of the offense sought to be charged can neither enlarge nor diminish the offense charged in the body of the instrument." *Id.* at 425, 156 S.E. 2d at 726 (citations omitted). In *Bennett*, the caption of the indictment alleged the felony of third offense escape, but the body of the indictment, required to contain allegations of facts showing times and places of previous escapes, contained no mention whatsoever of any former escape. This Court held that Bennett could not plead guilty to an offense for which he had not been charged (third offense escape), reversed his felony conviction, and remanded for entry of judgment on the lesser-included misdemeanor.

We might question whether the *Bennett* rule should apply in circumstances where, as here, a statutorily authorized short-form indictment, sufficient to charge first-degree rape and every lesser-included offense, contains a caption listing the offense charged as "second degree rape" followed by a citation to the statutory definition of second-degree rape. However, we need not decide that question here, as we hold that the State made a binding election not to pursue a verdict of guilty of first-degree rape, thereby effectively assenting to an acquittal of the maximum offense arguably charged by the indictment. Without regard to whether the caption of the indictment could operate as an election by the State to abandon prosecution of first-degree rape, the State made this election by unequivocably arraigning the defendant on second-degree rape, by having that charge entered of record in the clerk's minutes of arraignment, and by failing to express the State's intent to pursue a conviction for first-degree rape at any time before the jury was impaneled and jeopardy attached.

In *State v. Hickey*, 317 N.C. 457, 346 S.E. 2d 646 (1986), we reviewed the evolution in this state of the *Miller/Pearce* "State's election" rule and concluded that recent cases have incorrectly applied the principle announced in *State v. Taylor*, 84 N.C. 773 (1881). We stated in *Hickey*:

> We conclude that justice does not require the rule stated in *Miller* and *Pearce*: that a prosecutor's pre-trial announcement of his election to seek conviction only for some of the

> offenses charged in the indictment or only for lesser included offenses has the *immediate* effect of an acquittal of the other or greater charges in the indictment. The better rule which we now adopt for this jurisdiction is that such an announcement by the district attorney at any time prior to trial does not immediately or automatically have the effect of a verdict of acquittal. Instead, such an announced election by the district attorney becomes binding on the State and tantamount to acquittal of charges contained in the indictment but not prosecuted at trial *only* when *jeopardy has attached* as the result of a jury being impaneled and sworn to try the defendant. *See State v. Hunt*, 128 N.C. 584 (431 in the revision), 38 S.E. 473 (1901); *State v. Sorrell*, 98 N.C. 738, 4 S.E. 630 (1887); *see also State v. Shuler*, 293 N.C. 34, 42, 235 S.E. 2d 226, 231 (1977). Until that time the district attorney may withdraw his previously announced election and prosecute the defendant for all crimes charged in the indictment. We emphasize, however, that proper notice of the withdrawal and new election to prosecute must be given the defendant sufficiently in advance of trial to insure the defendant's rights of due process and effective representation of counsel.

State v. Hickey, 317 N.C. at 466, 346 S.E. 2d at 652-53.

Applying the *Hickey* rule to the facts of the instant case, we hold that by unequivocably arraigning the defendant on second-degree rape and by failing thereafter to give *any notice whatsoever*, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape arguably supported by the short-form indictment, the State made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape.

In light of the fact that the State made a binding election not to pursue a first-degree rape conviction and thereby effectuated the equivalent of a verdict of not guilty as to that offense, it was clearly error for the trial judge to instruct the jury on first-degree rape, to submit that offense as a possible verdict on the jury verdict sheet, to enter judgment of conviction for first-degree rape, and to impose a life sentence upon that conviction.

In finding the defendant guilty of first-degree rape, the jury necessarily found the existence of all the necessary elements of second-degree rape, a lesser-included offense. *State v. Perry*, 291 N.C. 586, 591, 231 S.E. 2d 262, 266 (1977). For error committed in the trial court resulting in the defendant's conviction of first-degree rape, we vacate the judgment of conviction for that offense and the life sentence imposed therefor and remand the matter for entry of judgment of conviction for second-degree rape and for a resentencing hearing on second-degree rape. This holding renders moot defendant's second assignment of error regarding jury instructions on a new theory of liability for first-degree rape.

II.

[2] Defendant next assigns as error the admission of testimony by Glenn Odom, Captain of the Investigative Division of the Wayne County Sheriff's Department, as to the consistency of various statements made to him by State's witness David McCullen. Captain Odom testified that in January 1985, he received word from a jailer that David McCullen wished to see him. Odom picked up McCullen from the jail and drove him to the Sheriff's office where McCullen gave Odom a statement, the contents of which Odom did not relate at trial. Odom committed the statement to writing and McCullen signed it. Some two or three days later, Captain Odom conveyed the information contained in the statement to District Attorney Donald Jacobs, and McCullen was subsequently brought to the District Attorney's office where he made a further statement. Following these events, McCullen entered into a plea bargain arrangement and was released from jail on bond.

At trial, only McCullen testified as to the information allegedly contained in the statements he made prior to trial, and the written statements themselves were not introduced. Before McCullen took the stand to testify as to his statements (in which he allegedly recounted defendant's admission to him that defendant and Joseph Leach had committed the crimes for which defendant was on trial), the following exchange took place on direct examination of Captain Odom:

Q. During the time that David McCullen was interviewed in my [District Attorney's] office, did he make any statement—

STRIKE IT—was his statement consistent with the statement that he had made to you?

MR. TAYLOR: Objection.

THE COURT: Overruled. EXCEPTION NO. 12

A. Yes.

Defendant contends that the foregoing constituted an effort to corroborate McCullen's trial testimony in an impermissible manner. Defendant argues that it was within the province of the jury, and not within that of Captain Odom, to determine whether McCullen was consistent in his accounts and that it was the jury which must decide whether Odom's testimony in fact corroborated that of McCullen. 1 Brandis on North Carolina Evidence § 52 (1982).

Defendant refers to the decision of the Court of Appeals in *State v. Norman*, 76 N.C. App. 623, 334 S.E. 2d 247, *disc. rev. denied*, 315 N.C. 188, 337 S.E. 2d 863 (1985), in which an undercover law enforcement officer had been allowed to testify at trial that a witness' post-arrest, pretrial statements to him were consistent with the witness' trial testimony. In *Norman*, the Court of Appeals stated:

> [The officer] was not asked to relate to the jury what [the witness] had said to him, only to give his opinion as to whether whatever was said by [the witness] before trial was "essentially what he testified to." In our opinion, this carries the liberality of the consistent statement rule too far. At the least, [the officer] should have been put to the test of recalling for the jury what [the witness] had told him before trial before giving his opinion as to whether [the witness] had been consistent in his pre-trial statements and trial testimony.

Id. at 627, 334 S.E. 2d at 250.

The defendant contends that the context of the officer's testimony in *Norman* is "indistinguishable" from that in the instant case. We do not agree, even assuming, *arguendo*, that the Court of Appeals was correct in finding reversible error in *Norman*. First, the officer in *Norman* testified to the effect that his conversations with the witness *before trial* were consistent with

the witness' *trial testimony.* In the instant case, Captain Odom was questioned regarding his opinion as to the consistency, *inter se,* of McCullen's several *pretrial* statements. McCullen had not yet testified at trial.

Second, in *Norman,* upon objection by defense counsel to the prosecutor's question, the trial judge gave a limiting instruction on corroboration of the witness' trial testimony. The Court of Appeals' brief discussion in *Norman* appears to assume, correctly it seems, that the prosecutor's question, "And he told you during those conversations essentially what he testified to here today?" was intended to, and did in fact, elicit an affirmative response tending to bolster the credibility of the witness' earlier trial testimony via corroboration by evidence that the witness had made prior consistent statements.

The context in which the challenged testimony was given in the instant case convinces us that the prosecutor's question was not posed for the purpose of corroboration. The line of questioning preceding Odom's response regarding the consistency of McCullen's pretrial statements disclosed the fact that, after McCullen had made these statements, he entered into a plea bargain arrangement with the District Attorney's office. Much was subsequently made by the defendant of the fact that McCullen's alleged pretrial statements were made at a time when he was incarcerated pending disposition of numerous criminal offenses with which he was charged and that, after McCullen made these statements, he was released on bond but shortly thereafter was arrested on new charges of the same nature. Nonetheless, pursuant to his plea agreement, and presumably in exchange for his testimony in the instant case, McCullen received a sentence substantially less severe than the maximum sentence to which a conviction of all the alleged offenses would have exposed him.

The purpose for which the prosecutor questioned Captain Odom regarding the consistency of McCullen's pretrial statements appears, from the context in which the question was asked, to have been to demonstrate to the jury the reasonableness, at the time, of the State's concessions in entering into a plea agreement in McCullen's cases. The prosecutor obviously anticipated defendant's frontal attack on McCullen's credibility as well as on his and the State's motivation for engaging in plea bargain negotiations

in McCullen's cases in exchange for State's evidence in the instant case. The investigating officer's opinion as to the reliability of McCullen's various pretrial statements, as evidenced by their consistency over time, is certainly relevant in the State's understandable effort to demonstrate the reasonableness of its agreement with him in order to procure valuable, reliable testimony in its prosecution of the defendant in this case.

Therefore, because the challenged testimony was offered, not as corroboration of McCullen's forthcoming trial testimony, but rather by way of explanation of the State's grounds for relying on McCullen's statements in entering plea bargain arrangements with him, a matter entirely collateral to the issue of the defendant's guilt, we find no merit in this assignment of error.

III.

In his next assignment of error, defendant challenges certain portions of the prosecutor's closing argument which he contends amounted to a violation of his right to a fair trial. Defendant had argued at trial that State's witness Decarol Swinson was a "scorned woman," inferring that her fury provided a motivation for fabrication of her testimony to the effect that defendant had confessed to her that he had robbed and strangled Mary Taper. In response to this theory, the prosecutor pointed out that Ms. Swinson continued to profess her love for the defendant even after she had allegedly learned of his involvement in the crimes. The prosecutor then argued to the jury:

> [I]t was argued to you and I heard it that certainly that's not the type of individual you would want to marry if you know they killed somebody. Well, that may be so for you, but that certainly wasn't so for that lady that wanted to marry Briley in Virginia right before his execution and did in fact and she was from North Carolina.

Although not a part of the record, defendant explains for this Court on appeal that "[t]he reference, of course, was to a matter entirely unsupported by any evidence in the case—the controversial case of James Briley, a Virginia death row inmate who was executed on April 18, 1985. Briley figured prominently in the news in the month and one-half preceding this defendant's trial. His intentions to marry a North Carolina woman . . . were widely publicized in late March 1985."

The defendant lodged no objection at trial to this brief reference to the Briley matter, yet he now contends that the reference "added substantial prejudice to the case."

Another of defendant's theories at trial was that Ms. Swinson's version of the events contained "nothing but simple information anyone could have fabricated." He points out in particular that her pretrial "version" made no reference to an accomplice or to any sexual attack. Although he did not object at trial, defendant assigns as error the failure of the trial judge to intervene *ex mero motu* when the prosecutor argued to the jury:

> [D]oes it stand to reason that Decarol would not know about the sex and you can say, well, Mr. Jacobs, that doesn't mean anything. Well, if she fabricated, *you knew that she knows when she gave her statement in October that there was evidence that the woman had been sexually assaulted* and she has never volunteered that information, which would be a fact that you would look at to determine, well, maybe she did hear what she says she heard because *if she was fabricating and wanting to do the will of her mother, then she would try to pile on or she might try to pile on every harmful fact she could think of and you know and I know she knew the fact that she was sexually assaulted. Some of you knew it before you came or knew something of the case before you came to the court, heard about it, read about it. She had that much interest in Gary you know that she probably had that information too . . . .*

(Emphasis added by the defendant.)

[3] Ordinarily, objection to the prosecutor's jury argument must be made prior to the verdict in order for the alleged impropriety to be reversible on appeal. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982); *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982); *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978). Failure to lodge an objection constitutes a waiver of the alleged error. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566.

We have said that because of the severity of the sentence in a death case, we will review alleged improprieties in the prosecutor's jury argument in a capital case despite the defendant's failure to enter a timely objection. *E.g.*, *State v. Brock*, 305 N.C. 532,

290 S.E. 2d 566; *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674; *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912, 50 L.Ed. 2d 278 (1976); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976); *State v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664 (1953). These cases establish that in capital cases, we may review the prosecutor's argument to determine whether the argument was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error.

Other cases, however, appear to support the position that appellate review of a prosecutor's argument for gross impropriety is not limited to capital cases, but may be invoked in noncapital cases as well. *See, e.g., State v. Mason*, 317 N.C. 283, 345 S.E. 2d 195 (1986); *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983); *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978); *State v. Woods*, 56 N.C. App. 193, 287 S.E. 2d 431, *cert. denied*, 305 N.C. 592, 292 S.E. 2d 13 (1982).

We hold that appellate review of a prosecutor's argument for *gross* impropriety in absence of an objection at trial is not limited to capital cases, but may be invoked as well in noncapital cases.

[4] The law regarding the scope of counsel's jury arguments has been stated as follows:

> "We have consistently held that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. Even so, counsel may not employ his argument as a device to place before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs and opinions not supported by the evidence[.] It is the duty of the trial judge, upon objection, to censor remarks not

> warranted by the evidence of the law and, in cases of gross impropriety, the court may properly intervene, *ex mero motu*." (Citations omitted.)

State v. Williams, 314 N.C. 337, 358, 333 S.E. 2d 708, 722 (1985) (quoting *State v. Covington*, 290 N.C. 313, 327-28, 226 S.E. 2d 629, 640 (1976)).

We agree that the prosecutor's reference to the Briley matter, which was not part of the evidence in this case and was a highly sensational, contemporaneous event, and the indirect reference to media coverage were inappropriate. However, we do not find that these references "so exceeded the bounds of permissible argument" or amounted to such gross impropriety as to require the trial court to intervene *ex mero motu* and instruct the jury to ignore the prosecutor's comments. *See State v. Williams*, 314 N.C. 337, 358, 333 S.E. 2d 708, 722. This assignment of error is therefore overruled.

IV.

[5] By his final assignment of error, defendant contends that he "is entitled to a new trial because the constitution prohibits a death qualified jury to pass on the defendant's guilt or innocence." For reasons set forth in *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986), this assignment of error is without merit.

The judgment of defendant's conviction for first-degree rape, and the life sentence entered thereon, is vacated. The case is remanded to the Superior Court, Wayne County, for entry of judgment of conviction for second-degree rape and for appropriate resentencing. We find no other error.

Vacated and remanded in part.

STATE OF NORTH CAROLINA v. DAVIS GRANT BARBER

No. 511A85

(Filed 12 August 1986)

1. **Criminal Law § 88.1— inconsistent statements—cross-examination not unduly limited**

The trial court did not violate defendant's right to confront and cross-examine the State's witnesses by refusing to allow him to cross-examine the six-year-old rape victim about prior inconsistent statements she made during the competency *voir dire* where defendant was allowed to ask the victim substantially the same questions both on *voir dire* and later before the jury without objection, and defendant failed to show that the verdict was improperly influenced by the court's ruling.

2. **Criminal Law § 82— clergy-communicant privilege inapplicable**

The clergy-communicant privilege of N.C.G.S. § 8-53.2 did not bar a witness's testimony about statements made to him by defendant where (1) the witness was not an ordained minister or clergyman at the time defendant confessed to him, and (2) the only purpose of defendant's visit to the witness was to confide in a friend and not to seek spiritual comfort and guidance.

3. **Criminal Law § 82— clergy-communicant privilege—no discretion in court to require disclosure**

Under the 1967 amendment to N.C.G.S. § 8-53.2, the trial courts have no discretion to compel disclosure when the clergy-communicant privilege exists.

4. **Criminal Law § 102.8— comments on defendant's failure to testify—harmless error**

Assuming *arguendo* that the prosecutor's comment during jury argument that defendant was exercising his *Miranda* rights "right now to have this trial before you" and his comments about "uncontradicted evidence" of penetration amounted to improper comments on defendant's failure to testify, the trial court's error in overruling defendant's objections to these comments was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt. N.C.G.S. § 15A-1443(b).

APPEAL by the defendant from a judgment entered on 1 May 1985 by *Owens, J.*, in Superior Court, CALDWELL County.

The defendant was charged in a bill of indictment, proper in form, with two counts of first degree rape of his five-year-old adopted daughter. The jury found the defendant guilty on both counts of first degree rape. The trial court imposed two life sentences to run concurrently. The defendant appealed to the Supreme Court as a matter of right under N.C.G.S. § 7A-27(a). Heard in the Supreme Court on 11 March 1986.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell and Steven F. Bryant, Assistant Attorneys General, for the State.

Malcolm R. Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant has brought forward assignments of error by which he contends that the trial court erred in refusing to allow the defendant to cross-examine the six-year-old victim about testimony she gave during the competency *voir dire*, that the trial court erred in admitting the testimony of Michael Barrier in violation of the clergy-communicant privilege, and that the trial court permitted the prosecutor to impermissibly comment on the defendant's failure to testify. The assignments and contentions are without merit.

The defendant was charged with the first degree rape of his five-year-old adopted daughter. The trial court conducted a *voir dire* to determine whether the child, who was six at that time, was competent to testify. After questioning of the child by the prosecutor and the defense attorney, the trial court made findings of fact and concluded that the witness was competent to testify.

The child testified that she stayed with the defendant, her father, when her mother was in the hospital having a baby. She testified in substance that during that time, the defendant engaged in sexual intercourse with her. She also testified concerning another occasion on which the defendant had "done the same thing." The second offense occurred when her mother left her at home with the defendant and her brother.

The child first told her maternal grandmother about these acts by the defendant while her grandmother was giving her a bath. At that time the child's vagina appeared red and she said that it hurt. In response to her grandmother's questions, the child told her grandmother what had occurred and that the defendant had done this "lots of times."

Sue Thomas, the child's grandmother, corroborated her granddaughter's testimony. Thomas stated that while she was giving the child a bath on 30 May 1984, the child refused to sit

down in the bathtub. When she asked the child if anyone had touched her "private parts," the child told her that the defendant had touched her vagina. Thomas described the child's vagina as being "red and inflamed." Thomas questioned her further about the incident. The child told her that the defendant had removed her panties and "told her that he was going to stick it all the way up in her." The child also told her grandmother about the other incident which had occurred when her mother had been away.

Lisa Barber, the child's mother and the defendant's wife, gave testimony tending to corroborate the testimony of the child and Thomas.

Dr. Thomas Cruden, a physician in family practice, testified to the results of his medical evaluation of the child on 31 July 1984. He testified that the hymen ring appeared more open than one would expect for a five-year-old girl. He further testified that the anterior fourchette appeared to be scarred. Dr. Cruden opined that these findings were abnormal and "consistent with some form of relative blunt pressure or trauma in the area long enough ago to have healed."

After a *voir dire* hearing was conducted, Detective J. J. Amelia of the Lenoir Police Department testified that he informed the defendant of his Miranda rights. Amelia testified that the defendant stated he had fondled his adopted daughter and had rubbed his penis against her vagina.

Michael Barrier testified that he was a friend of the defendant and had previously worked with him. Barrier testified that in late May 1984, the defendant came to his house, was very upset and wanted to talk. The defendant objected to further testimony concerning the conversation between Barrier and the defendant on the ground that Barrier is a preacher and the communication between them was privileged. The trial court conducted a *voir dire* hearing and determined that Barrier was neither ordained nor licensed as a minister. The trial court then concluded the clergy-communicant privilege of N.C.G.S. § 8-53.2 was inapplicable.

Barrier testified that the defendant told him he was afraid. Barrier also testified that "[defendant] said he tried to put it in but when she cried and said it hurt, he said he didn't go all the way with it and he pulled it out and said I will not do it again."

[1] By his first assignment of error, the defendant contends that the trial court abridged his right to confrontation and cross-examination by refusing to allow him to question the victim in the presence of the jury about her inconsistent testimony during the competency *voir dire*. The defendant contends that he had an absolute right to cross-examine the victim on matters regarding her credibility. We find no error.

During the competency *voir dire*, the prosecutor asked the child victim, "Is it good or bad to tell the truth?" She replied "Bad." The prosecutor again asked whether it was good or bad to tell the truth. The defendant's counsel's objection was overruled. The child answered "Bad" and then changed her answer to "Good." On recross-examination, the defendant's counsel asked the child:

> You said you told this gentleman right here that it is bad to tell the truth, and it is bad to tell the truth?

The prosecutor objected on the ground that the question had been previously asked and answered. The trial court sustained the objection on the ground the victim's answer was in the record. The trial court made the appropriate findings of fact and concluded that the child was a competent witness. The defendant did not object to the trial court's conclusion of competency.

On cross-examination before the jury, the defendant's counsel attempted to question the child about her testimony during the competency *voir dire*. The following transpired:

> Q. And you told the judge awhile ago, did you not, the gentleman up here . . .
>
> MR. JONES: Objection to any statement made on voir dire.
>
> COURT: Sustained.
>
> MR. PALMER: Your Honor, I want her answer in the record.
>
> Q. You told the judge awhile ago did you not that it is bad to tell the truth?
>
> MR. JONES: Objection.
>
> COURT: Sustained.

> Q. And you told the judge awhile ago, did you not, that you know what a lie is?
>
> MR. JONES: Objection.
>
> Q. Did you not?
>
> MR. JONES: Objection. I object to any further questions along this line and move that they be disallowed and put in at a later time.
>
> COURT: Objection is sustained.
>
> Q. Sweetheart, you said that you were . . . went to church some time with your nanny, did you not?
>
> MR. JONES: Objection.
>
> A. Yes.
>
> MR. JONES: Object to questions on the voir dire being asked. Move to strike all of this line of questioning.
>
> COURT: Sustained as to the line of questioning starting with, you said.

The defendant contends he attempted to cross-examine the child by confronting her with prior inconsistent statements from the competency *voir dire*. The defendant contends that the trial court's ruling denied him the right of engaging in permissible cross-examination. *State v. Green*, 296 N.C. 183, 250 S.E. 2d 197 (1978); *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *Citizens Bank v. Motor Co.*, 216 N.C. 432, 5 S.E. 2d 318 (1939).

We recognize the importance of the defendant's constitutional right to confront and cross-examine the State's witnesses. Nevertheless, this Court has stated that:

> While it is axiomatic that the cross-examiner ought to be allowed wide latitude, the trial judge has the responsibility to exercise his discretion in such a way that unduly repetitive and argumentative questioning, as well as inquiry into matters which are only peripherally relevant, are banned.

State v. Royal, 300 N.C. 515, 528, 268 S.E. 2d 517, 526 (1980). Since the scope of cross-examination is largely within the trial court's discretion, its rulings will not be held to be error in the absence

of a showing that the verdict was improperly influenced by the limited scope of the cross-examination. *State v. Ford*, 314 N.C. 498, 505, 334 S.E. 2d 765, 770 (1985); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982).

The defendant has failed to make a showing that the verdict was improperly influenced by the trial court's ruling. A review of the record convinces this Court that the defendant was allowed to ask the child substantially the same questions both on *voir dire* and later before the jury without objection. The trial court had no duty to require her to answer them again. *See State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1976). The defendant's first assignment of error is without merit.

[2] By his second assignment of error, the defendant contends that the trial court erred in allowing the testimony of the State's witness Michael Barrier. The defendant contends that his statements to Barrier are privileged under the clergy-communicant privilege. N.C.G.S. § 8-53.2 provides:

> No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

The clergy-communicant privilege is not applicable in the case *sub judice*.

A *voir dire* was conducted by the trial court to determine the applicability of the clergy-communicant privilege. Michael Barrier testified that when the defendant came to talk to him, they were friends and had previously been co-workers. Although they were not members of the same church, they had attended church together several times. After being asked whether he was an ordained minister, Barrier responded:

> No, I am not ordained. I can explain this. I am a licensed exhorter by the Church of God. At the time that Grant came and talked to me I had no licenses of any kind with any organization. I had been licensed with the Christian Ministry out of Tennessee and they [sic] had expired at that time. My license was invalid at the time I talked to him. I was still conducting services at times but as far as to say ordianed [sic] minister I was not becuase [sic] to be such I had to have the hands of an ordianed [sic] minister laid upon me and I had not. I am a licensed exhorter right now and I got the license in July or August of 1984.
>
> Q. How long have you been a friend of Mr. Barber?
>
> A. Approximately four years.
>
> Q. You become a friend of his as a fellow employee?
>
> A. Fellow employee and he knew at the time I was conducting services and spreading the word but as far as being ordianed [sic], I did not have any such license at that time.
>
> . . . .
>
> When Grant talked to me, he only asked me not to tell anyone because he didn't want it all exposed and hurt . . . [the victim] or anyone else and I didn't go anywhere to tell anybody but I told my wife for I don't keep nothing from my wife as far as telling her things but I did not tell anyone at the time.

The trial court concluded that Barrier was neither an ordained minister of an established church nor a clergyman and that the statute, N.C.G.S. § 8-53.2, was inapplicable.

Our research has revealed a paucity of cases involving the application of the clergy-communicant privilege. A review of these few cases, the *voir dire* testimony, and the statute leads us to the conclusion that the trial court was correct in concluding that the privilege was inapplicable.

Our conclusion is not based on a determination that the Christian Ministry of Tennessee from which Barrier received a license for a ten dollar fee is not an established church within the meaning of the statute. *See generally State v. Lynch*, 301 N.C.

479, 272 S.E. 2d 349 (1980); *State v. Bray*, 35 N.C. 289 (1852). Instead, we conclude that the clergy-communicant privilege did not bar Barrier's testimony for two reasons. First, Barrier was not an ordained minister or clergyman at the time the defendant confessed to him. Second, the statements made by the defendant were not "entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office . . . wherein such person so communicating such information . . . is seeking spiritual counsel." *See State v. West*, 317 N.C. 219, 345 S.E. 2d 186 (1986). *See generally* Note, *Evidence—Privileged Communications—The New North Carolina Priest-Penitent Statute*, 46 N.C. L. Rev. 427 (1968).

During the *voir dire*, Barrier testified that at the time the defendant confessed to him, he was not an ordained or licensed minister of any church and did not hold any office in any church. He had preached from the pulpit several times and had taught Sunday School. Although Barrier "would spread the Gospel" as often as he was allowed, the evidence is clear that he was not a person the statute was enacted to cover.

Barrier also testified that he and the defendant had been friends since they had worked together at the same plant. In *Burger v. State*, 238 Ga. 171, 231 S.E. 2d 769 (1977), the court refused to apply the priest-penitent privilege. In *Burger*, as here, the minister-witness had been the defendant's friend and frequent companion. The court found that the defendant did not make the statements while seeking spiritual comfort and guidance but that they were conversational statements to a friend. The same is true in the case *sub judice*.

The defendant cites *State v. Jackson*, 77 N.C. App. 832, 336 S.E. 2d 437 (1985), in which statements made by the defendant to a minister who was his aunt and also the victim's mother were held to be privileged. In *Jackson*, the minister visited her nephew, the defendant, several times while he was in jail. During her visits, they prayed together and she sought to comfort him. The Court of Appeals stated that "[h]is admissions came after they prayed together. The comfort and encouragement she gave him can fairly be described as spiritual counsel." 77 N.C. App. at 834, 336 S.E. 2d at 438.

We find the facts in the present case more similar to those of the *Burger* case than to those of *Jackson*. In the case *sub judice*, the defendant asked Barrier not to tell anyone about their conversation to avoid hurting the victim. The evidence clearly establishes that the only purpose of the defendant's visit was to confide in a friend.

[3] The trial court further concluded that "even if said statute is applicable the court is of the opinion and concludes as a matter of law that in the interest of justice this testimony should be allowed." Although this was error, it was not prejudicial.

The General Assembly enacted the clergy-communicant statute in 1959. It contained a provision that the trial court could compel disclosure in its discretion when necessary to the proper administration of justice. 1959 N.C. Sess. Laws ch. 696. The statute was amended in 1967 to remove the provision by which the trial court could compel such testimony to satisfy the ends of justice. 1967 N.C. Sess. Laws ch. 794. *See* Note, 46 N.C. L. Rev. at 429-30. The 1967 amendments reveal the General Assembly's intent to remove from the trial courts any discretion to compel disclosure when the clergy-communicant's privilege exists.

The trial court erred in concluding that the testimony should be allowed in the interest of justice and in admitting it for that reason. Since the clergy-communicant privilege was inapplicable, however, the trial court's error was not prejudicial.

[4] By his final assignment of error, the defendant contends that the prosecutor improperly commented on his failure to testify. The defendant contends these comments violated his fifth and fourteenth amendment rights to remain silent. *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106 (1965); *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975).

The defendant complains of the following portions of the prosecutor's closing argument:

> There has been a lot of discussion in this case and you have been told about the defendant's rights. He has rights, and he has had those rights protected every step of the way. You have heard testimony about his Miranda rights, rights he is exercising right now to have this trial before you. And ladies and gentlemen—

MR. PALMER: Objection to that argument, Your Honor.

THE COURT: Objection overruled.

In addition, the defendant complains that the prosecutor's comments on "uncontradicted evidence" of penetration also were improper comments on the defendant's failure to take the stand. *United States v. Rodriquez*, 627 F. 2d 110 (7th Cir. 1980); *United States v. Flannery*, 451 F. 2d 880 (1st Cir. 1971). *Contra*, *State v. Mason*, 317 N.C. 283, 345 S.E. 2d 195 (1986); *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986).

Assuming *arguendo* that these arguments by the prosecutor amounted to improper comments on the defendant's failure to testify and the trial court erred in overruling the defendant's objections to these comments, the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of the defendant's guilt. N.C.G.S. § 15A-1443(b).

The defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. STEPHANIE YVETTE EURY

No. 515A85

(Filed 12 August 1986)

1. **Criminal Law § 102— capital case—closing arguments by both defense counsel**

When a defendant in a capital case does not offer evidence and is entitled to both open and close the argument to the jury, his attorneys may each address the jury as many times as they desire during the closing phase of the argument, the only limit to this right being the provision of N.C.G.S. § 84-14 allowing the trial judge to limit to three the number of counsel on each side who may address the jury. Therefore, the trial court erred in denying defendant's motion that both defense counsel be permitted to address the jury during defendant's closing argument at the guilt-innocence phase of the trial, and such error was prejudicial to defendant. Rule 10, General Rules of Practice for the Superior and District Courts.

2. **Criminal Law § 102— noncapital case—closing arguments—number of defense counsel**

If defendant elects to present evidence on retrial of a first degree murder case which has lost its capital nature, defendant is entitled to open the argu-

ment to the jury before the prosecution argues, and two of her counsel may address the jury within the time limits prescribed by N.C.G.S. § 84-14. If defendant does not present evidence, she is entitled to both open and close the argument to the jury, and in such case she may have one lawyer make the opening argument and one the closing or she may waive one argument and have both lawyers address the jury during the remaining argument.

Justice MARTIN dissents in part.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment entered by *Rousseau, J.*, at the 22 April 1985 Session of STOKES County Superior Court. Defendant's motion to bypass the North Carolina Court of Appeals on the non-Class A felonies was allowed on 30 August 1985.

Defendant was convicted of first degree murder, first degree burglary, and robbery with a dangerous weapon. The trial judge imposed a sentence of life imprisonment for first degree murder, a sentence of 15 years for first degree burglary to run consecutively to the sentence for first degree murder, and a sentence of 14 years for robbery with a dangerous weapon to run consecutively to the sentence for first degree burglary.

The State's evidence tended to show the following:

Mrs. Doris Faircloth, the daughter of Rev. J. E. Darter, found the body of her 92-year-old father in his home on 28 August 1984. The body was lying on the foot of his bed. Two belts were wrapped around his neck and one of the belts was tied to a bed post. One of the eyes appeared to have been gouged out of his badly swollen head, and there was a long gash on each of his arms. There was medical testimony that the victim died of ligature strangulation.

On 26 August 1984 at 5:46 p.m. a telephone call was made from Rev. Darter's residence to the residence of Ruby Locklear in Greensboro. Mrs. Locklear stated that she did not know Rev. Darter, but that she had received a telephone call from Perrie Dyon Simpson on that date. Simpson was arrested on an unrelated charge and was subsequently charged with the first degree murder of Rev. Darter. On 22 September, defendant was arrested as she left Moses Cone Hospital where she had given birth to a child four days earlier. The 16-year-old defendant initially denied any knowledge of Rev. Darter's death, but later she gave a state-

ment admitting that on 27 August 1984 she and Simpson killed Rev. Darter and stole several items from his home. In addition to her confession, the State presented fingerprint evidence which tended to connect defendant to the crimes. Also, items stolen from the victim's home were found at defendant's residence.

Defendant offered no evidence at the guilt-innocence phase of her trial.

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

Mark Galloway and W. Osmond Smith III, for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant contends that the trial court erred in denying her motion that *both* defense counsel be permitted to address the jury during defendant's closing argument at the guilt-innocence phase of the trial.

The record in this case reflects the following exchange between the court and defense counsel Smith:

> COURT: . . . How many arguments does the defendant want?
>
> MR. SMITH: Mr. Dillinger and I both want to argue, Your Honor, and both would like to argue after the State completes its argument.
>
> COURT: I understand that you would but I don't believe that is the procedure.
>
> MR. SMITH: In a capital case?
>
> COURT: You get the opening and closing arguments.
>
> MR. SMITH: If that is the case we waive the opening and want the closing.
>
> COURT: No, you don't get that.
>
> MR. SMITH: Note our exception to that then, as I understand it.

COURT: You get the opening argument, then the State argues, and you get the closing argument. I believe there is a limit on the number of arguments in a capital case. Three, and the time is unlimited.

MR. SMITH: That is as to the number of lawyers, Your Honor, but the rules say that the jury arguments are unlimited.

COURT: That is as to the time. Anyway, you may have the opening argument by one lawyer, then the State will argues [sic], then you argue the closing by one attorney.

MR. SMITH: We understand and object and note our exception and let the record reflect that whether it be considered a waiver of the opening or not we would both like to argue at the close of the State's argument.

COURT: I understand but that is not the law and in my discretion I direct that you have the opening and the State is next and you have the last. Three lawyers and three arguments.

The record also shows that Mr. Smith argued to the court that under N.C.G.S. § 84-14 both defense counsel should be allowed to close the argument to the jury. Mr. Smith requested a few minutes to obtain the applicable statute for the judge's reference, but the judge called for jury arguments to begin. After a break, defense counsel renewed their request that they both be allowed to address the jury during closing argument which request was again denied.

N.C.G.S. § 84-14 states as follows:

> In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: to not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel

> may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.

Rule 10 of the General Rules of Practice for Superior and District Courts provides:

> In all cases, civil and criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

N.C.G.S. § 15A-1230(b) states that the "[l]ength, number, and order of arguments allotted to the parties are governed by G.S. 84-14." Thus, a review of the applicable statutes and rules of court provides no clear answer to the question posed by this assignment of error.

In *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673 (1986), we carefully examined the statutory provisions which were the forerunners of N.C.G.S. § 84-14. Justice Meyer, speaking for the Court, stated:

> We construe N.C.G.S. § 84-14 to mean that, although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish and each may address the jury as many times as he desires. Thus, for example, if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury and may, upon being refreshed, rise again to make another address during the defendant's time for argument. However, if the defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument.

Gladden, 315 N.C. at 421, 340 S.E. 2d at 688.

The question of the order in which arguments should be made was considered by our Court in *State v. Raper*, 203 N.C. 489, 166 S.E. 314 (1932). There, the defendant was charged with felonious conspiracies arising from a plan to steal a carload of cigarettes. During cross-examination his counsel, without objection, elicited from a State's witness evidence of the defendant's good character. No evidence was offered by defendant Raper or any of his co-defendants.

The trial judge held that defendant Raper had offered evidence and denied all the defendants the right to open and close the arguments to the jury. *Id.* at 491-92, 166 S.E. at 315. This Court ordered a new trial and in so doing, in part, stated:

> We do not concur in the opinion of the court, and hold that it was error for the court, upon the facts shown in the statement of the case on appeal to deny the defendants the right to have their counsel at least to conclude the argument to the jury. This is a substantial legal right, of which the defendants could not be deprived by an exercise of judicial discretion. The defendant in an action, civil or criminal, who introduces no evidence after the plaintiff, or the State, as the case may be, has rested, is entitled as a matter of right to reply to the argument of counsel for the plaintiff or of the solicitor for the State, and to that end to conclude the argument to the jury.

Id. at 492, 166 S.E. at 315.

State v. Gladden makes it clear that in a capital case as many as three counsel on each side "may argue for as long as they wish and each may address the jury as many times as he desires." *Gladden*, 315 N.C. 398, 421, 340 S.E. 2d 673, 688. It is evident that the trial court in violation of the provisions of N.C.G.S. § 84-14 erroneously limited the *number* of addresses by defense counsel.

We concluded that "if the defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument." *Gladden*, 315 N.C. at 421, 340 S.E. 2d at 688. It follows as a matter of fairness and equity that when, in a capital case, a defendant does not offer evidence and is entitled to both open and close the argument to the jury, his attorneys may each address the jury as many times as they desire during the closing phase of

the argument. The only limit to this right is the provision of N.C.G.S. § 84-14 allowing the trial judge to limit to three the number of counsel on each side who may address the jury.

Having decided that the trial judge erred in refusing to permit both counsel to address the jury during defendant's closing argument in instant case, we turn to the question of whether his ruling constituted prejudicial error.

The right to closing argument is a substantial legal right of which a defendant may not be deprived by the exercise of a judge's discretion. *State v. Raper*, 203 N.C. 489, 492, 166 S.E. 314, 315. *See also State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976).

Although the cases do not consider the *number* of addresses by counsel our Court of Appeals has also held a trial judge's violation of the provisions of N.C.G.S. § 84-14 to be prejudicial error. *See State v. Feldstein*, 21 N.C. App. 446, 204 S.E. 2d 551 (1974); *State v. Campbell*, 14 N.C. App. 596, 188 S.E. 2d 558 (1972).

In instant case there was strong evidence of defendant's guilt. However, one can only speculate as to how the jury would have reacted had defendant not been deprived of her substantial right to have both counsel make closing argument. We, therefore, hold that the ruling of the trial judge constituted prejudicial error.

[2] Because the jury recommended that defendant be sentenced to life imprisonment the State may not seek the death penalty on retrial. As a result the case has lost its capital nature. In trials in the superior courts involving other than capital felonies the State and the defendant are entitled to two addresses to the jury. N.C.G.S. § 84-14 (1985). If on retrial defendant elects to present evidence she is entitled to open the argument to the jury before the prosecution argues, and two of her counsel may address the jury within the time limits prescribed by N.C.G.S. § 84-14. *See* Rule 10, General Rules of Practice for the Superior and District Courts; *State v. Gladden*, 315 N.C. 398, 421, 340 S.E. 2d 673, 688. If defendant does not present evidence she is entitled to both open and close the argument to the jury. Rule 10, General Rules of Practice for the Superior and District Courts. In such case she may have one lawyer make the opening argument and one the

closing or she may waive one argument and have both lawyers address the jury during the remaining argument.

Defendant did not specifically raise the issue herein presented as to the noncapital charges. However, by stipulation, she waived her opening argument and thereby squarely factually presented the question of noncapital charges. We therefore, in our discretion, elect to consider the question as to noncapital charges. Applying the above-stated principles of law, we hold that the failure of the trial judge to allow both of defendant's counsel to make the closing argument was prejudicial error in the noncapital as well as the capital charges.

For reasons stated, the defendant is entitled to a new trial.

New trial.

Justice MARTIN dissenting in part.

I concur in the holding that the trial judge erred in refusing to allow both counsel for defendant to make their jury arguments after the state's argument. However, the defendant has failed to demonstrate that this error was prejudicial. Therefore, I dissent from the conclusion of the majority that defendant is entitled to a new trial.

The defendant has the burden not only to show error but prejudice as well. *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982); *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979). The test for harmless error in this case is whether there is a reasonable possibility that had the error not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1983). As the majority states, "there was strong evidence of defendant's guilt." The majority further holds that one can only "speculate" how the jury would have reacted if the error had not been committed. A new trial should not be granted based upon a *speculation* that prejudicial error infected the trial. Defendant's burden is greater. She must show there was a reasonable possibility that a different result would have obtained absent the error. Defendant has failed to so do. I find no prejudicial error in defendant's trial.

STATE OF NORTH CAROLINA v. PATRICK MARK McKOY AND LAWRENCE L. HARRISON

No. 76A86

(Filed 12 August 1986)

Criminal Law § 34.2— evidence of other offenses—admission harmless error

There was no prejudicial error in a prosecution for felonious breaking or entering and felonious larceny from the erroneous admission of an accomplice's testimony implicating defendant in an unrelated breaking or entering where the testimony was not offered or admissible for a purpose within N.C.G.S. § 8C-1, Rule 404(b); defendant did not open the door to the testimony by questioning the witness about his criminal record in an effort to impeach his credibility; and there was no prejudice because the testimony exonerated one defendant and the other defendant did not show that there was a reasonable possibility that a different result would have been reached had the testimony been excluded.

Justice MITCHELL concurring in the result.

Justices MEYER and MARTIN join in the concurring opinion.

THE State appeals from a decision of the Court of Appeals, 78 N.C. App. 531, 337 S.E. 2d 666 (1985), *Chief Judge Hedrick* dissenting, granting defendants a new trial following their convictions of felonious breaking or entering and felonious larceny. The cases were tried before *Brewer, J.*, at the 1 October 1984 Criminal Session of Superior Court, CUMBERLAND County. Heard in the Supreme Court on 11 June 1986.

The sole issue on appeal is whether the Court of Appeals erred in holding that the trial judge committed prejudicial error in admitting testimony implicating defendant Harrison in an unrelated breaking or entering. We agree with the Court of Appeals that the trial judge erred in admitting this testimony. However, we find that defendants have failed to show prejudice by its admission and therefore we reverse the Court of Appeals.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Leland Q. Towns, for defendant Patrick Mark McKoy.

James R. Parish for defendant Lawrence L. Harrison.

BILLINGS, Justice.

At trial, the State's case depended primarily on the testimony of Thomas Jefferson "Luke" Bowens. Bowens testified that on the night of 26 July 1983, he and the two co-defendants had been at an arcade in a shopping center in Spring Lake, North Carolina. As they left the arcade, defendant Harrison said that he had a pair of bolt cutters in the blue football bag that he was carrying and Bowens stated that he needed money. Bowens took the bolt cutters and broke into a storage building behind the shopping center. The building was used to store merchandise that had been put on layaway for customers of the Maxway Store. Bowens entered the building, stated "Yo, man, . . . we just got paid," and removed approximately eighteen microwave ovens, four television sets and some miscellaneous items which he handed to the defendants. The three men hid the merchandise in an empty trailer. Bowens later arranged for the sale of the ovens and each of the three received approximately $600.

Bowens was later arrested for an unrelated crime and as a result of a plea arrangement, he provided officials with information concerning other break-ins, including the break-in at the Maxway Store in which he implicated Harrison and McKoy.

During direct examination of Bowens by the prosecutor, the following exchange took place:

Q. Had the three of you done anything like this before?

MR. MELVIN: Objection, your Honor.

COURT: Overruled.

(Witness shaking head.)

COURT: You may answer.

A. Answer?

COURT: Yes.

A. What you mean?

Q. Had you and Mr. Harrison and Mr. McKoy or any of you broken into places like this before?

MR. MELVIN: Objection.

COURT: Overruled.

A. No.

Q. Had you broken into anything—at homes or anything with these two, either of these two fellows before. [sic]

MR. MELVIN: Objection.

COURT: Overruled.

COURT: You may answer.

A. (Shook head negatively.) No.

During cross-examination, Mr. Bowens was asked by defense counsel to "go back as far as the hands of time [would] take [him] in [his] career" and discuss everything he had been convicted of. Bowens testified that he had been convicted of breaking or entering in 1978. He was released from prison in 1980. He was arrested six months later for breaking or entering but was not convicted. He was arrested "every thirty days" after that and was finally convicted in 1983 for breaking into a pawn shop in Fayetteville and was put on probation. Following the break-in at the Maxway Store, Bowens committed another breaking or entering of a pawn shop.

On redirect examination, the prosecutor questioned Bowens as follows:

Q. Mr. Bowens, you broke into the Boulevard Pawn Shop, didn't you?

A. Yes.

. . . .

Q. That's one of the break-ins Mr. Melvin asked you about, isn't it?

A. Yes.

Q. Who broke into the pawn shop with you?

MR. MELVIN: Objection.

COURT: Overruled.

Q. Who went into the pawn shop with you?

A. The best of my knowledge? Harrison.

Q. The defendant, Mr. Harrison?

A. Yes.

Q. And you also broke into a house at 206 Holland Drive, home of Isabel Rodriguez, didn't you?

A. Who?

Q. You did.

A. Not that I can remember of.

Q. And you took a General Electric black and white television set, a Zenith nineteen inch color television set and a Pioneer stereo, that was back in March of 1983?

A. Oh—I know what you're talking about.

Q. Okay.

A. No. They wasn't with me.

. . . .

Q. Do you remember Mr. McKoy being with you?

A. Not really.

Q. You don't remember breaking into a house with Mr. McKoy?

A. I remember breaking into a house. Not with him.

. . . .

Q. Now, Mr. Bowens, you remember back earlier in the year, when you were about to be tried for breaking into the Boulevard Pawn Shop?

A. Yes.

Q. That's the same pawn shop you said Mr. Harrison and you broke into—

MR. MELVIN: Objection, your Honor.

COURT: Overruled.

Q. —is that right?

A. Yes.

Q. And your lawyer and I had some discussions that resulted in a plea bargain for you, isn't that correct?

A. Yeah.

Q. Now, is that the plea bargain in which you were to plead guilty and get six years?

A. About that pawn shop?

Q. Um-hum.

A. I got probation for that pawn shop. Oh, you got the wrong pawn shop here.

Q. That's the pawn shop that you broke into.

A. Sir, I'm going to be honest with you. The way this went down, I don't know which charge I got tried for and which business I broke into. It was some of them.

Q. You broke into some of them?

A. Yeah.

Q. And you broke in with a lot of different people?

A. Quite—

Q. Are you sure that—and are you sure that you broke into this place with Mr. Harrison?

A. If that's what's on that paper, it has to be.

Q. Do you remember going in there with him?

A. Which pawn shop?

COURT: Repeat your question, Mr. Ammons.

Q. The pawn shop that you broke into with Mr. Harrison, do you remember which pawn shop that was?

A. (Pause.) I think so.

Q. Which pawn [sic] was it?

A. It's three Braggs. Bragg—I broke in all three of them with different people.

Q. In any event, do you remember pleading guilty in the case in which you broke into a pawn shop with Mr. Harrison?

MR. MELVIN: Objection, your Honor. He's answered that.

COURT: Overruled.

A. (Pause.) I remember pleading guilty to the pawn shop that I broke into. See, I broke into Bragg by myself, too, now.

Q. That's not the one you broke into with Mr. Harrison?

A. I don't think it is.

On appeal to the Court of Appeals, defendants successfully argued that the trial court erred to defendants' prejudice in permitting the prosecutor to elicit from the witness evidence of another crime committed by defendant Harrison and in permitting leading questions about involvement of the defendants in other crimes, even though the witness denied that the defendants were involved.

Defendants contend that the only purpose for the prosecutor's questions was to show defendants' propensity to commit other break-ins and that its only relevance was to show the character of the defendants. The State argues as follows: (1) that defense counsel's general objection is effective only if there is no purpose whatsoever for which the evidence could have been admissible; (2) that the burden is on the defendant to demonstrate that the evidence would not be admissible for any purpose; (3) that the evidence was admissible to show defendants' intent or guilty knowledge; and (4) that the defendant "opened the door" to the evidence by asking the witness on cross-examination about his criminal record, which included the pawn shop break-in which Bowens said defendant Harrison had committed with him. We agree that unless, on the face of the evidence, there is no purpose for which the evidence could have been admissible, a general objection is ineffective.[1] 1 *Brandis on North Carolina Evidence* § 27

1. Note, however, this Court's recent case of *State v. Morgan*, 315 N.C. 626, 640, 340 S.E. 2d 84, 93 (1986) where Justice Meyer, speaking for the Court, said in reference to the offer of evidence under Rules 404(b) and 608(b): "Both rules require the trial judge, prior to admitting extrinsic conduct evidence, to engage in a balancing, under Rule 403, of the probative value of the evidence against its prejudicial effect. The better practice is for the proponent of the evidence, out of the presence of

(1982). On appeal, defendant must demonstrate that the evidence would not be admissible for any purpose. *State v. Ward*, 301 N.C. 469, 272 S.E. 2d 84 (1980).

In the present case we believe that defendants have successfully demonstrated that evidence of another crime committed by Harrison is not admissible for any purpose.

The North Carolina Rules of Evidence, N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1985) provides:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

In *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986), we held that subdivision (b) of Rule 404 is consistent with North Carolina practice prior to its enactment. In this regard, our courts have consistently relied on what is commonly referred to as the "McClain rule," articulated in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). In *McClain*, this Court stated that as a general rule "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." *Id.* at 173, 81 S.E. 2d at 365. We then enumerated certain well recognized exceptions—the "other purposes" to which Rule 404(b) makes reference.[2] Our courts have since relied on *McClain* both for its succinctly stated general rule and its clear articulation of the exceptions. However, in order to understand fully the *McClain* rule

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the jury, to inform the court of the rule under which he is proceeding and to obtain a ruling on its admissibility prior to offering it."

2. As Professor Stansbury noted, the proposition should more properly be stated, not as a general rule with exceptions, but as follows: "Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 *Brandis on North Carolina Evidence* § 91 (1982).

and thereby properly construe its codification in Rule 404(b), it is necessary to review the analysis provided in that case.

We first noted in *McClain* that the general rule rests on the following "cogent reasons":

(1) "Logically, the commission of an independent offense is not proof in itself of the commission of another crime."

(2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose.

(3) "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence."

(4) "Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial."

Id. at 173-74, 81 S.E. 2d 365-66 (citations omitted).

We also pointed out that "[s]ince evidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial, the general rule of exclusion should be strictly enforced in all cases where it is applicable." *Id.* at 176, 81 S.E. 2d at 368.

Finally, we provided the following insights to assist in the determination of whether evidence of an offense other than the one charged should be excluded under the general rule or admitted under one of the exceptions:

> The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected. *State v. Gregory, supra; State v. Lyle*, 125 S.C. 406, 118 S.E. 803.

Id. at 177, 81 S.E. 2d at 368.

Applying this reasoning in the case *sub judice*, we must reject the State's argument that, because there was no direct evidence of a conspiracy and the case went to the jury on an acting-in-concert theory, evidence of Harrison's participation in another break-in was offered to prove guilty knowledge or shared intent on 26 July when the Maxway break-in occurred. Bowens' testimony, if believed, could lead only to a conclusion that Harrison and McKoy were at all times aware of Bowens' intent to break into the Maxway storage building for the unlawful purpose of removing merchandise, that they participated in the break-in and resulting larceny, and that they shared in the profits of the unlawful act. Guilty knowledge or shared intent of the defendants was not a "material fact in issue."

The record belies the argument that Bowens' testimony concerning Harrison's participation in another break-in was offered for the purpose of showing knowledge or intent.[3] The witness

3. In fact, if we were to speculate as to the purpose of the prosecutor in pursuing the line of questioning initially, it would appear that he was attempting to show that these three persons had engaged in a pattern of break-ins amounting to a common scheme. Assuming the prosecutor had a good-faith basis for believing that the

Bowens testified that he had broken into the pawn shop on at least three occasions and that one of those occasions was on 8 November 1983, four and one-half months after the break-in at the Maxway storehouse. He was never able to identify on which occasion the defendant Harrison was with him, saying, "I broke in all three of them with different people." Therefore, the testimony was not relevant to show, as the State contends, that because he had been with Bowens during a previous break-in, defendant Harrison knew that Bowens was going to commit larceny from the storehouse, thus tending to establish guilty knowledge and intent, for there is no evidence that the defendant Harrison broke into any place with Bowens prior to the Maxway break-in.

Further, the defendant, by questioning the witness Bowens about his criminal record in an effort to impeach his credibility, did not "open the door" to evidence of the defendant's commission of other crimes. The case relied upon by the State, *State v. Pruitt*, 301 N.C. 683, 273 S.E. 2d 264 (1981) is clearly distinguishable. In *Pruitt* the defendant was being tried for conspiracy to commit forgery and conspiracy to utter forged instruments. He objected to testimony on re-direct of a State's witness that a previous charge against the witness of being an accessory after the fact to a break-in, about which she had been questioned on cross-examination, related to the theft of the check-writer used to write the checks involved in the conspiracy cases then being tried. She said that the defendant had been involved in that theft. The relevance of that evidence to the case being tried was obvious.

While this Court in *Pruitt* said that when the defense cross-examines a witness about prior crimes in an effort to impeach her credibility, the State is "entitled to explore the matter fully in its attempt to rehabilitate its witness," *id.* at 687, 273 S.E. 2d at 267, we went further and noted that "[i]n the process of securing that elaboration, the state was able to secure the connection it had earlier demonstrated between defendant and the forgery scheme." *Id.* We do not read that opinion as saying that any time a defendant questions a witness for impeachment purposes about

witness's answer would support such a finding, his questions on direct were entirely proper. However, the witness denied prior participation by the defendants with him in a common scheme.

the witness's prior convictions, the defendant opens the door for the witness to testify about the defendant's participation in those same crimes if evidence of those crimes otherwise would not be admissible against the defendant and the defendant's involvement in no way lessens the witness's culpability or aids in an attempt to rehabilitate the witness.

Inasmuch as the evidence of defendant Harrison's other criminal conduct was not offered or admissible for a purpose within N.C.G.S. § 8C-1, Rule 404(b) and was not admissible because the witness was questioned about his own criminal conduct, its admission was error. We do not agree with the Court of Appeals, however, that defendants were prejudiced thereby.

In the case of defendant McKoy, Bowens repeatedly stated that McKoy was not involved in any other break-ins. Thus, Bowens' testimony was favorable to this defendant, and he has failed to show that the admission of testimony concerning defendant Harrison's involvement would have changed the result in his case. *See* N.C.G.S. § 15A-1443(a); *State v. Wilson,* 311 N.C. 117, 316 S.E. 2d 46 (1984) (verdicts and judgments are not to be lightly set aside, nor for any improper ruling which did not materially and adversely affect the result of the trial).

With respect to defendant Harrison, Bowens' testimony at trial, if believed, clearly established Harrison's guilt as a participant in the Maxway break-in. The State's entire case against both defendants depended upon the jury's believing Bowens' testimony. It is highly unlikely that the jury would have had a reasonable doubt about Bowens' credibility regarding the crime in the case *sub judice* but would have believed the conflicting and uncertain statements about Harrison's involvement with him in a different crime and on that basis have become convinced of Harrison's propensity to commit crimes with Bowens and therefore his involvement in the breaking or entering and larceny under consideration. The defendant Harrison has failed to show that there is a reasonable possibility that a different result would have been reached at trial had Bowens' testimony concerning Harrison's involvement in the other break-in been excluded. N.C.G.S. § 15A-1443(a). We therefore reverse the Court of Appeals; the judgments of the Superior Court of Cumberland County shall remain undisturbed.

Reversed.

Justice MITCHELL concurring in the result.

The majority has concluded that evidence tending to show that the defendant Harrison committed another felonious break-in with the State's witness, in addition to that charged in this case, was inadmissible but not prejudicial. As a result, the majority has reversed the decision of the Court of Appeals which awarded the defendant a new trial. I concur only in the result reached, because I believe the evidence of the other break-in committed by the defendant Harrison with the State's witness was admissible in this case.

During cross-examination of the State's witness Bowens, defense counsel inquired into all crimes Bowens had ever committed and attempted to show both his long criminal record and the fact that he had made deals with the State. By so doing, the defense counsel opened the door to permit the State to inquire into the facts of all of those crimes, including the identity of anyone who participated with the State's witness in committing them. *State v. Pruitt*, 301 N.C. 683, 686-87, 273 S.E. 2d 264, 267 (1980). The defendant having opened the door on cross-examination, the State came in to show that the defendant Harrison had participated in at least one other break-in inquired about by the defendant during cross-examination. This was proper, and the evidence resulting was admissible. *Id.*

Evidence of the other break-in by Harrison and the State's witness was admissible for another and more important reason. Evidence of other crimes committed by a defendant is clearly admissible for "purposes, such as *proof of motive*, opportunity, *intent*, preparation, *plan*, *knowledge*, identity or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1985) (emphasis added). All of the evidence in the present case tended to show that the defendants did not commit the actual breaking or entering of the store, but stood by while the State's witness broke into and entered the store. As a result, the State's case against the defendants was based entirely upon circumstantial evidence of their common plan and concerted action with the State's witness. Therefore, the majority seems to me to be entirely and obviously incorrect in stating that: "Guilty knowledge or

shared intent of the defendants was not a 'material fact in issue.'" No fact in issue was more material in this case than the knowledge or shared intent of the defendants. It was absolutely vital to the State's case that it produce evidence of the defendants' motive, intent, plan or knowledge that the State's witness Luke Bowens would break into the store.

This Court has specifically held in prior cases that evidence just such as that held inadmissible here by the majority is competent and admissible to show that a defendant knew the unlawful purpose of others who participated with him in the crime for which he stands charged. *E.g., State v. Ferrell,* 205 N.C. 640, 172 S.E. 186 (1934). Evidence of the other break-in by the defendant Harrison with the State's witness—whether it was committed before or after the crimes charged in this case—was at least some substantial circumstantial evidence of Harrison's motive and intent as well as of the existence of a common plan and concerted action.

Finally, I do not understand the need for the first footnote to the opinion of the majority wherein the majority quotes *State v. Morgan,* 315 N.C. 626, 640, 340 S.E. 2d 84, 93 (1986) for the obvious proposition that before admitting extrinsic conduct evidence under Rules 404(b) or 608(b) of our Rules of Evidence, the trial court must "engage in a balancing, under Rule 403 of the probative value of the evidence against its prejudicial effects." The balancing required by Rule 403 and by the quoted language in *Morgan* does not apply until a court is considering whether to exclude evidence it has *determined to be otherwise admissible* because the unfair prejudice of the *otherwise admissible* evidence outweighs its probative value. Clearly, the balancing requirement of Rule 403 is not pertinent to the opinion of the majority which concludes that evidence of Harrison's participation in another break-in was not admissible for any purpose within Rule 404(b).

As I have previously indicated, I would hold the evidence in question admissible under the specific exceptions of Rule 404(b). Since the evidence went directly to the most material fact in issue in this case, I would also find that its probative value far exceeded any danger of unfair prejudice resulting from its admission.

For the foregoing reasons, I concur only in the result reached by the majority.

Justices MEYER and MARTIN join in this concurring opinion.

STATE OF NORTH CAROLINA v. PAUL MICHAEL TUCKER

No. 417A85

(Filed 12 August 1986)

1. **Kidnapping § 1.2— removal from truck to commit rape—not an integral part of offense**

The trial court properly refused to dismiss kidnapping charges for insufficient evidence where the State's evidence tended to show that defendant Tucker removed the victim from his truck and dragged her down to the river and under the bridge where he committed sexual assaults out of the view of passersby on the road; the victim sustained multiple bruises, abrasions and cuts from being dragged on her back; and those acts constituted neither a mere technical asportation nor an inherent and integral part of the rape and sex offense committed. N.C.G.S. § 14-39(a).

2. **Kidnapping § 1.3— instructions—theory not alleged in indictment—plain error**

The trial court committed plain error in a kidnapping prosecution by instructing the jury on restraint when the indictment alleged only removal. N.C.G.S. § 14-39, N.C. Rules of App. Procedure Rule 10(b)(2).

3. **Criminal Law § 102— evidence of other crimes—improperly argued by prosecutor**

The trial court erred in a kidnapping prosecution by overruling defendant's objection to the prosecutor's reference in his closing argument to defendant's prior crimes. The evidence of defendant's prior convictions was offered and admitted solely to impeach defendant's credibility but the main thrust of the prosecutor's argument was to show that defendant was a bad man of a violent, criminal nature and clearly more likely to be guilty of the crime charged. N.C.G.S. § 8C-1, Rule 609(a), Rule 404, N.C.G.S. § 15A-1443.

APPEAL by defendant from his conviction of first degree rape, first degree sex offense and first degree kidnapping before *Hyatt (J. Marlene), J.*, and a jury at the 11 March 1985 Criminal Session of LINCOLN County Superior Court, and his concurrent sentences therefor of life, life and twelve years, respectively. We allowed defendant's petition to bypass the Court of Appeals in the kidnapping case on 22 July 1985.

Lacy H. Thornburg, Attorney General, by James E. Magner, Jr., Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Acting Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

In his appeal defendant contends the trial court (1) committed reversible error in failing to dismiss the kidnapping charges for insufficient evidence; (2) committed plain error in instructing the jury on a theory of kidnapping not charged in the indictment; (3) denied defendant a fair trial by overruling objections to the prosecutor's closing argument concerning defendant's prior criminal acts; and (4) committed plain error in instructing the jury that a knife is a deadly weapon. We conclude defendant's second and third contentions have merit and entitle him to a new trial. We reject contention one and find it unnecessary to discuss contention four.

I.

The state's evidence at trial tended to show: The prosecuting witness, age 47 at trial, and defendant, age 33, both of Lincolnton, became reacquainted in December 1984, having not seen each other since approximately fifteen years earlier when they had worked together in the same mill. They began seeing each other socially during late December 1984 and early January 1985, visiting in each other's and various relatives' homes, riding around in defendant's truck, visiting defendant's grandfather together in the hospital, and attending bingo games. On one of these occasions when the prosecuting witness was riding around with defendant in his truck, the two argued. Defendant forced the prosecuting witness to have sex with him and prevented her from jumping out of the truck by holding her. Defendant was not armed. The prosecuting witness did not report this attack. After that incident defendant visited the prosecuting witness at work, but she refused to leave with him. He also telephoned her and came to the house where she lived with her father and her son, but the prosecuting witness remained with her father at all times.

On 9 January 1985 defendant called the prosecuting witness at home and told her he would leave her alone if she would just talk to him. She assented, telling defendant she had to take her granddaughter to the mill where the child's mother worked. Defendant agreed to pick them up and drive them there. After making several stops they finally dropped off the child and went for something to drink. They then began arguing because the prosecuting witness did not want to see defendant any more, and defendant became angry. They drove off and defendant stopped his truck on the right side of the road near the South Side River Bridge about one-half mile from the prosecuting witness's house. The prosecuting witness told defendant she wanted to go home so she could use the bathroom. When he refused she attempted to open her door, but defendant grabbed her by the chin, pulled her back and held her, telling her "You'll do like I tell you to do, not like you want to do." He pulled her out of the truck and told her she would have to use the bathroom in the woods. Defendant then removed a silver knife from his pocket, opened it up, and said to the prosecuting witness, "I'll cut your guts out right here." He pushed the prosecuting witness down the embankment and dragged her to the river and under the bridge, where he forced her to disrobe and lie down. While holding his knife and threatening to kill her, defendant forced the prosecuting witness to perform oral sex on him before he raped her. He then repeated this sequence.

The prosecuting witness asked defendant to take her to her father's house. He refused, saying her father had a warrant out for him. She convinced defendant that if they went to Gastonia her cousin would let them both spend the night at her home, although the prosecuting witness knew that was not the case.

When they arrived at the prosecuting witness's cousin's home, her cousin, Clarice King, proposed she spend the night. Upon King's insistence defendant left. After defendant left, the prosecuting witness explained to her cousin what had happened. King informed her she would have to report the crimes in Lincoln County where they took place.

After reporting the crimes to law enforcement authorities on 11 January 1985, the prosecuting witness went to Dr. William H. Bobbitt for an examination. Dr. Bobbitt found abrasions and

bruises on her right shoulder, arm and leg and severe swelling in the opening of the vaginal area. Dr. Bobbitt diagnosed the prosecuting witness as having undergone a physical assault, probably sexual in nature. Other witnesses for the state, including the prosecuting witness's cousin Clarice King, two law enforcement officers and a magistrate, corroborated various portions of the prosecuting witness's testimony.

Defendant testified in his own defense. He acknowledged engaging in consensual vaginal and oral intercourse with the prosecuting witness on 9 January 1985. He asserted that was their third sexual encounter and described in detail the events of that night, notably the prosecuting witness's difficulty in completing the acts of vaginal intercourse. He explained that since he lived with his parents and she with her father, their assignations had to take place elsewhere. Defendant also testified he and the prosecuting witness planned to elope that night but went first to Clarice King's house to borrow money. James Heavner testified he saw the pair in defendant's truck on 9 January 1985 in the late afternoon, sitting "just as close as you want to get."

II.

[1] Defendant first assigns error to Judge Hyatt's refusal to dismiss the kidnapping charges because of insufficient evidence of a confinement, removal or restraint separate from the sexual assaults. Our legislature has defined kidnapping as "unlawfully confin[ing], restrain[ing], or remov[ing] from one place to another, any other person 16 years of age or over without the consent of such person . . . ." N.C.G.S. § 14-39(a) (1986).

Defendant relies on *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981), in which we held that an asportation which is an inherent and integral part of some crime for which defendant has been convicted other than the kidnapping will not support a separate conviction for kidnapping. *Irwin* involved the armed robbery of a store, during which the perpetrator forced the clerk from the front to the back of the store at knifepoint to open the safe. We held this a mere technical asportation and an inherent and integral part of the robbery which would not support a separate conviction for kidnapping. The key principle governing whether a kidnapping charge will lie, as expressed in *Irwin*, is whether "[u]nder such circumstances the victim is . . . exposed to

greater danger than that inherent in the armed robbery itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Irwin*, 304 N.C. at 103, 292 S.E. 2d at 446.

We find *Irwin* distinguishable. The state's evidence here tended to show defendant Tucker removed the victim from his truck and dragged her down to the river and under the bridge where he committed the sexual assaults out of the view of passersby on the road. The victim sustained multiple bruises, abrasions and cuts from being dragged on her back. These acts constituted neither a mere technical asportation nor an inherent and integral part of the rape and sex offense committed. Defendant exposed the victim to greater danger than was involved in the sexual attacks themselves by removing her some distance, injuring her in the process, and by insuring that passersby would not witness or hinder the commission of the sexual crimes. We therefore hold Judge Hyatt correctly refused to dismiss the kidnapping charges, and we overrule this assignment of error.

III.

[2] We next consider whether Judge Hyatt committed plain error in instructing the jury on a theory of kidnapping not charged in the indictment. Insofar as the instructions given allowed the jury to convict on grounds other than those charged in the indictment, they were error. Since defendant failed to object to these instructions at trial, we consequently must consider whether they rise to the level of plain error, meriting a new trial for defendant on the kidnapping charge. We hold the instructions constituted plain error.

Defendant was tried under N.C.G.S. § 14-39 which 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 flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(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 portion of the indictment which led to defendant's ultimate conviction of kidnapping charged as follows:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did kidnap [the victim], a person who had attained the age of 16 years, by unlawfully *removing her from one place to another*, without her consent, and for the purpose of facilitating the commission of the felonies of First Degree Rape and First Degree Sexual Offense. The victim . . . was sexually assaulted by the defendant.

With respect to the kidnapping charge, Judge Hyatt instructed the jury they could find defendant guilty of first degree kidnapping if they found, *inter alia,* "that the defendant unlawfully *restrained* [the victim], that is, restricted [her] freedom of movement by force and threat of force." (Emphasis supplied.)

Although the state's evidence supported Judge Hyatt's instruction, the indictment does not. "It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not

supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E. 2d 409, 413 (1980); *accord*, *State v. Dammons*, 293 N.C. 263, 272, 237 S.E. 2d 834, 840-41 (1977). The kidnapping indictment charges that defendant committed kidnapping only by unlawfully *removing* the victim "from one place to another." Judge Hyatt repeatedly instructed the jury that defendant could be convicted if he simply unlawfully *restrained* the victim, "that is, restricted [her] freedom of movement by force and threat of force."

Our decision in *Dammons* resolves precisely this point. In *Dammons*,

> [t]he trial judge repeatedly told the jury that the defendant could be found guilty if he 'confined or restrained or removed' the victim. As an abstract legal proposition the instruction is correct. There was, furthermore, evidence of confinement, restraint, and removal. The indictment, however, charged only that defendant kidnapped the victim 'by unlawfully removing her from one place to another.'
>
> . . . Had the state desired to prosecute on the theory that defendant confined and restrained the victim . . ., it should have so alleged by way of an additional count in the indictment.

Dammons, 293 N.C. at 273, 237 S.E. 2d at 841.

This Court consistently has held that:

> [A]n indictment charging first-degree kidnapping *must* include information 'regarding the factual basis under which the State intends to proceed and, under the authority of [*State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980)] and cases cited therein the State is limited to that factual basis at trial.' *State v. Moore*, 311 N.C. 442, 463, 319 S.E. 2d 150, 158 (1984) (Meyer, J., concurring). *See also State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983) (indictment for kidnapping will not support conviction unless all elements of crime accurately and clearly alleged in indictment).

State v. Brown, 312 N.C. 237, 248-49, 321 S.E. 2d 856, 861 (1984). Our decisions in *Dammons*, *Taylor* and *Brown* control here; under them the trial court erred in its jury instructions on kidnapping.

The state argues that while the instructions may have been erroneous defendant waived appellate review on the issue by failing to interpose a timely objection. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides: "No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ." *Id.* This Court, however, mitigated the rule's harshness by adopting "the 'plain error' rule . . . used by the federal courts pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure which states that '[p]lain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E. 2d 375, 378 (1983). "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." *Id.* at 661, 300 S.E. 2d at 378-79. We said in *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986):

> 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. [736] at 741, 303 S.E. 2d [804] 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).

316 N.C. at 39, 340 S.E. 2d at 83-84.

State v. Brown, 312 N.C. 237, 321 S.E. 2d 856, strongly supports the proposition that the erroneous jury instructions in this case constituted plain error. *Brown* was a kidnapping case in which the trial court instructed the jury on theories of conviction not charged in the indictment. The Court concluded that the instructions were not only error, but were plain error, saying:

> In conclusion, the judge's instructions permitted the jury in this case to predicate guilt on theories of the crime which were not charged in the bill of indictment and which were, in one instance, not supported by the evidence at trial. We therefore hold that under the factual circumstances of this case, there was 'plain error' in the jury instructions as that concept was defined in *Odom* and defendant must therefore receive a new trial on the first-degree kidnapping charge.

312 N.C. at 249, 321 S.E. 2d at 861. It is true that in *Brown* one of the theories submitted was supported by neither the evidence nor the indictment. Nevertheless, it would be difficult to say that permitting a jury to convict a defendant on a theory not legally available to the state because it is not charged in the indictment or not supported by the evidence is not plain error even under the stringent test required to invoke that doctrine. In light of the highly conflicting evidence in the instant kidnapping case on the unlawful removal and restraint issues, we think the instructional error might have, as we said in *Walker*, " 'tilted the scales' and caused the jury to reach its verdict convicting the defendant." Defendant must, therefore, receive a new trial on the kidnapping charge for plain error in the jury instructions.

IV.

[3] Defendant next contends he was denied a fair trial because the trial court overruled his objections to the prosecutor's closing argument. We agree with defendant on this issue, and therefore grant him a new trial on all remaining charges as well.

Judge Hyatt overruled defendant's objection to the following portion of the prosecutor's closing argument:

> She could have fought him under the bridge, and they would have found her corpse. He would have cut her guts out like he threatened to do. And I believe this past history would show that he would. He has admitted on the stand this is a man of violence. This is a woman abuser. This man cannot understand anything but force. He does not understand authority. He has no respect for people's property. He stole someone's car. He went to prison. He did not understand that authority. He admitted he escaped twice. Can you believe this man? He escaped from that authority. Then what does

he do? In 1973. Can you believe a man who would do this in this type of case in 1973 by forcing with a razor, took [another victim] and kidnapped her and kept her in the woods several days.

MR. LAFFERTY: Objection, Your Honor.

MR. RANDALL: Can you believe this man?

THE COURT: Overruled.

She similarly overruled defendant's subsequent objections to the following closing statements by the prosecutor:

> If she had fought him all the way, they would have found her under the bridge dead at the hands of Paul Michael Tucker, a confessed kidnapper, with a knife. He used a razor the other time.
>
> MR. LAFFERTY: Objection.
>
> MR. RANDALL: Can you believe that story?
>
> THE COURT: Overruled.
>
> . . . .
>
> Or believing a man who is a confessed kidnapper, charged again with kidnapping thirty-two days after he gets out of prison. Charged with kidnapping in the same method that he had confessed to before. By putting a razor to a girl's throat, and a knife.
>
> MR. LAFFERTY: Objection.
>
> THE COURT: Overruled.
>
> . . . .
>
> Now, if she was sexually assaulted let's back up. Who did it? Paul Michael Tucker. Where did he do it? Under the bridge at South Side. How did he do it? With a knife. Why did he do it? He had done it before.
>
> MR. LAFFERTY: Objection.
>
> MR. RANDALL: That is the life of Paul Michael Tucker.
>
> THE COURT: Overruled.

On direct examination defendant admitted he had been convicted of temporary taking of an auto, two prison escapes and kidnapping. During cross-examination the prosecutor sought to introduce more detailed information regarding defendant's prior criminal offenses:

> I will ask you if this is not the girl that you kidnapped in early July of 1973 and stayed out with her, kept her out against her will for four days?
>
> A. I was convicted of it.
>
> Q. You say you do not recognize her now?
>
> A. It has been eleven and a half years.
>
> Q. I will ask you in that time when you kidnapped this lady that the way you kidnapped her was you held her by the chin and held a razor to her throat. Wasn't that what you pled guilty to, and took her against her will and kept her for four days in the woods down there?
>
> MR. LAFFERTY: Objection, Your Honor.
>
> THE COURT: On what grounds?
>
> MR. LAFFERTY: I would like to be heard, if I could.
>
> THE COURT: Out of the jury's presence?
>
> MR. LAFFERTY: Yes.

After the ensuing discussion covering six pages in the transcript, Judge Hyatt ruled that under Rule 609 of the North Carolina Rules of Evidence[1] "the defendant may be asked about prior convictions to the extent of what is established by the public record, but what is not established by the public record may not be inquired into at this point in time." Thereafter, defendant responded affirmatively to the following query posed by

1. Rule 609(a) of the North Carolina Rules of Evidence provides:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter."

N.C.G.S. § 8C-1, Rule 609(a) (1986).

the prosecutor, which ended the questioning on this topic: "Mr. Tucker, in 1973, you pled guilty to kidnapping this lady on a bill of indictment that charged that you kidnapped her by force and by placing a razor against her throat; is that correct?"

On appeal, defendant argues the prosecutor's jury argument materially misstated the evidence and urged the jury to consider as substantive evidence testimony admitted only for impeachment purposes. The state urges this Court to hold the prosecutor's argument proper because it was based on evidence of defendant's other crimes admissible to show intent, motive, opportunity, plan and knowledge, under Rule 404 of the North Carolina Rules of Evidence.

Defendant's argument is well taken, as the impropriety of the prosecutor's argument is apparent. The evidence of defendant's past convictions was offered and admitted solely to impeach defendant's credibility. This was the only legitimate purpose for which the evidence was admissible. Yet the prosecutor went far beyond using this evidence for purposes of challenging defendant's credibility. He used defendant's prior convictions primarily to characterize him as a woman abuser, a person of violence who understands nothing but force, and one who has no respect for authority or the property of others. Although the prosecutor occasionally interjected "Can you believe this man," the argument's main thrust is to show defendant is a bad man of a violent, criminal nature and clearly more likely to be guilty of the crime charged. The prosecutor alluded to the fact that defendant was charged with kidnapping by the same method as before and stated defendant did it this time because he had done it before. He concluded with "That is the life of Paul Michael Tucker." Thus the prosecutor improperly argued that evidence admissible only to impeach defendant's credibility should be considered as substantive evidence that he committed the crimes of which he is charged herein.

This Court made it clear in the landmark decision of *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), that generally 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. . . .

> The general rule rests on these cogent reasons: (1) 'Logically, the commission of an independent offense is not proof in itself of the commission of another crime.' *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. R. 649; *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193. (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose. *State v. Simborski*, 120 Conn. 624, 182 A. 221; *State v. Barton*, 198 Wash. 268, 88 P. 2d 385. (3) 'Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.' *State v. Gregory*, 191 S.C. 212, 4 S.E. 2d 1. (4) 'Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial.'

240 N.C. at 173-74, 81 S.E. 2d at 365-66.

Although it was proper to cross-examine defendant concerning his prior convictions on the question of his credibility, these convictions were not admissible as substantive evidence tending to prove his guilt. It was error for the trial court to permit the prosecutor to argue as if they were.

The state's evidence tended to prove defendant's guilt of all crimes, but defendant's evidence tended to show his innocence. The conflict should have been determined by the jury free from the state's argument which gave force to the evidence of defendant's prior convictions beyond that permitted by the law. In light of the sharp evidentiary conflict, we conclude 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 (1983). Defendant, consequently, must be given a new trial on all charges.

Inasmuch as defendant's remaining assignment of error is directed to an instruction which may not occur on retrial, we decline to address it.

For the reasons given we conclude there must be a

New trial.

STATE OF NORTH CAROLINA v. BIENVENIDO DIAZ

No. 30PA86

(Filed 12 August 1986)

1. Narcotics § 4— trafficking in marijuana—evidence sufficient

The evidence of trafficking in marijuana was sufficient to support a reasonable inference that defendant was a participant in the planning of the crime of trafficking in more than 10,000 pounds of marijuana, that defendant was present and assisted in the loading, unloading and transportation of the marijuana, and that defendant was one of the men who fled to the swamp when agents arrived at the site at which a trawler was being unloaded. It was not necessary for the jury to stack inference upon inference to find that defendant was guilty and it is not necessary to invoke the doctrine of constructive possession when the State has established that a defendant was present while a trafficking offense occurred and that he acted in concert with others to commit the offense pursuant to a common plan or scheme.

2. Narcotics § 5— trafficking in marijuana—disjunctive instruction—ambiguous verdict

The trial court erred in a prosecution for trafficking in marijuana by denying defendant's motion to set aside the verdict where the court instructed the jury that it could find defendant guilty if it found that defendant knowingly possessed or knowingly transported 10,000 pounds or more of marijuana and the jury's verdict of guilty was fatally defective as ambiguous because there was no way to determine whether the jurors unanimously found that defendant possessed 10,000 pounds or more of marijuana, transported 10,000 pounds of marijuana, both possessed and transported 10,000 pounds or more of marijuna, or whether some jurors found that defendant possessed the marijuana and some found that he transported it. There was nothing in the verdict, the initial instructions of the trial judge, the charge, or the evidence which resolved the ambiguity. N.C.G.S. § 15A-1237, Art. 1, § 24 of the North Carolina Constitution.

Justice FRYE dissenting in part and concurring in part.

ON the State of North Carolina's petition for writ of certiorari to review the decision of the Court of Appeals reported at 78 N.C. App. 488, 337 S.E. 2d 147 (1985) (*Judge Parker* with *Judges Arnold* and *Wells* concurring), which vacated judgment entered by *Judge Frank Brown* at the 21 January 1985 criminal session of HYDE County Superior Court.

The defendant was charged in an indictment, proper in form, with trafficking in marijuana in an amount in excess of 10,000 pounds in violation of N.C.G.S. § 90-95(h)(1)(d). The trial judge charged that the defendant could be found guilty on the theory of concerted action and submitted as possible verdicts a verdict of guilty as charged or not guilty. The State's evidence will be fully set out in the body of the opinion.

Defendant offered no evidence.

The jury returned a verdict of guilty as charged.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant-appellee.

BRANCH, Chief Justice.

The State assigns as error the decision of the Court of Appeals that the State failed to produce substantial evidence that the crime charged had been committed and that the offense was committed by defendant.

> [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. Any contradictions or discrepancies in the evidence are for resolution by the jury. . . . The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Brown, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984) (citations omitted). "It is immaterial whether the substantial evidence is circumstantial or direct, or both." *State v. Jones*, 303 N.C. 500, 504, 279 S.E. 2d 835, 838 (1981) (quoting *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956)). Circumstantial evidence need not exclude every reasonable hypothesis of innocence. *Id.*

Under N.C.G.S. § 90-95(h)(1) anyone who sells, manufactures, delivers, transports, or possesses more than 50 pounds of marijuana is guilty of the felony of trafficking in marijuana. If the quantity of marijuana involved equals or exceeds 10,000 pounds, the offense carries a minimum sentence of 35 years' imprisonment and a minimum fine of $200,000.

A defendant acts in concert with another to commit a crime when he acts "in harmony or in conjunction . . . with another pursuant to a common criminal plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E. 2d 390, 395 (1979). Evidence that a defendant did some act forming a part of the crime charged, when considered together with evidence that others also did acts leading to the crime's commission, strongly indicates that the defendant was acting in concert with others to commit the crime charged. *Id.* at 356-57, 255 S.E. 2d at 395. However, it is not

> necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

Id. at 357, 255 S.E. 2d at 395.

An examination of the record reveals overwhelming evidence that the crime of trafficking in marijuana occurred. Over 40,000 pounds of marijuana, along with a number of the traffickers, were seized by the State Bureau of Investigation and the Hyde County Sheriff's Department on 2 May 1984. The sole question remaining under this assignment of error is whether the State produced sufficient evidence that defendant committed the trafficking offense to take the case to the jury.

In reversing the trial court and deciding that the State did not produce sufficient evidence to take the case to the jury, the Court of Appeals reasoned that in order for the jury to conclude that defendant had engaged in trafficking in marijuana in excess of 10,000 pounds it would have to build inference upon inference. The Court of Appeals relied primarily on *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982).

It is necessary at this point to review the evidence offered by the State before we discuss the applicability of *LeDuc* to the instant case or determine the question presented by this assignment of error.

The State's evidence tended to show the following:

On 1 and 2 May 1984 agents of the State Bureau of Investigation were engaged in the surveillance of individuals believed to be involved in smuggling drugs. At approximately 6:05 p.m. on 1 May 1984, Carlos Sosa and Roberto Tellez were observed leaving the Holiday Inn in Williamston, North Carolina. Sosa was driving a tractor trailer truck; Tellez, a Ryder rental truck. They were followed by the agents until they turned off Highway 264 onto Fifth Avenue, a 2.3-mile dirt road which goes to the Long Shoal River. The agents walked to a point just south of the intersection of Fifth Avenue and Highway 264 and hid in a ditch. They heard voices coming from a pumping station located at the intersection and the sound of outboard motors coming from the Long Shoal River.

Around 1:00 a.m. on 2 May 1984, the agents saw a Buick Regal and a tractor trailer truck emerge from Fifth Avenue and turn towards Englehard onto Highway 264. The agents alerted other officers in the area who stopped the vehicles. The truck, driven by Sosa and carrying a passenger, Elias Silvino Rivero, was hauling 517 bales of marijuana and was equipped with a CB radio. The Buick was occupied by four Hispanic individuals: Louis Concepcion, Juan Hernandez, Reineril Fonseca, and Orlando Tudela. A search of the Buick revealed a rental agreement for the car in the name of Bienvenido Diaz. The agreement lists a home address, VISA card number, Florida driver's license number, and home telephone number for Bienvenido Diaz. CB radios wired into the electrical system, a map of the tidewater area, an airplane

ticket for an A. Jiminez, and papers for Louis Concepcion and Juan Hernandez were also found in the car.

After the tractor trailer truck and Buick Regal had left the area the agents went about 0.7 miles down Fifth Avenue where they discovered Roberto Tellez in a rental truck and arrested him. The truck was loaded with bales of marijuana and was also equipped with a CB radio.

At this point the agents and local law enforcement officers turned on the blue lights in their vehicles and went to the end of Fifth Avenue. There they saw several vehicles and numerous individuals running for the swamp. Four Hispanic individuals were arrested almost immediately, and Carlos Mesa was later arrested after he was found hiding in a Ryder truck. One of the vehicles found near the river was a Plymouth Reliant which had been rented by Reineril Fonseca, who was one of the occupants of the Buick Regal.

A trawler recently painted black was offshore at the end of Fifth Avenue at the time of the raid. It had scratches on its right side, apparently as a result of being unloaded. Flatbottomed boats containing marijuana residue were found in the back of two Ryder trucks parked at the site. A search of the trawler revealed numerous radios, marijuana residue, and a notebook and papers containing a code. The code contained the phrase "Dias equals Galones." On 10 May 1984 another copy of the code containing the same phrase was found in a house in Duck which the traffickers had rented.

Fingerprints from a number of traffickers were found on notes from the trawler or on notes at the house rented by the traffickers in Duck. Fingerprints of both Frank Concepcion and Eladio Valdes were found.

During the early morning hours of 2 May 1984 the officers apprehended a number of individuals from the surrounding water and swamp in addition to those already arrested. Most of those arrested were Hispanic. The next day four more suspects were arrested at Wahoo Seafood Company in Stumpy Point. On that same day Sheriff Dale arrested Eladio Valdes on Highway 264, five miles from Englehard. On 4 May 1984, Frank Concepcion was arrested after being found in a boat near the drug landing site.

On 5 May 1984, defendant was spotted walking along Highway 264 towards a bombing range by Sheriff Dale who noted that he was dirty and wet and appeared to be exhausted. Sheriff Dale also noted that defendant looked Hispanic. The Sheriff stopped defendant and asked him his name. Defendant replied that he was Benny Diaz. When Sheriff Dale asked defendant where he had been, Diaz stated that he had been out in the swamp for several days and nights. The Sheriff then arrested him.

The area in which Sheriff Dale spotted defendant is approximately ten miles from Stumpy Point and fifteen miles from Englehard. That area is uninhabited, contains a bombing range, and consists of woods and swamp. Sheriff Dale testified that it was unusual for anyone to be walking through that area, especially in early May.

[1] The evidence concerning the code phrase containing the word "Dias" and the rental agreement purportedly renting the seized Buick automobile to defendant, which automobile was seized while engaged in the trafficking of marijuana, was sufficient to support a reasonable inference that defendant was a participant in the planning of the crime of trafficking in more than 10,000 pounds of marijuana.

We are also of the opinion that there was ample evidence to support an inference from which the jury could reasonably find that defendant was one of the men who fled to the swamp and that prior to his flight he was present and assisting in the loading, unloading, and transportation of the marijuana. The evidence tending to support this inference is as follows: (1) That defendant, a Hispanic resident of Florida, was arrested three days after the raid at the loading area as he walked in the uninhabited marshes of Hyde County near a bombing range; (2) that at the time of his arrest defendant stated that he had been in the swamp for several days; (3) that three days before defendant's arrest, officers had arrested several Hispanic persons who were leaving the area where the marijuana was being unloaded from the trawler and loaded on a truck; four of these men were in a Buick automobile which was following a truck heavily loaded with marijuana; (4) that after these arrests were made, the officers proceeded to the loading area where more Hispanic persons were ar-

rested, and numerous individuals were observed fleeing to the swamp.

Further, we are of the opinion that defendant's reliance on *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607, and *State v. Baize*, 71 N.C. App. 521, 323 S.E. 2d 36 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E. 2d 33 (1985), is misplaced.

In *LeDuc* the defendant was convicted of conspiring to possess 22.4 pounds of marijuana. The State produced evidence that the marijuana was found in a trawler docked at an isolated point in Dare County and that LeDuc's fingerprints were found in several different places in the trawler. There was also evidence that shortly after the trawler docked cargo was unloaded from it and put into a truck. After the truck left, three unidentified persons were seen coming from the direction of the trawler and left in a second truck after staying in an unlocked building for approximately five minutes. There was no direct evidence that LeDuc had chartered the trawler. LeDuc's signature on the charter was similar to known examples of his signature. However, the owners of the trawler could not identify LeDuc as being the man who chartered the trawler under the name of "LeDuc" and one owner testified that LeDuc was not the man who had chartered the trawler.

Though there was no direct evidence that LeDuc chartered the trawler, participated in its navigation, or was aboard while marijuana was being transported, we held that the jury could reasonably infer from the evidence that these things were true. *LeDuc*, 306 N.C. at 77, 291 S.E. 2d at 616-17.

> It could infer, from similarity in the signatures and names and the Florida driver's license shown to the owners of the trawler, that defendant was the same Milan LeDuc who arranged for and executed the charter. It could infer from defendant's fingerprints found on board the vessel, the places where these prints were found, and defendant's Coast Guard license application that defendant had participated in navigating the trawler and was on board at the time marijuana was being transported. It is only by building on these inferences, however, that the jury might then further infer that defendant participated in an unlawful agreement to possess marijuana.

Id. at 77-78, 291 S.E. 2d at 616-17.

LeDuc differs from this case in that it concerned a charge of conspiracy to possess marijuana. In order to establish that a defendant is guilty of conspiracy, the State must prove that he "entered into an unlawful confederation for the criminal purposes alleged." *LeDuc*, 306 N.C. at 76, 291 S.E. 2d at 616 (quoting *State v. Andrews*, 216 N.C. 574, 6 S.E. 2d 35 (1939)). In *LeDuc* the State could not prove the essential elements of the conspiracy without resorting to the stacking of inferences.

In the instant case it was unnecessary for the jury to stack inference upon inference to find that defendant was guilty of trafficking in marijuana in excess of 10,000 pounds. There is evidence which raises a reasonable inference that he was involved with the other traffickers in the planning of the smuggling operation, and there is evidence which raises a reasonable inference that he was present at the unloading site when the marijuana was landed. Together, these inferences are sufficient to support the jury's conclusion that defendant acted in concert with the traffickers to possess or transport in excess of 10,000 pounds of marijuana.

The Court of Appeals also relied on *State v. Baize*, 71 N.C. App. 521, 323 S.E. 2d 36, for the proposition that the State could not use the doctrine of concerted action to avoid proving constructive presence and constructive possession because that would permit the State to stack inference upon inference. We hasten to point out that in the instant case there was no need for the State to show constructive possession. When the State has established, as it has in this case, that a defendant was present while a trafficking offense occurred and that he acted in concert with others to commit the offense pursuant to a common plan or purpose, it is not necessary to invoke the doctrine of constructive possession. *See generally State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390. In *Baize*, reliance by the State on the doctrine of constructive possession was necessary because the drugs in question were in the possession and under the control of a person other than Baize, and Baize was not present when the drugs were seized. 71 N.C. App. at 528-29, 323 S.E. 2d at 41.

We therefore hold that when considered as a whole the evidence produced by the State was sufficient to withstand defendant's motion to dismiss.

[2] Defendant next assigns as error the trial court's denial of his motion to set aside the verdict. He argues that the verdict was ambiguous and lacked the unanimity required by N.C.G.S. § 15A-1237 and article 1, section 24 of the North Carolina Constitution.

In his final mandate the trial judge instructed the jury as follows:

> I charge that if you find from the evidence and beyond a reasonable doubt that on or about May 2nd, 1984, the defendant Diaz, acting either by himself or acting together with Tudela, or Harrelson, or Sosa, or Almanzar, or Alonzo, or Fonseca, or Steeg or Martinez or Alfonso or Louis Concepcion or Tellez or Jose Almanzar or Fernandez or Juan Hernandez or Rivero or Mesa or Reed or Vandesteeg or Stevens or Coiner or Jimenez or Andrews or Glow or Valdes or Frank Concepcion, knowingly possessed or knowingly transported marijuana, and that the amount which he possessed or transported was 10,000 pounds or more, it would be your duty to return a verdict of guilty as charged. However, if you do not so find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.

"No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1 § 24. *See also* N.C.G.S. § 15A-1237(b) (1983). Submission of an issue to the jury in the disjunctive is reversible error if it renders the issue ambiguous and thereby prevents the jury from reaching a unanimous verdict. *See Jones v. All American Life Ins. Co.*, 312 N.C. 725, 736, 325 S.E. 2d 237, 243 (1985). Previously we have held that a verdict of guilty following submission in the disjunctive of two or more possible crimes to the jury in a single issue is ambiguous and therefore fatally defective. *State v. McLamb*, 313 N.C. 572, 577, 330 S.E. 2d 476, 480 (1985) (jury found that defendant "feloniously did sell or deliver" cocaine); *State v. Albarty*, 238 N.C. 130, 133, 76 S.E. 2d 381, 383 (1953) (criminal complaint improperly alleged that defendant did sell, barter, or cause to be sold or bartered lottery tickets; verdict of guilty as charged invalid because it was "not sufficiently definite and specific to identify the crime of which defendant [was] charged").

Sale, manufacture, delivery, transportation, and possession of 50 pounds or more of marijuana are separate trafficking offenses for which a defendant may be separately convicted and punished. *State v. Perry*, 316 N.C. 87, 102-04, 340 S.E. 2d 450, 460-61 (1986); *State v. Anderson*, 57 N.C. App. 602, 605-06, 292 S.E. 2d 163, 165-66, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982). *See State v. Creason*, 313 N.C. 122, 129, 326 S.E. 2d 24, 28 (1985).

By instructing the jury that it could find defendant guilty of trafficking in marijuana if it found that defendant knowingly possessed or knowingly transported 10,000 pounds or more of marijuana the trial judge submitted two possible crimes to the jury. The jury could find defendant guilty if it found that he committed either or both of the crimes submitted to it. However, the jury's verdict of guilty as charged in this case is fatally defective because it is ambiguous. There is no way for this Court to determine whether the jurors unanimously found that defendant possessed 10,000 pounds or more of marijuana, transported 10,000 pounds of marijuana, both possessed and transported 10,000 pounds or more of marijuana, or whether some jurors found that defendant possessed the marijuana and some found that he transported it. Therefore, we hold that defendant has been deprived of his constitutional right to be convicted by a unanimous jury and is entitled to a new trial. N.C. Const. art. 1 § 24; N.C.G.S. § 15A-1237(b) (1983). *See State v. McLamb*, 313 N.C. 572, 330 S.E. 2d 476; *State v. Creason*, 313 N.C. 122, 326 S.E. 2d 24; *State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381.

Our decision in this case does not mean that a simple verdict of guilty based on an indictment and instruction charging crimes in the disjunctive will always be fatally ambiguous. An examination of the verdict, the charge, the initial instructions by the trial judge to the jury as required by N.C.G.S. § 15A-1213, and the evidence in a case may remove any ambiguity created by the charge. *See State v. Hampton*, 294 N.C. 242, 239 S.E. 2d 835 (1978). Reference to the indictment will rarely, if ever, be helpful because N.C.G.S. § 15A-1221(b) forbids the reading of the indictment to the jury or prospective jurors.

We have held that

> [a]s a general rule, where a statute specifies several means or ways in which an offense may be committed in the alterna-

> tive, it is bad pleading to allege such means or ways in the alternative. But where terms laid in the alternative are synonymous, the indictment is good; and where a statute, in defining an offense, uses the word 'or' in the sense of 'to-wit,' that is, in explanation of what precedes, making it signify the same thing, the indictment may follow the words of the statute.

State v. Jones, 242 N.C. 563, 565, 89 S.E. 2d 129, 131 (1955) (quoting 31 C.J., Indictments and Information, § 181 (1923) (Indictment charging that defendant "did unlawfully and wilfully build or install a septic tank . . ." not duplicitous because terms "build" and "install" are synonymous). This rule is applicable to a trial judge's instructions to the jury as well as to indictments and informations. *See United States v. Gipson*, 553 F. 2d 453, 458 (5th Cir. 1977). When construing N.C.G.S. § 90-95(h)(2), it cannot be said that possession and transportation of marijuana are synonymous, and in this case we find nothing in the verdict, the initial instructions of the trial judge to the jury, the charge, or in the evidence which resolves the ambiguity created by the disjunctive instruction.

We recognize that *State v. Foust*, 311 N.C. 351, 317 S.E. 2d 385 (1984), and *State v. Hall*, 305 N.C. 77, 286 S.E. 2d 552 (1982), reached results at variance with this opinion. Insofar as those and other opinions of this Court contain language inconsistent with the holding of this case they are overruled.

Since defendant was deprived of his constitutional right to be convicted only by a unanimous jury and is, therefore, entitled to a new trial, we need not consider his remaining assignments of error. For the reasons stated the decision of the Court of Appeals is reversed and defendant is awarded a new trial.

Reversed and remanded.

Justice FRYE dissenting in part and concurring in part.

I dissent to that part of the majority's opinion which holds that the State produced substantial evidence that defendant committed the crime charged. The majority relies upon the following facts to support the identification of defendant Diaz as one of the people involved in the activities at the swamp: the phrase "Dias

equals Galones" found in what appeared to be a code book, the name "Bienvenido Diaz" typed on the rental receipt for the Buick caught leaving the swamp, and the circumstances of defendant's arrest. From these facts, the majority concludes first that Diaz "was a participant in the planning of the crime of trafficking in more than 10,000 pounds of marijuana" and second, that he was "present and assisted in the loading, unloading, and transportation of the marijuana."

First, I am convinced that the facts as presented in this case will not support a reasonable inference that the phrase "Dias equals Galones" had any connection at all with defendant. Defendant's name is Dia*z*, not Dia*s*. While this distinction might not appear critical to an English speaker, it might well be critical to a Spanish speaker. As far as is shown in the opinion, the State introduced no evidence on this point. From context, the word "Dias" could be any non-English word; there is not even a suggestion that it is a name. The code read, "One equals Rosalba, two equals Maricla, . . . Dias equals Galones."

Second, the State's evidence as described in the majority's opinion will permit only an inference that defendant rented the Buick automobile detained during the raid. The State's only evidence connecting defendant with the automobile is the name "Bienvenido Diaz" appearing on the rental agreement. No one identified defendant as the person who rented the Buick, the rental agreement was not signed, the purported identifying information was not confirmed as actually identifying defendant, and neither defendant, his personal possessions, nor his fingerprints were found in the automobile. To conclude from the inference that defendant rented the Buick that he also participated in planning the crime would amount to stacking an inference upon an inference. Defendant's guilt may not be predicated upon such evidence in this state. *State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309 (1986); *State v. Parker*, 268 N.C. 258, 150 S.E. 2d 428 (1966).

While the circumstances of defendant's arrest three days after the raid may be sufficient for the jury to infer that defendant was present at the scene, it would be necessary for the jury to stack inference upon inference for it to further find from these circumstances that defendant also participated in the criminal events of that evening.

I therefore conclude, as did the unanimous panel of the Court of Appeals, that there was insufficient evidence to go to the jury.

Because I believe that the State's evidence was insufficient to take the case to the jury, I would not reach the second issue discussed by the majority. Nevertheless, since the Court has decided to reach this issue, I concur in the well-reasoned opinion of the majority as to this issue.

STATE OF NORTH CAROLINA v. ADAM GLIDDEN

No. 692PA85

(Filed 12 August 1986)

Anonymous Threats § 1— transmitting unsigned threatening letters—secrecy and malice—not felonious

In a prosecution for secretly and maliciously transmitting unsigned threatening letters, the trial court's judgment sentencing defendant as a felon was vacated and the case was remanded for sentencing as a misdemeanor because N.C.G.S. § 14-3(b), which raises to felonies misdemeanors which are infamous or done in secrecy and malice, does not convert a violation of N.C.G.S. § 14-394 into a felony in any case. The crime of transmitting an unsigned threatening letter is not such an act of depravity as to be an infamous offense; does not fall within that class of offenses which are by definition done in secrecy and malice because, although the letters are required to be unsigned, the sender is not required to have maintained privacy or concealed his identity; and it is entirely possible for such an offense to be committed without deceit and intent to defraud.

Justice MEYER concurring.

ON discretionary review of the decision of the Court of Appeals, 76 N.C. App. 653, 334 S.E. 2d 101 (1985), which found no error in the defendant's trial before *Tillery, J.*, at the 5 September 1983 session of Superior Court, NEW HANOVER County. Heard in the Supreme Court 12 May 1986.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

Shipman & Lea, by Gary K. Shipman and James W. Lea, III, for the defendant appellant.

MITCHELL, Justice.

The issue before this Court is whether the misdemeanor of transmitting an unsigned threatening letter in violation of N.C.G.S. § 14-394 is an offense which is made a felony by N.C.G.S. § 14-3(b). We conclude that the transmitting of such a letter does not fall within any of the classes of misdemeanors made felonious by N.C.G.S. § 14-3(b). Accordingly, we reverse the decision of the Court of Appeals.

After a presentment by the grand jury, the defendant was indicted for fourteen counts of feloniously, in secrecy and malice, transmitting unsigned threatening letters between the dates of 30 July 1982 and 18 February 1983. He was convicted by a jury of ten felony counts of transmitting unsigned threatening letters in violation of N.C.G.S. § 14-394 and N.C.G.S. § 14-3(b). The trial court sentenced him to a presumptive term of three years on each count, combined into two groups of concurrent sentences totaling an active sentence of six years.

The State prosecuted the defendant and obtained his felony convictions by relying on the combined effect of N.C.G.S. § 14-394 and N.C.G.S. § 14-3(b). The first statute, N.C.G.S. § 14-394, makes it unlawful to write and transmit an unsigned threatening letter. Standing alone, such an offense is a misdemeanor. *State v. Glidden*, 76 N.C. App. at 654, 334 S.E. 2d at 101; N.C.G.S. § 14-1 (1981). By alleging that the offense was committed "in secrecy and malice," the State was able to elevate the offense and procure felony convictions under N.C.G.S. § 14-3(b). That statute provides:

> If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a class H felony.

N.C.G.S. § 14-3(b) (1981).

The defendant appealed to the Court of Appeals contending that his equal protection and due process rights were violated when the State charged him with felonies by combining the two statutes. The defendant first contended that the elements of secrecy and malice are inherent in both statutes. The defendant contended that where the same act is punishable either as a fel-

ony or a misdemeanor, and the elements essential to a conviction of either are exactly the same, a conviction under the felony statute works a denial of both due process and equal protection. He argued that since the elements of both statutes are the same, the prosecutor has absolute discretion to decide whether a violation is a misdemeanor or a felony, resulting in an equal protection violation. He also argued that the combination of the two statutes results in an ambiguous and vague sentencing provision in violation of due process.

The Court of Appeals rejected each of the defendant's constitutional arguments. Relying on *United States v. Batchelder,* 442 U.S. 114, 60 L.Ed. 2d 755 (1979), it held that the State may elect to prosecute for either a felony offense under the combined statutes or the misdemeanor offense proscribed in N.C.G.S. § 14-394 alone.

Although we find error and reverse the Court of Appeals' decision in the present case, we do not do so on constitutional grounds. We do not address or decide the constitutional issues raised by the defendant. Instead, we hold that N.C.G.S. § 14-3(b) does not convert a violation of N.C.G.S. § 14-394 into a felony in any case.

The majority of cases considering N.C.G.S. § 14-3(b) have involved a solicitation or attempt to commit some specific criminal offense which the State contended was an "infamous offense" and, therefore, a felony under the terms of this statute, *E.g., State v. Mann,* 317 N.C. 164, 345 S.E. 2d 365 (1986) (solicitation to commit common law robbery is infamous crime); *State v. Hageman,* 307 N.C. 1, 296 S.E. 2d 433 (1982) (attempted receipt of stolen property is not infamous); *State v. Harward,* 264 N.C. 746, 142 S.E. 2d 691 (1965); *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496 (1964) (attempt to commit armed robbery is infamous offense); *State v. McNeely,* 244 N.C. 737, 94 S.E. 2d 853 (1956) (attempt to commit common law robbery is infamous offense); *State v. Surles,* 230 N.C. 272, 52 S.E. 2d 880 (1949) (attempt to commit first degree burglary is infamous offense); *State v. Spivey,* 213 N.C. 45, 195 S.E. 1 (1938) (attempt to commit crime against nature is infamous offense). *See State v. Page,* 32 N.C. App. 478, 232 S.E. 2d 460, *disc. rev. denied,* 292 N.C. 643, 235 S.E. 2d 64 (1977) (attempt to obtain property by false pretenses is necessarily done with in-

tent to deceive). *See generally* Note, *Criminal Law—Infamous Offenses—Attempted Burglary Punishable as a Felony,* 28 N.C. L. Rev. 103 (1949) (historical discussion).

In determining whether an offense is "infamous" and shall be punished as a felony for that reason under N.C.G.S. § 14-3(b), this Court has consistently looked to the nature of the offense. *Id.* In the most recent case considering that issue, we stated that: "A crime is 'infamous' within the meaning of the statute if it is an act of depravity, involves moral turpitude, and reveals a heart devoid of social duty and a mind fatally bent on mischief . . . ." *State v. Mann,* 317 N.C. at 170, 345 S.E. 2d at 369. The "infamous" nature of the offense was the determinative consideration rather than the particular circumstances of the individual case. It suffices to say that we conclude that the crime of transmitting an unsigned threatening letter is not such an act of depravity as to be an "infamous" offense made felonious by N.C.G.S. § 14-3(b).

We turn then to consider whether the offense of transmitting an unsigned threatening letter falls within the other classes of misdemeanors made felonious by N.C.G.S. § 14-3(b). We conclude that it does not.

In *State v. Hageman,* 307 N.C. 1, 296 S.E. 2d 433 (1982), this Court considered whether the attempted receipt of stolen property fell within one of the three classes of misdemeanors made felonies by N.C.G.S. § 14-3(b). We first determined that the offense of attempting to receive stolen property is not of such a degrading nature as to be classified as an "infamous" crime under N.C.G.S. § 14-3(b). 307 N.C. at 9, 296 S.E. 2d at 439. We next considered whether the offense could fall within the remaining two classes. In construing the meaning of the words "done in secrecy and malice" and "with deceit and intent to defraud," as used in the statute, we adopted that part of the dissent of Justice Ervin in *State v. Surles,* 230 N.C. 272, 284, 52 S.E. 2d 880, 888 (1949), where he wrote:

> When the Legislature used the words "done in secrecy and malice, or with deceit and intent to defraud," to describe the second and third classes of aggravated offenses included in the statute now codified as G.S. 14-3, its manifest purpose was to describe offenses in which either secrecy and malice,

> or the employment of deceit with intent to defraud are elements necessary to their criminality as defined by law.

307 N.C. at 9, 296 S.E. 2d at 438-39. We then held that the offense of attempted receipt of stolen property did not include secrecy, malice, deceit or intent to defraud as *necessary* elements of the crime.

In determining whether a misdemeanor is an offense "done in secrecy and malice," then, the courts must apply a *definitional test* and determine whether both "secrecy and malice" are necessary or inherent elements of the offense. This approach is consistent with the general rule that criminal statutes are to be strictly construed against the State. *State v. Hageman*, 307 N.C. at 9, 296 S.E. 2d at 438; *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967). Further, this approach is mandated by *Hageman*.

Having set forth the proper test, we conclude that the offense of transmitting unsigned threatening letters does not fall within that class of offenses which are by definition "done in secrecy and malice" and, therefore, felonies. Secrecy is not an element inherent in the offense. Secrecy is defined as "the habit or practice of keeping secrets or maintaining privacy or concealment." *Webster's Ninth Collegiate Dictionary*, 1061 (1984). Although N.C.G.S. § 14-394 requires that the threatening letters be unsigned, it does not require that the sender have maintained privacy or concealed his identity in order to be convicted. The sender could transmit an unsigned threatening letter while at the same time exposing his identity. The threatening letter could contain clues allowing for the unmistakable identification of the sender, such as personal facts and recognizable handwriting. Likewise, the sender could hand deliver the unsigned letter thereby destroying any possibility of anonymity and secrecy. The sender could easily violate N.C.G.S. § 14-394 by transmitting an unsigned threatening letter without maintaining secrecy. Therefore, we conclude that the offense of transmitting unsigned threatening letters does not by definition include the elements of secrecy *and* malice.

For similar reasons, the offense of transmitting unsigned threatening letters does not fall within the third class of misdemeanors made felonious by N.C.G.S. § 14-3(b). It is entirely possible for such an offense to be committed without "deceit and

intent to defraud." Therefore, such offenses are not by definition done "with deceit and intent to defraud" and are not elevated to the level of felonies on that basis.

A prosecutor has neither the discretion nor the authority, under either N.C.G.S. § 14-394 or N.C.G.S. § 14-3(b), to charge a person with *feloniously* transmitting unsigned threatening letters. The trial court erred in the present case by entering its judgment punishing the defendant as a felon under N.C.G.S. § 14-3(b).

For the foregoing reasons, the trial court's judgment sentencing the defendant as a felon must be vacated. The case must be remanded to the Superior Court, New Hanover County, for judgment and sentencing as a misdemeanor pursuant to N.C.G.S. § 14-3(a). *State v. Hageman*, 307 N.C. 1, 10, 296 S.E. 2d 433, 439 (1982). Accordingly, the decision of the Court of Appeals is reversed, and the judgment of the trial court is vacated. This case is remanded to the Court of Appeals for its further remand to the Superior Court, New Hanover County, for further proceedings consistent with this opinion.

Reversed, judgment vacated, and remanded.

Justice MEYER concurring.

Although I agree with the result reached by the majority, I cannot subscribe to its rationale. The "definitional test" so readily adopted by the majority to determine whether a misdemeanor may be "elevated to the level of felon[y]" raises the very constitutional principles the majority refuses to address and its application defies logic and common sense.

This case requires the construction of several statutes and therefore requires an examination of legislative intent. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). Legislative intent may be ascertained from the words as well as the nature and purpose of the statute and the consequences which would follow from a construction one way or another. *Campbell v. Church*, 298 N.C. 476, 259 S.E. 2d 558 (1979).

The substantive offense with which the defendant was charged is set out in N.C.G.S. § 14-394:

> It shall be unlawful for any person, . . . under whatever name styled, to write and transmit any letter, note, or writing . . . without signing his . . . true name thereto, threatening any person . . . with any personal injury or violence or . . . using . . . any language or threats of any kind . . . calculated to intimidate or place in fear any such persons . . . as to their personal safety . . ., or using vulgar or obscene language, or using such language which if published would bring such persons into public contempt and disgrace, and any person . . . violating the provisions of this section shall be fined or imprisoned, or both, in the discretion of the court.

N.C.G.S. § 14-394 (1981).

The offense described by the words of that statute is a misdemeanor by operation of N.C.G.S. § 14-1 (an offense is a misdemeanor unless (1) it was a felony at common law, (2) it is punishable by death, (3) it is punishable by imprisonment in the state prison, or (4) it is denominated as a felony by statute). *See also State v. Robbins*, 253 N.C. 47, 116 S.E. 2d 192 (1960). However, N.C.G.S. § 14-394 does not prescribe "specific punishment." Section 14-394 is, therefore, "a misdemeanor offense as to which no specific punishment is prescribed." N.C.G.S. § 14-3(b) (1981). That latter statute provides that violators of such offenses shall "be guilty of a class H felony" if such misdemeanor offenses "*be* infamous, *done* in secrecy and malice, or with deceit and intent to defraud." *Id.* (emphasis added).

The words of § 14-3(b) call for two different tests, depending upon which of the three prongs is being considered. A "definitional test" is applied in order to determine, for purposes of § 14-3(b), if an offense "*be* infamous." The definitional test requires an examination of the *nature* of the offense *itself* without consideration of the circumstances under which it was committed. *See, e.g., State v. Mann*, 317 N.C. 164, 345 S.E. 2d 365 (1986); *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496 (1964); *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938). The test is objective; an offense either "be infamous" or not. I agree with the majority that transmitting unsigned threatening letters is not infamous as that legal concept has been variously defined. *See, e.g., State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949) (Ervin, J., dissenting).

The second and third prongs of § 14-3(b) call for an entirely different inquiry. The words of that statute ask whether the offense was "*done* in secrecy and malice, or [*done*] with deceit and intent to defraud." Whether or not an act was *done* in some specific manner or *done* with a specific state of mind depends upon subjective factors to be examined on a case-by-case factual or "transactional" basis.

All but two of the cases cited by the majority in support of its blanket adoption of a "definitional test" for § 14-3(b) are cases examining the *first* prong of § 14-3(b): whether an offense "be infamous." The majority opinion in *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880, although concerned primarily with the "infamous" nature of attempted burglary, notes almost in passing that "[s]ecrecy is implicit in an act which must be done in the nighttime." *Id.* at 277, 52 S.E. 2d at 884. The only other case cited by the majority in which the second or third prong was the basis of decision was *State v. Page*, 32 N.C. App. 478, 232 S.E. 2d 460, *disc. rev. denied*, 292 N.C. 643, 235 S.E. 2d 64 (1977), in which the Court of Appeals held that "[a]ny attempt to obtain property by false pretenses necessarily is done with intent to deceive. By its plain language G.S. 14-3(b) makes any attempt to obtain property by false pretenses a felony." *Id.* at 481, 232 S.E. 2d at 462.

By adopting a definitional test for the application of the second and third prongs of § 14-3(b), the majority has, in essence, held that, although the legislature might define as a misdemeanor a substantive offense which includes as essential elements that it was committed in secrecy and malice, the offender may be convicted of a class H felony by superimposing § 14-3(b), depending on whether or not the prosecutor elects to punish the offender as a felon or is aware that such an "elevation" is possible. The definitional application of the latter two prongs of § 14-3(b) would require the prosecutor merely to prove the essential elements of the substantive statutory misdemeanor in order to convict the defendant of a class H felony. If a prosecutor were not aware of § 14-3(b) or elected for whatever reason not to employ it, he or she would proceed toward a misdemeanor conviction on the face of the plain words of the substantive statute. This amounts to a situation in which the identical conduct of a defendant may result in his conviction either for a two-year misdemeanor or a presumptive three-year felony, depending solely on the unchecked discre-

tion of the prosecutor or his unfamiliarity with § 14-3(b). It is inconceivable to me that our legislature intentionally would define specific conduct as a misdemeanor in one breath and, in the next, provide that it be punishable as a class H felony.

A hypothetical example of the operation of the majority's reasoning might be helpful:

Statute X sets out the following elements of a misdemeanor but does not provide for specific punishment:

(1) Taking and carrying away

(2) the family pet

(3) of another

(4) in secrecy

(5) and with malice.

Because the defendant is angry with his neighbors for playing their stereo too loud, he enters the yard of his neighbor at night wearing dark clothing and a mask and places the neighbor's family pet, Fifi the Poodle, in a burlap sack, carries it away, and releases it in the next county. Defendant is arrested and charged, pursuant to Statute X and § 14-3(b).

If the prosecutor proves each and every element of the *misdemeanor* defined in Statute X, defendant, by the majority's interpretation of § 14-3(b), is guilty of a class H felony. By this interpretation, the majority holds that the legislature has defined the above conduct as a substantive misdemeanor, yet it has provided that one who violates the substantive statute is guilty of a class H felony by operation of a non-substantive statute, § 14-3(b), if the prosecutor proves *no more than* each essential element of the substantive misdemeanor!

It defies logic and common sense to hold that the legislature intended this result. If the legislature intended that violators of Statute X be convicted as class H felons, why would it label the conduct proscribed by Statute X as a misdemeanor? I believe that the legislature intended to raise to the level of a felony only those misdemeanors which do *not* have as necessary elements secrecy and malice or fraud and deceit, but which are "done" with those

additional characteristics, i.e., in the manner described in either the second or third prong of § 14-3(b).

Beyond the incongruous result of the majority's interpretation, it squarely raises constitutional issues of due process and questions of statutory ambiguity raised by the defendant in the instant case yet found by the majority unnecessary to address.

The majority's interpretation of the operation of § 14-3(b) would allow a prosecutor arbitrarily to elect to pursue a felony conviction for an offense, *defined* by the substantive statute *as a misdemeanor*, which requires proof of the very elements by which it may be "elevated" to felony status. There would be no substantive distinction between the statutorily defined misdemeanor and its "elevation" to a class H felony by operation of § 14-3(b). Viewed another way, every misdemeanor which contains the elements of "secrecy and malice," but for which specific punishment is not prescribed, automatically becomes a class H felony, *despite* the legislative designation of the offense as a misdemeanor; the misdemeanor designation is meaningless. I believe that such a scheme raises serious constitutional questions about vagueness, ambiguity, and notice of how prohibited conduct is punishable.

As chronicled in Justice Ervin's lengthy dissent in *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880, § 14-3(b) is of ancient origin; its ancestors have been applied in situations no longer a part of our criminal justice system. It is a vestige of the common law which provided no specific punishment for attempts to commit well-recognized criminal offenses. *See id.* at 279, 52 S.E. 2d at 885. I admit that I question its modern viability. However, assuming its constitutionality as well as its viability, I perceive that if § 14-3(b) were to be applied to a violation of N.C.G.S. § 14-394, it would operate as follows:

Section 14-394, standing alone, is a general misdemeanor by operation of § 14-1. Section 14-394 does *not* contain as essential elements that the prohibited act be committed in secrecy or with malice. *For that reason,* a prosecutor may elect to charge an offender with a misdemeanor violation and, at trial, must prove only each and every essential element set out in § 14-394. Upon conviction, the offender will be guilty of the general misdemeanor. However, a prosecutor, upon a belief that the offense

described in § 14-394 was committed in secrecy and with malice, may indict an offender with a felony violation of that statute by operation of § 14-3(b). The indictment would have to allege that it charged a felony violation of § 14-394 because it was committed in secrecy and with malice. At trial, the prosecutor would be required to prove beyond a reasonable doubt each and every element of the offense described in § 14-394 *as well as* the *additional elements* of secrecy and malice. Upon such proof, the offender would stand convicted of a class H felony and be punished accordingly. Failure of the prosecutor to prove the additional elements of secrecy and malice would result in a conviction of the lesser-included misdemeanor, § 14-394. The felony offense and the misdemeanor offense do *not* punish identical conduct differently; a felony conviction requires proof of *two* additional elements.

This procedure is not susceptible of an equal protection or due process challenge for the same reasons that an indictment for first-degree burglary as opposed to one for second-degree burglary is not constitutionally infirm. First-degree burglary involves the allegation and proof of the *additional* element that the house was actually occupied at the time of the crime; the "degree" of the offense charged and tried depends upon the facts of the case. Here, if the facts proved a secret and malicious transmission of unsigned threatening letters, a felony indictment and conviction would be appropriate. Because I believe that the facts proved in the instant case failed to show secrecy, at least, I agree that this defendant was wrongly convicted of the felony.

In summary, I believe that the majority reached the right result for the wrong reasons. I also believe that the confusion engendered by § 14-3(b) bears witness to the need for legislative reconsideration in light of its continuing attempts to provide a sensible, systematic codification of our criminal law and an attendant cohesive, comprehensive scheme for the punishment of criminal offenses.

STATE OF NORTH CAROLINA v. MICHAEL ALLEN STAFFORD

No. 598A85

(Filed 12 August 1986)

Criminal Law § 53; Rape and Allied Offenses § 4— rape trauma syndrome—victim's statements to physician—inadmissible hearsay

The trial court erred in a prosecution for second degree rape by admitting the testimony of a physician regarding rape trauma syndrome and statements made to him by the victim and her mother regarding the rape and the victim's subsequent symptoms. The testimony did not fall under the exception to the hearsay rule for statements made for medical diagnosis and treatment because it was abundantly clear on the record that the statements were made not for diagnosis and treatment but to prepare and present the State's rape trauma syndrome theory at trial; moreover, the testimony was not admissible as corroboration because it was obviously not offered for that purpose and because it went far beyond the testimony of the victim and her mother. N.C.G.S. § 8C-1, Rule 803(4).

Justice MARTIN dissenting.

Justice MITCHELL joins in the dissent.

APPEAL of right by the state under N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 77 N.C. App. 19, 334 S.E. 2d 799 (1985) (opinion by *Webb, J.*, with *Becton, J.*, concurring in the result and *Martin (John C.), J.*, dissenting), ordering a new trial for defendant on the ground of evidentiary errors. Defendant had been convicted of second degree rape before *Lewis, J.*, and a jury during the 16 July 1984 Session of WAYNE County Criminal Superior Court, and had received the presumptive twelve-year sentence.

Lacy H. Thornburg, Attorney General, by Alfred N. Salley, Joan H. Byers and David Roy Blackwell, Assistant Attorneys General, for the state appellant.

Barnes, Braswell, Haithcock & Warren, P.A. by R. Gene Braswell and S. Reed Warren for defendant appellee.

EXUM, Justice.

The Court of Appeals held in this rape case that it was reversible error to submit certain testimony concerning what a physician described as "rape trauma syndrome." Judge Webb, writing for the majority, concluded that insofar as this evidence

consisted of statements made to the physician by the prosecuting witness, the physician could not relate them because they were made to him "in preparation for going to court" and not for diagnosis and treatment, as required by N.C.G.S. § 8C-1, Rule 803(4).[1] Judge Webb concluded further that the statements related by the physician went beyond merely corroborating the prosecuting witness's own testimony. Judge Becton concurred in the result on the ground that the phenomenon referred to as "rape trauma syndrome" had not attained sufficient scientific reliability to be admissible as evidence in a criminal case. Judge Martin dissented, concluding there was no error in the admission of any of the physician's testimony. The state appeals.

We conclude the trial court committed reversible error in admitting the physician's testimony. We neither reach nor decide the question of whether in a proper case expert testimony concerning "rape trauma syndrome" will be admitted in the trial courts of this state.

I.

The state relied essentially on the testimony of the prosecuting witness who on 9 December 1983, according to the evidence, was a 13-year-old female junior high student, 5 feet 4 inches tall, 125 pounds, and well-developed for her age. She testified that on that date she spent the evening in the home of her aunt, Sally Stafford, and Sally's husband Mike Stafford, the defendant. Sometime during the night she awoke to find her hands tied behind her back with torn pillowcases and defendant standing above her. After trying to muffle her screams by putting a washcloth over her mouth, defendant laid her across the bed, pulled down her underpants and raped her. He left the room and disposed of the torn pillowcases in the fireplace. She noticed bleeding in her vaginal area; but after washing herself, she slept until morning. She had never before engaged in sexual intercourse. She told no one about the incident until sometime in January 1984 when she told a friend from school about it. Her friend convinced her to tell her mother, who, when told, notified law enforcement authorities. Her mother, the prosecuting wit-

1. Hereinafter references to various evidentiary rules in N.C.G.S. § 8C-1 will be made simply by rule number.

ness's school friend, and an investigating deputy sheriff testified to prior consistent statements made by the prosecuting witness to them concerning the incident.

Defendant testified in his own behalf and also presented evidence through his wife, her sister, and two character witnesses. Defendant's evidence tended to show the following:

Defendant slept with his wife and three-year-old daughter on the night in question. Defendant neither made sexual advances toward nor raped his niece. The prosecuting witness acted normally towards defendant and his family at all times before and after this incident allegedly occurred. Despite various opportunities to leave, tell her aunt, or call her parents either before or after the alleged attack, the girl remained in the house that evening, slept through the night after the incident she described, and stayed through the next morning, not telling anyone of the incident until one month later. Defendant acted normally at all times. No one heard any noise or commotion during the night the prosecuting witness spent at the Stafford's home. The next morning, the girl helped defendant's wife Sally with household chores and asked to help bake a cake for a Stafford family gathering the former wanted to attend that afternoon. No one ever found the torn pillowcases or sheets allegedly used to tie up the prosecuting witness. Neither Sally Stafford nor her sister Cheryl Parker, who normally slept in the bed occupied on 9 December 1983 by their niece, saw any blood spots on the bedding, and everything in the room was in proper order. Ms. Parker often had been alone in the house with defendant while living with the Staffords, and defendant had never made improper advances toward her. One afternoon a week or two before this incident allegedly occurred, the prosecuting witness had asked Ms. Parker if they "could go out whoring around." Furthermore, the prosecuting witness had been experiencing difficulties with female classmates who accused her of stealing their boyfriends. These conflicts upset her and caused her parents to consider transferring her to another school.

II.

The testimony giving rise to the evidentiary questions in this case was that of Dr. Joseph Ponzi, tendered by the state as an expert pediatrician. Dr. Ponzi testified that he first saw the prosecuting witness on 12 January 1984. She came to his office "with a

complaint of possible sexual abuse." He testified to the version of the crime given him by the prosecuting witness which, with a few minor inconsistencies, essentially corroborated the witness's trial testimony.

Dr. Ponzi then testified that he was familiar with the "medical term 'rape trauma syndrome.'" Upon objection the jury was excused and a voir dire was held regarding the admissibility of this line of testimony. Defendant objected on the grounds there had been no indication by the state in the discovery stages of the case that the state would rely on rape trauma syndrome. Neither was there any indication of such a diagnosis in the physician's report furnished to defendant. Upon inquiry by the court as to whether Dr. Ponzi held himself out as "an expert in the field of trauma and related sex offenses," Dr. Ponzi replied:

> That's a difficult question. . . . I don't think there are any experts per se in that field . . . but usually pediatrics sees the whole spectrum of abuse. . . . So there aren't any specialists in rape trauma or rape itself. It's something we all see and we're diagnosing more and more often. I'm not going to make any conclusions about whether or not this child was raped. . . . The only thing I will say is define what the syndrome is and say she may fulfill some of that criteria. . . . I can state what she told to me and what the symptoms of the syndrome are. I think the defense is probably right. It's hard to, you know, you have to go into an in-depth psychological before and after to probably—absolutely say it's definitely the reason why this child is living some of these symptoms. . . . I can't make any conclusions whether or not this means she was raped. I can just say she fulfills some of the criteria for the syndrome that has been defined, and that's all I can say.
>
> . . . .
>
> [Rape trauma syndrome is] a well-recognized [by the medical profession] complex number of symptoms that has been referenced multiple times. . . . I brought some articles along to substantiate the fact that it exists. Burgess and Holstrum have described what they call a rape trauma syndrome. . . . [There is a reference] in Symposium on Pediatrics and Adolescent Gynecology and Pediatric Clinics of

North Carolina, Volume 28, May 1981. Another reference is Burgess and Holstrum, Rape Trauma Syndrome, American Journal of Psychiatry, Volume 131981, 1974. It's a recognized medical syndrome.

After this voir dire the court overruled defendant's objections, the jury was returned to the courtroom and the following testimony was given by Dr. Ponzi:

> Rape trauma syndrome is "a syndrome described in medical literature affecting or concerning people who have been raped, and it's a list of symptoms or a symptom complex that seems to be attributable to these people as a result of the fact they were raped.
>
> . . . .
>
> It shows such things as muscular skeletal complaints, headaches, vomiting, weight loss, vaginitis, dysmenorrhea, emotional turmoil.

Regarding the prosecuting witness's visit to Dr. Ponzi on 12 January, the prosecuting attorney first asked and then withdrew a question as to whether the physician made a medical diagnosis on that occasion. Dr. Ponzi testified that he spoke with the prosecuting witness on 12 January; she told him what had happened. He did not give her any tests or any type of treatment and did nothing other than talk to her and give her a physical examination.

Dr. Ponzi testified he next saw the prosecuting witness and her mother on 13 July 1984, the Friday before trial was to begin on Monday, 16 July. Dr. Ponzi asked the witness whether there had been any "unusual symptoms that had developed since the incident, or the alleged incident." Dr. Ponzi said the prosecuting witness "told me that she had a 15-pound weight loss between December and February. She said she had been vomiting. She was crying a lot, emotionally labile, and had marked, . . . decreased school performance. She had some nightmares and dreamed occasionally about the incident, the alleged incident. Tammy was noted to be depressed by the mother." Defendant's objections to this testimony were overruled and his motion to strike the testimony denied.

On cross-examination Dr. Ponzi said that he saw the prosecuting witness for about an hour per visit on 12 January and 13 July. Dr. Ponzi also admitted that peer pressure on teenagers could cause problems similar to those he had mentioned and that one could have "emotional turmoil for lots of reasons." He said his physical examination of the prosecuting witness, including her vaginal area, on 12 January was normal.

We agree with Judge Webb's opinion in the Court of Appeals that Dr. Ponzi's testimony concerning what the prosecuting witness told him on 13 July was inadmissible hearsay.

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." Rule 801(c). The statements attributable to the prosecuting witness by Dr. Ponzi were obviously offered to prove the truth of the matter asserted. Hearsay is inadmissible under Rule 802 unless the proffered testimony falls under one of the various exceptions listed in Rule 803. The exception germane to the instant case appears in Rule 803(4):

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

The Advisory Committee's Note to Rule 803(4) enunciates the rationale behind this exception:

> 'Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. . . . The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment.

Essentially Rule 803(4) codifies prior case law on the subject. *State v. Franks*, 300 N.C. 1, 9, 265 S.E. 2d 177, 182 (1980); *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979); *State v. Bock*, 288 N.C.

145, 217 S.E. 2d 513 (1975), *death sentence vacated*, 428 U.S. 903 (1976).

Under Rule 803(4) a prerequisite to admissibility for substantive purposes of statements made to physicians is that they be "made for purposes of medical diagnosis or treatment . . . ." It is abundantly clear on this record, as Judge Webb concluded in the Court of Appeals, that the prosecuting witness's statements to Dr. Ponzi concerning symptoms she had experienced months earlier were made not for purposes of diagnosis or treatment but for the purpose of preparing and presenting the state's "rape trauma syndrome" theory at trial which was to commence three days later. Dr. Ponzi admitted that he neither treated nor diagnosed any condition of the prosecuting witness on 13 July. There was no testimony from either the prosecuting witness or her mother that they visited Dr. Ponzi for the purpose of treatment or obtaining a diagnosis. Indeed, Dr. Ponzi never diagnosed the prosecuting witness as suffering from "rape trauma syndrome." He simply listed some of the symptoms of that syndrome and then testified concerning various symptoms the prosecuting witness told him she had experienced. He never purported to give an opinion for the jury as to whether the prosecuting witness by reason of her symptomatology suffered from "rape trauma syndrome."

We are bolstered in our conclusion by our holding in *State v. Bock*, 288 N.C. 145, 217 S.E. 2d 513. In *Bock*, as in the instant case, the expert witness had seen the putative patient briefly only days before the trial in which the expert testified in the latter's behalf. The expert, a psychiatrist in *Bock*, based his opinion as did the pediatrician in the instant case on the history given by defendant (the "patient") and his family. This Court held the testimony inadmissible because the visit was to prepare for testifying at trial, not to treat and cure defendant. The information the "patient" gave, therefore, lacked the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment.

Judge Martin in his dissent below suggested the following test for admissibility under Rule 803(4), which the state also promoted in its brief: "[I]s the declarant motivated to tell the truth because diagnosis or treatment depends on what she says; and is it reasonable for the physician or health care provider to rely on

this information." *State v. Stafford,* 77 N.C. App. at 25, 334 S.E. 2d at 802-03 (John C. Martin, J., dissenting). Even if we were to adopt that standard, it would avail the state nothing in the instant case. As the prosecuting witness did not visit him for diagnosis or treatment and Dr. Ponzi neither diagnosed nor treated her, the motivation to tell the truth is simply not present.

Neither is the challenged testimony admissible for the purpose of corroborating the prosecuting witness's or her mother's testimony. First, this is obviously not the purpose for which it was offered. Second, the prosecuting witness's mother testified merely that she "heard her [daughter] tell [Dr. Ponzi] the whole story." The prosecuting witness's mother never specified in her testimony any of the symptoms her daughter related to Dr. Ponzi. Dr. Ponzi's testimony went far beyond that of the prosecuting witness herself, who said before the jury only that she had lost 10 to 15 pounds and had made lower grades in school after the attack. On cross-examination, however, she admitted that she had been doing poorly in school before December 1983, saying "I always do bad in school. I can't help it." In contrast, Dr. Ponzi testified the prosecuting witness had told him not only about her weight loss between December and February but also that she had been vomiting, was crying a lot, was emotionally labile, had had a marked decrease in school performance, and had nightmares about the incident.

Finally, we do not deem it necessary to reach on this record the question whether in a proper case testimony about rape trauma syndrome will be admissible in the courts of this state. Other jurisdictions are divided on the issue. *Compare State v. McQuillen,* 236 Kan. 161, 689 P. 2d 822 (1984); *State v. Middleton,* 294 Or. 427, 657 P. 2d 1215 (1983); *State v. Liddell,* 685 P. 2d 918 (Mont. 1984), holding rape trauma syndrome testimony admissible, *with State v. Saldana,* 324 N.W. 2d 227 (Minn. 1982); *People v. Bledsoe,* 36 Cal. 3d 236, 681 P. 2d 291 (1984), holding rape trauma syndrome testimony inadmissible because of a lack of scientific reliability. In the instant case Dr. Ponzi never, as we demonstrated above, diagnosed the prosecuting witness as having suffered from rape trauma syndrome. Indeed he never diagnosed the prosecuting witness as suffering from any medical malady at all. His testimony on voir dire made it clear that before the prosecuting witness, or any other person, could be diagnosed as suffering

from rape trauma syndrome, that person would have to undergo an "in-depth" psychological examination both before and after the attack. This was never done in this case. Even if we were to hold that the concept of rape trauma syndrome had enough scientific reliability to be admitted into evidence in a criminal trial, a prerequisite to admissibility would be that the prosecuting witness be diagnosed as suffering from it. Since there was no such diagnosis in the instant case, testimony on the subject was not admissible for this reason alone.

For the foregoing reasons the decision of the Court of Appeals is

Affirmed.

Justice MARTIN dissenting.

I respectfully dissent. I find that the testimony of Dr. Joseph Ponzi is competent within the meaning of Rule 803(4) of the North Carolina Rules of Evidence. The only assignment of error addressed by the Court of Appeals was whether Dr. Ponzi's testimony concerning "rape trauma syndrome" was admissible. Dr. Ponzi's testimony concerning this issue was based in part upon the testimony of Tammy Ingram and her mother concerning Tammy's symptoms. The majority holds the admission of this testimony to be prejudicial error. Tammy and her mother went to Dr. Ponzi for examination on 12 January 1984, one month and three days after the rape occurred. Under Rule 803(4), statements made for the purpose of medical diagnosis and past or present symptoms, pain or sensations, are admissible. The reason for their admissibility is based upon their reliability because of the motivation of the declarant to assist the physician in diagnosis or treatment. Not only are statements by the patient admissible, but statements made to the physician by a third person as to the patient's symptoms are also admissible when made for that purpose if the court determines that such statement is likely to be reliable. 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(4) [01], at 145 (1985). It is not necessary that the physician actually make a diagnosis or actually treat the patient in order for the rule to apply. The majority seems to indicate that unless the physician makes the diagnosis, then the exception to the hearsay rule is not applicable. Such a restrictive interpretation obviously

could exclude statements reasonably pertinent to diagnosis or treatment of other medical conditions.

I also see no reason to exclude statements given to a medical doctor for the purpose of diagnosis *and* in preparation for trial. If the statements were made for a medical purpose, the incidental fact that the statements would be used as evidence should not make them inadmissible. To do so would likely eliminate statements made to medical doctors in the examination of claimants by doctors appointed by the Industrial Commission for that purpose. In such situations, the sole purpose often is to determine the amount of disability that a claimant has, without any purpose of making a diagnosis or giving treatment to the claimant. Rule 803(4) of the Federal Rules of Evidence is identical to the North Carolina rule. The Advisory Committee's comment to the federal rule states:

> Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. *The rule accordingly rejects the limitation.* This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

(Emphasis added.) Thus it appears that the challenged testimony would be admissible under the federal rule. The majority has not demonstrated to me why our rule should be construed to the contrary.

Dr. Ponzi testified that when Tammy was at his office on 12 January 1984 she was very upset and cried at two points. He further testified what Tammy told him as to the facts of the incident with her uncle. Dr. Ponzi made a physical examination of Tammy on 12 January 1984 and diagnosed her condition, including her vaginal area, as normal. Dr. Ponzi then testified that he saw her on 13 July 1984, a few days before the trial. At that time he asked her and her mother if any unusual symptoms had devel-

oped since the incident. Tammy and her mother told him that she had a fifteen-pound weight loss between December and February, and she had been vomiting, was crying a lot, and was emotionally labile. Tammy had markedly decreased school performance, had nightmares and dreams about the event, and was depressed.

The majority relies upon *State v. Bock*, 288 N.C. 145, 217 S.E. 2d 513 (1975). This case was decided *before* the effective date of the new evidence code. Moreover, later cases permit this type testimony from court-appointed physicians even though the medical examination was solely for the purpose of preparing the doctor to testify. *E.g.*, *State v. Allison*, 307 N.C. 411, 298 S.E. 2d 365 (1983) (error to exclude psychiatrist's testimony concerning substance of his conversation with defendant which provided basis of his opinion as to defendant's sanity); *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979).

The answers to the questions propounded by Dr. Ponzi to Tammy and her mother provided him with information as to Tammy's physical, emotional, and mental condition, such information being useful to the doctor as a basis for a diagnosis and treatment of her condition. As such I find that the statements are within the scope of admissible hearsay permitted by N.C.R. Evid. 803(4). *See United States v. Iron Thunder*, 714 F. 2d 765 (8th Cir. 1983); *State v. Hebert*, 480 A. 2d 742 (Me. 1984).

Dr. Ponzi's testimony also largely corroborated the testimony of Tammy and her mother. The trial judge instructed the jury as to corroborating evidence with respect to Dr. Ponzi's testimony. Although Dr. Ponzi's testimony was not precisely the same as the testimony of Tammy and her mother, the discrepancies were not so significant as to render the use of the testimony reversible error. *State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985). Even if the testimony in question was incompetent for one purpose, that would not prevent its admission for another proper purpose. 1 Brandis on North Carolina Evidence § 79 (1982).

Justice MITCHELL joins in this dissenting opinion.

JOHN A. SHARPE, JR.; HELEN A. SHARPE; CLIFFORD S. SHARPE; BRENDA B. SHARPE; AND HAL C. SHARPE v. PARK NEWSPAPERS OF LUMBERTON, INC.

No. 56A86

(Filed 12 August 1986)

Declaratory Judgment Act § 3— anti-competitive provisions in promissory notes— no justiciable controversy

The trial judge properly dismissed for lack of a justiciable controversy a declaratory judgment action in which plaintiffs sought to have declared invalid provisions in notes accepted by plaintiffs for the sale of a newspaper which prohibited competition by plaintiffs. Plaintiffs had not competed against defendant in the covered area and the only intentions expressed by plaintiffs were to explore feasibility or to ascertain opportunities; whether they would actually engage in competitive activity would depend upon many factors other than the provisions in the notes. N.C.G.S. § 1-254 (1983); N.C.G.S. § 1A-1, Rule 12(b)(6).

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 78 N.C. App. 275, 337 S.E. 2d 174 (1985), which reversed a judgment entered by *Ellis, J.*, on 11 December 1984, in Superior Court, ROBESON County. Heard in the Supreme Court 17 April 1986.

The plaintiffs, minority shareholders in a corporation that sold its assets to defendant, filed suit 1 July 1983 alleging unfair restraint of trade and asking for a declaratory judgment to determine the validity of certain provisions in a promissory note executed by the defendant to the corporation which was in turn assigned to the plaintiffs for their share of the unpaid balance of the purchase price of the corporation's assets. Defendant's motions to dismiss and for summary judgment under N.C.G.S. § 1A-1, Rules 12(b)(6) and 56 were denied. At the end of the plaintiffs' evidence in a non-jury trial, Judge Ellis granted defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 41(b) on the ground that there existed no justiciable controversy between the parties.[1] The plaintiffs appealed to the Court of Appeals, which

1. This dismissal is, of course, not an adjudication upon the merits. N.C.G.S. § 1A-1, Rule 41(b) (1983) provides, *inter alia*: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction* . . . operates as an adjudication upon the merits." (Emphasis added.)

reversed the trial court, one judge dissenting. The defendant appealed to this Court.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Donald W. McCoy; and Lee & Lee, by W. Osborne Lee, Jr., for plaintiff-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson, Michael E. Weddington, and William H. Moss, for defendant-appellant.

BILLINGS, Justice.

In 1982, the defendant purchased the assets of The Robesonian, Inc., whose business was the publication of a daily and Sunday newspaper in Lumberton, North Carolina called The Robesonian. The plaintiffs, minority stockholders in The Robesonian, Inc., voted against the sale of the assets.

In partial payment of the $11,751,000.00 purchase price for the assets of the corporation, the defendant gave promissory notes to the corporation, which were distributed to the shareholders in amounts proportional to their ownership interests. The plaintiffs object to the following provisions in their note, which, except for different amounts payable, were in all of the promissory notes, and request a judicial declaration that they are invalid and unenforceable:

A. If the Holder does not compete against Park as hereinafter defined, the principal amount shall bear interest at the rate of ten percent (10%) per annum and shall be payable:

> $78,724.96 on April 1, 1983, together with accrued interest; thereafter in equal quarterly payments of principal and interest of $30,077.99 each during the following nine year period on the first day of July, October, January and April of each year; or

B. If the Holder does compete with Park, as hereinafter defined, then the unpaid principal amount of this Note shall thereafter not bear interest and shall be payable in a lump sum on March 23, 1992.

> For the purposes of determining the payments due under this Note, as provided above, the Holder shall be deemed and held to be competing against Park if he or she shall, without prior written consent and approval of Park, to any extent directly or indirectly own, operate, finance, establish, control, support, or be employed by a newspaper or other printed advertising medium in Robeson County, North Carolina or in any county contiguous to Robeson County, North Carolina, or if he or she shall permit any third party to use his or her name to finance, directly or indirectly, any activities which would result in competition with Park or with any corporation affiliated with Park which publishes a newspaper or other printed advertising medium in any of the aforesaid counties.

In his judgment dismissing the plaintiffs' action, the trial judge made, *inter alia*, the following findings of fact:

> 4. That the discovery in this case includes Interrogatories to plaintiffs and plaintiffs' Answers thereto as follows:
>
> > Question 3. As of on or about July 1, 1983 and continuing to the present what plans, if any, do you have to directly or indirectly own and operate, finance, establish, control, support or be employed by any newspaper or other printed advertising medium in Robeson County, North Carolina, or in any county contiguous to Robeson County, North Carolina?
> >
> > ANSWER: John A. Sharpe, Jr. and Helen A. Sharpe—Contingent upon court decision granting the relief sought by plaintiffs in this action, INTEND TO EXPLORE FEASIBILITY of directly or indirectly owning and/or operating and/or financing and/or establishing and/or controlling and/or supporting and/or becoming employed by a newspaper or other printed advertising medium in Robeson County or any county adjacent thereto. [Emphasis added by trial court.]
> >
> > . . . .
>
> 7. That plaintiffs have presented no evidence of specific plans to directly or indirectly own, operate, finance, establish,

control, support or become employed by a newspaper or other printed advertising medium in Robeson County or in any other county adjacent thereto.

8. That due to plaintiffs' lack of evidence of any specific plans to compete with defendant, as defined in the Promissory Note, and due to the lack of evidence of plaintiffs' having requested written consent and approval of defendant to so compete,[2] that this matter has not ripened into an actual controversy.

. . . .

11. That no actual controversy exists between the parties to this action.

12. That it does not appear that litigation between these parties is unavoidable.

The plaintiffs have not assigned as error any of the trial judge's findings of fact. N.C.G.S. § 1A-1, Rule 52(c) (1983) provides:

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings.

This Court has held that Rule 52(c) allows a party to seek appellate review on the question of whether the evidence supported the findings of fact without excepting at trial to the judge's findings, but that in the record on appeal it is "incumbent upon appellant to assign error so as to outline his objections on appeal." *Whitaker v. Earnhardt*, 289 N.C. 260, 264, 221 S.E. 2d 316, 319

2. In their briefs and arguments before this Court, the parties attach significance to the question of whether the plaintiffs had been denied written consent to compete with the defendant. Because the plaintiffs contend that they should have an absolute right to compete without asking for permission from the defendant, we find that, except as it relates to the question of whether the plaintiffs have shown that at the time of the institution of the action they had formed an intention to compete, the absence of a request for and denial of the right to compete is irrelevant to the question of justiciability.

(1976). Because the plaintiffs have not assigned error to the judge's findings, those findings are conclusive on appeal, *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965), and we are only required to determine whether the findings support the trial judge's conclusions and the entry of judgment. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316. Nevertheless, because the question presented involves the jurisdiction of the courts to entertain the plaintiffs' action, we have elected to review the entire record to determine whether the trial judge's findings of fact were supported by competent evidence and in turn supported his conclusion that "no justiciable controversy exists between the parties" and that the "plaintiffs are not entitled to relief under the Declaratory Judgment Act."[3]

The plaintiffs' action is for a declaratory judgment as authorized by Article 26 of Chapter 1 of the General Statutes of North Carolina. N.C.G.S. § 1-254 (1983) provides as follows:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement. *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E. 2d 59, 61 (1984). An often-quoted and colorful explanation by Justice Ervin of the limitations upon jurisdiction under the Declaratory Judgment Act is contained in *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E. 2d 404, 409 (1949):

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3. We note that in the Record on Appeal the parties have stipulated that "the trial court had jurisdiction over the [defendant] and the subject matter of this action" and yet that the defendant is contesting the subject matter jurisdiction of the courts on the basis that an actual or justiciable controversy did not exist. Because parties cannot stipulate to give a court subject matter jurisdiction when it does not exist, *City of Raleigh v. R.R. Co.*, 275 N.C. 454, 168 S.E. 2d 389 (1969), we are not bound by the stipulation.

> There is much misunderstanding as to the object and scope of this legislation. Despite some notions to the contrary, it does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. [Citations omitted.] This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.

While the requirement for an actual controversy is clearly a prerequisite for jurisdiction under the Declaratory Judgment Act, the determination of whether a justiciable controversy exists is not always an easy question.

We begin our analysis by examining the statement by the Court of Appeals that "[t]here is no absolute requirement that the controversy exist at the time the pleadings are filed." 78 N.C. App. at 280, 337 S.E. 2d at 177. In reaching its conclusion, the Court of Appeals relied upon *Golden v. Zwickler*, 394 U.S. 103, 22 L.Ed. 2d 113 (1969), noting, however, that the rule therein applied[4] "is usually applied to render moot controversies which have been resolved between the filing of the complaint and time of hearing." 78 N.C. App. at 280, 337 S.E. 2d at 177. We disagree with the Court of Appeals and hold that in order for a court to have subject matter jurisdiction to render a declaratory judgment, an actual controversy must exist between the parties at the time the pleading requesting declaratory relief is filed.

We first note that while we may look for guidance to federal court decisions regarding the existence or absence of a justiciable controversy, jurisdiction within the state courts of North Carolina is not controlled by those federal decisions but is determined by our own statutes and court decisions. *See In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297 (1979); *McCune v. Manufacturing Co.*, 217 N.C. 351, 8 S.E. 2d 219 (1940).

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4. "The proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed at the time of the hearing on the remand." 394 U.S. at 108, 22 L.Ed. 2d at 117.

We further note that in *Golden*, the plaintiff had sought a declaration that a state statute penalizing the distribution of anonymous literature in connection with an election campaign was unconstitutional. The plaintiff had already been prosecuted once for violating the statute and alleged that he would again distribute anonymous handbills criticizing a named Congressman in his bid for reelection in 1966. While the action was pending, the Congressman became a state Supreme Court Justice, mooting any opportunity for the plaintiff to violate the statute in the way in which he had alleged an intention to violate it. Without addressing the question of whether the controversy had been "ripe" for adjudication at the time the complaint was filed, the United States Supreme Court found that by the time of the hearing no controversy existed; i.e., the "immediacy and reality" necessary to jurisdiction which might have existed at the time of filing of the complaint had disappeared by the time of the hearing and the matter had become moot. "It was not enough to say, as did the District Court, that nevertheless Zwickler has a 'further and far broader right to a general adjudication of unconstitutionality . . . [in] [h]is own interest as well as that of others who would with like anonymity practise [sic] free speech in a political environment . . . .'" 394 U.S. at 109-10, 22 L.Ed. 2d at 118.

This Court has required that an actual controversy exist both at the time of the filing of the pleading and at the time of hearing. *Gaston Bd. of Realtors v. Harrison*, 311 N.C. at 234-35, 316 S.E. 2d at 62 ("When the record shows that there is no basis for declaratory relief, *or* the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under G.S. 1A-1, Rule 12(b)(6) will be granted"). (Emphasis added.) In stating that "we see no reason why the rule should not operate to allow consideration of any genuine controversy existing at any time after the pleadings are filed up to the time the motion to dismiss is ruled upon," 78 N.C. App. at 280, 337 S.E. 2d at 177, the Court of Appeals overlooks the fact that the existence of an actual controversy is necessary to the court's subject matter jurisdiction, *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E. 2d 294 (1984); *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978), and the basic rule that "the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked." *In re Peoples*, 296 N.C. 109, 144, 250 S.E. 2d 890, 910. As Chief Justice

Sharp noted in *In re Peoples*, 296 N.C. at 148, 250 S.E. 2d at 912: "Unlike the question of *jurisdiction*, the issue of *mootness* is not determined solely by examining facts in existence at the commencement of the action." (Emphasis added.)

We must next determine whether Judge Ellis correctly concluded that at the time of institution of this action no justiciable controversy existed between the parties.[5]

The original complaint filed on 1 July 1983 alleged that the plaintiffs were "entitled to engage in the lawful activities of publishing a newspaper or other printed advertising media" in the area covered by the contested provisions of the promissory note, but the plaintiffs did not allege that they intended to engage in any activity covered by those provisions. Following a hearing before Judge Giles Clark on the defendant's motion pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) to dismiss the complaint, the plaintiffs amended their complaint by adding the following allegations:

> 16. "The plaintiffs maintained their residence in Robeson County, North Carolina, and do not intend to move their residence; plaintiffs do intend, subject to circumstances of their health, financial ability, availability of personnel, business feasibility, and public demand, to engage in the activities of publishing a newspaper or other printed advertising media, or to seek employment with a newspaper or other printed advertising media in Robeson County, North Carolina, or in a county contiguous to Robeson County, North Carolina."

The only evidence before the court regarding the intention of the plaintiffs to compete with the defendant in the subject area consisted of answers by plaintiffs to interrogatories as follows:

> 3. As of on or about July 1, 1983, and continuing to the present, what plans, if any, do you have to directly or indirectly

5. We note that Judge Ellis's actual conclusion is that "no justiciable controversy *exists* between the parties" (emphasis added), suggesting that he was not limiting his consideration to the time when the complaint was filed. However, we also note that under the facts of the case, if no actual controversy existed at the time of the hearing, necessarily no controversy existed at the time of the filing of the complaint.

own, operate, finance, establish, control, support, or be employed by any newspaper or other printed advertising medium in Robeson County, North Carolina, or in any county contiguous to Robeson County, North Carolina?

> John A. Sharpe, Jr., and Helen S. Sharpe—Contingent upon court decision granting the relief sought by plaintiffs in this action, intend to explore feasibility of directly or indirectly owning and/or operating, and/or financing, and/or establishing, and/or controlling, and/or supporting, and/or becoming employed by a newspaper or other printed advertising medium in Robeson County or any county adjacent thereto.
>
> Clifford S. Sharpe—Currently committed to military service. Intends, at expiration of tour of duty, to ascertain opportunities for ownership and management of an independent newspaper, as an alternative to a military career.
>
> Brenda B. Sharpe—Plans to support and assist husband, Clifford S. Sharpe, in newspaper work if he becomes so engaged.
>
> Hal C. Sharpe—Plans to participate in ownership and/or financing and/or operation of a newspaper or other advertising medium in conjunction with parents and/or brother.

. . . .

b. Have you entered into any contract, memorandum of understanding or agreement of any kind regarding such plans?

> Verbal agreement only, as to intent to explore and evaluate opportunities at such time and in such circumstances as exist when a determination is made by the court as to restrictions on payments for assets of THE ROBESONIAN, INC.

(1) With whom?

> Plaintiffs, among themselves.

. . . .

4. What actions, other than as may already have been described above, have you taken to carry out such plans?

John A. Sharpe, Jr., and Helen S. Sharpe—To maintain capability to carry out above-stated intent: continued associate membership in North Carolina Press Association and National Newspaper Association; continued subscription to and study of newspaper trade publications; inquiries about newspaper equipment; option to purchase a building for renovation for office use;[6] petition for declaratory judgment (this action).

Brenda B. Sharpe—Student on-job training in newspaper (out of state).

Clifford C. Sharpe and Hal C. Sharpe—None. Assent to parents' action.

This evidence supports Judge Ellis's finding that "plaintiffs have presented no evidence of specific plans to directly or indirectly own, operate, finance, establish, control, support or become employed by a newspaper or other printed advertising medium in Robeson County or in any other county adjacent thereto."

Plaintiffs rely upon this Court's statement in *Light Co. v. Iseley*, 203 N.C. 811, 820, 167 S.E. 56, 61 (1933) that "[i]t is not required for purposes of jurisdiction that the plaintiff shall allege or show that his rights have been invaded or violated by the defendants, or that the defendants have incurred liability to him, prior to the commencement of the action." This is an accurate statement of the law and is consistent with the portion of N.C.G.S. § 1-254 which says "[a] contract may be construed either before or after there has been a breach thereof." In order to maintain a declaratory judgment action, the plaintiff does not have to allege or prove that a traditional "cause of action" exists in his favor against the defendant. On the other hand, he must establish that something more than a disagreement as to rights exists between

6. Although not important to our decision, we note that the record does not indicate whether this building is within the area of Robeson County or any adjoining county. There is evidence that Jack Sharpe, one of the plaintiffs, purchased newspapers in Nashville and Lillington, both outside the area covered by the questioned provisions in the note.

the parties. In an effort to describe the point along a continuum between disagreement and actual breach of contract the parties must have reached in order for their conflict to have become an "actual or real presently existing controversy," *Consumers Power v. Power Co.*, 285 N.C. 434, 451, 206 S.E. 2d 178, 190 (1974), this Court has said that in order "to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable," *Gaston Bd. of Realtors v. Harrison*, 311 N.C. at 234, 316 S.E. 2d at 61.

That the plaintiffs misapprehend the nature of an actual controversy necessary for jurisdiction under the Declaratory Judgment Act is illustrated by the contention in their brief that "[t]he controversy as to whether the noncompetition clause in the promissory notes was valid as to Plaintiffs arose the instant such clause was inserted in the notes." They further contend that:

> Plaintiffs voted against the sale of the corporation's assets to Defendant; Plaintiffs refused to agree to a non-compete contract with Defendant; Plaintiffs did not assent to the Agreement of Sale negotiated by the officers of the corporation; Plaintiffs did not acquiesce in or sign the non-compete language in the promissory notes; and the notes were delivered to Plaintiffs. No other facts are necessary to show that an actual controversy exists between the parties regarding the validity of the promissory notes as enforced against the Plaintiffs.

We disagree. In the first place, the questioned provision in the notes has not been "enforced against the Plaintiffs," for the plaintiffs have not competed with the defendant in the covered area. Neither is it reasonably certain that the plaintiffs intend to compete with the defendants if the provisions are declared invalid, for the only intentions expressed by the plaintiffs are intentions to "explore the feasibility" or to "ascertain opportunities" for activities which would be covered by the provisions. Whether they will actually engage in competitive activity depends upon many factors other than the provisions in the notes, including the plaintiffs' health and financial ability, availability of personnel, and public demand. There is nothing to make it appear reasonably certain that if the courts agree with the plaintiffs and declare invalid the questioned provisions that the plaintiffs will engage in

the covered activities rather than "put [the opinion] on ice to be used if and when occasion might arise." *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E. 2d 450, 453 (1942).

In *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178, Justice (now Chief Justice) Branch quoted with approval the following excerpt from E. Borchard, *Declaratory Judgments* (2d ed. 1941) at page 60:

> ". . . The imminence and *practical certainty* of the act or event in issue, or the *intent*, capacity, and power to perform, create justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote, *contingent*, and uncertain events that may never happen and upon which it would be improper to pass as operative facts."

Id. at 451, 206 S.E. 2d at 189. (Emphasis changed.)

Because there is no evidence of a practical certainty that the plaintiffs will compete with the defendant within Robeson County or adjoining counties or that they have the intention of doing so if the provisions in the note are declared invalid, no justiciable controversy existed between the parties at the time this action was filed and the trial judge properly dismissed the action. We therefore reverse the Court of Appeals.

Reversed.

STATE OF NORTH CAROLINA v. ROBERT LEWIS WINGARD

No. 306A85

(Filed 12 August 1986)

1. **Indictment and Warrant § 8.4— murder—election between theories—not required**

The trial court did not err in a first degree murder prosecution by denying defendant's motion to compel the State to disclose prior to trial the theory on which it sought to convict him where the indictment set out sufficient factual information to enable defendant to understand the basis of the State's case against him and defendant did not show how an election between legal theories would have aided his trial preparation or show any other prejudice.

2. Constitutional Law § 30— State not required to disclose criminal records of witnesses—no prejudice

The trial court in a first degree murder prosecution did not err by denying defendant's motion to compel the State to disclose the criminal records of its witnesses because N.C.G.S. § 15A-903 does not give the defendant the right to the names of the State's witnesses, let alone their criminal records, and because defendant was given considerable information about the State's witnesses and the evidence against him.

3. Constitutional Law § 63— death qualified jury constitutional

The trial court did not err in a first degree murder prosecution by denying defendant's motion to prohibit death qualification of the jury.

4. Jury § 6— first degree murder—individual voir dire and sequestration denied —no error

The trial court did not err in a first degree murder prosecution by overruling defendant's motion for individual voir dire and sequestration of prospective jurors where defendant neither alleged nor showed any abuse of discretion by the trial judge and did not advance any argument showing how the denial of the motion prejudiced him. N.C.G.S. § 15A-1214(j).

5. Criminal Law § 81— best evidence rule—order in which document read and introduced

The trial court did not err in a first degree murder prosecution by allowing two threatening notes to the victim to be read into evidence where the State later produced the original notes in proving the contents of those notes. The order in which the notes were read and introduced as exhibits has no bearing on whether the notes violated the best evidence rule. N.C.G.S. § 8C-1, Rule 1002.

6. Homicide § 15— threatening notes—definition of word—relevant

The trial court did not err in a prosecution for first degree murder by allowing a witness to define "rollers" as used in a threatening note from defendant to his victim where the witness had heard defendant use "rollers" when referring to the police; the note was unquestionably relevant since it showed defendant's unrelenting desire and intent to locate the victim and do her physical harm; defining terms in the note unlikely to be familiar to jurors would appear to be relevant; and defendant did not demonstrate how it was prejudicial to his interests. N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985); N.C.G.S. § 15A-1443(a) (1983).

7. Criminal Law §§ 73.4, 162— murder—statement of bystander—excited utterance

The trial court did not err in a first degree murder prosecution by admitting testimony that a bystander told defendant not to shoot his victim any more because he had already killed her where the statement was an excited utterance within the meaning of N.C.G.S. § 8C-1, Rule 803(2); moreover, defendant waived his objection by eliciting the same testimony on cross-examination.

8. **Homicide § 15— first degree murder—testimony that victim pregnant—no prejudice**

Defendant failed to show in a first degree murder prosecution that he was prejudiced by the admission of irrelevant testimony that the victim was pregnant. N.C.G.S. § 15A-1443(a) (1983).

9. **Homicide § 30.3— first degree murder—failure to instruct on involuntary manslaughter—no error**

The trial judge did not err in a first degree murder prosecution by failing to instruct the jury on involuntary manslaughter where there was no evidence from which the jury might infer that there was an unintentional discharge of the weapon.

10. **Criminal Law § 102.6— first degree murder—argument of prosecutor—no error**

The trial court did not err in a first degree murder prosecution by overruling defendant's objections to statements in the prosecutor's closing argument that defendant was hunting the victim, that the State of North Carolina deserved a guilty verdict, and that as spokesman for the State, he demanded such a verdict.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment entered by *Ferrell, J.*, at the 21 January 1985 Criminal Session of Superior Court, BUNCOMBE County, imposing life imprisonment upon a jury verdict of guilty of murder in the first degree. Heard in the Supreme Court 15 April 1986.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

J. Robert Hufstader, Public Defender, and John Byrd, Assistant Public Defender, for the Twenty-Eighth Judicial District, for defendant-appellant.

FRYE, Justice.

Defendant argues eleven assignments of error on this appeal. He contends that the trial court erred in denying his motions to compel disclosure of the theory upon which the State sought to convict him, to disclose criminal records of the State's witnesses, to prohibit death qualification of the jury, and to allow individual *voir dire* and sequestration of prospective jurors. Defendant further alleges that the trial court erred in allowing notes to be read into evidence; testimony as to the meaning of "rollers"; testimony concerning a statement made by an eyewitness to the shooting; and evidence that the victim was pregnant at the time of the

shooting. Lastly, defendant contends that the trial court erred in failing to give a jury instruction on involuntary manslaughter, and in overruling objections to portions of the prosecutor's closing arguments. We find no reversible error.

Defendant was charged with murder in the first degree. The State's evidence tended to show that on the evening of 31 December 1983, defendant went to Beverly Roselle Howell's apartment and loaded several guns. He placed a threatening note on the kitchen table and told Ms. Howell's twelve-year-old son to give the note to his mother when she came home. Several days earlier defendant had left another threatening note for Ms. Howell.

Sometime between the hours of 2:00 and 3:00 a.m., 1 January 1984, defendant went to an apartment in Deaverview Apartments where Ms. Howell was attending a New Year's party. With a pistol in his right hand, defendant approached Ms. Howell, grabbed her hair with his left hand, and began hitting her with his right hand. Mr. Ray, a guest at the party, attempted to break up the fight. After the parties struggled for a brief period, defendant pushed Ms. Howell to the floor, and tried to kick her in the face. She raised her hands to block the kick and defendant shot her in the head. Defendant then bent over Ms. Howell with the gun still in his hand. At this point, Mr. Ray said "not to shoot her no more because he had already killed her." Defendant yelled, "Hell, yes, the bitch is dead," and turned to Juanita Taylor, the deceased's friend, and said, "You too, Puddin'. You're next." Defendant went outside the apartment and fired the gun several times into the air.

Ms. Howell died on 10 March 1984 of bronchopneumonia. Dr. George Lacy, the pathologist who performed the autopsy, testified that the initiating cause of Ms. Howell's death was a gunshot wound to the head. Defendant offered no evidence.

The jury returned a verdict of guilty of murder in the first degree. At the sentencing hearing the jury found one aggravating circumstance and five mitigating circumstances and also found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance found by the jury. Nevertheless the jury failed to find beyond a reasonable doubt that the aggravating circumstance found by the jury was sufficiently substantial to call for the imposition of the death penalty when considered with

the mitigating circumstances found by it. Following the unanimous recommendation of the jury, defendant was sentenced to life imprisonment.

I.

[1] Defendant contends that the trial court erred in denying his motion to compel the State to disclose prior to trial the theory on which it sought to convict him of murder in the first degree.

It is well established that "the State is not generally required to elect between legal theories in a murder prosecution prior to trial." *State v. Silhan*, 302 N.C. 223, 235, 275 S.E. 2d 450, 462 (1981). "Where the factual basis for the prosecution is sufficiently pleaded, defendant must be prepared to defend against any and all theories which these facts support." *Id.* Defendant did not file a motion for a bill of particulars nor does he now challenge the sufficiency of the indictment. After examining the record, we conclude that the murder indictment set out sufficient factual information to enable defendant to understand the basis of the State's case against him. Defendant has not shown how an election between legal theories would have aided his trial preparation, nor has he shown any other prejudice. The trial judge did not err in denying defendant's motion.

II.

[2] Defendant contends that the trial court erred in denying his motion to compel the State to disclose the criminal records of its witnesses in the case against him on the grounds that such information would have aided him in his defense.

The pertinent statute, N.C.G.S. § 15A-903, "does not grant the defendant the right to discover the names and addresses, let alone the criminal records, of the State's witness." *State v. Robinson*, 310 N.C. 530, 536, 313 S.E. 2d 571, 575 (1984). Therefore, defendant's motion was properly denied.

We note that the record shows that defendant was given considerable information about the State's witnesses and the evidence against him. Defendant in arguing his motion to compel discovery stated that the prosecutor had "opened his files" to him. The evidence discloses that the district attorney gave defendant copies of the contents of his file in this case. Defendant's assignment of error is without merit.

III.

[3] Defendant next contends that the trial court erred in denying his motion to prohibit "death qualification" of the jury prior to the guilt-innocence phase of the trial. Defendant asks this Court to reconsider its holding in *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985), in light of "original" arguments presented in *Keeten v. Garrison*, 578 F. Supp. 1164 (W.D.N.C. 1984), *rev'd*, 742 F. 2d 129 (4th Cir. 1984).

In a recent United States Supreme Court decision, *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed. 2d 137 (1986), the Court held that "death qualification" of the jury in capital cases does not violate the federal constitution. The trial judge properly denied defendant's motion.

IV.

[4] Defendant contends that the trial judge erred in overruling his motion for individual *voir dire* and sequestration of prospective jurors on the grounds that N.C.G.S. § 15A-1214(j) provides for such procedure and the denial of the motion denied him a fair trial. By this assignment, defendant asks this Court to reconsider our decisions holding that it is within the trial judge's discretion to allow a motion for individual *voir dire* and sequestration of prospective jurors, and his rulings thereon will not be reversed absent a showing of abuse of that discretion. *See State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Barfield*, 289 N.C. 306, 259 S.E. 2d 510 (1979). Defendant has neither alleged nor shown any abuse of discretion by the trial judge in the instant case. Nor does defendant advance any argument showing how the denial of the motion prejudiced him. We decline to reconsider our previous holdings on this issue.

V.

[5] Defendant next contends that the trial judge erred in allowing two "notes" written by him to the victim to be read into evidence over his objections.

Several days prior to the shooting, defendant left the following note for the victim:

> I've just heard you were up town running your *lip*. And other things. Your *ass* is mine. Lewis

On the night of the shooting defendant left another note for the victim at her apartment as follows:

> *Now lady* I knew this was coming down—that's why I said go by *yourself*. You are *dumb*. *Yeah*. Girl you have just put you and your *partner* in the *hospital*. Pray that I can't find you. Lewis. Your Executioner. P.S. Ain't no way you can get out of this. If you call the *rollers* I will get *out*. So you are in *Big Trouble*. You better *Hide*. Their [sic] is no way you can hide.

The victim's son gave the notes to the police when they came to his mother's apartment investigating the shooting. At the trial, the boy identified State's exhibits #1 and #2 as the notes written by defendant. Lieutenant Foster, Asheville Police Department, testified that exhibits #1 and #2 were the notes given to him by the boy on the night of the shooting. Shortly after receiving the notes, Foster went to police headquarters and gave the notes to Detective Lambert. Detective Lambert, Asheville Police Department, testified that State's exhibits #1 and #2 were the notes given to him by Lieutenant Foster on the night of the shooting and that the notes had been in his custody and control since that time. Over defendant's objection Detective Lambert was allowed to read the notes. The State's request to have the notes introduced into evidence was granted and the notes were examined by the jurors. Defendant's argument is that the trial judge circumvented the Best Evidence Rule by allowing the notes to be read to the jury prior to being introduced into evidence.

N.C.G.S. § 8C-1, Rule 1002, the Best Evidence Rule, provides that "to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." During the witnesses' testimony concerning the contents of the notes, the original notes were in the courtroom and in the hands of the persons testifying about them. Thereafter, the notes were introduced into evidence and examined by the jurors.[1] In view of the fact that the State produced the original notes in proving the contents

1. Defendant has expressly abandoned his objection to the introduction of the notes.

of the notes, there was no violation of the Best Evidence Rule. The order in which the notes were read and introduced as exhibits has no bearing on whether the writing itself violates the Best Evidence Rule. Defendant's assignment of error is without merit.

VI.

[6] Defendant contends that the trial court erred in allowing witness Taylor to testify as to the meaning of the term "rollers" used in one of the notes written by defendant on the grounds that such evidence was irrelevant in the case against him.

In the note left by defendant on the night of the shooting, defendant wrote: "If you call the *rollers* I will get out." On direct examination, the prosecutor asked witness Taylor if she knew what the term "rollers" meant. Over defendant's objection, she was allowed to testify that she had heard defendant use "rollers" when referring to the police. Defendant contends that such testimony was irrelevant to the issues in this case, and therefore was inadmissible evidence.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985). 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, 322 S.E. 2d 148 (1984); *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1980). The note left at the victim's apartment on the night of the shooting was unquestionably relevant in this case since it showed defendant's unrelenting desire and intent to locate the victim and to do her physical harm. The definition of terms used in the note unlikely to be familiar to the jurors would also appear to be relevant. Assuming, *arguendo*, that the relevance of this evidence is too attenuated for it to have been properly admitted, defendant has not demonstrated how it was prejudicial to his interests. *See* N.C.G.S. § 15A-1443(a) (1983).

VII.

[7] Defendant contends that the trial court erred in allowing witness Bryant to testify that after defendant shot Ms. Howell, Mr. Ray, a bystander, told defendant "not to shoot her no more

because he had already killed her." Defendant argues that the statement was hearsay which does not fall within any recognized exception to the hearsay rule.

Evidence is hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness who is testifying at the hearing or trial and is offered in evidence to prove the matter asserted therein. N.C.G.S. § 8C-1, Rule 801(c) (Cum. Supp. 1985); 1 Brandis on North Carolina Evidence § 138 (Supp. 1983). Hearsay evidence is inadmissible unless an exception is applicable. Commentary, N.C.G.S. § 8C-1, Rule 802 (Cum. Supp. 1985).

The evidence to which defendant objects is clearly hearsay. Its probative value depended on the competency and credibility of a person other than the witness testifying. In fact, Mr. Ray, the person to whom the statement was attributed, was not called by either party to testify at trial. Therefore, if we assume that the evidence was offered to prove the matter asserted therein, the propriety of the trial court's ruling depends on whether the evidence falls within an exception to the hearsay rule.

N.C.G.S. § 8C-1, Rule 803, lists twenty-four exceptions to the hearsay rule where the availability of the declarant at trial is immaterial. The "excited utterance" exception, Rule 803(2), is applicable in the case at hand. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C.G.S. § 8C-1, Rule 803(2) (Cum. Supp. 1985). This statutory exception is the codification of the common-law exception, spontaneous utterance. *See State v. Murvin*, 304 N.C. 523, 284 S.E. 2d 289 (1981). The rationale for the admissibility of an excited utterance is its trustworthiness. "Circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Commentary, N.C.G.S. § 8C-1, Rule 803 (Cum. Supp. 1985).

In the instant case, the statement to which defendant objects was made by a person standing near the spot where the victim was shot. The statement was made immediately after defendant shot the victim and bent over her with the gun still in his hand. It was clearly a statement relating to the startling attack and

shooting while the declarant was under the stress of excitement caused by the event. As such, it is an excited utterance within the meaning of Rule 803(2) and admissible into evidence notwithstanding its hearsay character.

We also note that defendant waived his objection to the testimony concerning the statement made by Mr. Ray after the shooting. After witness Bryant testified on direct examination as to Mr. Ray's statement, defense counsel, on cross-examination, elicited the same testimony to which no objection was made. It is a well-settled rule that "if a party objects to the admission of certain evidence and the same or like evidence is later admitted without objection, the party has waived the objection to the earlier evidence." 1 Brandis on North Carolina Evidence § 30 (1982); *State v. Tysor*, 307 N.C. 679, 300 S.E. 2d 366 (1983). Therefore, witness Bryant's testimony on cross-examination as to what Mr. Ray said after the shooting operated as a waiver of defendant's objection to her testimony on direct examination.

VIII.

[8] Defendant argues that the trial court erred in denying his *motion in limine* and in allowing the pathologist's testimony that the victim was pregnant at the time of the shooting. Defendant contends that this evidence was irrelevant, and even if relevant, its prejudicial effect outweighed its probative value. According to the State, evidence of the pregnancy is a collateral issue but relevant since it relates to the ability of the victim to protect herself in the struggle with defendant.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (Cum. Supp. 1985). In light of the fact that defendant did not assert self-defense as a defense to the crime, we agree with defendant's contention that evidence that the victim was pregnant at the time of the shooting was irrelevant, at least during the guilt-innocence phase of the trial. Nevertheless, the admission of irrelevant evidence is generally considered harmless error and not reversible error unless it is of such a nature as to mislead the jury. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). Defendant has the burden of showing that he was prejudiced by the admission of the

evidence. *Id.* Defendant has clearly failed to show that he was prejudiced by the admission of the irrelevant evidence. N.C.G.S. § 15A-1443(a) (1983).

IX.

[9] Defendant argues that the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter. It is defendant's contention that since there was evidence of a "struggle" or "scuffle" between him and the victim, an inference can be drawn that he unintentionally killed the victim by means of a culpably negligent act.

The trial court is not required to charge the jury on the question of defendant's guilt of lesser degrees of the crime charged in the indictment where there is no evidence to sustain a verdict of such lesser degrees. *State v. Strickland,* 307 N.C. 274, 298 S.E. 2d 645 (1983). We must, therefore, determine whether there was evidence at trial to support a verdict of involuntary manslaughter.

Involuntary manslaughter is "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Hill,* 311 N.C. 465, 471, 319 S.E. 2d 163, 167 (1984).

In the instant case, defendant did not testify or put on any evidence. The State's evidence tended to show that on the night of the shooting defendant went to the victim's apartment, loaded several guns, left a threatening note for the victim, and left, taking the guns with him. Later that night, defendant went to an apartment where the victim was attending a party, grabbed her by her hair, and began hitting her. He threw her to the floor, tried to kick her in the face, and then shot her in the head. Defendant yelled, "Hell, yes, the bitch is dead," and then said to Juanita Taylor, a friend of the deceased, "You, too, Puddin'. You're next." The State's evidence, if believed, tends to show an intentional killing. There was no evidence presented from which the jury might infer that there was an unintentional discharge of the weapon. *See State v. Robbins,* 309 N.C. 771, 309 S.E. 2d 188 (1983). Therefore, the trial judge did not err in failing to instruct on involuntary manslaughter.

X.

[10] We now consider defendant's assignments of error X and XI, both dealing with statements made by the prosecutor in his closing argument to the jury. Defendant contends that the trial court erred in overruling his objections to the prosecutor's argument that defendant was "hunting" the victim, and the argument that "Ladies and gentlemen, the State of North Carolina deserves a verdict of guilty to first degree murder, and as spokesman for the State I demand that verdict and . . . ."

This Court has consistently stated that "argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E. 2d 125, 131 (1975). Counsel for both sides are entitled to argue before the jury law and facts in evidence and all reasonable inferences to be drawn therefrom. *Id.* However, "counsel may not place before the jury incompetent and prejudicial matters, and may not 'travel outside the record' by injecting into his argument facts of his own knowledge or other facts not included in the evidence. Nor may counsel argue principles of law not relevant to the case." *Id.* It is the duty of the trial court, upon objection, to censor remarks not warranted by either the evidence or the law or remarks calculated to mislead or prejudice the jury. *Id.* "If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu.*" *Id.*

Defendant contends that in arguing that he was "hunting" the victim, the prosecutor traveled outside the record and injected facts not in evidence. It is clear in this case that the prosecutor's argument was a reasonable inference to be drawn from the evidence. On the night of the shooting, defendant left the victim a note stating, "Pray that I can't find you." Defendant left Ms. Howell's apartment, carrying a loaded weapon, and later arrived at an apartment where she was attending a party. Defendant immediately attacked and shot her. A reasonable inference from this evidence is that defendant was vigorously searching for Ms. Howell. Therefore, the prosecutor's use of the term "hunting" when describing defendant's actions was compatible with the evidence in the case. The trial judge acted properly in overruling defendant's objection.

Defendant next contends that the trial judge erred in overruling his objection to the prosecutor's statement that the State of North Carolina deserved a verdict of guilty of first degree murder, and as spokesman for the State he demanded such a verdict. Defendant argues that in making this argument, the prosecutor placed before the jury incompetent and prejudicial matters. We disagree with defendant's contention. When the prosecutor's jury argument is considered as a whole, as it must be, we find that the statement to which defendant objects was nothing more than an assertion that the evidence at trial warranted a conviction for the charged crime. *See State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985). This is a permissible argument. The trial judge properly overruled defendant's objection.

Defendant's trial was free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. RICHARD ANTHONY SANDERS AND STEVEN WALLACE SANDERS

No. 519A85

(Filed 12 August 1986)

1. Jury § 7.7— challenge for cause—failure to preserve for appeal

Defendants failed to comply with the requirements of N.C.G.S. § 15A-1214(h) and were not entitled to relief on appeal where they at no time sought to renew any of their previously denied challenges for cause; *State v. Watson*, 310 N.C. 384, did not imply that the former common law rule provides an alternative method of preserving such issues for appeal. Moreover, the issue arose in the selection of alternate jurors and the jurors who rendered the verdicts were acceptable to the State and to both defendants.

2. Searches and Seizures §§ 35, 15— tennis shoes seized incident to arrest—no error

The trial court did not err in a prosecution for murder, burglary and robbery by admitting tennis shoes seized when one defendant was arrested where the seizure was incident to a lawful arrest in that the shoes were discovered around the bed where defendant was standing when arrested, and the other defendant failed to show standing in that he had no possessory interest in the house or the room where the shoes were seized and was not present at the house when the first defendant was arrested and the shoes seized. N.C.G.S § 15A-972.

3. Constitutional Law § 63— death qualified jury—constitutional

Defendants' rights to due process of law and trial by jury were not violated by a death qualified jury.

APPEAL by the defendants from judgments entered on 14 June 1985, by *Bowen, J.*, in Superior Court, ORANGE County.

Each defendant was convicted upon proper indictments of first degree murder, first degree burglary, attempted robbery with a firearm, and two counts of robbery with a firearm. The murder charges were tried as capital offenses. Because the jury based the first degree murder convictions on the theory of felony murder, the trial court stayed judgment on the armed robbery charges and the attempted armed robbery charges. At the conclusion of the penalty phase, the jury returned verdicts recommending that the defendants each be sentenced to life imprisonment for first degree murder. Following the jury's recommendation, the trial court sentenced each defendant to life imprisonment for murder. The trial court sentenced each defendant to imprisonment for fourteen years for burglary.

The defendants appealed their murder convictions and resulting life sentences to the Supreme Court as a matter of right. Their motions to bypass the Court of Appeals on their appeals of the burglary convictions were allowed by the Supreme Court on 8 January 1986. Heard in the Supreme Court on 9 June 1986.

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

Ann B. Petersen for the defendant-appellant Richard Anthony Sanders.

Malcolm R. Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for the defendant-appellant Steven Wallace Sanders.

MITCHELL, Justice.

By their assignments, the defendants contend that the trial court made several errors. The defendants first contend that the trial court erred by refusing to dismiss a juror for cause. They next contend that the trial court erred by permitting the State to introduce a pair of shoes that were seized when the defendant

Steven Sanders was arrested. They also contend that the trial court erred by allowing the State to "death qualify" the jury.

The evidence presented at trial by the State tended to show, *inter alia*, that on 4 February 1985, Robert Wimberly was living in a mobile home with William Bullock and James Youngman at 35 Hilltop Mobile Home Court in Chapel Hill. Wimberly testified that Thomas Perry Zimmerman visited them at their home three or four times weekly. During the evening of 4 February 1985, the four men were in the mobile home. Wimberly, Bullock and Youngman had prepared supper. About 8:00 p.m. Wimberly was in the kitchen area. Bullock and Youngman were sitting in the den eating and watching television. Zimmerman was playing a guitar.

An intruder wearing a "dark colored mask" burst into the mobile home with an automatic pistol in his hand. He told everyone to get down on the floor and fired a shot through the roof of the trailer. He then said: "Where is it? Where is the stuff?" Wimberly testified that "everyone replied they didn't know what he was talking about." The intruder began hitting Wimberly over the head with a two-by-four board and asked: "Where is the stuff?" He also beat Youngman with the board and asked: "Where is the stuff?"

A second intruder then entered the mobile home. He was not wearing a mask and was later identified by Youngman as the defendant Steven Sanders. The intruders ransacked the home and found "an ounce of marijuana . . . ." They beat Wimberly with the two-by-four and demanded "the cocaine." Wimberly told them that he did not know "anything about any cocaine."

Wimberly testified that he recognized the voice of one of the intruders as that of the defendant Richard Sanders. Wimberly testified that when Richard Sanders first came in he was talking in a normal tone but later began speaking in a "real high squeaky tone like Mickey Mouse." The other defendant disguised his voice in a "whispered growl."

The defendants continued to search the mobile home for drugs and would periodically yell at Zimmerman: "I told you to quit looking at me, boy." Wimberly testified that "you'd hear the sound of the board hitting him in the head. And he would scream back: 'I'm not looking at you. I'm not looking at you.'" The de-

fendants took everyone's money and car keys. They made Wimberly specifically identify his car keys and his car and then left the mobile home.

A few minutes later Bullock asked: "Are you gone? Are they gone?" One of the defendants yelled from the rear of the trailer: "Hell no, we're not gone. We're going to kill you . . . ." Wimberly testified that: "then there was about a minute, two minutes of silence. The next thing I heard was a gun shot and Perry [Zimmerman] scream." The defendants then left. Zimmerman was lying on the floor with his face in a puddle of blood and was not moving. Wimberly "turned his head out of the puddle of blood so he could breath [sic] if he had been alive."

William Bullock corroborated Wimberly's testimony. He testified that the defendants hit him on the head with a two-by-four, and he could hear everyone else being hit on the head. He testified that the defendants kept saying to Zimmerman: "I told you not to look at me," and "he'd be hollering, 'I'm not looking at you. I swear I'm not.' Just crying mercy please don't kill me. Still kept getting hit." Bullock said that after Zimmerman was shot, he: "started breathing gargling air; and I assume it was a hole in his lungs . . . . You could hear blood mixed in with his breathing like he was gasping for air."

James Youngman testified and corroborated Wimberly's and Bullock's testimony. He identified the defendant Steven Sanders as the second intruder to enter the mobile home.

Dale Lunsford testified that on 4 February 1985, he lived one hundred feet from the crime scene. He came home at approximately 8:30 p.m. and heard a shot and "rustling" in the victims' mobile home. He also heard a "lot of footsteps, a lot of pounding."

William D. Carter, a Chapel Hill Public Safety Officer, testified that he lived at Hilltop Mobile Home Park on 4 February 1985. He heard a gunshot there "shortly after 8 o'clock."

John Butts, Associate Chief Medical Examiner for the State of North Carolina, performed an autopsy on the victim Zimmerman. In his opinion Zimmerman died as a result of a gunshot wound. The bullet entered the left side of Zimmerman's back and passed through both of his lungs and his heart.

William Cotton testified that he had known the Sanders brothers for five or six years. On 4 February 1985, Richard and Steven Sanders picked him up. Richard was driving a gray or silver Opel automobile with Steven on the passenger side. The trio drove to a store where they purchased beer and two "regular toboggans." After leaving the store they went to "the trailer park out Airport Road." They first drove past the mobile home park. Richard then turned the car around and drove to the mobile home park where he backed into a side road. Richard and Steven got out, and "they said they be back in five or ten minutes." The defendants said that they were going to try to get some marijuana. They walked toward the mobile home park. Cotton "jumped around to the passenger seat and got in." The car was parked "about a hundred yards out from the mobile home on the . . . opposite side of the road."

Cotton had been sitting in the car for approximately fifteen minutes when he was approached by a friend, Vincent Atwater. Cotton moved the car "up to the next road up from the trailer" so he could talk to Atwater. Atwater asked where Richard was, and Cotton said he would be right back. When Atwater left, Cotton moved the car back to the spot where the defendants had "told [him] to park." By the time Cotton returned the car, "Richard was coming running up." Richard jumped into the car and said: "Get out of here" and "I like to got shot." Steven then jumped into the back seat. Cotton drove the defendants to their mother's house in Chatham County where Richard took a shower. Richard then drove Cotton back to town and dropped him off.

Vincent Atwater testified that he knew the defendants well and that he had seen their gray Opel "a thousand times." He corroborated Cotton's testimony and said that he had seen the defendants' car at Hilltop Mobile Home Park on 4 February 1985.

The State also offered the testimony of various law enforcement officers concerning their investigation of the incident.

The defendants offered no evidence during the guilt-innocence phase of the trial.

[1] By their first assignments of error, the defendants argue that the trial court erred when it denied their challenges of venireman Milton Rogerson for cause. Rogerson had come into

contact with the defendants prior to 4 February 1984 when performing the duties of his position as Chief Court Counselor for Judicial District Fifteen-B of the State of North Carolina.

After the trial court denied their challenges for cause, the defendant Richard Sanders' trial counsel exercised the last peremptory challenge allowed him under N.C.G.S. § 15A-1217(a) and excused Rogerson. The defendant Steven Sanders had previously exhausted all peremptory challenges available to him.

Rebecca Thigpen was the next prospective juror to be called for *voir dire* examination. Both defendants and the State stated that they were satisfied with Thigpen and she was seated as the twelfth juror.

The trial court next commenced the selection of three alternate jurors. Larry Pearson was the last of the three alternate jurors chosen. When he was called for *voir dire* examination, the defendants had exhausted all additional peremptory challenges available to them under N.C.G.S. § 15A-1217(c). Following an examination of Pearson, counsel for the defendants requested an additional peremptory challenge in order to excuse him. The defendants' request was denied and Pearson was seated as the third alternate juror.

The defendants may not now be heard to complain on appeal that the trial court erred in denying their challenges of the prospective juror Rogerson for cause, since they failed to comply at trial with the requirements of N.C.G.S. § 15A-1214(h) and (i). By failing to comply with the procedure made mandatory by the statute, the defendants failed to preserve the purported error for appellate review.

The pertinent parts of the statute expressly require that:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) *Renewed his challenge as provided in subsection (i) of this section; and*
>
> (3) Had his renewal motion denied as to the juror in question.

> (i) A party who has exhausted his peremptory challenges may move orally or in writing to *renew a challenge for cause previously denied* if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.
>
> The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

N.C.G.S. § 15A-1214(h) & (i) (1983) (emphasis added). The defendants at no time sought to renew any of their previously denied challenges for cause. Therefore, they failed to comply with the statute and are not entitled to any relief on appeal as a result of alleged errors by the trial court in denying their challenges for cause.

The defendants, however, argue that by exhausting their peremptory challenges and thereafter seeking to challenge an alternate juror peremptorily, their exception was preserved for appellate review under our former common law. The defendants cite *State v. Watson*, 310 N.C. 384, 396, 312 S.E. 2d 448, 456 (1984) in support of their contention that our former common law rule in this regard still applies and entitles them to appellate review. Although in *Watson* we mentioned our former common law rule for preserving this type of error, we did not intend to imply in any way that the former rule now provides an alternative method of preserving such issues for appeal or relieves defendants of the mandatory requirements of the statute. As we stated in *Silhan*, "[t]o the extent that a constitutionally valid statute overrules or supplements the dictates of one of our cases the statute is, of course, controlling." *State v. Silhan*, 302 N.C. 223, 239, 275 S.E. 2d 450, 464 (1981). The statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review.

Additionally, even had the defendants complied with the statute in this case, they would have been entitled to no relief. The jury which actually considered the case and rendered the verdicts against the defendants was comprised of the original twelve regular jurors, since it did not become necessary to use any of the alternates. Each of the twelve jurors actually seated as regular jurors and who rendered the verdicts here were acceptable to the State and to both defendants. The defendants were able, either through use of their peremptory challenges or challenges for cause, to excuse from the jury which actually considered their case all jurors they found objectionable. It has always been the law in this jurisdiction that a defendant's right to excuse jurors, either peremptorily or for cause, is the right

> not to select but to reject jurors; and if the jury as drawn be fair and impartial, the complaining party would be entitled to no more upon a new trial, and this he has already had on the first trial. [Citations omitted.] Hence the ruling, even if erroneous, would be harmless.

State v. Young, 287 N.C. 377, 389, 214 S.E. 2d 763, 772 (1975), *quoting State v. Levy,* 187 N.C. 581, 122 S.E. 386 (1924). *See State v. Brittain,* 89 N.C. 481 (1883); *State v. Holmes,* 63 N.C. 18 (1868); *State v. Arthur,* 13 N.C. 217 (1830). When a defendant has expressed satisfaction at trial with the jurors who actually considered his case and fails to show on appeal that any such juror was unable to be fair and impartial, the defendant has failed entirely to show possible prejudice from the denial of his challenges for cause and is entitled to no relief. *Id.; State v. Watson,* 310 N.C. at 397, 312 S.E. 2d at 456. *But, cf. Batson v. Kentucky,* 476 U.S. ---, 90 L.Ed. 2d 69 (1986) (showing of actual prejudice not required where prosecutor excuses a class of prospective jurors on the basis of race); *State v. Jackson,* 317 N.C. 1, 343 S.E. 2d 814 (1986) (*Batson* rule applicable only to cases in which jury selection took place after the Supreme Court rendered its decision in that case). This assignment of error is overruled.

[2] By their assignments of error the defendants also contend that the trial court erred when it denied their motions to suppress the introduction into evidence of a pair of Nike tennis shoes seized when the defendant Steven Sanders was arrested. We do not agree.

Prior to trial the defendants filed motions to suppress the introduction of the tennis shoes. They argued that the shoes had been seized under an invalid search warrant. A pretrial suppression hearing was held on 3 June 1985, and the trial court entered an order on 14 June 1985 denying the motion. In its order the trial court concluded that the search warrant was valid.

At trial the defendants moved to suppress the shoes on the ground that they were seized incident to an unlawful arrest and on the ground that the search warrant was improperly issued. Various witnesses were examined during a *voir dire* hearing. Thereafter, the trial court denied the defendants' motions to suppress without stating its ground for admitting the evidence.

We find it unnecessary to decide whether the shoes were seized under the authority of a valid search warrant. With regard to the defendant Steven Sanders, the seizure of the shoes was proper under the rule permitting searches and seizures incident to a lawful arrest. The defendant Richard Sanders may not be heard to complain on appeal because he has failed to demonstrate standing to seek suppression of the shoes.

On 7 February 1985, arrest warrants were issued for the defendants charging them with the murder and other crimes which are the subject of their appeal in this case. Search warrants also were issued authorizing the search of the residence of the defendants' grandmother, Nettie Williams. Law enforcement officers then went to the residence of Nettie Williams to execute the arrest warrants and search warrants. Evidence introduced at the *voir dire* hearing conducted during the defendants' trial tended to show that upon arriving at Williams' residence, the officers went to the door. At that time the defendant Steven Sanders was in a back bedroom standing at the foot of a bed. The officers were admitted to the residence and arrested Steven Sanders pursuant to warrants for his arrest. While arresting Steven Sanders, the officers discovered and seized a pair of Nike tennis shoes "around the bed." The defendants' brother, Christopher Todd Sanders, was present and stated that they belonged to the defendant Steven Sanders.

In the course of the *voir dire* hearing during the trial, the defendants stated *inter alia* that the warrants for their arrest were unlawful and that the Nike tennis shoes were inadmissible

as having been seized pursuant to an unlawful arrest. The defendants offered no evidence whatsoever in support of their argument that the arrest of Steven was unlawful, however, and concentrated instead upon their efforts to show that the search warrants for the Williams' home were invalid. On appeal to this Court, neither defendant questions the lawfulness of his arrest.

Without question a "search without a search warrant may be made incident to a lawful arrest; however, the scope of search is limited to the arrestee's person and the area within his immediate control." *State v. Hardy*, 299 N.C. 445, 455, 263 S.E. 2d 711, 718 (1980). "When an arrest is made, it is reasonable for the arresting officer to search without a warrant the suspect and the area within his immediate control for weapons and evidentiary items which may be concealed or destroyed." *State v. Hunter*, 299 N.C. 29, 34, 261 S.E. 2d 189, 193 (1980). *See Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, *rehearing denied*, 396 U.S. 869, 24 L.Ed. 2d 124 (1969); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980).

When the defendant Steven Sanders was arrested, he was standing at the foot of a bed in a back bedroom of his grandmother's home. The Nike shoes were discovered and seized "around the bed" where he was standing. All of the evidence tended to show clearly that the shoes were in an area within his immediate control and were items which could easily be concealed or destroyed. The seizure of the shoes was reasonable and lawful as having been made incident to a lawful arrest. This assignment of error is overruled.

This assignment of error is also overruled as to defendant Richard Sanders because he failed to show standing to seek suppression of the shoes. N.C.G.S. § 15A-972 provides: "When an indictment has been returned . . . a defendant *who is aggrieved* may move to suppress evidence in accordance with the terms of this Article." (Emphasis added.) In *State v. Taylor*, 298 N.C. 405, 415-16, 259 S.E. 2d 502, 508 (1979), we stated:

> [A] defendant is 'aggrieved' and 'may move to suppress evidence' under G.S. 15A-972 only when it appears that his *personal* rights, not those of some third party, may have been violated, and such defendant has the burden of estab-

> lishing that he is an 'aggrieved' party before his motion to suppress will be considered.

Thus, before the defendant Richard Sanders properly could challenge the legality of the search and seizure in question, he was required to demonstrate that the bedroom in his grandmother's home where the shoes were seized was an area in which he had a reasonable expectation of privacy. *State v. Taylor*, 298 N.C. at 416, 259 S.E. 2d at 508. This he entirely failed to do.

The record is void of any evidence that Richard Sanders had any possessory interest in the house or room where the shoes were seized. At the very most the record shows that he had previously lived in the house and was at the time of his arrest a frequent visitor. Moreover, Richard Sanders was not present at the house when the officers arrested the defendant Steven Sanders and seized the shoes. The defendant Richard Sanders failed to establish that he was an "aggrieved" party under N.C.G.S. § 15A-972. Therefore, the trial court did not err when it denied his motions to suppress the shoes in question.

[3] Lastly, the defendants argue that: "The imposition of a sentence based upon a verdict of guilty returned by a jury drawn from a venire from which potential jurors were excluded because of their scruples against capital punishment deprives the defendant of his right to due process of law and his right to trial by a jury." This assignment of error is without merit and is overruled. *See generally Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed. 2d 137 (1986); *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986); *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982).

The defendants received a fair trial free from prejudicial error.

No error.

REBA C. SMITH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ARCHIE WAYNE SMITH v. JOHNNIE WADE STARNES

No. 424PA85

(Filed 12 August 1986)

Rules of Civil Procedure § 4— *failure to deliver summons to sheriff within thirty days*—subsequent alias or pluries—statute of limitations tolled

The trial court erred in granting defendant's motion for summary judgment in an action arising from an automobile accident where plaintiff's complaint and summons were filed just before expiration of the two-year statute of limitations; plaintiff's summons was not delivered to the sheriff for service within thirty days, but plaintiff attempted to have defendant accept service within the time provided by statute; and, when that failed, plaintiff served out a pluries summons in accordance with N.C.G.S. § 1A-1, Rule 4(d)(2) and service was obtained within four days of delivery of the last summons to the sheriff, but after the running of the statute of limitations. N.C.G.S. § 1A-1, Rule 4, does not require delivery of a summons to the sheriff within thirty days of its issuance in order for the summons to serve as the basis for the issuance of the alias or pluries summons, and the issuance of the alias or pluries summonses in this case tolled the statute of limitations.

Justice MEYER dissenting.

Chief Justice BRANCH joins in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, 74 N.C. App. 306, 328 S.E. 2d 20 (1985), affirming an order granting defendant's motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure by *Helms, J.*, at the 30 January 1984 Civil Session of Superior Court, DAVIDSON County. Heard in the Supreme Court 11 March 1986.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by J. Ruffin Bailey and Gary S. Parsons, for plaintiff-appellant.

Brinkley, Walser, McGirt, Miller, Smith and Coles, by Stephen W. Coles, for defendant-appellee.

FRYE, Justice.

This cause of action arose out of a 7 August 1980 automobile accident in which plaintiff's intestate was killed instantly and plaintiff's vehicle was severely damaged. Suit was duly commenced by the filing of a complaint and the issuance of a sum-

mons on 6 August 1982.[1] On 13 August 1982, Mr. Armentrout, plaintiff's counsel, mailed the original summons and a copy of the complaint to defendant's counsel and requested that counsel have defendant sign an enclosed acceptance of service. On 23 September 1982, defendant's counsel returned the complaint and summons by letter and stated that he had been unable to locate defendant and that service would have to be executed in another manner.

Plaintiff's attorney obtained alias or pluries summonses on 4 November 1982, 2 February 1983, 2 May 1983, and 22 July 1983. Neither the original summons nor the November, February or May alias or pluries summonses were ever delivered to the Davidson County Sheriff for service. The 22 July summons was delivered to the sheriff and served on defendant on 26 July 1983.

The trial court granted defendant's motion for summary judgment on the grounds that plaintiff's action was barred by the two-year statute of limitations.[2]

In affirming the decision of the superior court, the Court of Appeals held that plaintiff's failure to deliver the summons to the Davidson County Sheriff for service within thirty days of its issuance caused the summons to lose its "vitality," and therefore the summons could not serve as a basis for the issuance of an alias or pluries summons. Thus, plaintiff's action discontinued 5 September 1982 because service was not had on defendant within thirty days after the summons was issued (6 August 1982). The Court of Appeals further held that the subsequent issuance of the alias or pluries summonses commenced the action anew on the date of each of the summons. When the last alias or pluries summons was issued and delivered to the sheriff, the two-year statute of limitations had run, thus effectively barring plaintiff's action. The Court of Appeals stated:

> Though the action was timely instituted and the statute of limitations was tolled for a time thereby, plaintiff's failure to

1. An earlier action on these claims in Davidson County Superior Court was terminated by a voluntary dismissal.

2. N.C.G.S. § 1-53 provides that an action for damages on account of the death of a person caused by a wrongful act must be commenced within two years of the date of death.

> get the original summons into the hands of a sheriff or other process officer caused the action to discontinue.
>
> Rule 4(a) of the N.C. Rules of Civil Procedure requires that after an action has been commenced and a summons has been issued '[t]he complaint and summons shall be delivered to some proper person for service.' This was not done and the summons lost its vitality when the period passed when it could have been delivered to a sheriff or process officer for possible service on the defendant. That period was '30 days after the date of the issuance of summons,' since Rule 4(c) provides that the service of the summons must be made within that time, if at all. Though an action in which the summons is unserved can continue in existence beyond 30 days after the date the summons was issued, for it to do so two things must happen according to Rules 4(c) and (d) of the N.C. Rules of Civil Procedure. First, the unserved original summons must be returned to the court by the officer it was delivered to with an explanation as to why it was not served. Second, the original summons must be supplemented by either a timely endorsement thereto or a timely sued out alias or pluries summons . . . . Thus, under the facts recorded the action discontinued on 5 September 1982 and the statute of limitations had long since run when defendant was eventually served with process several months later.

74 N.C. App. at 308-09, 328 S.E. 2d at 22.

Plaintiff contends that the Court of Appeals erred in holding that under Rule 4 a summons not delivered to the sheriff within thirty days after it is issued may not serve as a basis for the issuance of an alias or pluries summons. Plaintiff argues that since her complaint and summons were timely filed and the issuance of the alias or pluries summons tolled the applicable statute of limitations, the trial judge erred in granting defendant's motion for summary judgment. For the reasons stated in this opinion, we agree with the plaintiff's contention, and accordingly reverse the decision of the Court of Appeals.

There is no evidence or contention in this case that the complaint and summons were filed or issued in bad faith or that they were interposed for delay or otherwise subject to dismissal as a sham and false pleading pursuant to Rule 11(a) of the North Caro-

lina Rules of Civil Procedure. *See Estrada v. Burnham*, 316 N.C. 318, 341 S.E. 2d 538 (1986). Nor are we presented with a motion for involuntary dismissal for failure of the plaintiff to prosecute an action pursuant to Rule 41(b). We are presented, rather, with a simple question of whether a duly issued summons not served or delivered to the sheriff for service within thirty days of its issuance may nevertheless serve as the basis for an alias or pluries summons so as to toll the statute of limitations.

N.C.G.S. § 1A-1, Rule 4,[3] provides in pertinent part:

> (a) *Summons—Issuance; Who May Serve.* Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. *The complaint and summons shall be delivered to some proper person for service.* In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons . . . . *A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so.* The date the summons bears shall be prima facie evidence of the date of issue.
>
> . . . .
>
> (c) *Summons—Return.* Personal service or substituted personal service of summons as prescribed by Rule 4(j)(1)a and b, must be made within 30 days after the date of the issuance of summons . . . . *But failure to make service within the time allowed shall not invalidate the summons.* If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its non-service and the reasons therefor as to every such party not served, but failure to comply with this requirement shall not invalidate the summons.
>
> (d) *Summons—Extension; Endorsement, Alias and Pluries.* When any defendant in a civil action is not served within the time allowed for service, the action may be continued

3. All references herein to "rules" are to the North Carolina Rules of Civil Procedure, Chapter 1A-1 of the North Carolina General Statutes (1983), unless otherwise specified.

in existence as to such defendant by either of the following methods of extension:

. . . .

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

. . . .

(e) *Summons—Discontinuance. When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed.* Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

(Emphases added.)

We do not believe that a correct interpretation of Rule 4 requires delivery of the summons to the sheriff within thirty days of its issuance in order that the summons may later serve as a basis for the issuance of an alias or pluries summons. Although section (a) provides that the complaint and summons shall be delivered to the sheriff of the county where process is to be made, the rule provides no sanction for a party's failure to make such a delivery. Section (c) expressly provides that the sheriff's failure to make service within the time allowed under the statute shall not invalidate the summons. Nor will the sheriff's failure to return an unserved summons invalidate the summons. N.C.G.S. § 1A-1, Rule 4(c) (1983). Section (e) controls in determining when an action is discontinued. It provides that a summons is discontinued as to any defendant not served within the time allowed when there is "neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d) . . . ." There is no provision in section (e) concerning a party's failure to deliver the summons to the sheriff for service. In light

of the clear language of Rule 4(e) on the discontinuance of a summons, there is no justification for construing the rule to require delivery of the summons to the sheriff within thirty days of its issuance to keep the summons alive.

In the case at hand, it is clear that plaintiff's summons had not been discontinued prior to being served on defendant. Plaintiff's complaint and summons were filed 6 August 1982—before the expiration of the two-year statute of limitations. Although plaintiff's summons was never delivered to the sheriff for service, plaintiff attempted to have defendant accept service within the time provided in the statute. When this failed, plaintiff sued out alias or pluries summonses in accordance with Rule 4(d)(2). Under the language of Rule 4, plaintiff was successful in keeping her original summons alive, and therefore the trial judge erred in granting defendant's motion for summary judgment.

In its opinion, the Court of Appeals cited *Adams v. Brooks*, 73 N.C. App. 624, 327 S.E. 2d 19, *disc. rev. denied*, 313 N.C. 596, 332 S.E. 2d 177 (1985), as authority for its decision in the instant case. In *Adams* the Court of Appeals held that the plaintiff's summons "could not be used as a basis for an extension of time for service" since the summons was not delivered to the sheriff for service on defendant within thirty days of its issuance. *Id.* at 627, 327 S.E. 2d at 21. According to the court, the summons expired thirty days after it was issued and later endorsements resulted in the filing of the action anew as of the date of each endorsement. The court in *Adams* cited no direct authority for its decision. Since *Adams* is inconsistent with our holding in the instant case, it is hereby overruled.

A case decided by this Court, not cited in the opinion of the Court of Appeals, *Deaton v. Thomas*, 262 N.C. 565, 138 S.E. 2d 201 (1964), held that a summons issued by the clerk but never delivered to the sheriff to whom it was directed for service may not serve as a basis for the issuance of an alias process or the extension of time for service. This case was decided under our old rules of civil procedure and relied, in part, on earlier decisions[4] which held that a summons was not issued until it was delivered

4. *McClure v. Fellows*, 131 N.C. 509, 42 S.E. 951 (1902); *United States v. American Lumber Co.*, 85 F. 827 (C.C.A. 9th Cir. 1898).

to the sheriff for service. Those cases are no longer controlling on the question of when a summons is issued since Rule 4(a) expressly provides that "a summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so." The clerk is an officer having such authority. In the instant case, it is without question that the original summons and alias or pluries summonses were duly issued under Rule 4(a).

We conclude that plaintiff's failure to deliver the summons to the sheriff within thirty days after it was issued did not preclude the original summons from serving as a basis for the issuance of the alias or pluries summons. Plaintiff's action was timely commenced upon the filing of her complaint and summons, and the subsequent issuance of the alias or pluries summonses tolled the statute of limitations until service could be had on defendant. Therefore, the trial judge erred in granting defendant's motion for summary judgment.

The decision of the Court of Appeals is

Reversed.

Justice MEYER dissenting.

I dissent. There are two extraordinarily grievous faults in the majority opinion. First, Rule 4 of the North Carolina Rules of Civil Procedure was applied incorrectly. The rule provides for service of summons by designated methods. Our cases have consistently declared: " '[W]here a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service.' " *Guthrie v. Ray*, 293 N.C. 67, 69, 235 S.E. 2d 146, 148 (1967) (quoting *S. Lowman v. Ballard & Co.*, 168 N.C. 16, 18, 84 S.E. 21, 22 (1915)). Second, I believe that the correct interpretation of Rule 4 requires that delivery of the summons to the sheriff within thirty days of its issuance *must* be accomplished in order to allow the summons to later serve as a basis for the issuance of an alias or pluries summons. *Deaton v. Thomas*, 262 N.C. 565, 138 S.E. 2d 201 (1964).

Rule 4(a) clearly provides that:

> The complaint and summons *shall* be delivered to some proper person for service. In this State, such proper person shall

> be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons.

N.C.G.S. § 1A-1, Rule 4(a) (1983) (emphasis added).

Rule 4(j) provides in pertinent part:

> (j) *Process—Manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:
>
> (1) Natural Person. . . .:
>
> a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept services of process or by serving process upon such agent or the party in a manner specified by any statute.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

N.C.G.S. § 1A-1, Rule 4(j) (1983).

The above rules provide three methods by which a valid service of process may occur. In this case, plaintiff's counsel never attempted service by any one of the three statutorily authorized methods. The "attempted" service here was merely the sending by regular mail of a copy of the summons to defendant's counsel in a letter requesting that defendant accept service. Plaintiff's counsel made the following answer in response to an interrogatory:

> The Summons issued August 6, 1982, was taken out, and an additional Acceptance of Service was prepared and forward-

> ed to the attorney for the Defendant Johnnie Wade Starnes, who indicated he would have his client accept service. The same was returned some weeks later, indicating that the Defendant could not be located, and service would have to be had another way. Thereupon, the attorney for Plaintiff attempted to find out where the Defendant was living and/or working and was able to obtain this information many months later.

Though, if successful, this method would have effectuated the equivalent of service and made any attempt at actual service unnecessary, it is by no means an attempt to serve the summons by any one of the statutorily authorized methods. Because plaintiff's attorney failed to comply with Rule 4, the original summons was discontinued thirty days after its issuance.

Although the majority states that "plaintiff attempted to have defendant accept service within the time provided in the statute," the majority fails to explain what happened to the original summons after defendant's counsel returned it or why what was done with it met any statutory requirement.

Even the majority should concede that in order for the original summons to serve as the basis for an alias and pluries summons, there must be some attempt at delivery by one of the statutory methods and that such was not accomplished in this case. Without an attempted service, the summons expires and any later endorsements by the clerk constitute the filing of the action as of the date of each respective endorsement. N.C.G.S. § 1A-1, Rule 4(a) and (b) (1983).

The North Carolina Rules of Civil Procedure must be strictly adhered to in order to preserve the integrity of our system for service of process. The purpose behind Rule 4 in North Carolina is " 'to provide the mechanisms for bringing notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.' " *Wiles v. Construction Co.*, 295 N.C. 81, 84, 243 S.E. 2d 756, 758 (1978) (quoting Wright & Miller, *Federal Practice and Procedure*: Civil § 1063, at 204 (1969)).

The record reveals that the defendant's telephone number was continuously listed in the Lexington telephone book from 6

August 1982 until July 1983 and that defendant has continuously worked at PPG Industries since 1977. Moreover, it must be stressed that when plaintiff finally delivered the fifth summons to the Davidson County Sheriff, the defendant was served within four days. This relatively immediate service, once plaintiff finally made a statutorily authorized attempt, *suggests* that had plaintiff attempted service by this or any other statutorily authorized manner within thirty days of the issuance of the summons, defendant would have been promptly notified that an action had been commenced against him. The provision of adequate and timely notice to a defendant of the commencement of an action against him and the simultaneous assertion of personal jurisdiction over him are the bases of Rule 4. The rule was *not* enacted for the convenience of parties causing summonses to be issued; it is structured around the notion of fair play and timely *notice* to adverse parties. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 94 L.Ed. 865 (1950). *See also Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966).

I am astonished that the majority would overrule *Adams v. Brooks*, 73 N.C. App. 624, 327 S.E. 2d 19 (1985). In that case, plaintiff's lawyer had summons issued and held it in his desk for over two years, never attempting to deliver a copy to the sheriff or to the defendant by any authorized method of Rule 4(j)(1)(a), (b), or (c). In the interim, plaintiff's attorney requested and received sixteen extensions. Finally, two and one-half years later, the attorney delivered the summons to a sheriff. When finally placed in the hands of the sheriff for service, the summons was served within six days. The statute of limitations would have been tolled for more than two years. The court in *Adams* held that plaintiff's failure to ever deliver summons to any sheriff prior to the first endorsement caused the action to discontinue thirty days after issuance. The holding in *Adams* is correct. The practicing bar will no doubt be shocked to learn that such conduct as was practiced in *Adams* is now acceptable.

My personal belief is that the *only* way that an unserved document may act as the basis for an alias or pluries summons is by accomplishing delivery to the sheriff within the statutory time period and obtaining a return from him. Otherwise, a plaintiff could continue a chain of endorsements or alias and pluries summonses and be allowed to keep a case alive indefinitely by con-

tinuously requesting extensions without any attempt at service by the sheriff as intended by the legislature. In the case at bar, the summons in question had expired for lack of effective renewal, and the later endorsements by the clerk constituted the filing of a new cause of action already barred by the statute of limitations.

Chief Justice BRANCH joins in this dissenting opinion.

BOLTON CORPORATION v. T. A. LOVING COMPANY

No. 715PA85

(Filed 12 August 1986)

Compromise and Settlement § 1.1— construction dispute—partial settlement by plaintiff's insurer—summary judgment for defendant improper

Summary judgment should not have been granted for defendant in an action arising from a construction dispute where plaintiff, a heating and air conditioning contractor, had filed an action against defendant, the general contractor, for damages caused by failure to schedule work properly; plaintiff's insurer had settled a claim against plaintiff by defendant involving a broken water pipe without plaintiff's knowledge; the insurer and defendant had executed a "release in full" which contained a reservation of rights clause; defendant filed a counterclaim to plaintiff's action involving the broken water line; and plaintiff pled the settlement and release in response. Plaintiff ratified the release by pleading it as a defense to the counterclaim and may not claim that damage caused by the broken water line was defendant's responsibility, but the reservation of rights clause in the release should be given effect because there was an ongoing contractual relationship and multiple transactions between the parties and it is possible that defendant caused delays and cost overruns for plaintiff which were not related to the broken water line.

Justice MARTIN dissenting.

Justice MITCHELL joins in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 77 N.C. App. 90, 334 S.E. 2d 495 (1985), affirming an order granting summary judgment in favor of the defendant entered 13 September 1984 by *Brannon, J.*, in WAKE County Superior Court. Heard in the Supreme Court on 10 June 1986.

Graham & James, by J. Jerome Hartzell, for plaintiff-appellant.

Poyner & Spruill, by J. Phil Carlton, Cecil W. Harrison, Jr., and Susanna K. Gilchrist; and Warren, Kerr, Walston & Hollowell, by John H. Kerr, for defendant-appellee.

BILLINGS, Justice.

The plaintiff, Bolton Corporation [hereafter Bolton], was the contractor responsible for installing the heating, ventilating and air conditioning system for the Walter R. Davis Library at the University of North Carolina at Chapel Hill. The defendant, T. A. Loving Company [hereafter Loving], the general contractor, was designated "Project Expediter" and was responsible for scheduling and coordinating the work of all the contractors. Both had fixed price contracts calling for completion in 930 days, which would have been early April of 1982. The work was completed in August of 1983, some 480 days late.

On 16 November 1983 the plaintiff sued the defendant for costs in excess of $350,000 which it claimed were the result of defendant's failure to schedule work properly so that plaintiff's work could be finished within the allotted 930 days. The plaintiff alleged breach of Loving's contract with the State, of which Bolton was an intended (later amended to read "direct") beneficiary, negligent breach of a common law duty of care flowing from the working relationship between plaintiff and defendant and breach of a common law duty of due care in the performance of its contract with the State.

On 23 January 1984 the defendant filed its answer, which included a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, various defenses, and a counterclaim for breach of contract and negligent performance of work by plaintiff under its contract, specifically claiming that Bolton had caused a 62-day delay by negligently damaging a water line that flooded the construction project and that Bolton had not paid its pro rata share of the power bills from April to August 1983, in the amount of $3,246.69.

On 2 February 1984 plaintiff's counsel notified plaintiff's liability insurer, Aetna Casualty & Surety Company, of the coun-

terclaim. The insurance company responded that Loving's claim regarding the broken water line had been settled. On 21 February 1984, without approval of the plaintiff, Aetna paid $136,445.29 to the defendant and obtained from the defendant a "Release in Full" executed by the defendant's Executive Vice-President. The release stated that it released Bolton and Aetna Casualty & Surety Company from

> all claims, demands, damages, actions, or causes of action, on account of damage to property, The Central Library, Chapel Hill, N.C. which occurred on or about the 14th day of April, 1983, by reason of water pipe breaking and of and for all claims or demands whatsoever in law or in equity, which it and its successors can, shall or may have by reason of any matter, cause or thing whatsoever prior to the date hereof.

The release concluded with the following preprinted wording on the form:

> It is Further Understood and Agreed that any party hereby released admits no liability to the undersigned or any others, shall not be estopped or otherwise barred from asserting, and expressly reserves the right to assert any claim or cause of action such party may have against the undersigned or any others.

On 22 February 1984 the plaintiff filed a reply to defendant's counterclaim alleging, *inter alia*, "that any recovery sought is barred by the doctrine of accord and satisfaction, settlement and release."

On 30 August 1984 Judge Brannon denied the defendant's Rule 12(b)(6) motion to dismiss. On 13 September 1984, he granted the defendant's motion for summary judgment. In the same order he stated that he had reconsidered the motion to dismiss and "now renews [the] determination that such motions should be denied," but he asked that if the appellate courts determined that summary judgment should not have been granted, in the interest of judicial economy they also rule on the correctness of his denial of the motion to dismiss. As reflected in the briefs before this Court, the motion to dismiss is based upon the defendant's contentions that:

(1) the State of North Carolina cannot legally delegate the duty to coordinate contracts governed by N.C.G.S. § 143-128; and

(2) the plaintiff's claim of negligent performance of contract does not allege property damage, and negligent performance of a contract does not give rise to a cause of action in tort against the promisor unless the negligence causes personal injury or property damage.

Because the Court of Appeals affirmed entry of summary judgment in favor of the defendant, it was not necessary for it to consider the trial judge's ruling on the motion to dismiss.

In considering the summary judgment order, the Court of Appeals noted that it was undisputed that Bolton had not consented to Aetna's settlement of Loving's claim against Bolton for the water damage, but it said that by pleading the settlement in its reply to defendant's counterclaim, Bolton ratified the settlement, thereby barring its own claims against defendant, citing *Keith v. Glenn*, 262 N.C. 284, 136 S.E. 2d 665 (1964). The Court of Appeals noted that if the plaintiff had not elected to ratify the settlement, it could have preserved its right of action against the defendant, citing *Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886 (1963) and *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E. 2d 585, *cert. denied*, 283 N.C. 665, 197 S.E. 2d 874 (1973).

The Court of Appeals also said that plaintiff's reliance on the reservation of rights language in the settlement "would have validity" if plaintiff had "been a true party to the settlement, that is, if plaintiff had consented to the settlement at the time the 'Release in Full' was executed . . . ." 77 N.C. App. at 96, 334 S.E. 2d at 499. However, because the plaintiff did not consent to the settlement when the release was executed, the Court of Appeals said that the reservation of rights language "is merely a restatement of the law concerning a nonconsenting insured's rights: that by not consenting to its insurer's settlement and release, it retained its right to pursue any claims it may have against the defendant. However, once plaintiff ratified the compromise settlement, it gave up this right." *Id.*

The case of *Keith v. Glenn*, 262 N.C. 284, 136 S.E. 2d 665, primarily relied upon by the Court of Appeals in reaching its decision, involves claims arising from an automobile accident. In the

context of a single automobile collision, the reason for the rule that ratification of a settlement of claims against the insured bars the insured's claim is obvious. If the plaintiff has ratified a settlement paying the defendant for injuries allegedly resulting from the plaintiff's negligence, it would be factually inconsistent for the plaintiff then to be allowed to recover against the defendant in a jurisdiction where contributory negligence is a total bar to recovery. As we said in *Snyder v. Oil Co.*, 235 N.C. 119, 120, 68 S.E. 2d 805, 806 (1952):

> By said compromise settlement each party bought his peace respecting any liability created by the collision. The adjustment of said claim by the payment of the amount agreed constituted an acknowledgment, as between the parties, of the liability of the oil company, and the nonliability, or at least a waiver of the liability, of the defendant Dixon.

In the case *sub judice*, instead of a single incident, an accident, we have an ongoing contractual relationship and multiple transactions. It is possible that the defendant caused delays to the work, resulting in cost overruns for the plaintiff, that were totally unrelated to any delays from the broken water line. In fact, the water line was not broken until well after the original completion date had been missed. By saying that the reservation of rights clause has no effect, we would be saying that for the price of settling the issue of its liability resulting from the broken water pipe, the plaintiff gave up all of its own completely unrelated claims against the defendant, even though the settlement agreement did not so provide. There is no logical reason for making the rule in automobile accident cases apply to the situation here.

In addition, by not giving effect to the reservation of rights language, we would be saying that it is legally impossible for parties to settle only one aspect of a multi-faceted dispute. There also is no logical reason for such a rule.

Finally, we note that in the cases cited by the defendant and relied upon by the Court of Appeals there was no reservation of rights language in the settlement documents signed by the party claiming that ratification barred the other party's claim. We disagree with the Court of Appeals' holding that the reservation of rights language had no effect but was merely an acknowledgment

of the rule of law that a release between an insured's insurance company and a claimant does not bind the insured unless ratified. The reservation of rights clause does not purport to reserve claims or causes of action only if the party released does not ratify the release; it reserves them completely. When the plaintiff ratified the release by pleading it as a defense to the counterclaim, it ratified the entire agreement, including the reservation of rights. We hold that such language should be given effect. "Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts." *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E. 2d 171, 173 (1959). As Justice (now Chief Justice) Branch said in *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E. 2d 190, 195-96 (1975),

> A release is the giving up or abandoning of a claim or right to the person against whom the claim exists or the right is to be exercised . . . . Whether this agreement be called a release, a waiver or be given some other designation is not important to our decision. Obviously defendant's Exhibit "A" is a contract and is therefore subject to the recognized rules of construction of contracts.
>
> The heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed.

In *Adder* this Court held that the contract by which the plaintiff had acknowledged that he had no defenses or set-offs against his indebtedness to the defendant for labor and parts to renovate the plaintiff's car did not bar the plaintiff's affirmative claims against the defendant, for "[n]owhere in the contract is there any reference to a release of plaintiff's pending claims based on negligence or implied warranty." *Id.* at 493, 219 S.E. 2d at 196.

All parts of a contract are to be given effect if possible. It is presumed that each part of the contract means something. *Robbins v. Trading Post*, 253 N.C. 474, 477, 117 S.E. 2d 438, 440-41 (1960). In *Electric Supply Co. v. Burgess*, 223 N.C. 97, 25 S.E. 2d 390 (1943), this Court gave effect to a provision in a general re-

lease of a principal and a surety on a construction contract that reserved rights against the principal for certain items, quoting with approval the following from 23 R.C.L., 389, sec. 26:

> "Great liberality is allowed in construing releases. The intent is to be sought from the whole and every part of the instrument; and where general words are used, if it appears by other clauses of the instrument, or other documents, definitely referred to, that it was the intent of the parties to limit the discharge to particular claims only, courts, in construing it, will so limit it."

Id. at 100, 25 S.E. 2d at 392.

Although the document at issue in the instant case was between Aetna and Loving, the reservation of rights clause applied to "any party hereby released," and the release is specifically of "Bolton Corporation and their representatives, Aetna Casualty & Surety Co." Bolton ratified the release by pleading it as a defense to the counterclaim and as a result may not claim that delay and damage caused by the broken water line was Loving's responsibility. *Keith v. Glenn*, 262 N.C. 284, 136 S.E. 2d 664; *Patterson v. Lynch, Inc.* 266 N.C. 489, 146 S.E. 2d 390 (1966).

In the instant case, according to the terms of the "Release in Full," in exchange for the payment of $136,445.29, Loving has surrendered all of its claims against Bolton arising prior to the date of execution of the release; Bolton has retained its right to pursue its claims against Loving. Loving caused the release agreement to be executed after the suit and counterclaim had been filed. Presumably defendant knew what the contract provided and was satisfied with its terms.

Because the reservation of rights in the release is to be given effect, summary judgment should not have been granted in favor of the defendant. We therefore reverse the Court of Appeals. Because of its disposition of the summary judgment issue, the Court of Appeals did not reach the question of whether to review the trial court's denial of the defendant's Rule 12(b)(6) motion to dismiss. A ruling denying a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) is ordinarily a nonappealable interlocutory order. *State v. School*, 299 N.C. 351, 261 S.E. 2d 908, *aff'd on rehearing*, 299 N.C. 731, 265 S.E. 2d 387, *appeal dismissed*, 449

U.S. 807, 66 L.Ed. 2d 11 (1980). The ruling by the trial judge in this case does not affect a substantial right of the defendant which cannot be later protected by a timely appeal. Therefore, we decline the invitation of the trial judge to entertain an appeal from his denial of the defendant's motion to dismiss.

This case is remanded to the Court of Appeals for further remand to the trial court for further proceedings.

Reversed and remanded.

Justice MARTIN dissenting.

I must dissent. The majority, without citing a single case in point, has held for the first time that a general release executed by one party and ratified by the opposing party does not bar the opposing party from pursuing claims against the party that executed the release. This is contrary to *Keith v. Glenn*, 262 N.C. 284, 136 S.E. 2d 665 (1964); *Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886 (1963); *Cannon v. Parker*, 249 N.C. 279, 106 S.E. 2d 229 (1958); *Houghton v. Harris*, 243 N.C. 92, 89 S.E. 2d 860 (1955); *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805 (1952).

T. A. Loving Company executed a "release in full" that

> for the sole consideration One hundred thirty six thousand, four hundred forty five & 29/100 Dollars, to it in hand paid by Aetna Casualty & Surety Co. and Bolton Corp. have released and discharged, and by these presents do for itself and its successors and assigns, release and forever discharge the said Bolton Corporation and their representatives, Aetna Casualty & Surety Co. and all other persons, firms or corporations from all claims, demands, damages, actions, or causes of action, on account of damage to property, The Central Library, Chapel Hill, N.C. which occurred on or about the 14th day of April, 1983, by reason of water pipe breaking and of and for all claims or demands whatsoever in law or in equity, which it and its successors can, shall or may have by reason of any matter, cause or thing whatsoever prior to the date hereof. Subject to carpet warranty stated in Aetna's letter of 12/2/83 to T. A. Loving Company and general warranties stated in Aetna's letter of 9/8/83 to T. A. Loving

Company, both of which are incorporated into and made a part of this release.

It is Understood and Agreed that this is a full and final release of all claims of every nature and kind whatsoever, and releases claims that are known and unknown, suspected and unsuspected.

It is Further Understood and Agreed that any party hereby released admits no liability to the undersigned or any others, shall not be estopped or otherwise barred from asserting, and expressly reserves the right to assert any claim or cause of action such party may have against the undersigned or any others.

Thereafter, in this litigation, Loving Company filed a counterclaim against the plaintiff, and to that counterclaim the plaintiff filed a reply in which Bolton ratified the release in full by pleading: "As a further reply to the counterclaim asserted by defendant, plaintiff alleges and says that any recovery sought is barred by the doctrine of accord and satisfaction, settlement and release."

The settled law in North Carolina is that when a plaintiff pleads settlement and release as a bar to a defendant's counterclaim, the pleading constitutes a ratification of the settlement and bars both plaintiff's and defendant's actions. *Keith v. Glenn*, 262 N.C. 284, 136 S.E. 2d 665 (and cases cited above).

The majority strains to hold that although plaintiff ratified the accord and satisfaction represented by the release, it did not ratify all of the terms of the release. Plaintiff did not limit its ratification in the reply. To interpret the reply and the release as meaning that the defendant can't sue the plaintiff but plaintiff can sue defendant is illogical and certainly not the intent of the parties. Plaintiff was not required to ratify the release. It is clear to me that it was the full, stated intent of the parties that all claims were released. If plaintiff had not ratified the release and become a party to the accord and satisfaction, then it could have exercised the remedies set out in the release instrument.

The majority states that unless we allow the plaintiff to maintain this action in spite of the release, it would be "legally impossible for parties to settle only one aspect of a multi-faceted

dispute." I am sure that the majority realizes that a party can release another party by a specific release rather than by a release in full. In fact, the release in question excepts from the general release claims under a warranty as to the carpet and as to certain other warranties "stated in Aetna's letter of 9/8/83." The parties could have easily prevented this controversy by simply stating in the release in question that it was only a release of the water damage claim resulting from the broken water pipe, thus making the release a specific release and avoiding the consequences of the ratification of a general release. While it is true that the cases cited in the Court of Appeals opinion deal with causes of actions arising from automobile collisions, the analysis of the principle which bars the plaintiff in such actions is not based upon tort law but upon the contractual law of accord and satisfaction based upon the ratification of a general release. *Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886.

Under the principles of contract, I find that plaintiff, by its ratification of the general release, has joined in the accord and satisfaction between plaintiff and defendant, and neither plaintiff nor the defendant may sue on the basis of any claims which may have arisen prior to the date of the execution of the general release.

Justice MITCHELL joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. HARVEY HILLARD BLAKE, SR.

No. 155A85

(Filed 12 August 1986)

1. Homicide § 15— evidentiary rulings—no error

There was no error in the trial judge's evidentiary rulings in a first degree murder prosecution where there was no abuse of discretion in the judge's rulings on leading questions; evidence of defendant's flight was relevant; items of hearsay were used for corroborative purposes or to explain actions rather than for substantive purposes; and the admission of lead fragments taken from the victim's body and an in-court identification of defendant as being at the scene of the shooting were inconsequential because defendant admitted being involved in the altercation which led to the victim's death and that the victim was shot with his gun.

2. **Homicide § 30.2— first degree murder—failure to instruct on voluntary manslaughter—no error**

The trial court did not err in a prosecution for first degree murder by failing to submit voluntary manslaughter as a possible verdict where the State's evidence tended to show a cold, calculated premeditated shooting by defendant and defendant's evidence tended to show that he did not shoot the victim intentionally and never intended to harm him.

3. **Homicide § 23— first degree murder—no error in instructions**

The trial court did not err in its instructions to the jury in a first degree murder prosecution where the judge fully and accurately instructed on the doctrine of misadventure and accident; there was no error in introducing a summary of the evidence by the use of the phrase "tends to show"; not guilty was submitted as an alternative verdict; and the judge's statement of the State's burden during the self-defense instruction was a *lapsus linguae* which was immediately rectified and from which there could have been no prejudice since it applied only to involuntary manslaughter and the jury returned a verdict of murder in the first degree.

4. **Homicide § 23— first degree murder—failure to adopt proffered jury instructions—no error**

The trial court did not err in a first degree murder prosecution by failing to adopt twenty-one of defendant's proffered jury instructions.

APPEAL by Defendant pursuant to N.C.G.S. § 7A-27(a) from a life sentence imposed by *DeRamus, J.*, presiding at the 29 October 1984 Session of GUILFORD County Superior Court, after a jury trial at which defendant was convicted of first degree murder.

Lacy H. Thornburg, Attorney General, by James J. Coman, Special Deputy Attorney General, and Joan H. Byers, Assistant Attorney General, for the state.

Robert S. Cahoon for defendant appellant.

EXUM, Justice.

This appeal presents questions having to do with the admissibility of certain evidence and the correctness of certain jury instructions. We find no merit to any of defendant's arguments. There is no reversible error in the trial.

I.

Defendant was indicted by the Guilford County Grand Jury on 7 July 1980 for first degree murder in the 25 August 1979 homicide of Louie Garcia Flores. Defendant fled the jurisdiction

the day of the killing and was arrested on a fugitive warrant on 8 January 1981. Defendant resisted extradition but finally was returned to North Carolina on 26 September 1983. The trial court, after a *Watson* hearing held at the state's instance, determined there were no aggravating circumstances and ruled the case be tried as a noncapital, first degree murder case.[1]

A.

The state presented evidence tending to show: The victim, Louie Garcia Flores (Flores), operated an automobile body shop in Greensboro. In the early evening of 25 August 1979, Flores was working in his shop on the vehicle of a customer, John Mandikos. Karen Blake, defendant's daughter and Flores' fiancee, arrived at the shop with her stepmother Hallie Blake, defendant's wife. The two women came to pick up a car Flores had repaired for Mrs. Blake's daughter from a previous marriage. Mrs. Blake argued with Flores about the price he charged and, upon returning home, informed her husband, defendant, of the dispute and sent him to Flores' shop to straighten it out.

Meanwhile several customers, including John Mandikos, Mr. and Mrs. Marshall Lancaster, and Steve Mannis had arrived at Flores' body shop to watch or assist Flores. The entire group was standing in or near the open garage door when a pickup truck pulled into the parking lot and screeched to a halt with its horn sounding. When he saw the truck, Flores, who was unarmed, put down his tools and walked outside to speak to the driver, the defendant herein, who remained in the truck. Defendant raised his voice and addressed Flores argumentatively. Defendant, still sitting in the truck cab, fired a gun once into the air. Flores froze about three feet from the truck. Defendant said, "The next shot will be for real." He held the gun next to Flores' right eyelid and shot Flores at point-blank range.

After the first shot the customers scattered and ran for cover. Defendant left in his truck after firing the second shot.

1. In *State v. Watson*, 310 N.C. 384, 388, 312 S.E. 2d 448, 452 (1984), the Court commended "for its judicial economy and administrative efficiency" a pretrial hearing in a potential capital case at which the trial court would determine whether there was any evidence of any of the aggravating factors defined by N.C.G.S. § 15A-2000(e). If not, the trial court could order that the case be tried as a first degree murder, noncapital case.

Lancaster, one of the customers, emerged from the shop, saw Flores lying on the ground bleeding from the nose, mouth and ear, and ran across the street to summon the police and an ambulance. Flores was declared dead shortly after his arrival at a local hospital, never having regained consciousness. Dr. Page Hudson, Chief Medical Examiner for the State of North Carolina, found no powder burns on Flores' face, leading him to conclude the gun's muzzle was against the victim's eyelid when fired. The gunshot wound to the head and the resulting brain damage proximately caused Flores' death.

Witnesses told the first Greensboro police officer who arrived at the scene, C. E. Bryant, that the man who shot Flores was a white male with the surname Blake and drove a light gray Ford pickup truck with a camper on the back. Greensboro police obtained an arrest warrant for defendant and searched in vain for him until January 1981, when officers learned he was working as a brickmason in Dallas, Texas. On 8 January 1981 Dallas police investigators in the fugitive unit, who knew from their Crime Stoppers unit that defendant was wanted for murder in North Carolina, informed Greensboro detectives they had Blake in custody in Texas. Dallas detectives had arrested defendant at the Denton County construction site where he worked under the name Jay Chandler but soon discovered by comparing photographs and fingerprints that he was Harvey Hillard Blake, Sr. Nevertheless, detectives found several types of identification on defendant's person, including a Florida driver's license, a California minister's license, a fishing license, and two Social Security cards with different numbers, all issued to either James D. or Jay D. Williams or Jay Chandler. Blake did not admit his true identity until detectives told him they had confirmed it through fingerprint comparison. Defendant then volunteered to Detectives Becerra and Parker "all that was back in North Carolina, my daughter is sixteen years old, got pregnant by a black man, and I went down to talk to him about it, the man reached in the pickup for a rifle, and I had to shoot him." Flores was in fact Hispanic, and Blake's daughter was in fact 22 years old in 1979. Blake was not returned to this jurisdiction from Texas until September 1983 due to his resistance to extradition.

B.

Defendant's own testimony tended to show: He had met Flores, who had been dating Blake's daughter Karen, about one year before Flores' death. Flores was to have married Karen Blake within a few days of 25 August 1979. Blake did not approve of the couple's lifestyle, notably their drug use and cohabitation and pregnancy out of wedlock, which he blamed on Flores. Nonetheless, Blake sought to get along with his future son-in-law.

When Mrs. Blake told defendant that Flores said he should come discuss the dispute over the bill, defendant finished some brickwork he was doing at his house, showered, and drove calmly to Flores' body shop. He pulled in to the shop slowly and blew the horn. When Flores came out to the truck, defendant accused him of lying about the repair estimate. Flores, who was unarmed, grabbed defendant by the throat and started choking him. Defendant, who was then 50 years old and had heart trouble, started having chest pains and reached beside him on the seat for his small .22 caliber pistol, which he kept there fully loaded at all times. Defendant never put his finger on the trigger, never pointed the gun at Flores, and never intended to harm him. He merely intended to show it to Flores so Flores would stop choking him. Flores, who had his head, arms and part of his torso in the truck's cab, grabbed the gun, which fired first through the passenger window. Immediately, while defendant still had his hand on the gun, Flores jerked the gun towards himself and it fired a second shot. Flores fell to the ground, and the gun fell back inside the truck in defendant's lap. Defendant panicked, drove away and threw his gun out the window on a nearby street. He drove to Charlotte and called his wife from a pay phone. She informed him that the police wanted him for Flores' murder.

Defendant then fled to Florida, Texas, California and Mexico over the next sixteen months, supporting himself by pursuing his occupation, brickmasonry. During these travels the passenger window of defendant's truck, immediately shattered by the first bullet, fell out and was replaced in Texas. Investigators did not find any broken glass at the scene of the shooting. Defendant admitted he remained a fugitive, changed his appearance, used aliases, and obtained a stolen birth certificate and false identification because he was scared. Defendant also paid $15 for a minis-

ter's license in an assumed name from the Universal Life Church. When first arrested, defendant denied he was Harvey Blake until confronted with evidence of matching fingerprints. At trial defendant denied, however, that he told Detectives Becerra and Parker anything about the events of 25 August 1979 in Greensboro.

C.

The trial judge instructed the jury they could find defendant guilty of murder in the first or second degree or involuntary manslaughter. Judge DeRamus also instructed them they could find defendant not guilty, and explained the concepts of flight, accident, burden of proof, reasonable doubt, and jurors' duties. He also summarized the evidence presented by both sides, reminding the jury they were to be guided by their own recollections and not his. The jury unanimously found defendant guilty of first degree murder, upon which Judge DeRamus entered the mandatory judgment of life imprisonment, as the case was tried as a noncapital case.

II.

[1] Defendant assigns error to the admission of a number of items of evidence. There is little argument and no citation of pertinent authority to support defendant's contentions as to admissibility. Most of this part of defendant's brief is simply a reproduction of the transcript where the alleged errors occurred. Defendant complains of (1) use by the prosecutor of leading questions; (2) unresponsive answers; (3) gratuitous condemnation of defendant by an eyewitness who said at the time of the shooting that defendant "looked like the devil, he was so mad"; (4) use of irrelevant evidence; (5) use of hearsay evidence; (6) lack of a proper foundation for certain business records; (7) lack of a chain of custody; and (8) an improper in-court identification of defendant.

We find no merit to any of defendant's arguments. It would serve no useful purpose to discuss in detail each item of evidence and to demonstrate why there was no error or if there was error, why it could not have affected the outcome of the trial.

We can summarily deal with these questions as follows: Rulings on questions arguably leading rest in the trial court's discretion and will not be disturbed in the absence of an abuse of discretion. *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985).

Nothing in the rulings complained of here even approach an abuse of discretion. An eyewitness's testimony that defendant was so mad he looked like the devil probably should have been stricken on defendant's motion as unresponsive to the question put, but we are satisfied this error had no effect on the trial's outcome. Evidence of defendant's flight was not, as defendant seems to contend, irrelevant. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). Items of so-called hearsay were not used for substantive, but for corroborative purposes, and the jury was so instructed. There was no need in these instances for the state to rely on the business records exception to the hearsay rule to admit this evidence. Another item of so-called hearsay was used again not for substantive purposes but to explain why a Dallas police investigator took certain actions to assist the Greensboro Police Department. Defendant's argument regarding lack of chain of custody relates to the admission into evidence of lead fragments removed from Flores' body to prove he was shot with defendant's pistol. The admission of the lead fragments, if error at all, was of absolutely no consequence because defendant acknowledged the victim was shot with defendant's gun. The question for the jury was whether the shooting occurred by accident or by design. As to defendant's attack on an eyewitness's in-court identification of defendant, it suffices to say there is no conflict in the state's and the defendant's evidence as to whether defendant was involved in the altercation leading to Flores' death. Defendant admits he was. The witness's in-court identification of defendant as being at the scene of the shooting is, therefore, inconsequential.

III.

Defendant's remaining assignments of error are directed toward Judge DeRamus' jury instructions.

A.

[2] Judge DeRamus instructed the jury it could return verdicts of guilty of murder in the first or second degree, involuntary manslaughter, or not guilty. He instructed on the concept of accident as a theory upon which the jury could return a not guilty verdict. He also instructed the jury that defendant would be excused of involuntary manslaughter on the ground of self-defense if:

> First, it appeared to the defendant and he believed it to be necessary to pick up his pistol in order to save himself from death or great bodily harm at the hands of Louie Flores.
>
> Second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to Louie Flores, the fierceness of the assault, if any, upon the defendant, and whether or not Louie Flores had a weapon in his possession. The defendant would not be guilty of manslaughter if he acted in self-defense as I have just defined that to be; and if he was not [the] aggressor in bringing on the fight. If the defendant voluntarily and without provocation entered the fight, he would be considered the aggressor unless he thereafter attempted to abandon the fight and gave notice to the deceased that he was doing so. One enters a fight voluntarily if he uses toward his opponent abusive language which considering all the circumstances is calculated and intended to bring on a fight. The defendant is not entitled to the benefit of self-defense if he was the aggressor. Therefore, in order for you to find the defendant guilty of involuntary manslaughter the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense, or failing in this that the defendant was the aggressor.

Defendant argues that Judge DeRamus committed reversible error in failing to submit voluntary manslaughter as a possible verdict. We hold Judge DeRamus properly refused to submit voluntary manslaughter as an alternative verdict.

The state's evidence tended to show a cold, calculated premeditated shooting by defendant. Defendant's evidence, on the other hand, tended to show that he did not shoot Flores intentionally and never intended to harm him. According to defendant's evidence, his gun accidentally discharged as he struggled with

Flores over the gun, which defendant had picked up to convince Flores to stop choking him.

This state of the evidence does not give rise to a possible voluntary manslaughter verdict. In *State v. Wallace*, 309 N.C. 141, 305 S.E. 2d 548 (1983), the state's evidence tended to show that defendant arrived at the home of his girlfriend, Alberta Bethea, the deceased. Defendant appeared intoxicated, and the deceased told him she did not want him to stay. "At that point the defendant, who had his back toward the deceased, stood up, turned around and shot the deceased." *Id.* at 142, 305 S.E. 2d at 550. Defendant's evidence, on the other hand, tended to show that the deceased was shot during a struggle between the two over the gun, and that the shooting was accidental, thus unintentional. The Court held in *Wallace* that there was no evidence to support a verdict of voluntary manslaughter, but that the court erred in not submitting a verdict of guilty of involuntary manslaughter. The Court said in *Wallace*:

> Similarly, there was no evidence to support a verdict of voluntary manslaughter. In general, voluntary manslaughter is an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant is the aggressor. *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981); *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Clearly, in the present case there was no evidence tending to indicate that the defendant killed the deceased in the heat of passion suddenly aroused by adequate provocation.
>
> In order for an instruction on imperfect self-defense to be required, the first two elements of perfect self-defense must be shown to exist. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). As pointed out above, the evidence indicated that the defendant did not in fact form a belief that it was necessary to kill the deceased and, if he did form such a belief, there is no evidence tending to show that such a belief was reasonable under the circumstances. Therefore, there was no basis on which the jury could have found the defendant guilty of voluntary manslaughter.

> As previously stated, the State's evidence in the present case, if believed, would only support a verdict of guilty of murder in the second degree. The defendant's evidence, if believed, would support verdicts of guilty of involuntary manslaughter or not guilty by reason of accidental killing. The failure of the trial court to submit the issue of involuntary manslaughter was prejudicial to the defendant and mandates a new trial. Additionally, if the same evidence is presented at retrial, the court should not instruct on self-defense or voluntary manslaughter.

Wallace, 309 N.C. at 149, 305 S.E. 2d at 553-54.

Wallace controls adversely to the contentions of defendant the question whether the court in the instant case should have submitted voluntary manslaughter as an alternative verdict.

B.

[3] Defendant next assigns error to the trial court's (1) failure to instruct on misadventure or accident; (2) use of the phrase "tends to show" in summarizing the evidence for the state; (3) failure to submit an alternative verdict of not guilty; and (4) charging on self-defense that "the state must prove beyond a reasonable doubt that defendant was not the aggressor."

Defendant refers this Court to no authority for the arguments he presents and, indeed, presents little argument for any of these propositions. The arguments have no merit. Judge DeRamus did fully and accurately instruct on the doctrine of misadventure and accident. There was no error in introducing a summary of the evidence by use of the phrase "tends to show." Judge DeRamus summarized both the state's and the defendant's evidence using this introductory phrase. Judge DeRamus did give "not guilty" as an alternative verdict. It is clear that Judge DeRamus' statement of the state's burden during his self-defense instruction was a *lapsus linguae* which he immediately rectified by restating the law as follows:

> The defendant is not entitled to the benefit of self-defense if he was the aggressor. Therefore, in order for you to find the defendant guilty of involuntary manslaughter the State must prove beyond a reasonable doubt, among other things, that

> the defendant did not act in self-defense, or failing in this that the defendant was the aggressor.

We are satisfied the jury was not misled by the self-defense instructions. Further, since the self-defense instructions were applied only to the offense of involuntary manslaughter, whatever error there might have been in them was cured by the jury's verdict of murder in the first degree. *State v. Wallace*, 309 N.C. 141, 305 S.E. 2d 548; *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982); *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969).

C.

[4] Defendant next assigns error to the trial court's failure to adopt twenty-one of his duly proffered jury instructions. Again, this section of defendant's brief cites no supporting authority and gives no specific argument in support of defendant's contentions. It consists essentially of a simple listing of all the proffered instructions defendant contends should have been, but were not, given. After careful examination of the instructions defendant suggested and those actually given, we find: (1) they were given either almost verbatim as defendant requested or else in substance; (2) it was not error to refuse to give those relating to voluntary manslaughter for reasons already expressed; and (3) it was not error to refuse to give self-defense instructions as a defense to murder, *State v. Wallace*, 309 N.C. 141, 305 S.E. 2d 548.

IV.

Defendant's final argument assigns error to Judge DeRamus' refusal to set aside the verdict for errors committed. As we have rejected all of defendant's assignments of error, Judge DeRamus cannot have erred in denying this motion.

We conclude defendant had a fair trial free of reversible error.

No error.

STATE OF NORTH CAROLINA v. HOWARD BEAVER

No. 710A85

(Filed 12 August 1986)

Narcotics § 4.3— marijuana growing in field—constructive possession—evidence sufficient

There was substantial evidence that defendant was in constructive possession of marijuana growing in a field behind his house where, when viewed as a whole and in the light most favorable to the State, the State's evidence tended to show that defendant specifically told officers that he had known marijuana plants were growing behind his residence; defendant had been coming around the house from the general direction of a barn and the marijuana fields when he was first seen by the officers; defendant was wearing work clothes and sweating heavily; the marijuana patches had been intensively cultivated and watered on a regular basis; after defendant was arrested, he clearly demonstrated his intimate knowledge of the terrain where the marijuana patches and barn were located by telling officers the best way to go to the house, warning them in detail of specific obstacles such as ditches and groundhog holes; when officers brought defendant back to the house his mother said to him that she had told him he'd get caught and not to mess with that stuff, to which defendant replied that he had not been caught in the fields or doing anything; paths had been cut through high dense weeds with power machinery from defendant's yard to a barn where marijuana was drying; and, although there was evidence that the marijuana patches could have been reached by a logging road, the road was passable only on foot or by four-wheel drive vehicle and did not lead directly to the marijuana patches. N.C.G.S. § 8C-1, Rule 803(2) (Cum. Supp. 1985).

APPEAL by the State under N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 77 N.C. App. 734, 336 S.E. 2d 112 (1985), reversing a judgment entered by *Downs, J.*, on 20 July 1984 in Superior Court, CHEROKEE County. Heard in the Supreme Court on 15 April 1986.

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

Jones, Key, Melvin & Patton, P.A., by R. S. Jones, Jr. and Chester Marvin Jones, for the defendant appellee.

MITCHELL, Justice.

The defendant was convicted of manufacturing a controlled substance (marijuana) upon a proper indictment and was sentenced to imprisonment for a term of three years. Three related

charges were dismissed at the close of the State's evidence. The defendant appealed to the Court of Appeals.

The majority of the panel in the Court of Appeals concluded that the evidence was insufficient to support a finding of constructive possession of the marijuana by the defendant. As a result, the Court of Appeals reversed the defendant's conviction. Hedrick, C. J., dissented. We reverse the decision of the Court of Appeals.

The State's evidence, viewed in the light most favorable to the State, tended to show *inter alia* that on 28 July 1982, the State Bureau of Investigation and the Cherokee County Sheriff's Department were jointly involved in a marijuana eradication program. Special Agent Rick Whisenhunt of the State Bureau of Investigation testified that in July 1982 he was responsible for drug enforcement activities in several North Carolina counties. On 28 July 1982, he was conducting an aerial surveillance and ground operation in a search for marijuana in Cherokee County. A nine-person ground crew followed the directions of an aircraft pilot and went to the Beaver residence in the Violet Community.

The defendant Howard Beaver first was seen coming from behind the house. He was wearing a pair of green coveralls and a headband and "sweating heavily." Special Agent Thomas Frye told the defendant that marijuana plants had been seen from the air growing behind the residence and asked for permission to go through the yard to secure the plants. The defendant stated that his mother would not appreciate their driving through the yard. He directed the officers to use a logging road located to the right of the residence. The defendant stated that he and his mother lived in the house.

The officers then followed the logging road and found a barn approximately seventy-five yards from the house. The barn contained drying marijuana plants. The marijuana was "still on the stalk hung upside down like tobacco in a barn." The area around the barn "was all grown up but the worst areas were bush-hogged."[1] A path which appeared to have been cut and mowed

1. We are not certain that the term "bushog," "bushhog" or "bush hog" is universally recognized. This descriptive term is used in North Carolina, at least, when referring to a particular type of rather heavy machinery used for removing bushes, small trees and heavy underbrush.

with a "bushhog" and tractor ran directly from the yard of the Beaver residence to the barn. Other paths had been "bush-hogged" and mowed from the house directly to patches of marijuana growing behind the house.

The officers located a total of five marijuana patches growing at distances of from three hundred yards to five hundred yards behind the house. The plants appeared to have been well fertilized and watered and were from eight to twelve feet high. Fertilizer bags and water jugs were found in the mouth of a nearby stream.

Whisenhunt testified that he did not see any other roads leading from the state road in front of the Beaver residence to the marijuana patches. The logging road was passable only by vehicles with four-wheel drive. He stated that the road was "red clay and washed really badly" and "overgrown on either side."

While the officers were in the fields of growing marijuana, the defendant was seen standing nearby. He had removed his coveralls and was wearing trousers and a shirt. The defendant was placed under arrest shortly thereafter. As the officers prepared to take the defendant back to his residence in one of their vehicles, the defendant stated that they could not drive directly to the house. He then gave directions to the officers as to the best route back to the house and told them the location of groundhog holes and other obstacles they should avoid on the way.

The defendant's mother was at the house when the officers brought him there from the marijuana patch. She began to cry when she was told that her son had been arrested for manufacturing marijuana. Agent Frye testified that the defendant's mother then told the defendant: "I told you you'd get caught. I told you not to mess with that stuff." The defendant responded: "Shut up Mama, shut up Mama. They hadn't caught me in the fields, they hadn't caught me doing anything. Shut up."

While being transported to jail the defendant said that he had known the marijuana plants were being grown behind his residence, but that he was not going to tell anyone because "it ought to be legal anyhow." He further said that he was on parole from prison in Kansas and could not tell anyone about the marijuana because a condition of his parole was that he not act as an inform-

ant. The defendant asked Whisenhunt how many pounds of marijuana he estimated would be taken. Whisenhunt said at least three hundred pounds. The defendant then said: "Well, there won't be that much after it dries. I have seen it drying in barns before and it really loses its weight."

C. D. Holbrook, Special Agent and the Chief Pilot for the State Bureau of Investigation, also testified. On 28 July 1982, he was piloting an aircraft and making an aerial search for growing marijuana in Cherokee County. He spotted what appeared to be marijuana growing behind the defendant's home and directed the ground crews to go there. Holbrook testified that from the air he saw "very clearly defined paths that went from the house area back in the direction of the patches." He informed the officers in the ground crews to go to the rear of the house where they would find paths leading to the patches.

Cherokee County Deputy Sheriff Clay Hardin testified that he accompanied other deputies and agents of the State Bureau of Investigation to the Beaver residence on 28 July 1982. The only indication of any recent cultivation in the vegetable garden behind the Beaver home was found at one spot where it appeared that someone had been digging potatoes in "just a small area there, big enough for a meal." However, "The tater digging was about a day or two old." Grass had already started growing in that spot.

Hardin also testified that there were paths leading to the marijuana patches and that there was a trail four to five feet from the side of the barn to the edge of the yard. In addition: "The barn was growed up except for one area right when you go in the barn that had just been . . . bushhogged apart and go into the barn." Ragweeds, milkweeds, and itch weeds were growing higher than Hardin's head in the area between the barn and a tool shed at the edge of the yard of the Beaver home. A patch had been "bushhogged" through the weeds and was "wide enough for any man could walk with ease through there without getting soaking wet." A person standing at the shed could see a person standing at the side of the barn and carry on a conversation with him "without straining your voice."

The State contends that the Court of Appeals erred by reversing the judgment of the trial court. The State argues that the

evidence at trial was sufficient to require submission of the charge of manufacturing marijuana to the jury and to support the verdict and judgment against the defendant. We agree.

The test to be applied in considering a defendant's motion to dismiss for insufficiency of the State's evidence in a criminal case has been stated frequently by this Court in recent years.

> When a defendant moves under N.C.G.S. § 15A-1227(a)(2) for dismissal at the close of all the evidence, 'the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.' The trial court is to view all of the evidence in the light most favorable to the State and give it all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. 'The trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying defendant's motion to dismiss.' The trial court must determine as a matter of law whether the State has offered 'substantial evidence of all elements of the offense charged so any rational trier of fact *could find* beyond a reasonable doubt that the defendant committed the offense.' (Emphasis added.)

State v. Riddick, 315 N.C. 749, 759, 340 S.E. 2d 55, 61 (1986) (citations omitted). We also have emphasized that:

> *Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'* The terms 'more than a scintilla of evidence' and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary. If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed. This is true even though the suspicion so aroused by the evidence is strong.
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> . . . .
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> [T]he trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence.

. . . .

The court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, when not in conflict with the State's evidence, it may be used to explain or clarify the evidence offered by the State. In ruling on the motion, evidence favorable to the State is to be considered *as a whole* in determining its sufficiency.

The test of the sufficiency of the evidence . . . is the same whether the evidence is direct, circumstantial or both.

State v. Earnhardt, 307 N.C. 62, 66-68, 296 S.E. 2d 649, 652-53 (1982) (emphasis added) (citations omitted).

As the Court of Appeals said in its opinion in this case: "It is not disputed that marijuana was in fact being manufactured. The dispositive question in this case is whether substantial evidence was adduced that the defendant was the manufacturer, which question may only be answered by determining whether the defendant was in actual or constructive possession of the marijuana." 77 N.C. App. at 737, 336 S.E. 2d at 114. The State does not contend that the defendant had actual possession of the marijuana. Instead, the State argues that substantial evidence was introduced at trial which would support a rational finding that the defendant had constructive possession of the marijuana in question.

A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing. *State v. Williams*, 307 N.C. 452, 455, 298 S.E. 2d 372, 374 (1983). As with other questions of intent, proof of constructive possession usually involves proof by circumstantial evidence. However, in testing the sufficiency of the evidence, the test to be used "is the same whether the evidence is direct, circumstantial or both." *State v. Earnhardt*, 307 N.C. at 68, 296 S.E. 2d at 653. "In ruling on the motion, evidence favorable to the State is to be considered *as a whole* in determining its sufficiency." *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980) (emphasis added).

In reaching its holding, the Court of Appeals seems to have treated this as a case in which the State was required to rely entirely or almost entirely upon the mere proximity of the marijuana patches and barn to the defendant's residence. After discussing in detail the distance from the defendant's residence to the places where marijuana was found, the Court of Appeals emphasized evidence tending to show that the marijuana patches and barn were on property not owned by the defendant. Additionally, in reaching its holding, the Court of Appeals relied upon cases such as *State v. Payne*, 73 N.C. App. 154, 325 S.E. 2d 654 (1985) and *State v. Wiggins*, 33 N.C. App. 291, 235 S.E. 2d 265, *cert. denied*, 293 N.C. 592, 241 S.E. 2d 513 (1977). In those cases the State was forced to rely entirely or almost entirely upon mere proximity of growing marijuana to the defendant's residence in order to carry its burden. This simply is not such a case.

We conclude that when all of the evidence favorable to the State is viewed as it must be viewed, *as a whole* and in the *light most favorable to the State*, there was substantial evidence that the defendant was in constructive possession of the marijuana seized at the time of his arrest. Therefore, the trial court properly denied the defendant's motion to dismiss. The Court of Appeals erred in reversing the judgment of the trial court.

The State's evidence tended to show that the defendant specifically stated to the officers that he had known that the marijuana plants were growing behind his residence. When the defendant was first seen by the officers, he was coming around the house from the general direction of the barn and marijuana fields. He was wearing coveralls and sweating heavily. From this the jury reasonably could have inferred that he had been working behind the house in the area which included the vegetable garden, barn and marijuana patches. No part of the vegetable garden had been recently cultivated, but the marijuana patches had been intensively cultivated and watered on a regular basis. It would have been reasonable on this evidence, for the jury to find that the defendant had just come from working in the marijuana patches and the barn used for curing marijuana.

After joining the officers in one of the marijuana patches and being arrested there by them, the defendant clearly demonstrated his intimate knowledge of the terrain where the marijuana

patches and barn were located by telling the officers the best way to go to the house. He first described the general topography. He then told them the fastest and easiest way back to the house and warned them in detail of very specific obstacles such as ditches and groundhog holes.

When the officers brought the defendant back to the house in one of the vehicles, his mother told him: "I told you you'd get caught. I told you not to mess with that stuff." The defendant then told her: "Shut up Mama, shut up Mama. They hadn't caught me in the fields. They hadn't caught me doing anything. Shut up."[2] The trial court correctly deemed the accusatory statements by the defendant's mother to be "excited utterances." This case was tried under our new North Carolina Rules of Evidence which define an "excited utterance" as being "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C.G.S. § 8C-1, Rule 803(2) (Cum. Supp. 1985). Hearsay testimony concerning such excited utterances is admissible. *Id.*

The jury was entitled to consider the defendant's mother's excited utterances in the form of accusatory statements and his responses. The jury also could consider his knowledge of marijuana drying processes, his statement that he had known about the marijuana, his intimate familiarity with the terrain around the marijuana patches and barn, and the fact that he had come from the direction of the marijuana patches and barn in work clothes and sweating heavily.

Further, the fact that the path was cut by power machinery from the shed to the barn through approximately fifty-five yards of high dense weeds would support a finding that the defendant cut them or observed them being cut. A reasonable jury also could have found on this evidence that the paths were cut from the shed to the barn for some reason related to the contents of the barn. The only thing occurring in the barn at the time the

2. The evidence revealed slightly differing versions of the precise dialogue between the defendant and his mother. The opinion of the Court of Appeals includes what appears to be a composite of the differing versions. For purposes of ruling on a motion to dismiss, of course, the State is entitled to have only the version most favorable to the prosecution considered. *See generally State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). It is that version we quote and rely upon here.

defendant was arrested was the drying of marijuana plants—a process about which the defendant professed and demonstrated familiarity.

The Court of Appeals was impressed with the fact that some evidence tended to show that the marijuana patches could have been "accessed" by the logging road near the home. This is true, although the evidence indicated that reaching the marijuana patches by the road would have been quite difficult. The road was passable only on foot or by four-wheel drive vehicle, and the road did not go directly to the marijuana patches. When the officers were on the road at the point where it passed closest to the marijuana patches, they could not see the marijuana and had to be directed through underbrush to it by the officer in the aircraft. Evidence favorable to the defendant as to access to the patches is not the controlling factor in considering the propriety of the trial court's denial of the defendant's motion to dismiss in this case. The State's evidence *need not* exclude every reasonable hypothesis of innocence before the trial court properly can deny the defendant's motion to dismiss for insufficiency of the evidence. *State v. Riddick*, 315 N.C. at 759, 340 S.E. 2d at 61.

Having viewed the evidence as a whole and in the light most favorable to the State as required upon a motion to dismiss for insufficiency of the evidence, we conclude as a matter of law that there was substantial evidence that the defendant was constructively in possession of the marijuana in question in this case. The Court of Appeals erred in reaching a conclusion to the contrary. The holding of the Court of Appeals reversing the judgment of the Superior Court, Cherokee County, is reversed. This case is remanded to the Court of Appeals for reinstatement of the judgment of the Superior Court, Cherokee County.

Reversed and remanded.

JACQUELINE TOLER CAVENAUGH v. MICHAEL L. CAVENAUGH

No. 180PA85

(Filed 12 August 1986)

1. Divorce and Alimony § 21.3; Specific Performance § 1— arrearage under separation agreement—failure to find ability to pay—specific performance erroneous

When a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement or other contract, the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance; because the trial judge did not make such findings in this case, he could not have properly exercised his discretion in decreeing specific performance of the separation agreement and ordering payment of arrearages.

2. Divorce and Alimony § 21.3— arrearages under separation agreement—conclusion of no adequate remedy at law—not supported by evidence

The trial court erred by concluding that the plaintiff did not have an adequate remedy at law to collect arrearages under a separation agreement where the conclusion was based on a finding that it would require a multiplicity of actions and legal processes to effect collection of the judgment through execution and there was no competent and substantial evidence in the record to support that finding.

3. Divorce and Alimony § 19.5— separation agreement incorporated into divorce decree—motion to modify denied—no error

The trial judge did not err by not modifying a separation agreement which was incorporated into a divorce judgment where defendant presented no evidence that the circumstances of either party had undergone a material change subsequent to the incorporation of the separation agreement; changes which occurred in defendant's earnings and financial situation after the parties entered into the agreement but before the agreement became an order of the court were irrelevant since defendant's obligations were purely contractual at that time.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals affirming the judgments entered by *Ragan, J.*, on 8 June 1983 and 12 September 1983.

Plaintiff and defendant were married on 13 March 1969. Their only child, Tona Caprice Cavenaugh, was born 6 November 1969. The parties separated from each other and entered into a separation agreement in October of 1981. In the agreement it was agreed that plaintiff would have custody of Tona, subject to rea-

sonable visitation by defendant, and that defendant would pay all uninsured medical and dental expenses for Tona. Defendant was also required to make certain enumerated payments totaling approximately $635 per month. This figure is variable because some of the payments are made on a weekly basis.

Defendant offered the following evidence at trial on 19 April 1983:

At the time the separation agreement was entered into defendant worked at the Newport Fuel Company and operated a poolroom and bar. He received $200.00 per week from the fuel company and $200.00 to $250.00 per week from the poolroom.

Defendant sold the bar on 29 March 1982 for $30,000.00. He used $12,000.00 of the sale proceeds to satisfy an existing debt on the poolroom and paid $7,000.00 in taxes. Another $1,000.00 was expended for a trip to the Bahamas in June of 1982.

In July of 1982 defendant purchased a half interest in the Newport Fuel Company for $12,500.00. He borrowed $10,000.00 from First Citizens Bank and Trust Company (First Citizens) and applied $6,000.00 of that money to the purchase price of his interest in the fuel company. He also borrowed $5,000.00 from Harry Livingston for that purpose. Defendant used $4,000.00 of the First Citizens' loan to purchase a pleasure boat in April of 1982. As of the date of trial defendant owed First Citizens $8,961.12 on the $10,000.00 loan and Harry Livingston $4,500.00. He also had a personal loan from First Citizens with a balance of $530.00.

Defendant testified that he received a salary of $212.79 per week from the fuel company. Since the sale of the poolroom that is his only source of income. Defendant also testified that he could not pay what he owed to First Citizens and also pay his debt to Harry Livingston in full.

Defendant itemized his monthly living expenses as follows:

	TOTAL
I. HOUSING:	$ 306.67
II. FOOD:	
Groceries	$ 150.00
Food away from home	200.00

III.	MEDICAL:	
	Health Insurance (Mutual of Omaha)	$ 39.70
	Routine Dental	4.17
IV.	TRANSPORTATION:	
	Gasoline	$ 100.00
	Car Insurance	15.00
V.	LIFE INSURANCE:	
	Charlotte Liberty—child	$ 11.00
	Jefferson Standard—defendant	47.00
VI.	MISCELLANEOUS:	
	Grooming/hygiene	$ 20.00
	Laundry/dry cleaning	60.00
	Club dues & expenses	5.00
VII.	DEBTS:	
	Visa (balance $800.00)	$ 45.00
	Avco (balance $415.00)	45.00
	First Citizens—Newport (balance $530.00)	92.23
	First Citizens—Newport (balance $8,961.12)	241.00
	Harry Livingston (balance $4,500.00)	100.00
	TOTAL MONTHLY LIVING EXPENSES:	$1,482.63

Plaintiff is employed as a nurse. At trial she testified that she cleared $400.00 bi-weekly without overtime. In her pay period immediately preceding the trial she cleared $540.00. Plaintiff testified that she had monthly expenses of $1,325.32 for herself and Tona and that her income combined with the child support defendant had been paying was sufficient to satisfy these expenses.

The pertinent findings of fact of the trial judge are summarized as follows:

In the separation agreement entered into on 15 October 1981 defendant agreed to pay to plaintiff the following sums of money: $156.00 each month to be applied to the mortgage indebtedness on the homeplace, $46.00 each month to be applied to the indebtedness due Avco, $50.00 each week for support in lieu of alimony, and $50.00 each week for child support.

Defendant refused to make payments on the mortgage indebtedness after the June 1982 payment and failed to make the $50.00 weekly payment in lieu of alimony commencing with the payment due on 3 September 1983. As of 15 April 1983 defendant owed arrearages of $3,210.00. Defendant did continue to pay $50.00 each week for child support and $46.00 each month on the Avco indebtedness.

Prior to the separation of the parties defendant earned $200.00 each week from his employment at the Newport Fuel Company and $200.00 to $250.00 each week from operation of the poolroom. On 29 March 1982 defendant conveyed the poolroom to Bud Smith for $30,000.00 cash. Defendant paid $12,000.00 to First Citizens as trustee for the Garner Trust and deposited $10,000.00 in an interest bearing account as security for a $10,000.00 loan.

Subsequently, defendant purchased a one-half interest in the Newport Fuel Company for $12,500.00. To make the purchase he borrowed $6,000.00 from First Citizens and gave an unsecured note to Harry Livingston for $5,000.00, payable at the rate of $25.00 per week. In April of 1982 defendant also purchased a pleasure boat for which he borrowed an additional $4,500.00. He pays a storage charge of $575.00 a year and insurance premiums of $150.00 a year on the vessel.

Defendant owes First Citizens a total of $8,961.12 which is being paid at the rate of $241.86 a month. Defendant has maintained his interest bearing account of $10,000.00. Defendant testified that he is now living with a female in her home and contributes $306.67 each month towards the household expenses. He also submitted an affidavit as to his other expenses.

Defendant's tax returns for the year 1982 show that he had total income for tax purposes of $22,489.88 and that his federal tax liability for 1982 was $4,122.07.

After making the above findings, on 8 June 1983, the trial judge, in part, concluded that defendant was indebted to plaintiff in the sum of $3,210.00 and entered judgment decreeing that plaintiff recover $3,210.00 from defendant and that defendant was obligated to carry out the terms of the separation agreement. Further, he found that it would require a multiplicity of actions and legal processes for plaintiff to effect collection of a judgment

through execution both for the arrearages and for future payments as they come due. Therefore, he concluded that plaintiff has no adequate remedy at law and specifically ordered defendant to pay the $3,210.00 to the clerk of the superior court. Defendant was also ordered to pay the following sums in the future: $50.00 support in lieu of alimony each week, $156.00 each month to be applied to the mortgage indebtedness described in the separation agreement, and $46.00 each month to Avco.

The separation agreement provides that it may be incorporated into any judgment granting either party a divorce on grounds of separation. In the judgment entered 8 June 1983, the trial judge concluded as a matter of law that plaintiff was entitled to have the agreement incorporated into any judgment decreeing a divorce between the parties. The judgment of divorce entered 12 September 1983 states that "[t]he 15 October 1981 separation agreement [sic] is, at the request of the plaintiff, hereby incorporated by reference. . . ." Defendant does not object to incorporation of the separation agreement but does except to the trial judge's failure to modify the incorporated agreement.

Charles William Kafer, for defendant-appellant.

No counsel for plaintiff-appellee.

BRANCH, Chief Justice.

The Court of Appeals, in affirming the trial judge's order, disposed of defendant's primary arguments by concluding that they were not raised by his exceptions and assignments of error. We hold that defendant's exceptions and assignments of error do raise the issues argued by him in this appeal.

[1] Defendant first assigns as error the failure of the trial judge to make findings concerning his ability to pay before ordering specific performance of the separation agreement. Defendant also argues that the trial judge erred in ordering him to pay into the office of the clerk of superior court the $3,210.00 in arrearages that had accumulated under the terms of the separation agreement as of 15 April 1983 because plaintiff had an adequate remedy at law.

Specific performance is available to a party only if that party has alleged and proven that he has performed his obligations

under the contract and that his remedy at law is inadequate. *Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 283, 261 S.E. 2d 899, 907-08 (1980). "A marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract." *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E. 2d 735, 737 (1979). Specific performance will not be decreed against a defendant who is incapable of complying with his contract. 71 Am. Jur. 2d *Specific Performance* § 69 (1973); *Lawing v. Jaynes and Lawing v. McLean*, 20 N.C. App. 528, 537, 202 S.E. 2d 334, 340, *modified in part and remanded on other grounds*, 285 N.C. 418, 206 S.E. 2d 162 (1974) (specific performance sought of contract to sell real estate pursuant to an option). *Cf. Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982) (if supporting spouse deliberately depresses income or dissipates resources, then capacity to earn rather than actual income may be the basis for an alimony award). "A court can properly order specific performance of only part of a contract if it deems another portion unworkable." *Harris v. Harris*, 307 N.C. 684, 688, 300 S.E. 2d 369, 372 (1983).

Defendant offered much evidence at trial that his income had declined and his debts had increased since the execution of the separation agreement and that he was unable to fully comply with its terms. Based on this evidence, the trial judge found that defendant paid $306.67 each month in household expenses, owed loan payments of $241.86 each month, and that defendant had submitted an affidavit as to his other expenses. Under the terms of the court's order defendant must pay approximately $635 each month out of a net monthly income of approximately $920 according to defendant's evidence. This would leave defendant with less than $300.00 to meet his monthly expenses. We note that the trial judge made no findings concerning defendant's ability to pay the $3,210.00 judgment for arrearages or as to defendant's income at the time of the hearing.

We hold that when a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement or other contract the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance. *See* 71 Am. Jur. 2d *Specific Performance* § 69 (1973); *Quick v. Quick*, 305 N.C. 446, 453-59, 290 S.E. 2d 653, 658-62 (in awarding alimony

trial judge is required to make findings and conclusions that the supporting spouse is able to pay the required amount and that the amount is fair and just to all parties); *Lawing v. Jaynes and Lawing v. McLean*, 20 N.C. App. 528, 202 S.E. 2d 334, *modified in part and remanded on other grounds*, 285 N.C. 418, 206 S.E. 2d 162. Because the trial judge did not make such findings in this case, he could not have properly exercised his discretion in decreeing specific performance of the separation agreement and ordering payment of arrearages. Therefore, this case must be remanded for additional findings of fact on defendant's ability to pay the arrearages and to comply with the terms of the separation agreement in the future. If the trial judge finds that defendant is unable to fulfill his obligations under the agreement, specific performance of the entire agreement may not be ordered absent evidence that defendant has deliberately depressed his income or dissipated his resources. *Harris v. Harris*, 307 N.C. 684, 300 S.E. 2d 369. *See Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653. If he finds that the state of defendant's finances warrants it, the trial judge may order specific performance of all or any part of the separation agreement unless plaintiff otherwise has an adequate remedy at law. *Harris*, 307 N.C. 684, 300 S.E. 2d 369.

[2] To support his conclusion that plaintiff did not have an adequate remedy at law to collect the arrearages owed by defendant, the trial judge found as a fact that it would require "a multiplicity of actions and legal processes . . ." to effect collection of the judgment through execution. There is no competent and substantial evidence in the record to support this finding. Since the trial judge's findings of fact are not supported by competent evidence, they cannot be used to support a conclusion of law that the plaintiff does not have an adequate remedy at law; thus his decree of specific performance for the arrearages must fall for this additional reason. *See Whitaker v. Earnhardt*, 289 N.C. 260, 265, 221 S.E. 2d 316, 319-20 (1976).

Neither party has properly presented the question of whether a court has the authority, under any circumstance, to decree specific performance of arrearages which are due pursuant to the terms of a separation agreement. Even assuming that the language of defendant's assignment of error presented this question, he has failed to present and discuss this question in his brief; therefore the question is deemed to be abandoned. N.C.R. App. P.

28(a). Resolution of this issue will not be necessary unless on remand the trial judge determines that plaintiff has no adequate remedy at law for collection of the arrearages due her under the separation agreement.

Once approved by the court as a judgment of the court a separation agreement loses its contractual nature. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E. 2d 338, 342 (1983); *Henderson v. Henderson*, 307 N.C. 401, 407, 298 S.E. 2d 345, 350 (1983). *See Doub v. Doub*, 313 N.C. 169, 326 S.E. 2d 259 (1985). Therefore, on remand, should the trial court again enter an order of specific performance for payments which at the time the order was entered were future payments due plaintiff, that order shall affect only those payments due before the date of incorporation of the separation agreement into the divorce decree.

[3] We now turn to the question of whether the trial judge should have modified the terms of the separation agreement which was made a judgment of the court on 12 September 1983. Prior to entry of judgment of divorce on that date, defendant made motions requesting, among other things, that the trial judge amend his findings of fact to include findings concerning plaintiff's income and expenses. Defendant also moved that the order decreeing specific performance of the separation agreement be vacated. Defendant proposed that plaintiff be awarded judgment in the amount of $3,210.00 and that in the future he should only be required to pay $50.00 each week as child support.

The trial judge rejected all of defendant's motions.

A court approved separation agreement is enforceable by the contempt power of the court and may be modified like other judgments in domestic relations cases. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E. 2d 338, 342. Likewise, an order decreeing specific performance may be modified when at a subsequent hearing the court determines that a change in circumstances warrants such modification. *Harris v. Harris*, 307 N.C. 684, 688, 300 S.E. 2d 369, 372.

By incorporating the separation agreement of the parties into the judgment of divorce the trial judge made that agreement an order of the court subject to modification on the basis of changed circumstances. *Walters v. Walters*, 307 N.C. at 386, 298 S.E. 2d at

342. However, defendant has presented no evidence that the circumstances of either party have undergone a material change subsequent to the incorporation of the separation agreement into the divorce decree. The changes which occurred in defendant's earnings and financial situation after the parties entered into the separation agreement, but before the agreement became an order of the court, are irrelevant since his obligations were purely contractual at that time. We hold that a separation agreement which has been incorporated into a judgment of the court may be modified by the court only upon a showing that the circumstances of the parties have changed subsequent to the date of incorporation. If defendant did not desire such a result, he was free not to enter into a separation agreement which provided that either party could request that it be made an order of the court by motion filed in the divorce action.[1]

Defendant's fear that without modification of the separation agreement he may be held in contempt even though he is unable to comply with the terms of the agreement is unfounded. As an order of the court the separation agreement is enforceable by the contempt power, *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E. 2d 338, 342, but defendant may be held in contempt for failure to comply with the terms of the agreement *only if his failure is willful*, *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E. 2d 391, 393 (1966). Therefore, defendant may not be held in contempt for failing to make the payments required by the incorporated agreement if he is unable to do so. Further, when incorporated into the divorce decree, the separation agreement became a judgment of the court and may be enforced by execution the same as any other judgment. *See Vaughan v. Vaughan*, 211 N.C. 354, 361, 190 S.E. 2d 492, 496 (1937); 2 R. Lee, *N.C. Family Law* § 158 (4th ed. 1980). Therefore, plaintiff retains the right to levy execution on defendant's property for arrearages.

The decision of the Court of Appeals is reversed in part and affirmed in part. This case is remanded to the Court of Appeals

1. We also note the possibility that a trial judge, in the exercise of his equitable power, may be able to refuse to incorporate a separation agreement into the divorce decree if he finds that incorporation would be inequitable. However, the parties have not raised this question and it is not before us.

with direction that it be further remanded to the district court of Carteret County for proceedings consistent with this opinion.

Reversed in part, affirmed in part, and remanded.

STATE OF NORTH CAROLINA v. STEVE ALBERT MITCHELL

No. 592A85

(*Filed 12 August 1986*)

1. Criminal Law § 48— post arrest statement—additional exculpatory testimony at trial—cross-examination proper

The trial court did not err in a prosecution for rape, armed robbery, kidnapping and larceny by allowing the prosecutor to cross-examine defendant about his failure to inform an officer about an alleged plan with the victim to destroy the victim's car and to defraud her insurance company where the officer had brought defendant from Tennessee to Lincoln County; defendant was informed of his rights before the trip began; defendant voluntarily engaged in conversation with the officer and said that after he had taken the car it had been stolen from him; and defendant testified at trial that the victim had offered to pay him to burn her car so she could collect insurance proceeds; that they had engaged in consensual sexual intercourse; and that the victim had created a plan whereby her house would appear to be robbed.

2. Criminal Law § 102.5— cross-examination of defendant—leading question—not assertion of personal opinion

The trial court did not err in a prosecution for rape, robbery, kidnapping and larceny by allowing the prosecutor to ask, during his cross-examination of defendant about defendant's testimony concerning the victim's alleged plan to destroy her car and collect insurance proceeds, whether it "took you awhile to dream all that stuff up . . .?" The question was in the nature of a leading question by which the prosecutor attempted to expose a fabricated defense and bore little similarity to the direct unequivocal accusations of prosecutors which have been held improper. N.C.G.S. § 8C-1, Rule 611(c) (Cum. Supp. 1985).

3. Robbery § 5.4— armed robbery—failure to instruct on common law robbery—no error

The trial court did not commit egregious error by failing to instruct on common law robbery as a lesser included offense of armed robbery where defendant testified that the gun which he had carried had not been loaded but his main defense was that the victim had engaged with him in feigning crimes which never really occurred.

4. Constitutional Law § 34— convictions for first degree rape and first degree kidnapping—no objection at trial—waiver

Defendant's contention that convictions and concurrent prison sentences for first degree rape and first degree kidnapping violated double jeopardy was waived by his failure to raise the issue at trial.

Justice EXUM concurs in the result.

APPEAL by the defendant from the order of *Allen, J.*, entered 13 June 1985 in the Superior Court, LINCOLN County.

The defendant was convicted of first degree rape, armed robbery, first degree kidnapping, and felonious larceny. He received a sentence of fourteen years for the armed robbery conviction and a consecutive life sentence for the rape conviction. Additional sentences totaling fifteen years for the kidnapping and larceny convictions were entered to run concurrently with the life sentence for rape. The defendant appealed the rape conviction and resulting life sentence to the Supreme Court as a matter of right under N.C.G.S. § 7A-27(a). On 2 October 1985, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal in the armed robbery, kidnapping, and larceny cases. Heard in the Supreme Court on 13 March 1986.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

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

MITCHELL, Justice.

The defendant brings forward assignments of error in which he contends that: (1) during cross-examination of the defendant, the prosecutor improperly impeached him with evidence of his exercise of his right to remain silent after he had been arrested and given the Miranda warnings; (2) the trial court erred in allowing the prosecutor to improperly communicate to the jury his personal belief that the defendant was lying; (3) the trial court erred in failing to submit the offense of common law robbery to the jury; and (4) his conviction and sentencing for both first degree rape and first degree kidnapping violated double jeopardy principles. We find no prejudicial error.

The State presented evidence which tended to show that on 17 April 1984, the victim took her two children to Joy Sain's house where they normally caught the bus for school. When she pulled into the driveway, the victim observed Sain and the defendant standing on the house steps. The defendant walked over to the car and asked the victim for a ride. The victim refused stating that she had to go home and dress for work. The victim testified that she knew the defendant, having seen him at Joy and David Sain's house on several occasions. The defendant was related to David Sain by marriage and lived in the Sain home.

After returning to her home and talking by telephone to a friend about the defendant, the victim dressed for work then returned to the Sain house and gave the defendant a ride. After she drove her car out of the Sain's driveway, the defendant pointed a gun at her. When she asked him what he was doing with the gun, he told her not to ask questions. He said that she would not be hurt if she followed his instructions. As he pointed the gun at her head, the defendant told her that he would kill her if she did not do exactly what he said.

The victim complied with the defendant's instructions to return to her house. During the entire trip to the house, the defendant pointed the gun at her head. Upon arrival at the victim's house, the defendant, with the gun still in his hand, demanded three hundred dollars. After being told that the victim had no money, the defendant dumped the contents of her pocketbook on a table. The victim testified that she later discovered that twenty dollars was missing from her pocketbook.

The defendant pulled the victim by the arm to the bedroom. He tied her hands behind her back with ripped pieces of towel, a string and a belt. He placed her on the bed and tied her feet together with pieces of towel and a coat hanger. During this entire period, the defendant had the gun nearby.

The defendant then sat on the victim's stomach. He pulled up her shirt and brassiere and put his mouth on her breasts. The defendant then unzipped her pants. When he realized he could not penetrate the victim with her legs tied, he untied them. After untying her legs, the defendant had sexual intercourse with the victim against her will. Throughout this period of time, the gun was laying on a dresser at the foot of the bed. The defendant there-

after tied a scarf around the victim's mouth and left the scene in her car. After he left, the victim worked her legs free and ran to the house of a neighbor for help.

Officer Robert Chapman, the investigating officer, testified that he escorted the defendant back to Lincoln County from Tennessee in February 1985. Before beginning the trip, Officer Chapman advised the defendant of his Miranda rights. Chapman testified that the defendant later initiated a conversation and "stated that he stopped at a truck stop near Atlanta and went in and left the car in the parking lot and when he came back, it had been stolen from him." While investigating at the victim's house, Chapman found pieces of towel, leather strips and a piece of wire.

Dr. Ari, a physician, testified that he examined the victim in a hospital emergency room on the morning of 17 April 1984. He was unable to examine her initially because she was "crying, upset, and jittery." After sedating the victim, Dr. Ari examined her and found red spots on both of her breasts. Dr. Ari observed red marks around both wrists and ankles. The victim's vaginal region appeared red.

The defendant testified that the victim offered to pay him five hundred dollars to burn her car so that she could collect insurance proceeds. The defendant told her that he would do so for six or seven hundred dollars. The defendant testified that they then agreed that he would destroy the car for five hundred dollars and sexual favors from the victim. He said that he later received one hundred dollars from her and that they engaged in consensual sexual intercourse.

The defendant testified that on 17 April 1984, they again engaged in consensual sexual intercourse at the victim's house. The victim created a plan whereby her house would appear to be robbed. The defendant was to tie her up and take her money and her car. The defendant testified that the victim dumped the contents of her pocketbook on the kitchen table. Following the victim's directions, the defendant then tied her hands and ankles. He then took her car and eventually went to Atlanta where the car was stolen from him.

[1] By his first assignment of error the defendant contends that the prosecutor improperly cross-examined him about his failure to

inform Officer Chapman of the plan to destroy the victim's car and to defraud the insurance company. He argues that such cross-examination violated his fifth amendment right to remain silent and denied him due process in violation of the dictates of *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91 (1976). We do not agree.

In the present case, Officer Chapman testified on direct examination that he brought the defendant from Tennessee back to Lincoln County. Prior to the start of the long car trip, Chapman advised the defendant of his Miranda rights. During the trip, the defendant informed Chapman that the victim's car had been stolen from him when he stopped at a truck stop.

At trial, the defendant testified to the details of the plan to destroy the victim's car in order to obtain the insurance proceeds. The defendant further testified that he parked the car at a truck stop near Atlanta, and the car was stolen from him there. On cross-examination, the following transpired:

> Q. Why did you tell Officer Chapman that you stole that car and it was stolen from you?
>
> A. I told him the car was stolen from me.
>
> Q. Why did you tell him you stole it? Why did you admit to stealing the car?
>
> A. I told him I took the car. That was my own words.
>
> Q. You didn't tell him any of this stuff about the elaborate conspiracy about turning it in on the insurance money, did you?
>
> A. No, sir.
>
> Q. You didn't tell him any of that?
>
> A. No, he asked me if I wanted to tell him what happened and I could tell him what happened and they could help me then. And if I didn't tell him then and I talked to my lawyer, they wouldn't be able to help me out on my case, so I just didn't tell him. I told him I wanted to speak to my lawyer.
>
> Q. Took you awhile to dream all that stuff up, too, didn't it.

MR. BLACK: OBJECTION.

THE COURT: OVERRULED.

A. I didn't dream it up.

The defendant contends that the prosecutor impermissibly used his silence after he had been arrested and given the Miranda warnings for impeachment purposes in violation of *Doyle*. We disagree.

In *Doyle*, two defendants were charged with selling marijuana to an undercover narcotics agent. At the time of arrest, the defendants were given Miranda warnings and chose to exercise the right to remain silent. At their separate trials each defendant testified that he had been "framed" by the narcotics agents. The prosecutor cross-examined each defendant about his failure to tell this to the authorities at the time of arrest.

The Supreme Court stated that the Miranda warnings contain an implicit assurance to a person who is given them that he will not be penalized for his postarrest silence. 426 U.S. at 618, 49 L.Ed. 2d at 98. The Supreme Court also said that:

> In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id.; See United States v. Hale, 422 U.S. 171, 182-83, 45 L.Ed. 2d 99, 108 (1975); *State v. Freeland*, 316 N.C. 13, 18, 340 S.E. 2d 35, 38 (1986). However, the Supreme Court has expressly tailored certain boundaries to *Doyle* in the more recent cases of *Jenkins v. Anderson*, 447 U.S. 231, 65 L.Ed. 2d 86 (1980); *Anderson v. Charles*, 447 U.S. 404, 65 L.Ed. 2d 222 (1980), and *Fletcher v. Weir*, 455 U.S. 603, 71 L.Ed. 2d 490 (1982) (per curiam).

In *Jenkins*, the Supreme Court held that *Doyle* was inapplicable in a case where the prosecutor referred to the defendant's *prearrest* silence. 447 U.S. at 240, 65 L.Ed. 2d at 96. The Court focused on the fact that "no governmental action induced petitioner to remain silent before arrest." *Id.*

In *Fletcher*, the defendant did not receive any Miranda warnings during the postarrest period in which he remained silent.

The Court declined to apply the *Doyle* principle "in the absence of the sort of affirmative assurances embodied in Miranda warnings . . . ." 455 U.S. at 607, 71 L.Ed. 2d at 494. *See State v. Burnett*, 39 N.C. App. 605, 251 S.E. 2d 717, *review denied*, 297 N.C. 302, 254 S.E. 2d 924 (1979) (same).

In *Anderson*, the Supreme Court declined to apply *Doyle* to a prosecutor's cross-examination that inquired into prior inconsistent statements of the defendant. 447 U.S. at 408, 65 L.Ed. 2d at 226. The Court stated that:

> Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Id.; *See Phelps v. Duckworth*, 772 F. 2d 1410 (7th Cir. 1985); *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980).

The rule set forth in *Doyle* likewise does not apply to the facts of the case *sub judice*. Here, the defendant did not exercise his right to remain silent after receiving Miranda warnings. He voluntarily engaged in conversation with Chapman and said that after he had taken the victim's car it had been stolen from him. The prosecutor did not attempt to capitalize on the defendant's reliance on the implicit assurances of the Miranda warnings, the concern embodied in the *Doyle* decision. *See State v. Freeland*, 316 N.C. 13, 19, 340 S.E. 2d 35, 38 (1986). The defendant had not relied on those implicit assurances and had not been induced to remain silent. As to the subject matter of his statements, the defendant did not remain silent at all. *Anderson*, 447 U.S. at 408, 65 L.Ed. 2d at 226. *Cf. United States v. Laughlin*, 772 F. 2d 1382 (7th Cir. 1985) (*Doyle* rule not applied where defendant testified at trial that he told exculpatory story to the authorities at the time of his arrest). This assignment of error is without merit.

[2] By his next assignment of error, the defendant contends that the trial court erred in overruling his objection to the prosecutor's question concerning whether he had fabricated the story about the plan to destroy the victim's car. On cross-examination, the prosecutor asked the defendant: "Took you a while to dream all that stuff up, too, didn't it?" The defendant answered: "I didn't dream it up."

The defendant contends that the prosecutor's question had the effect of asserting his personal opinion of the defendant's veracity. We have previously stated that a prosecutor may not assert his personal opinion concerning the veracity of a witness or state that the witness lied to the jury. *State v. Alston*, 294 N.C. 577, 586, 243 S.E. 2d 354, 361 (1978); *State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978). The prosecutor's question here, however, bears little similarity to the direct unequivocal accusations of the prosecutors in those cases in which we have applied the rule. In *Locklear*, for example, the prosecutor stated to the defendant during cross-examination, "you are lying through your teeth and you know you are playing with a perjury count; don't you?" 294 N.C. at 214, 241 S.E. 2d at 68.

Even while rendering its opinion in *Doyle*, the Supreme Court of the United States expressly recognized that, "unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." 426 U.S. at 617, 49 L.Ed. 2d at 97 n. 7. The Supreme Court recognizes the "importance of cross-examination and of exposing fabricated defenses . . . ." *Fletcher*, 455 U.S. at 605, 71 L.Ed. 2d at 493. Further, the North Carolina Rules of Evidence follow the traditional view that the use of leading questions is a matter of right during cross-examination. Our Rules expressly state that: "Ordinarily leading questions *should* be permitted on cross-examination." N.C.G.S. § 8C-1, Rule 611(c) (Cum. Supp. 1985) (emphasis added). The prosecutor's question here was in the nature of a leading question by which he attempted to expose a fabricated defense. As such, it was proper.

[3] By his next assignment of error, the defendant contends that the trial court erred in failing to instruct on common law robbery as a lesser included offense of armed robbery. On appeal the defendant has informed us, as required, that he failed to object to the instructions and failed to request an instruction on common law robbery. *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). The defendant's counsel only inquired as to whether the trial court planned to instruct on the lesser included offense. The defendant's failure to object to the trial court's instructions "con-

stitutes a waiver of the right to assert the alleged error on appeal." *Id.* at 334, 307 S.E. 2d at 311.

We have indicated, however, that on rare occasions we will apply the "plain error" rule first announced in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) to grant a party relief from a particularly egregious error though no objection was made. But we have been careful to emphasize that before granting relief under the "plain error" rule,

> the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. 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. 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.

State v. Walker, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986) (citations omitted).

In the present case, the defendant admitted that he carried a gun at all pertinent times. He also testified, however, that the gun was not loaded. The latter testimony constituted an alternative defense. It was affirmative evidence tending to show that life was not threatened or endangered by the defendant. Therefore, the trial court was required to instruct the jury on the lesser included offense of common law robbery. *State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614 (1982).

Here, however, the defendant's main defense was that no crime had been committed against the victim, because she had engaged with him in feigning crimes which never really occurred. It is highly unlikely, given the evidence in this case, that the jury disbelieved the defendant's story that no crime was committed against the victim yet believed him when he said that the gun was unloaded. We conclude that the trial court's failure to submit the lesser included offense of common law robbery to the jury was not such an egregious denial of a fundamental right as to be "plain error" entitling him to relief in the absence of an objection. *See generally State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986).

[4] By his final assignment of error, the defendant contends that his convictions and concurrent prison sentences for first degree rape and first degree kidnapping violate double jeopardy principles. *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986). The defendant failed to raise this issue at trial and, therefore, waiver has occurred. *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977).

The defendant received a fair trial free from prejudicial error.

No error.

Justice EXUM concurs in result.

LEE H. GUNTER, EMPLOYEE, PLAINTIFF v. DAYCO CORPORATION ("DAYCO-WAYNESVILLE"), EMPLOYER, AND NATIONAL UNION FIRE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 99A85

(Filed 12 August 1986)

Master and Servant § 55.3— transfer within company—injury while learning new position—accidental

The Industrial Commission's findings justified its conclusion that plaintiff suffered injury by accident where plaintiff was notified that he would be laid off and exercised his union seniority to displace a less senior employee; plaintiff's old position did not require manual labor or heavy pulling or pushing with his arms but his new job required him to twist hose onto a mandrel and off again after the hose had cured in an oven; plaintiff spent two days observing how the new job was done and two days doing the job; plaintiff ruptured a tendon on the third day as he was twisting and jerking a hose off the mandrel; and plaintiff testified that he was still learning how to do the new job when he was injured. Plaintiff had not become so proficient performing the new job or so accustomed to its new conditions that the twisting it required had become a part of his normal work routine.

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

APPEAL by defendants, pursuant to N.C.G.S. § 7A-30(2), of the decision of a majority of the Court of Appeals (*Judge Eagles*, with *Judge Whichard* concurring, and *Judge Webb* dissenting), re-

ported at 72 N.C. App. 329, 324 S.E. 2d 621 (1985), affirming a workers' compensation award by the Industrial Commission.

Smith, Patterson, Follin, Curtis, James & Harkavy by Donnell Van Noppen III for plaintiff appellee.

Russell & Greene, P.A., by J. William Russell for defendant appellants.

EXUM, Justice.

Defendants seek reversal of the Commission's award of workers' compensation to plaintiff for temporary total disability suffered as a result of a ruptured tendon. The sole issue before this Court is whether plaintiff suffered "injury by accident" within the meaning of the Workers' Compensation Act, N.C.G.S. § 2(6). We hold that he did.

I.

The facts are not controverted. Plaintiff was employed under a contract which stated that before he could be laid off he was entitled to displace another employee in a different department with less union seniority than he. As a result of economic conditions at defendant Dayco Corporation, plaintiff was notified he would be laid off. Plaintiff exercised his union seniority and was assigned to the curved hose molding department. Plaintiff's old job as a calendar operator in the millroom did not necessitate that plaintiff engage in manual labor or heavy pulling or pushing with his arms. Plaintiff's new job in the curved hose molding department required him to do all these things. Plaintiff's chief responsibility was to twist hose onto a mandrel and then off again after the hose cured in an oven.

Plaintiff spent two days observing how the new job was done and then began doing the work himself. He worked two days without incident. A few hours after he began working on the third day he ruptured a tendon as he was twisting and jerking a hose off the mandrel.

Plaintiff testified he was still learning how to do the new job when he was injured:

> I had trouble getting it [the hose] all off, it's sort of hard getting them on and off all of them, but I later found out that

> the colder the mandrel the harder they are to get off and on. I was slow enough, I guess, I wasn't keeping my mandrels hot.
>
> I testified earlier that the first two days on this new job I watched, and the second two days I worked. As to whether I worked at a regular pace, and whether I did a full day's work, the way that I would have been expected to do in the future, I was doing the work, but I wasn't doing it near as much as I should have been doing, as I would have been expected to do. But it is right that I was doing as much as I could.

With this evidence before it, the Commission, adopting findings of the hearing commissioner, first found as follows:

> [The] evidence was uncontroverted . . . he [plaintiff] injured his left arm as he 'jerked it and twisted it.'
>
> The evidence is also clear that the plaintiff had not learned how to do the new job when he was injured.

The Commission then made the following additional findings and conclusions:

> 1. Prior to December 1981 plaintiff had been employed by defendant for some time as a calendar operator in the mill room. In December 1981 he was transferred to a new job building curved hose, and it was on his fifth day at this new job that he was injured. His first two days on the new job plaintiff had observed, and then he had worked two days before he was injured.
>
> 2. Plaintiff's job required him to put hose on a tube, where it was cured, and then to take it off. When putting the hose on the tube it was necessary to twist and turn it, and apparently this also was necessary when taking the hose off. It was while jerking and twisting a hose off a tube on December 18, 1981 that plaintiff injured his left arm.
>
> 3. Plaintiff's new job involved greater exertion and twisting and jerking movements not involved in his previous job and these circumstances constituted an interruption of his normal work routine. He therefore sustained an injury by accident arising out of and in the course of his employment

on December 18, 1981 when he ruptured a tendon in his left arm which had been broken in a previous injury on the job in 1970. Plaintiff was temporarily totally disabled as a result of his injury from December 18, 1981 until March 22, 1982.

4. Plaintiff sustained an injury by accident arising out of and in the course of his employment as a result of the interruption of his normal work routine and is entitled to benefits under the Workers' Compensation Act. G.S. 97-2(6).

Upon the foregoing findings of fact and conclusions of law, the Commission entered an award of compensation at the rate of $210 per week for temporary total disability less an attorney's fee and for medical expenses incurred as a result of the injury. The Court of Appeals affirmed the Commission's award with Judge Webb dissenting on the ground that "the plaintiff was carrying out the duties of his job when he was injured. There is nothing to show the normal work routine of his job was interrupted."

II.

The Workers' Compensation Act extends coverage only to "injury by accident arising out of and in the course of employment." N.C.G.S. § 97-2(6), (18) (1985). This Court has interpreted the language of the statute, "injury by accident," to mean an injury caused by accident. "[I]njury by accident implies a result produced by a fortuitous cause . . . . There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute." *Slade v. Hosiery Mills*, 209 N.C. 823, 825, 184 S.E. 844, 845 (1936). If an employee is injured while carrying on his usual tasks in the usual way the injury does not arise by accident. *Jackson v. Highway Commission*, 272 N.C. 697, 701, 158 S.E. 2d 865, 868 (1968). An accidental cause will be inferred, however, when an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences occurs. *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 429, 124 S.E. 2d 109, 111 (1962); *Moore v. Sales Co.*, 214 N.C. 424, 430, 199 S.E. 605, 608 (1938).

In reliance on *Adams v. Burlington Industries*, 61 N.C. App. 258, 300 S.E. 2d 455 (1983), the Industrial Commission and the Court of Appeals agreed in the case at bar that the twisting and

jerking movements involved in plaintiff's new job "constituted an interruption of his normal work routine." The claimant's regular duties in *Adams* involved lifting chairs from a conveyor belt, turning them upside down, and securing them in cartons. His normal work routine required him to lift chairs with his upper torso in a straight posture. On the day of his injury claimant was asked to fill in on the "hot box" because the employee who ordinarily worked there was absent from work. The hot box job involved putting a cardboard tray on the conveyor belt, placing a chair on the tray and covering the chair with plastic. It required claimant to pick up every chair with a twisting motion of his upper torso. Claimant injured his back three and one-half hours after he began working on the hot box. The Court of Appeals held that claimant's normal work routine of lifting chairs with his upper torso in a straight posture was interrupted by the introduction of the turning and twisting movements required by the hot box job; it affirmed the Industrial Commission's conclusion that plaintiff sustained injury by accident. *Adams v. Burlington Industries*, 61 N.C. App. at 261-62, 300 S.E. 2d at 457.

Defendants contend the Court of Appeals erred here in holding that the Commission's findings of fact justified its conclusion of law that the jerking and twisting movements involved in plaintiff's new job interrupted his normal work routine. Defendants do not dispute that the new job of building curved hose required plaintiff to twist and turn his arms in a manner the millroom job did not require. They argue, rather, that as of the time plaintiff was injured, after two days of watching and two days and a few hours of performing it, the turning and jerking required by the curved hose molding job had become part of plaintiff's work routine. They attempt to distinguish *Adams* on the basis that lifting chairs in a straight posture clearly remained the normal work routine of the claimant in *Adams* because he was assigned to the hot box to fill in for an absent employee only for one day. In this case they say the twisting required in the curved hose molding job was not a mere temporary interruption in plaintiff's regular routine because when he was assigned to the new job he was expected to work there regularly.

Defendants cite *Trudell v. Heating & Air Conditioning Co.*, 55 N.C. App. 89, 284 S.E. 2d 538 (1981), as dispositive of this case.

In *Trudell*, plaintiff was employed to do service installments. In order to install air ducts he had to work in the crawl spaces underneath buildings. Two months after he was hired, plaintiff began working at a condominium site in which the crawl space was lower than any other under which he previously worked. After at least one and perhaps two weeks at the site, plaintiff began to feel pain in his lower back. The Court of Appeals agreed with the Commission that "the low crawl space had become part of plaintiff's normal work routine," concluded "[t]here was, therefore, no accident causing his back injury," and affirmed the Commission's denial of compensation. *Trudell v. Heating & Air Conditioning Co.*, 55 N.C. App. at 91, 284 S.E. 2d at 540.

We agree with defendants that *Adams* does not control this case. Claimant in that case, unlike plaintiff, was working on a short-term, temporary assignment at the time he was injured. We are not persuaded, however, that compensation must be denied under authority of *Trudell*. In *Trudell* the Court of Appeals concluded plaintiff's new working conditions had become part of his work routine before he was injured. In the instant case we conclude plaintiff's new working conditions had not become part of his work routine at the time of his injury.

New conditions of employment to which an employee is introduced and expected to perform regularly do not become a part of an employee's work routine until they have in fact become routine. A routine is "1a: a standard practice: regular course of procedure. b: the habitual method of performance of established procedures. . . . 3a: an established sequence of operations (as in a factory or business establishment)." Webster's Third New Int'l Dictionary (1979). New conditions of employment cannot become an employee's "regular course of procedure" or "established sequence of operations" until the employee has gained proficiency performing in the new employment and become accustomed to the conditions it entails.

The Commission made findings of fact supported by competent evidence which support our conclusion that plaintiff had not become so proficient performing the new job or so accustomed to its new conditions that the twisting it required had become a part of his normal work routine. The Commission made factual findings that while plaintiff "had spent two days observing how the new

work was done," he spent only "two days and a few hours doing it when the injury occurred." The Commission similarly found that "[t]he evidence is clear that plaintiff had not learned how to do the new job when he was injured." Plaintiff described the curved hose molding job as "it's learning how and it's a whole lot of knowing how to do it." He also stated that removal of the hose was more difficult for him than more experienced workers because he struggled more than they with the hoses before learning how to put them on and off the mandrels efficiently, allowing the mandrels to cool. Finally, plaintiff testified he was not performing the work nearly as efficiently as would be expected of him in the future.

Plaintiff's testimony that his inexperience required him to twist and turn the hose more vigorously than more experienced workers also distinguishes this case from *Trudell.* No matter how proficient he became, the employee in *Trudell* could not alter the new condition he confronted; he could do nothing to increase the height of the crawl space. In this case as plaintiff gained proficiency, he would not have had to jerk and twist the hose off the mandrel with as much effort as he was required to expend at the time he was injured.

Defendants argue finally that had plaintiff not chosen to transfer into this new position, been laid off, and accepted work for another employer, he would have no basis for claiming compensation for an injury received under similar circumstances in the new employment. They say he should not receive compensation because he chose to transfer to the new job rather than be laid off.

We are not persuaded that the circumstances under which plaintiff began performing the curved hose molding job preclude him from receiving compensation. We do not express an opinion whether a new employee injured under circumstances similar to those existing in this case could receive compensation because we do not believe the rights of such an employee, whatever they may be, are determinative of plaintiff's rights. Plaintiff simply is not a new employee; he has worked for defendant Dayco Corporation for more than ten years.

The Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for in-

jured employees and its benefits should not be denied by a narrow, technical and strict construction. *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342 (1963). The analogy defendant asks us to make between plaintiff and a new employee injured under similar circumstances would require us to construe the Act in the most narrow way to plaintiff's detriment, which we decline to do. We hold that the Court of Appeals did not err in concluding that the Commission's findings of fact justified its conclusion of law that plaintiff suffered an injury by accident.

For all the foregoing reasons the decision of the Court of Appeals is

Affirmed.

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

STATE OF NORTH CAROLINA v. ABRIM LEONARD ACKLIN

No. 778A85

(Filed 12 August 1986)

Criminal Law § 73— SBI lab reports—exclusion erroneous

The trial judge erred in a prosecution for kidnapping and rape by excluding lab reports of hair and blood analysis which showed that a pubic hair and semen retrieved from the victim and her underwear had not originated with defendant. The reports were admissible under N.C.G.S. § 8C-1, Rule 803(8)(c) in that both reports were prepared by a public office or agency pursuant to authority granted by law; both contained factual findings; both were to be introduced against the State in a criminal case; both contained assurances of trustworthiness in the impartiality of SBI chemists and the right to examine and cross-examine witnesses; and there was prejudice from the exclusion even though the SBI agents were allowed to testify because the exculpatory nature of their conclusions was largely obscured by the judge's refusal to allow the reports into evidence, both agents were cross-examined by the State in such a way as to draw attention away from their conclusions, and the jury during deliberations requested all exhibits and asked the judge whether evidence by a witness had more weight than physical evidence. N.C.G.S. § 15A-1443(a) (1983).

DEFENDANT appeals from judgment entered by *Wright, J.*, at the 19 August 1985 Criminal Session of Superior Court, FRANK-

LIN County, imposing concurrent sentences of life imprisonment and twelve years upon jury verdicts of guilty of first-degree rape and first-degree kidnapping. Defendant's motion to bypass the Court of Appeals on his appeal of the twelve-year sentence was allowed by this Court 9 January 1986. Heard in the Supreme Court 15 May 1986.

Lacy H. Thornburg, Attorney General, by Wilson Hayman, Assistant Attorney General, for the State.

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

FRYE, Justice.

Defendant contends that he is entitled to a new trial because of four alleged errors committed by the trial court. First, he contends that the trial court erred in instructing the jury that it could consider the photograph on his 1981 driver's license as evidence of "how he might have looked in 1981" but could not consider the evidence as to "how he looked in 1985." Second, he contends that the trial court erred in refusing to admit into evidence laboratory reports prepared by two forensic chemists for the State Bureau of Investigation. Third, defendant contends that the trial court erred in allowing the district attorney, over defendant's objection, to engage in cross-examination which was improper and prejudicial. Lastly, defendant contends that the trial court erred in refusing to admit into evidence his employee time card which showed that he was at his place of employment at the time the charged offenses allegedly occurred. For the reasons stated in this opinion, we find that the trial court committed prejudicial error in refusing to admit the SBI laboratory reports into evidence, and therefore defendant is entitled to a new trial. Because defendant's remaining assignments of error may not arise at his new trial, they will not be discussed in this opinion.

Defendant was charged with first-degree rape and first-degree kidnapping. The State's evidence tended to show that around 8:30 p.m. on 26 March 1985 the victim[1] was working at a convenience store near Louisburg when a black male of "normal"

1. We will not subject the victim to further embarrassment by the use of her name in this opinion.

size entered the store, remained for a few minutes and left. He returned around 9:30 p.m. and forced the victim, at gunpoint, to leave the store with him. He led the victim around the right side of the store, across a field and highway to a path where he had left his automobile, a grey, two-door Chevrolet. The man forced the victim into the passenger side of the car, ordered her to stay down, and drove for about twenty to twenty-five minutes until he stopped in front of a white house with a low porch. Using a key to unlock the door, the man pushed the victim inside the house. Once inside, he forced the victim to remove her clothes and raped her. He then told the victim to get dressed and drove her to an area approximately two miles from her home. After the man let her out of the car, the victim ran to her house. The victim's sister called the police.

The victim was taken to a local hospital where a rape kit was prepared, and then to the courthouse where she gave a statement to the police. She described her assailant as a black man having a thin mustache, a "kind of" wide nose, and a "part" in his hair. She also stated that he was wearing a cap. On the following day, the victim worked with Deputy Wesley Denton, Franklin County Sheriff's Department, in preparing a composite drawing of her assailant. At trial, the victim identified the drawing as a picture of the man who raped her. She also made an in-court identification of defendant as her assailant, describing him as the man seated by Attorney Yarborough (defense counsel). She testified that she had never viewed or been asked to view defendant prior to trial.

Deputy Denton testified that he interviewed the victim at approximately 12:50 a.m. on 27 March 1985. Denton's testimony corroborated that of the victim. He further testified that despite an extensive house by house search over a large area of Franklin County, the police never located the house described by the victim.

Defendant testified and offered several witnesses in his behalf. Defendant's testimony was that he was employed as a dishwasher at Rex Restaurant in Morehead City on 26 March 1985. He arrived at work that evening between 5:30 and 6:00 and left around 10:30. Defendant testified that he remembered what he did on 26 March 1985 because it was the day that he received a refund check from the Internal Revenue Service. He cashed the

check at a local bank and later accompanied his sister to a garage where he paid for repairs which had been made on her car. The teller supervisor at defendant's bank testified that an IRS check written to defendant was cashed at the bank on the afternoon of 26 March 1985. Defendant testified that he had never been in Franklin County and denied any knowledge of the crimes charged.

Defendant offered the testimony of two forensic chemists from the State Bureau of Investigation in his defense. Agent Hamlin testified that a comparison between the negroid pubic hair retrieved from the pubic region of the victim after the rape and defendant's pubic hair revealed that the pubic hair in question "did not originate from [defendant]." Agent Taub testified that after examining the semen found on the victim's panties and defendant's blood sample, he concluded that the semen was not produced by defendant. The court permitted the agents' testimony but sustained the State's objections to both of defendant's attempts to have the laboratory reports introduced into evidence.

Defendant next offered the testimony of his former employer to the effect that his employee time card revealed that he was at work when the charged offenses took place. When defense counsel attempted to elicit this testimony, the State objected and requested a *voir dire*. During *voir dire*, defendant's former employer testified that defendant's time card showed that on 26 March 1985 defendant arrived at work at 6:15 p.m. and left at 10:45 p.m. She said that she was certain that the time card presented at the *voir dire* was the original card issued to defendant because there were notations made by her and her husband on the back of the card relating to defendant's employment. The trial judge ruled that the time card and any testimony concerning it was inadmissible evidence on the grounds that "there existed too much opportunity for alteration and that this card was not kept in the ordinary course of business as intended by the rules of evidence."

Defendant's sister also testified in his defense. She testified that on 26 March 1985 she dropped defendant off at the Rex Restaurant around 6:10 p.m. and picked him up shortly after 10:30 p.m. She further testified that defendant did not own a car. She stated that she remembered the events of 26 March 1985 because

on that day defendant received a check from the Internal Revenue Service and he went with her to pick up her car, a blue 1979 Pontiac, from a garage where it was being repaired.

On rebuttal, the State called an officer with the Louisburg Police Department who testified that he saw defendant in a gas station in Louisburg in December of 1984. Another witness testified that she saw defendant in the store in which she worked in Franklin County buying beer sometime during the third week of March 1985.

The jury returned verdicts of guilty of first-degree rape and first-degree kidnapping.

Defendant contends that the trial court committed prejudicial error in refusing to admit laboratory reports prepared by two forensic chemists with the State Bureau of Investigation. At trial, agent Troy Hamlin, specializing in fiber and hair analysis, testified that he conducted a hair examination comparison on hairs taken from the victim's head and pubic area and hairs taken from defendant's pubic area. The examination revealed that a negroid pubic hair found in the pubic hair combings received from the victim after the rape was microscopically different from defendant's pubic hairs, and therefore the pubic hair in question "did not originate from defendant." The State's objection to defendant's request to have the report introduced into evidence was sustained. Jeb Taub, specializing in the analysis of bodily fluids, testified that he performed tests on a rape kit marked [the victim] and on a blood sample taken from defendant. The tests disclosed that the semen found in the victim's panties was not attributable to defendant. The State's objection to defendant's request to have Taub's report introduced into evidence was sustained. Defendant contends that the reports were admissible as substantive evidence under Rule 803(8)(c) of the North Carolina Rules of Evidence and that the judge's failure to allow the actual reports into evidence constituted prejudicial error.

Under Rule 803(8)(c), records, reports, or statements, in any form, of public offices or agencies, setting forth factual findings, although hearsay, are admissible against the State in a criminal case if "resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness." N.C.G.S. § 8C-1,

Rule 803(8)(c) (Cum. Supp. 1985); *see also United States v. MacDonald*, 688 F. 2d 224 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 74 L.Ed. 2d 951 (1983) (construing Fed. R. Evid. 803(8)(c)). The rule is "premised on the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." *Ellis v. International Playtex, Inc.*, 745 F. 2d 292 (4th Cir. 1984) (construing Fed. R. Evid. 803(8)(c)). "If sufficient negative factors are present to indicate the report is not trustworthy, it should not be admitted." *Id.*

The laboratory reports defendant sought to introduce meet the standards of admissibility under Rule 803(8)(c): (a) both reports were prepared by the State Bureau of Investigation, a public office or agency pursuant to authority granted by law, (b) containing factual findings, (c) to be introduced against the State in a criminal case, and (d) containing, given the impartiality of the SBI chemists and the right to examine and cross-examine witnesses, adequate assurances of trustworthiness.

The record does not disclose the basis for the judge's ruling excluding the reports. The State does not argue that the reports are not admissible under Rule 803(8)(c) but instead contends that any error committed by the trial court in refusing to admit the reports was not prejudicial.[2]

We are convinced that the trial judge's error was prejudicial. The ultimate issue was one of identity, *i.e.* whether this defendant committed the charged offenses. It is without question that the laboratory reports would have aided in resolving this issue. The State's own agents' reports unequivocally showed that defendant could not have been the source of the pubic hair or semen found in the victim's rape kit. This fact is of particular significance, since the victim testified that any semen found on her panties had to come from her assailant since she had not otherwise engaged in sexual intercourse on the day she was raped.

2. There is no contention by the State that the reports were excluded in the exercise of the court's discretion under N.C.G.S. § 8C-1, Rule 403, which provides that "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."

While the SBI agents were allowed to testify at trial as to the contents of their reports, we believe that the exculpatory nature of their conclusions was largely obscured by the trial judge's refusal to allow the reports into evidence. In addition, both agents were cross-examined by the State in such a way as to draw attention away from their conclusions which tended to vindicate defendant as to both offenses. In such a case there was no adequate substitute for having the State's own agents' findings in the hands of the jury.

We note that after the jury began its deliberations it requested and received all exhibits which had been admitted into evidence. Prior to that request, the jury asked the judge whether "evidence by a witness had more weight than physical evidence." The judge instructed the jury that it had to use its own "common experience and common sense" to resolve the question. Under the circumstances of this case, we find that the trial court committed prejudicial error in refusing to allow the SBI forensic chemists' laboratory reports into evidence, and therefore defendant is entitled to a new trial. N.C.G.S. § 15A-1443(a) (1983).

New trial.

CECIL K. CHAVIS, AND WIFE VICKY L. CHAVIS v. STATE FARM FIRE AND CASUALTY COMPANY

No. 138A86

(Filed 12 August 1986)

Insurance § 122 — fire insurance — policy provision requiring production of records — overbroad

The trial court erred by granting defendant's motion for a directed verdict in an action under a fire insurance policy where plaintiffs had complied with all requests by defendant to furnish information but had refused to sign a release authorizing access to any and all records in connection with all banks or any type of lending institution with which plaintiffs had done any business. N.C.G.S. § 58-176 does not grant to the insurer an unlimited right to roam at will through all of the insured's financial records without the restriction of reasonableness and specificity.

APPEAL pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals reported at 79 N.C. App.

213, 338 S.E. 2d 787 (1986), affirming the trial court's allowance of defendant's motion for directed verdict at the close of all of the evidence and entry of judgment for defendant.

The pertinent facts are as follows. On 17 February 1981 plaintiffs procured a policy of fire insurance from defendant, insuring their dwelling in the amount of $34,000.00. The policy also provided personal property coverage of $17,000.00, additional living expenses coverage of $6,800.00, and appurtenant structure coverage of $3,400.00. On 5 October 1981, plaintiffs' home and its contents were destroyed by fire. As required by the policy, plaintiffs timely notified defendant of their loss. Defendant paid Farmers Home Administration $17,892.21 for assignment to it of a deed of trust held by Farmers Home Administration on plaintiffs' property. Defendant also paid to plaintiffs $1,500.00 for living expenses incurred as a result of the fire. When defendant declined to make further payment under the policy, plaintiffs instituted action praying for recovery of $33,107.79, the balance of the policy coverage on the burned dwelling and contents and for attorney's fees in the amount of $1,000.00 which aggregated a total prayer for relief of $34,107.79. Defendant answered, alleging that plaintiffs were precluded from recovering on the policy due to their failure to produce books of account and other records as required by the policy and due to the fact that the fire was the result of arson.

At trial, plaintiffs produced evidence tending to establish the value of their home at the time of the fire at $40,500.00. After the fire, the value of their home was estimated at $2,500.00, representing the value of the lot. Plaintiffs denied that the fire was started as a result of arson or that they had misrepresented their financial condition to defendant.

Defendant offered *inter alia* the testimony of Gary Moss, an expert in the field of fire analysis, that based on the physical evidence present at the scene the fire was not caused by accidental means. Vance Allen, an expert in fire debris analysis, testified that each of the five samples taken from different locations at the scene contained a fire accelerant of either kerosene or number two fuel oil.

At the close of all the evidence, the trial court granted defendant's motion for a directed verdict on the basis that plaintiffs

had breached a provision of the fire insurance policy as a matter of law by failing to produce documents and accounts as requested by defendant, a condition precedent for a recovery on the policy.

Burns, Pope, Sessoms and Williamson, by William J. Williamson, and T. Craig Wright, co-counsel for plaintiff-appellants.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by Henry L. Anderson, Jr., for defendant-appellee.

BRANCH, Chief Justice.

The sole question presented by plaintiffs' appeal is whether the trial court erred in granting defendant's motion for a directed verdict. The trial court's ruling in defendant's favor at the close of all the evidence terminated the action on the ground that as a matter of law plaintiffs were precluded from recovering on the fire insurance policy because they had failed to produce their financial records as required by the policy. Consequently, the issue of arson was never submitted to the jury.

The portion of the standard fire insurance policy relevant to a determination of this issue is as follows:

> The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.
>
> . . . .
>
> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity; unless all the requirements of this policy shall have been complied with. . . .

These provisions were inserted into the policy in question, not by the Company, or by plaintiffs, but by statute, N.C.G.S. § 58-176. *See Johnson v. Insurance Co.*, 201 N.C. 362, 160 S.E. 454 (1931).

Under the terms of these particular provisions, the insured as a condition precedent to recovering on the policy must: (1) exhibit the remains of the subject property, (2) submit to examinations under oath, (3) produce for examination, as often as may be reasonably required, all books of account, bills, invoices, and other vouchers, and (4) permit copies of these records to be made.

The record in this case discloses that on 25 November 1981 defendant requested that plaintiffs appear on 4 December 1981 for an examination under oath. Plaintiffs were also instructed at this time to bring a detailed inventory of the items claimed, as well as any bills, invoices, receipts, and other documents that they had to substantiate their loss. It is uncontroverted that plaintiffs complied with these requests. It is also uncontested that persons designated by defendant were given free access to the fire site for their various inspections.

During the 4 December deposition proceedings, defendant further requested that plaintiffs sign a form authorizing defendant to secure copies of their tax returns from 1975 to date. Plaintiffs again complied. The record also reveals that both plaintiffs were thoroughly deposed and answered detailed questions concerning their income, assets, banking relationships, loans and loan payment record, credit accounts, involvement in any civil lawsuits or criminal proceedings, and their other insurance policies. Plaintiffs likewise answered various personal questions, including questions concerning their consumption of alcohol and any history of fires in their family backgrounds. In fact, the record plainly indicates that plaintiffs complied with all requests made by defendant, except for their refusal to sign the following release:

AUTHORIZATION AND RELEASES OF
INFORMATION AND RECORDS

I, Cecil K. Chavis and Vickie Chavis, do hereby authorize any representative of all banks and/or any type of lending institution which I have done any business with to consult with and/or deliver to any representative of State Farm Fire and Casualty Company any and all records referred to or requested by any representative of State Farm Fire and Casualty Company.

This the 4th day of December, 1981.

Plaintiffs concede that under a contract of fire insurance in North Carolina an insured must provide all documents and information which relate not only to the loss itself, but also to the insured's financial condition if a defense of arson is anticipated. Plaintiffs argue, however, that the above unqualified and unlimited authorization and release exceeds the scope envisioned by the legislature when it included the "production of documents" provision in the standard fire insurance policy of N.C.G.S. § 58-176. We agree.

In the first place, the "production of documents" provision in the statutory policy only expressly provides that the insured shall *produce* for examination "all books of account, bills, invoices, and other vouchers." This provision is similar in purpose to "iron-safe clauses" traditionally included in fire insurance policies. These clauses required the insured to keep a record of its accounts and inventories and thus enabled the insurer to verify the value of the insured's loss by fire. *See generally Arnold v. Insurance Co.*, 152 N.C. 232, 67 S.E. 574 (1910); *Coggins v. Insurance Co.*, 144 N.C. 7, 56 S.E. 506 (1907); *Parker v. Insurance Co.*, 143 N.C. 339, 55 S.E. 717 (1906).

As noted above, defendant likewise requested in the initial stage of its investigation that plaintiffs compile a "detailed inventory of the items claimed [by the fire], as well as any bills, invoices, receipts, and other documents that they had to substantiate their loss." These kinds of documents typically reveal the ownership and value of the property lost by fire for which the insurer must pay. As also noted, plaintiffs willingly complied with this request.

Certainly, we recognize that the financial condition of the insured is a relevant matter of inquiry to an insurer suspecting arson. *See State v. Harrell*, 20 N.C. App. 352, 201 S.E. 2d 716, *cert. denied*, 284 N.C. 619, 202 S.E. 2d 275 (1974). *See generally Halford v. American Preferred Ins.*, 698 S.W. 2d 40 (Mo. App. 1985); *Payne v. Nationwide Mutual Ins. Co.*, 456 So. 2d 34 (Ala. 1984). Yet, contrary to defendant's position, the statutory clause does not expressly authorize the insurer's unlimited access to any and all of the insured's other business and financial records.

In our opinion, the language of the statutory provision in question assumes that the insurer's requests for documents will

be reasonable and will relate to the insured property. The provision does not grant to the insurer an unlimited right to roam at will through all of the insureds' financial records without the restriction of reasonableness and specificity. Such an obligation would subject an insured to endless document production, including every check they might have tendered and every automatic teller withdrawal they might have made, as the insurer fished for evidence on which to build an arson defense.

In *Happy Hank Auction Co. v. Amer. Eagle Fire Ins. Co.*, 286 A.D. 505, 509, 145 N.Y.S. 2d 206, 211 (1955), *modified on other grounds*, 1 N.Y. 2d 534, 154 N.Y.S. 2d 870, 136 N.E. 2d 842 (1956), the New York Supreme Court in construing a similar statutory fire insurance policy provision stated that insurers have no license to harass insureds with aimless questions and demands for documents, or with random shots in the dark. The court noted that the circumstances must excite suspicion so that there is a basis for probing the bona fides of the claim and that the questions asked and documents sought must have point and direction. *Id.*

Likewise, in order to carry out the reasonable and relevant requirements in our statutory provision, we construe these particular terms of the policy to require the insurer's request to be specific. The release form in the present case, requesting access to "any and all records" in connection with "all banks and/or any type of lending institution" with which plaintiffs had done "any business" is simply unreasonably broad. It is this lack of specificity in defendant's request and plaintiffs' willingness to comply with all other requests which distinguishes this case from those cases cited by defendant in support of its position, including *Kisting v. Westchester Fire Ins. Co.*, 290 F. Supp. 141 (W.D. Wis. 1968), *aff'd*, 416 F. 2d 967 (7th Cir. 1969); and *Southern Guaranty Ins. Co. v. Dean*, 252 Miss. 69, 172 So. 2d 553 (1965). Had defendant's request for banking information been reasonably specific plaintiffs would have been obligated to produce the requested documents. We hold therefore that plaintiffs were justified as a matter of law in refusing to sign this overbroad release. The trial court, therefore, improperly granted defendant's motion for a directed verdict.

Since the trial court improperly granted defendant's motion for a directed verdict, the decision of the Court of Appeals affirming the judgment of the trial court is

Reversed.

FORSYTH COUNTY BOARD OF SOCIAL SERVICES AND FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES v. DIVISION OF SOCIAL SERVICES, AND DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, AND ALEXANDER HINES (DECEASED), BY WILLIAM EVERHART, REPRESENTATIVE FOR APPLICANT

No. 194PA85

(Filed 12 August 1986)

Social Security and Public Welfare § 1— eligibility for Medicaid benefits—standing of county to appeal DHR award

Petitioners could not contest the Department of Human Resources' final decision finding respondent eligible for Medicaid benefits where the dispute involved the application and interpretation of DHR's rules and regulations and petitioners were seeking to have DHR's decision overturned and their own initial decision reinstated. Federal regulations prohibit local agencies such as petitioners from changing or disapproving DHR's decisions or otherwise substituting their judgment for DHR's. N.C.G.S. § 108A-71 (Cum. Supp. 1985), N.C.G.S. § 108A-79(1) (Cum. Supp. 1985), N.C.G.S. § 108A-79(k).

ON discretionary review of an unpublished decision of the North Carolina Court of Appeals, affirming the judgment of *Hairston, J.*, setting aside the North Carolina Department of Human Resources' award of Medicaid benefits to respondent Hines. Judgment entered 19 August 1983, in Superior Court, FORSYTH County. Heard in the Supreme Court on 19 December 1985.

Bruce E. Colvin, for petitioner-appellee.

Turner, Enochs & Sparrow, P.A., by Wendell H. Ott and Thomas E. Cone, for respondent-appellant Hines.

North Carolina Legal Services Resource Center, by Pam Silberman; East Central Community Legal Services, by Jane Wettach; and Legal Services of the Southern Piedmont, by Douglas Sea, for Amicus Curiae Alliance for Social Security Disability Recipients.

FRYE, Justice.

The dispositive issue in this case is whether the petitioners had standing to bring the suit. For the reasons set forth in this opinion, we conclude that they did not.

On 19 May 1981, one Alexander Hines was found in a comatose state while at work and was taken to North Carolina Baptist Hospital. There he was diagnosed as having a large intracerebral hematoma in the right frontal region of the brain with intraventricular hemorrhage. Surgery was to no avail, and Hines remained comatose in a "persistent vegetative state" until he died on 7 October 1981. His medical care expenses totaled $45,145.14.

On 8 June 1981, Hines' sister, Della Black, submitted an application for Medicaid to the Forsyth County Department of Social Services (County Department) on behalf of Hines. The County Department learned that Hines had an interest in some real property located in Georgia and valued for taxation at $2,377. The Department contacted Hines' brother in Georgia who informed them that Jim Walter Homes in Jessup, Georgia, was holding the deed to the property because of the nonpayment of a second mortgage. The property consisted of a house and lot. The house was a deteriorating prefab structure that was abandoned and uninhabitable. The property was subject to unpaid taxes amounting to $951 and a possible second mortgage that the County Department was unable to verify. Although contacted on several occasions by the County Department, Hines' sister, brother, and ex-wife were unable to assist the County Department in obtaining any further information about the property. The County Department held the Medicaid application pending for twelve months and then notified Hines' sister, Della Black, on 8 June 1982, that the application was denied "based on inability to obtain information on which to base eligibility following the 12 month pending requirement."

On 11 June 1982, William Everhart, financial counselor at North Carolina Baptist Hospital, was appointed personal representative for Hines relative to Hines' eligibility for Medicaid benefits. Everhart requested a local appeal hearing which was held on 11 August 1982. At this hearing, Everhart and Della Black, Hines' sister, testified that Hines had been comatose throughout his hospitalization until his death. The hospital never

had an opportunity to ask Hines whether the Georgia property was income-producing or to secure any information regarding any liens on the property. Della Black testified that she was unable to provide any information on the Georgia property. The programs supervisor who conducted this hearing affirmed the County Department's denial on 16 August 1982.

Everhart, acting in his capacity as Hines' representative, appealed the local appeal hearing decision to the Division of Social Services, North Carolina Department of Human Resources. At this hearing it was again shown that Hines had remained in a comatose state and never regained consciousness throughout his hospitalization. Also offered in evidence was a URESA order for the support of Hines' dependent children dated 24 February 1977 and a letter from a Georgia attorney indicating that no money had been received by Hines' former wife in Georgia on this order, and a deed of trust on the Georgia property dated 26 May 1960. The state hearing officer determined that the County Department's decision to deny the application was incorrect and reversed the decision. The hearing officer relied on an earlier agency determination dated 7 October 1981 to the effect that a comatose patient unable to act in his own behalf cannot be held accountable for the lapse of time before the appointment of a guardian and that the cash value of certain insurance policies was not readily available within the meaning of the Medicaid regulations when an applicant was in a comatose state at the time of eligibility determination.

Upon petitioners' petition for review of the decision of the Department of Human Resources, Judge Peter Hairston, presiding in Forsyth Superior Court, set aside the order of the state hearing officer on the ground that "the decision was erroneous and unsupported by substantial evidence." Although all defendants initially gave notice of appeal from Judge Hairston's judgment, rendered on 19 August 1983, ultimately all except respondent Hines withdrew their appeal.

The Court of Appeals in an unpublished opinion affirmed Judge Hairston's decision. Respondent accordingly petitioned this Court for discretionary review on 8 April 1985. His petition was allowed on 13 August 1985.

Respondent and amicus curiae contend that petitioners' action should be dismissed because petitioners lack standing to bring this action. Although they raise this question for the first time on appeal and would normally be barred by N.C. R. App. P. 16, questions of subject matter jurisdiction may properly be raised at any point, even in the Supreme Court. *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *see* N.C. R. Civ. P. 12(b)(3); *see also Stuart v. Hunsucker*, 38 N.C. App. 414, 248 S.E. 2d 567 (1978), *cert. denied*, 296 N.C. 583, 254 S.E. 2d 32 (1979).

Petitioners brought this action before the superior court pursuant to N.C.G.S. § 108A-79(k) (Cum. Supp. 1985), which provides that "[a]ny . . . county board of social services . . . who is dissatisfied with the final decision of the Department [of Human Resources] may file . . . a petition for judicial review in superior court of the county from which the case arose." On its face, this section appears to give petitioners standing to contest the Department of Human Resources' award of Medicaid benefits to an applicant.

However, the Medicaid program is a cooperative federal-state program established by Congress in 1965 for the purpose of enabling the states to furnish medical assistance to certain classes of needy people. *Lackey v. Department of Human Resources*, 306 N.C. 231, 235, 293 S.E. 2d 171, 175 (1982). Participation by the state is optional, but those states that choose to participate must comply with the requirements of federal law. *Id.*

North Carolina adopted the Medicaid program through the enactment of N.C.G.S. § 108-59 to -61.4 (1978), amended and recodified effective 1 October 1981 as N.C.G.S. § 108A-54 to -62 (Cum. Supp. 1985). N.C.G.S. § 108A-56 (Cum. Supp. 1985) provides that all provisions of the federal Social Security Act are accepted and adopted. N.C.G.S. § 108A-79(1) (Cum. Supp. 1985) provides that in the event of conflict between state law and federal law or regulations, the latter will control.

The question is therefore whether federal law or regulations would prohibit petitioners from challenging the Department of Human Resources' determination that respondent was eligible for Medicaid benefits. A review of the applicable statutes and regulations leads to an affirmative answer to the question.

Title 42, Section 1396a(a)(5) of the United States Code provides that a state's Medicaid plan must designate "a single State agency to administer or to supervise the administration of the plan." 42 U.S.C. § 1396a(a)(5) (1982). This requirement is further defined by the Code of Federal Regulations. The regulations in effect both at the time petitioners brought their action and at the present time require that this single State agency, *inter alia*, "[m]ake rules and regulations . . . that are binding upon local agencies that administer the plan." 42 CFR § 431.10(b)(2)(ii) (1985). When this agency is charged with determining eligibility, other State or local agencies that perform services for it "must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency." 42 CFR § 431.10(e)(3) (1985).

In North Carolina, the "single State agency" is the Department of Human Resources (hereinafter DHR). N.C.G.S. § 108A-71 (Cum. Supp. 1985). The county departments of social services perform various services for DHR, including the making of initial decisions on eligibility for Medicaid. Therefore, federal regulations prohibit local agencies such as petitioners from changing or disapproving of DHR's decisions or "otherwise" substituting their judgment for DHR's.

By bringing this action before the Superior Court, petitioners were seeking to have DHR's decision overturned and their own initial decision reinstated. The quarrel was over the application and interpretation of DHR's rules and regulations. Petitioners were essentially requesting the court to adopt their interpretation of the rules and regulations over DHR's. Petitioners were thereby seeking to substitute their judgment for that of DHR. The State is forbidden by 42 CFR § 431.10(e)(3) to allow petitioners to do so. Accordingly, we hold that petitioners could not contest DHR's final decision finding respondent eligible for Medicaid benefits. We further hold, in keeping with N.C.G.S. § 108A-79 (1) (federal law controls), that so much of N.C.G.S. § 108A-79(k) as purports to authorize county boards of social services to petition for judicial review in superior court does not apply to this type of final agency decision. *Accord, Romano v. Perales*, 110 A.D. 2d 1028, 488 N.Y.S. 2d 316 (1985), *aff'd*, 67 N.Y. 2d 848, 492 N.E. 2d

787, 501 N.Y.S. 2d 659 (1986) (per curiam). *But see Cass County Welfare Department v. Wittner*, 309 N.W. 2d 320 (Minn. 1981), *cert. denied*, 454 U.S. 1135, 71 L.Ed. 2d 287 (1982).

Petitioners contend further that interpreting the "single State agency" requirement to forbid local arms of the state agency from attacking that agency's decisions in court will also preclude *any* review of a final agency decision. We disagree with this interpretation. The state agency is not immune from attack. Our decision limits only local agencies acting in their capacity as an agent or delegate of DHR, such as petitioners in the instant case. Other parties are not barred hereby.

For the reasons set forth herein, the decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Superior Court, Forsyth County, with directions to vacate the judgment of the Superior Court, Forsyth County, to the end that the decision of the Department of Human Resources may be reinstated.

Reversed and remanded.

MILDRED C. SHARP v. JESSE LEWIS WYSE

No. 802PA85

(Filed 12 August 1986)

Negligence § 6.1— camper top detached while pickup in motion—res ipsa loquitur not applicable

In an action to recover for damages suffered when a camper top came off defendant's pickup truck and struck plaintiff's vehicle while they were traveling on a highway, the trial court properly directed a verdict for defendant where *res ipsa loquitur* did not apply because plaintiff failed to show that defendant was the only probable tort-feasor.

ON defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31, of a decision of the North Carolina Court of Appeals, 78 N.C. App. 171, 336 S.E. 2d 675 (1985), reversing a directed verdict for defendant and judgment entered accordingly on 12 October 1984 by *Wood, J.*, presiding in FORSYTH County Superior Court.

Roy G. Hall, Jr., for plaintiff appellee.

Petree, Stockton & Robinson by W. Thompson Comerford, Jr., for defendant appellant.

EXUM, Justice.

This is an action for personal injury and property damage allegedly occurring after defendant's camper top became detached from his pickup truck and struck plaintiff's automobile while the vehicles were travelling in opposite directions on Interstate 40 in Winston-Salem.

We allowed defendant's petition for discretionary review on 18 February 1986 limited to the following question: Whether the Court of Appeals correctly applied the doctrine of *res ipsa loquitur* to the facts. We answer in the negative and reverse.

The incident giving rise to this lawsuit was a 5 June 1982 automobile mishap on Interstate 40 in Winston-Salem. On that day plaintiff, Mildred Sharp, a Tennessee resident en route to Norfolk, Virginia, was traveling east on Interstate 40 in her 1979 Ford Thunderbird while defendant, Jesse Wyse, was driving west on the same highway in his 1979 El Camino pickup truck, which was equipped with a camper top purchased from and installed by Triangle Campers, Inc. of Winston-Salem approximately one and one-half years earlier. Triangle Campers, Inc. had purchased the camper top from an Indiana company. As the vehicles approached each other, the camper top became detached from defendant's pickup truck, became airborne, crossed the median strip and struck plaintiff's car.

The plaintiff, in her complaint filed on 22 March 1983, alleged that defendant negligently operated or maintained his vehicle by failing to secure the camper top to the truck, both of which were in his exclusive possession and control, and that the top would not have separated from the truck absent defendant's negligence in this and "in other respects." This negligence, plaintiff alleged, proximately caused $3,000 in property damage to her automobile. In addition, plaintiff alleged the collision of defendant's camper top with her automobile caused her

> such a start that she involuntarily jerked her head and back backward and her body around within the interior of the ve-

> hicle with such force that she injured her neck and back, causing pain, suffering, medical expenses to date in excess of the amount of $1,000.00, loss of sleep, and to date she has lost wages in a sum in excess of $260.00.

Plaintiff further contended this injury aggravated prior calcification of her spine, of which she had been unaware, and for which she asked $50,000 in damages. Defendant answered, denying any negligence on his part, and contended the accident was unavoidable, as he had no indication the camper top was not secured adequately to his truck.

At trial, plaintiff's evidence tended to show: The 70- to 90-pound camper top had four clamps with tightening levers built into the fiberglass. A nut and a bolt went through each clamp, enabling it to pivot. The bolts locked the clamps in place, and the camper top could not be removed without unscrewing the bolts. Defendant, called by plaintiff as an adverse witness, testified that shortly before the accident he heard a "sipping" sound shortly after an eastbound tractor-trailer passed him. He then saw the camper top float across the median and hit plaintiff's vehicle. When defendant and a police officer investigated the wreckage of the camper top, all clamps remained in place with the nuts and bolts firmly attached. No one had ever removed or tampered with the camper top since its installation. Defendant had used the truck, including the rear portion, daily for business and pleasure, and it was in his possession and control at all times. Defendant never checked to see that the clamps were securely in place because they were bolted down.

At the conclusion of plaintiff's evidence the trial court granted defendant's motion for a directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, and dismissed plaintiff's action with prejudice. Plaintiff appealed to the North Carolina Court of Appeals, which reversed the directed verdict for defendant, holding plaintiff's evidence sufficient to invoke the doctrine of *res ipsa loquitur* and therefore sufficient to require submission of the case to the jury. We granted defendant's petition for discretionary review to determine whether the Court of Appeals incorrectly applied the doctrine of *res ipsa loquitur* to this case. We hold the doctrine inapplicable here and reverse the Court of Appeals' decision, thus reinstating the directed verdict for defendant.

In considering a defendant's motion for directed verdict, the court must view the evidence in the light most favorable to plaintiff, drawing all reasonable inferences and resolving all conflicts in her favor. *Snow v. Power Co.*, 297 N.C. 591, 256 S.E. 2d 227 (1979). Only if the evidence is insufficient to support a verdict for plaintiff as a matter of law should the motion to dismiss be granted. *Id.* Plaintiff here argues the evidence so considered suffices to invoke the doctrine of *res ipsa loquitur*, thus requiring submission of the case to the jury.

"The doctrine of *res ipsa loquitur* is merely a mode of proof and when applicable it is sufficient to carry the case to the jury on the issue of negligence. However, the burden of proof on such issue remains upon the plaintiff." *Lea v. Light Co.*, 246 N.C. 287, 290, 98 S.E. 2d 9, 11 (1957) (citations omitted). *See generally* Byrd, *Proof of Negligence in North Carolina, Part I, Res Ipsa Loquitur*, 48 N.C.L. Rev. 452 (1970). "*Res ipsa loquitur* (the thing speaks for itself) simply means that the facts of the occurrence itself *warrant an inference of defendant's negligence, i.e.*, that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking." *Kekelis v. Machine Works*, 273 N.C. 439, 443, 160 S.E. 2d 320, 323 (1968) (citations omitted).

> *Res ipsa loquitur*, in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident is sufficient to carry the case to the jury on the bare question of negligence. But where the rule does not apply, the plaintiff must prove circumstances tending to show some fault or omission or commission on the part of the defendant *in addition to* those which indicate the physical cause of the accident. (Emphasis added.)

Id. at 443-44, 160 S.E. 2d at 323. In *Kekelis* Justice (later Chief Justice) Sharp, writing for the Court, explained:

> The principle of *res ipsa loquitur*, as generally stated in our decisions, is this: When an instrumentality which caused an injury to plaintiff is shown to be under the control and operation of the defendant, and the accident is one which, in the ordinary course of events, does not happen if those who have

> the management of it use the proper care, the occurrence itself is some evidence that it arose from want of care. *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E. 2d 785; *Etheridge v. Etheridge*, [222 N.C. 616, 24 S.E. 2d 477]; *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251; *Ridge v. R.R.*, 167 N.C. 510, 83 S.E. 762; 3 Strong, N.C. Index, Negligence § 5 (1960); Stansbury, N.C. Evidence § 227 (2d ed. 1963) and cases cited therein. The principle does not apply, *inter alia*, when more than one inference can be drawn from the evidence as to whose negligence caused the injury, *Springs v. Doll*, *supra*, or when the instrumentality causing the injury is not under the exclusive control or management of the defendant, *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21.

Id. at 443, 160 S.E. 2d at 322-23.

The Court further elucidated the following principle, which controls this case:

> The rule of *res ipsa loquitur* never applies when the facts of the occurrence, although indicating negligence on the part of some person, do not point to the defendant as the *only* probable tortfeasor. In such a case, unless *additional evidence*, which eliminates negligence on the part of all others who have had control of the instrument causing the plaintiff's injury, is introduced, the court must nonsuit the case. When such evidence is introduced and the only inference remaining is that the fault was the defendant's, the plaintiff has produced sufficient circumstantial evidence to take his case to the jury.

Id. Accord Lea v. Light Co., 246 N.C. at 290, 98 S.E. 2d at 11-12.

Under the facts here, even when viewed in the light most favorable to her, plaintiff has failed to show that defendant is the only probable tort-feasor. Defendant did not design, build, or install the camper top. There is nothing in the evidence to show that reasonable and regular inspections of camper tops by those in exclusive possession and control will ordinarily prevent their becoming dislodged or that this particular top had been properly designed, built and installed. On the evidence presented faulty design, construction or installation of the camper top is as likely a cause of its becoming dislodged as any act or omission on defend-

ant's part. There is, in short, simply nothing in this record from which we can conclude that the dislodging of camper tops from the backs of pickups does not occur in the absence of negligence on the part of the one in exclusive possession and control of the truck to which the top is attached. Under the principles governing the application of the doctrine of *res ipsa loquitur*, we hold this is not a case in which the doctrine may be appropriately applied.

Concluding, then, that the Court of Appeals improperly applied the doctrine of *res ipsa loquitur*, we reverse its decision, thus reinstating the trial court's judgment for defendant.

Reversed.

ALLEN v. MURRAY

No. 302P86.

Case below: 80 N.C. App. 166.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

ANDREWS v. ANDREWS

No. 261P86.

Case below: 80 N.C. App. 337.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

ATHEY v. ATHEY

No. 368P86.

Case below: 80 N.C. App. 559.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986. Motion by plaintiff and defendant to dismiss appeal for lack of substantial constitutional question allowed 12 August 1986.

BACKER v. GOMEZ

No. 283P86.

Case below: 80 N.C. App. 228.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

BARNA v. EVANS CONSTRUCTION CO., INC. OF RALEIGH

No. 311P86.

Case below: 80 N.C. App. 337.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

BRUCE v. BRUCE

No. 225P86.

Case below: 79 N.C. App. 579.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

BRYANT v. CARSON

No. 404P86.

Case below: 81 N.C. App. 528.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

BRYANT v. PITT

No. 86P86.

Case below: 78 N.C. App. 801.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

BURNETTE INDUSTRIES, INC. v.
DUNBAR OF WINSTON-SALEM, INC.

No. 307P86.

Case below: 80 N.C. App. 318.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

CENTRAL CAROLINA BANK & TRUST CO.
v. FAWN VENDORS, INC.

No. 256P86.

Case below: 79 N.C. App. 755.

Motion by third-party plaintiffs for reconsideration of the petition to this Court for review of the decision of the North Carolina Court of Appeals denied 12 August 1986.

COOPER v. COOPER

No. 465P86.

Case below: 80 N.C. App. 559.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

COX v. JEFFERSON-PILOT FIRE AND CASUALTY CO.

No. 377P86.

Case below: 80 N.C. App. 122.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

DAVIS v. SELLERS ENTERPRISES, INC.

No. 259P86.

Case below: 79 N.C. App. 570.

Petition by defendant (Sellers Enterprises, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

DELLINGER v. LAMB

No. 185P86.

Case below: 79 N.C. App. 404.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

DUNN v. HARRIS

No. 423P86.

Case below: 81 N.C. App. 137.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 13 August 1986.

ELLIS v. WILLIAMS

No. 107PA86.

Case below: 78 N.C. App. 433.

Petition by several plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed limited to consideration of the interpretation and application of Appellate Rule 10 to summary judgments 12 August 1986.

GHIDORZI CONSTRUCTION, INC. v. TOWN OF CHAPEL HILL

No. 364P86.

Case below: 80 N.C. App. 438.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

HARTON v. HARTON

No. 414P86.

Case below: 81 N.C. App. 295.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

HINSON v. HINSON

No. 303P86.

Case below: 80 N.C. App. 337.

Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 12 August 1986. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

IN RE BADZINSKI

No. 143P86.

Case below: 79 N.C. App. 250.

Petition by Wake County Department of Social Services and Badzinski for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

IN RE ESTATE OF EDWARDS

No. 701A85.

Case below: 77 N.C. App. 302.

Petition by Clayton I. Duncan and Charles B. Nye for rehearing pursuant to Rule 31 N.C. Rules of Appellate Procedure denied 12 August 1986.

IN RE WILL OF KING

No. 327P86.

Case below: 80 N.C. App. 471.

Petition by Caveators for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

JOYCE v. CLOVERBROOK HOMES, INC.

No. 421P86.

Case below: 81 N.C. App. 270.

Petition by defendant (Cloverbrook Homes, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

LEWIS v. LEWIS NURSERY, INC.

No. 329P86.

Case below: 80 N.C. App. 246.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

LOVE v. MEWBORN

No. 136P86.

Case below: 79 N.C. App. 465.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

MERRITT v. KEWAUNEE SCIENTIFIC EQUIP.

No. 196P86.

Case below: 79 N.C. App. 370.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

MOFFETT v. DANIELS

No. 370P86.

Case below: 80 N.C. App. 516.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

MORRISON v. SEARS, ROEBUCK & CO.

No. 267PA86.

Case below: 80 N.C. App. 224.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed with review limited to question of whether the Court of Appeals erred in affirming summary judgment only insofar as plaintiffs' claims rest on breach of warranty of merchantability under G.S. 25-2-314 12 August 1986.

N. C. DEPARTMENT OF TRANSPORTATION v. KAPLAN

No. 361P86.

Case below: 80 N.C. App. 401.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

OLIVETTI CORP. v. AMES BUSINESS SYSTEMS, INC.

No. 418PA86.

Case below: 81 N.C. App. 1.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 12 August 1986.

PARK AVENUE PARTNERS v. JOHNSON

No. 354P86.

Case below: 80 N.C. App. 537.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

PEE DEE OIL CO. v. QUALITY OIL CO.

No. 268P86.

Case below: 80 N.C. App. 219.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

PHILBECK v. MORROW

No. 305P86.

Case below: 80 N.C. App. 337.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

RICE v. RICE

No. 420P86.

Case below: 81 N.C. App. 247.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

ROANOKE CHOWAN HOUSING AUTHORITY v. VAUGHAN

No. 413P86.

Case below: 81 N.C. App. 354.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

ROSI v. McCOY

No. 122PA86.

Case below: 79 N.C. App. 311.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 12 August 1986.

SMITH v. SPENCE & SPENCE

No. 383P86.

Case below: 80 N.C. App. 636.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 12 August 1986.

STATE v. ALLEN

No. 348P86.

Case below: 80 N.C. App. 549.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. ALSTON

No. 366P86.

Case below: 80 N.C. App. 540.

Petition by defendant (Alston) for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986. Petition by defendant (McCloud) for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986. Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 August 1986.

STATE v. BALL

No. 430P86.

Case below: 81 N.C. App. 157.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. BLACKWELL

No. 208P86.

Case below: 79 N.C. App. 370.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

STATE v. BOONE

No. 316P86.

Case below: 79 N.C. App. 746.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

STATE v. BREWINGTON AND STATE v. NORRIS

No. 292P86.

Case below: 80 N.C. App. 42.

Petition by defendant (Norris) for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. BROWN

No. 425P86.

Case below: 81 N.C. App. 157.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. CLAYTON

No. 365P86.

Case below: 80 N.C. App. 559.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 August 1986.

STATE v. COEN

No. 117P86.

Case below: 78 N.C. App. 778.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 August 1986.

STATE v. COSTNER

No. 360P86.

Case below: 80 N.C. App. 666.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 August 1986.

STATE v. DALTON

No. 358P86.

Case below: 80 N.C. App. 559.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. DAVIS

No. 443P86.

Case below: 80 N.C. App. 523.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

STATE v. DYE

No. 445P86.

Case below: 80 N.C. App. 724.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

STATE v. FIE

No. 389A86.

Case below: 80 N.C. App. 577.

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 the basis for the dissenting opinion in the Court of Appeals denied as to additional issues 12 August 1986.

STATE v. HAMBY AND SHOUN

No. 458P86.

Case below: 81 N.C. App. 680.

Petition by defendant (Hamby) for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 12 August 1986. Petition by defendant (Shoun) for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986. Motion by the State to dismiss the appeal for lack of substantial constitutional question allowed 12 August 1986.

STATE v. HARVERSON

No. 389A86.

Case below: 80 N.C. App. 577.

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 the basis for the dissenting opinion in the Court of Appeals denied as to additional issues 12 August 1986.

STATE v. HINES

No. 328P86.

Case below: 80 N.C. App. 560.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. ISLEIB

No. 397PA86.

Case below: 80 N.C. App. 599.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 12 August 1986.

STATE v. McGILL

No. 440P86.

Case below: 81 N.C. App. 157.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. MARTIN

No. 209P86.

Case below: 77 N.C. App. 61.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

STATE v. MASON

No. 255P86.

Case below: 76 N.C. App. 154.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. MILLER

No. 359P86.

Case below: 80 N.C. App. 425.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 12 August 1986.

STATE v. MOORE

No. 242PA86.

Case below: 79 N.C. App. 666.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 12 August 1986 with review is limited to consideration of (1) the validity of the search, and (2) the admissibility of the evidence seized pursuant thereto 12 August 1986.

STATE v. NORWOOD

No. 387P86.

Case below: 44 N.C. App. 174.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals treated as a motion to reconsider his prior petition for certiorari (315 N.C. 188) and allowed on 12 August 1986, with an order remanding the case for consideration of defendant's appeal.

STATE v. OLIVER

No. 433P86.

Case below: 81 N.C. App. 157.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. RAINES

No. 427PA86.

Case below: 81 N.C. App. 299.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 12 August 1986. Motion by State to dismiss appeal for lack of substantial constitutional question denied 12 August 1986.

STATE v. RANSOM

No. 444P86.

Case below: 80 N.C. App. 711.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

STATE v. RAWLS

No. 218P86.

Case below: 70 N.C. App. 230.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

STATE v. ROARK

No. 306P86.

Case below: 80 N.C. App. 338.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. SHEA

No. 407P86.

Case below: 80 N.C. App. 705.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

STATE v. TAYLOR

No. 355P86.

Case below: 80 N.C. App. 560.

Petition by L. J. Moore for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. THOMPSON

No. 422P86.

Case below: 81 N.C. App. 157.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. TICE

No. 449P86.

Case below: 81 N.C. App. 529.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. WILLIAMS

No. 192P86.

Case below: 79 N.C. App. 371.

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STATE v. WOODARD

No. 309P86.

Case below: 80 N.C. App. 338.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

STEGALL v. ROBINSON

No. 485P86.

Case below: 81 N.C. App. 617.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

TURNER v. NICHOLSON PROPERTIES, INC.

No. 281P86.

Case below: 80 N.C. App. 208.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

VA. ELECTRIC AND POWER CO. v. TILLETT

No. 371P86.

Case below: 80 N.C. App. 383.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 12 August 1986.

WEE ONE'S PARADISE DAY CARE CENTER, INC. v. MARYLAND CASUALTY COMPANY

No. 428P86.

Case below: 81 N.C. App. 158.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 12 August 1986.

APPENDIXES

REVISED RULES FOR COURT-ORDERED ARBITRATION

DISCIPLINE AND DISBARMENT RULES

CLIENT SECURITY FUND

SUPREME COURT OF NORTH CAROLINA

****

IN THE MATTER OF PILOT PROGRAM OF MANDATORY, NONBINDING ARBITRATION	))))	ORDER

****

WHEREAS, the Supreme Court of North Carolina adopted an order in this matter on 28 August 1986; and

WHEREAS, the Court now desires to revise the rules therein adopted;

Now, therefore, the Court orders:

(1) Effective immediately, the program shall operate pursuant to the attached revised "Rules for Court-Ordered Arbitration."

(2) These revised rules shall be promulgated by their publication, together with this order, in the Advance Sheets of the Supreme Court and the Court of Appeals of North Carolina.

Done by the Court in conference this 4th day of March 1987.

WHICHARD, J.
For the Court

THE RULES AND COMMENTARY AS ORIGINALLY PROMULGATED ARE REVISED AS FOLLOWS:

Rule 2

Delete from Rule 2(a) the following: "60 days after the date the action was filed" and substitute in lieu thereof "the first 20 days after the 60-day period fixed in Rule 8(b) begins to run."

Rule 3(i)

Rewrite to read as follows:

No ex parte communications between parties or their counsel and arbitrators are permitted.

Rule 3(l)

Rewrite the final phrase to read "as provided in N.C.R. Civ. P. 11, 37(b)(2)(A)-37(b)(2)(C) and N.C. Gen. Stat. § 6-21.5."

Rule 3, Comment

Final paragraph, last sentence, should end with a comma after "papers" and this phrase should be added: "except in cases in which a N.C. R. Civ. P. 12 motion is filed in lieu of a responsive pleading."

Rule 5

In Rule 5(d), delete the words "or in any other proceedings" and insert in lieu thereof the words "or in any subsequent proceeding involving any of the issues in or parties to the arbitration."

In Rule 5(e), add these words after "proceeding":

in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration.

Rule 8

Amend Rules 8(a) and 8(b) by substituting:

(a) *Actions Designated for Arbitration.*

The court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment and give notice of such designation to the par-

ties in all cases not exempted for comparison purposes pursuant to Rule 1(d)(2).

(b) *Hearings Rescheduled; 60 Day Limit; Continuances.*

(1) The court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.

(2) A hearing may be scheduled, rescheduled or continued to a date after the time allowed by this rule only by the court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

Amend the *Comment* to read as follows:

One goal of these rules is to expedite disposition of claims involving $15,000 or less. See Rule 8(a). The 60 days in Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal.

RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

Revised March 4, 1987

TABLE OF CONTENTS

	Page
Rule 1—Actions Subject to Arbitration	726
(a) Types of Actions; Exceptions	726
(b) Arbitration by Agreement	726
(c) Court-Ordered Arbitration in Cases Having Excessive Claims	727
(d) Exemption and Withdrawal from Arbitration	727
Comment	727
Rule 2—Arbitrators	728
(a) Selection	728
(b) Eligibility	728
(c) Fees and Expenses	728
(d) Oath of Office	729
(e) Disqualification	729
(f) Replacement of Arbitrator	729
Comment	729
Rule 3—Arbitration Hearings	729
(a) Hearing Scheduled by the Court	729
(b) Pre-hearing Exchange of Information	729
(c) Exchanged Documents Considered Authenticated	730
(d) Copies of Exhibits Admissible	730
(e) Witnesses	730
(f) Subpoenas	730
(g) Authority of Arbitrator to Govern Hearings	730
(h) Law of Evidence Used as Guide	730
(i) No Ex Parte Communications with Arbitrator	730
(j) Failure to Appear; Defaults; Rehearing	730

TABLE OF CONTENTS

Page

(k) No Record of Hearing Made 731

(l) Sanctions 731

(m) Proceedings in Forma Pauperis 731

(n) Limits of Hearings 731

(o) Hearings Concluded 731

(p) Parties Must be Present at Hearings; Representation 732

(q) Motions 732

Comment 732

Rule 4—The Award 733

(a) Filing the Award 733

(b) Findings; Conclusions; Opinions 733

(c) Scope of Award 733

(d) Copies of Award to Parties 733

Comment 733

Rule 5—Trial De Novo 733

(a) Trial De Novo As of Right 733

(b) Filing Fee 734

(c) No Reference to Arbitration in Presence of Jury 734

(d) No Evidence of Arbitration Admissible 734

(e) Arbitrator not to be Called as Witness 734

(f) Judicial Immunity 734

Comment 734

Rule 6—The Court's Judgment 734

(a) Termination of Action by Agreement Before Judgment 734

TABLE OF CONTENTS

	Page
(b) Judgment Entered on Award	735
Comment	735
Rule 7—Costs	735
(a) Arbitration Costs	735
(b) Costs Following Trial De Novo	735
(c) Costs Denied if Party Does Not Improve His Position in Trial De Novo	735
Rule 8—Administration	735
(a) Actions Designated for Arbitration	735
(b) Hearings Rescheduled; 60 Day Limit; Continuances	736
(c) Date of Hearing Advanced by Agreement	736
(d) Forms	736
(e) Delegation of Nonjudicial Functions	736
(f) Definitions	736
Comment	736
Rule 9—Application of Rules	737
Comment	737

COURT-ORDERED ARBITRATION

Rule 1

ACTIONS SUBJECT TO ARBITRATION

(a) *Types of Actions; Exceptions.* All civil actions filed in the trial divisions of the General Court of Justice which are not assigned to a magistrate and all appeals from judgments of magistrates in which there is a claim or there are claims for monetary relief not exceeding $15,000 total, exclusive of interest, costs and attorneys' fees, are subject to court-ordered arbitration under these rules except actions:

(1) Involving a class;

(2) In which there is a substantial claim for injunctive or declaratory relief;

(3) Involving:

(i) family law issues,

(ii) title to real estate,

(iii) wills and decedents' estates, or

(iv) summary ejectment;

(4) Which are special proceedings;

(5) In which a claim is asserted for an unspecified amount exceeding $10,000 in compliance with N.C.R. Civ. P. 8(a)(2);

(6) Involving a claim for monetary recovery in an unspecified amount later to be determined by an accounting or otherwise, if the claimant certifies in the pleading asserting the claim that the amount of the claim will actually exceed $15,000; or

(7) Which are certified by a party to be companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue.

(b) *Arbitration by Agreement.* The court may submit any other civil action to arbitration under these rules or any modification thereof, pursuant to agreement by the parties approved by the court.

(c) *Court-Ordered Arbitration in Cases Having Excessive Claims.* The court may order any case submitted to arbitration under these rules at any time before trial if it finds that the amount actually in issue is $15,000 or less, even though a greater amount is claimed.

(d) *Exemption and Withdrawal from Arbitration.*

(1) The court may exempt or withdraw any action from arbitration on its own motion or on motion of a party made not less than 10 days before the arbitration hearing and a showing that: (i) the amount of the claim(s) exceed(s) $15,000; (ii) the action is excepted from arbitration under Rule 1(a); or (iii) there is a strong and compelling reason to do so.

(2) During the pilot arbitration program, the court shall exempt from arbitration a random sample of cases so as to create a control group of cases to be used for comparison with arbitrated cases in evaluating the pilot arbitration program.

COMMENT

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to $15,000. The $15,000 jurisdictional limit by statute and Rule 1(a) applies only to the claim(s) actually asserted, even though the claim(s) is or are based on a statute providing for multiple damages, *e.g.* N.C. Gen. Stat. §§ 1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases reasonably without court involvement. The court has ultimate authority to order overvalued cases to arbitration. The court's authority and responsibility for conducting all proceedings and for the final judgment in a case are not affected by these rules, which merely give the court a new civil procedure. A false certification under Rule 1(a)(6) might trigger N.C.R. Civ. P. 11(a) and N.C. Gen. Stat. § 6-21.5 sanctions or State Bar disciplinary action.

"Family law issues" in Rule 1(a)(3)(i) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody and visitation. Actions which are "special proceedings" or involve summary ejectment, referred to in Rule 1(a), are actions so designated by the General Statutes.

Rule 1(b) allows binding or non-binding arbitration of *any* case by agreement and permits the parties to modify these rules

for a particular case. Court approval of any modification will give a variant proceeding the court's imprimatur and ensure adherence to their primary purpose. For example, arbitrators under these rules are not expected to decide protracted cases without fair compensation by the parties. This rule was not intended to provide compensation from the limited funds available to the pilot courts for protracted or exceptional cases. Therefore, the court should review and approve any such extraordinary stipulations.

Rule 1(c) is a safeguard against overvaluation of a claim to evade arbitration. It would become operative on motion of a party. This rule *does not* require (nor forbid) the court to examine any case on its own motion to determine its true value. The court may establish an administrative procedure for reviewing pleadings in cases appropriate for consideration by a judge for referral under Rule 1(c). *See also* the Comment to Rule 1(a).

Exemption or withdrawal may be appropriate under Rule 1(d)(1)(iii) in a challenge to established precedent in an action in which a trial de novo and subsequent appeal are probable or a case in which there has been prior mediation through the North Carolina Attorney General's office.

Rule 2

ARBITRATORS

(a) *Selection.* The court shall select and maintain a list of qualified arbitrators, which shall be a public record. Unless the parties file a stipulation identifying their choice of an arbitrator on the court's list within the first 20 days after the 60-day period fixed in Rule 8(b) begins to run, the court will appoint an arbitrator, chosen at random from the list.

(b) *Eligibility.* An arbitrator shall have been a member of the North Carolina State Bar for at least five years and must be approved by the Senior Resident Superior Court Judge and the Chief District Court Judge for such service.

(c) *Fees and Expenses.* Arbitrators shall be paid a $75 fee by the court for each arbitration hearing when they file their awards with the court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $75 for work on a case not resulting in a hearing upon the arbitrator's written application to, and approval by, the Senior Resident Superior Court

Judge, or the Chief Judge of the District Court, of the court in which the case was pending.

(d) *Oath of Office.* Arbitrators shall take an oath or affirmation similar to that prescribed in N.C. Gen. Stat. § 11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) *Disqualification.* Arbitrators shall be disqualified and must recuse themselves if as a judge in the same action they would be disqualified or obliged to recuse themselves. Disqualification and recusal may be waived by the parties upon full disclosure of any basis for disqualification or recusal.

(f) *Replacement of Arbitrator.* If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed in a random manner by the court.

COMMENT

Under Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have *the burden of taking the initiative if they want to make the selection,* and they must do it promptly.

Under Rule 2(c) filing of the award is the final act at which payment should be made, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. *See* Rule 3(n).

Payments and expense reimbursements authorized by Rule 2(c) are made subject to court approval to ensure conservation and judicial monitoring of the funds available during the pilot program from the "private sources" specified in the enabling Act.

Rule 3

ARBITRATION HEARINGS

(a) *Hearing Scheduled by the Court.* Arbitration hearings shall be scheduled by the court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) *Pre-hearing Exchange of Information.* At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing.

(c) *Exchanged Documents Considered Authenticated.* Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) *Copies of Exhibits Admissible.* Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) *Witnesses.* Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) *Subpoenas.* N.C.R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) *Authority of Arbitrator to Govern Hearings.* Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the court.

(h) *Law of Evidence Used as Guide.* The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect he determines appropriate.

(i) *No Ex Parte Communications with Arbitrator.* No ex parte communications between parties or their counsel and arbitrators are permitted.

(j) *Failure to Appear; Defaults; Rehearing.* If a party who has been notified of the date, time and place of the hearing fails

to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C.R. Civ. P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond his control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Rule 5(a).

(k) *No Record of Hearing Made.* No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(l) *Sanctions.* Any party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner shall be subject to sanctions by the court on motion of a party, or report of the arbitrator, as provided in N.C.R. Civ. P. 11, 37(b)(2)(A)-37(b)(2)(C) and N.C. Gen. Stat. § 6-21.5.

(m) *Proceedings in Forma Pauperis.* The right to proceed in forma pauperis is not affected by these rules.

(n) *Limits of Hearings.* Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for pre-hearing exchange of information under Rule 3(b). The court will rule on these applications after consulting the arbitrator if appointed.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) *Hearing Concluded.* The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments he permits have been completed. In exceptional cases, he may in his discretion receive post-hearing briefs, but not evidence, if submitted within 3 days after the hearing has been concluded.

(p) *Parties Must be Present at Hearings; Representation.* All parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Only individuals may appear pro se.

(q) *Motions.* Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in his award. Parties shall state their contentions regarding pending motions deferred to the arbitrator in the exchange of information required by Rule 3(b).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

COMMENT

Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

An arbitrator may at any time encourage settlement negotiations and may participate in such negotiations if all parties are present in person or by counsel. *See* Rule 3(p).

The purpose of Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Rule 4(a), which requires the arbitrator to file his award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, he should specify the points he wants addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C. Gen. Stat. §§ 103-4, 103-5.

Under Rule 3(q) the court will rule on prehearing motions which dispose of the case on the pleadings or relate to the pro-

cedural management of the case. The court will normally defer to the arbitrator for his consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or examination of records and documents other than the pleadings and motion papers, except in cases in which a N.C.R. Civ. P. 12(b) motion is filed in lieu of a responsive pleading.

Rule 4

THE AWARD

(a) *Filing the Award.* The award shall be in writing, signed by the arbitrator and filed with the court within 3 days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) *Findings; Conclusions; Opinions.* No findings of fact and conclusions of law or opinions supporting an award are required.

(c) *Scope of Award.* The award must resolve all issues raised by the pleadings and may exceed $15,000.

(d) *Copies of Award to Parties.* The court shall forward copies of the award to the parties or their counsel.

COMMENT

Under Rule 4(a) the arbitrator should issue the award when the hearing is over and should not take the case under advisement. If the arbitrator wants post-hearing briefs, he must receive them within three days, consider them, and file his award within three days thereafter. *See* Rule 3(o) and its *Comment.*

See Rule 1(a) and its *Comment* in connection with Rule 4(c).

Rule 5

TRIAL DE NOVO

(a) *Trial De Novo As of Right.* Any party not in default for a reason subjecting him to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been filed, or within 10 days after an adverse determination of a Rule 3(j) motion to rehear.

(b) *Filing Fee.* A party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the court until the case is terminated and returned to the demanding party only if there has been a trial in which, in the trial judge's opinion, the demanding party improved his position over the arbitrator's award. Otherwise, the filing fee shall be forfeited to the fund from which arbitrators are paid.

(c) *No Reference to Arbitration in Presence of Jury.* A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without the consent of all parties to the arbitration and the court's approval.

(d) *No Evidence of Arbitration Admissible.* No evidence that there have been arbitration proceedings or any fact concerning them may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the court's approval.

(e) *Arbitrator Not to be Called as Witness.* An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. His notes are privileged and not subject to discovery.

(f) *Judicial Immunity.* The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to his actions in the arbitration proceeding.

COMMENT

Rule 5(c) does not preclude cross-examination of a witness in a later proceeding concerning prior inconsistent statements during arbitration proceedings, if done in such a manner as not to violate the intent of Rules 5(c) and 5(d).

See also the *Comment* to Rule 6 regarding demand for trial de novo.

Rule 6

THE COURT'S JUDGMENT

(a) *Termination of Action by Agreement Before Judgment.* The parties may file a stipulation of dismissal or consent judgment at any time before entry of judgment on an award.

(b) *Judgment Entered on Award.* If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo within 30 days after the award is filed, the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be mailed to all parties or their counsel.

COMMENT

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. By failing to demand a trial de novo the right is waived. Demand for jury trial pursuant to N.C.R. Civ. P. 38(b) does not preserve the right to a trial de novo. There must be a separate, specific, timely demand for trial de novo after the award has been filed.

Rule 7

COSTS

(a) *Arbitration Costs.* The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(b) *Costs Following Trial De Novo.* If there is trial de novo, court costs may, in the discretion of the trial judge, include costs taxable under Rule 7(a) incurred in the arbitration proceedings.

(c) *Costs Denied if Party Does Not Improve His Position in Trial De Novo.* A party demanding trial de novo who does not improve his position may be denied his costs in connection with the arbitration proceeding by the trial judge, even though prevailing at trial.

Rule 8

ADMINISTRATION

(a) *Actions Designated for Arbitration.* The court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from the magistrate's judgment and give notice of such designation to the parties in all cases not exempted for comparison purposes pursuant to Rule 1(d)(2).

(b) *Hearings Rescheduled; 60 Day Limit; Continuances.*

(1) The court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.

(2) A hearing may be scheduled, rescheduled or continued to a date after the time allowed by this rule only by the court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

(c) *Date of Hearing Advanced by Agreement.* A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(d) *Forms.* Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) *Delegation of Nonjudicial Functions.* To conserve judicial resources and facilitate the effectiveness of these rules, the court may delegate nonjudicial, administrative duties and functions to supporting court personnel and authorize them to require compliance with approved procedures.

(f) *Definitions.* "Court" as used in these rules means, depending upon the context in which it is used:

(1) The Senior Resident Superior Court Judge, if the action is pending in the Superior Court Division, or his delegate;

(2) The Chief District Court Judge, if the action is pending in the District Court Division, or his delegate; or

(3) Any assigned judge exercising the court's jurisdiction and authority in an action.

COMMENT

One goal of these rules is to expedite disposition of claims involving $15,000 or less. *See* Rule 8(a). The 60 days in Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal.

Rule 9

APPLICATION OF RULES

These Rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Rule 1(b) or referred to arbitration by order of the court.

COMMENT

A common set of rules has been adopted for the three pilot districts. These rules may be amended, to permit experiments with variant procedures or to take into account local conditions, with the prior approval of the Supreme Court of North Carolina. The enabling legislation, 1985 N.C. Sess. Laws, ch. 698 § 23, vests rulemaking authority in the Supreme Court, and this includes amendments.

AMENDMENT TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

ARTICLE IX

Discipline and Disbarment of Attorneys

Disability Procedures

The following amendments to the Rules and Regulations of the North Carolina State Bar relating to the Disciplinary Procedures were originally approved by the Supreme Court of North Carolina on the 4th day of November, 1975, as appears in 288 NC 743, and reprinted in full in 310 NC 794.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Sections 14 and 29 as appear in 310 NC at pages 811 and 831 are amended as follows:

ARTICLE IX

Discipline and Disbarment of Attorneys

§ 14. Formal Hearing.

Rewrite Article IX § 14(10) by striking the words, "for a period not to exceed 30 days." So this subsection will read:

(10) The initial hearing date as set by the Chairman in accordance with § (4) of this section may be reset by the Chairman pursuant to § (5) and (7) of this section, and said initial hearing or reset hearing may be continued by the Chairman of the Hearing Committee for good cause shown.

Delete the first sentence of § 14(11) which presently reads:

"Unless necessary to afford the accused due process, no more than one continuance of a hearing and no more than one extension of time for filing of pleadings shall be granted."

§ 29. Confidentiality

Rewrite Section 29 by striking the period of this section following American Bar Association and inserting in lieu thereof a comma and the following additional language:

", or to the Client Security Fund Board of Trustees to assist the Board in determining losses caused by dishonest conduct by members of the North Carolina State Bar."

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on April 17, 1987.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of May, 1987.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2 day of June, 1987.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 2 day of June, 1987.

WHICHARD, J.
For the Court

CLIENT SECURITY FUND

On 10 October 1984, this Court, upon recommendation of the North Carolina State Bar, established the Client Security Fund. It now appears that it will not be necessary for contributions to be made to the fund for the calendar year 1987; therefore, the Court orders that the requirement of contribution to the Client Security Fund by the members of the North Carolina State Bar is waived for the calendar year 1987.

Done by order of the Court in Conference, this 11 day of June, 1986.

BILLINGS, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADOPTION
ANONYMOUS THREATS
APPEAL AND ERROR

COMPROMISE AND SETTLEMENT
CONSTITUTIONAL LAW
CRIMINAL LAW

DECLARATORY JUDGMENT ACT
DIVORCE AND ALIMONY

EMINENT DOMAIN

FRAUD

HOMICIDE

INDICTMENT AND WARRANT
INFANTS
INSURANCE

JURY

KIDNAPPING

MASTER AND SERVANT
MUNICIPAL CORPORATIONS

NARCOTICS
NEGLIGENCE

PARENT AND CHILD
PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

RAPE AND ALLIED OFFENSES
ROBBERY
RULES OF CIVIL PROCEDURE

SEARCHES AND SEIZURES
SOCIAL SECURITY AND PUBLIC WELFARE

UTILITIES COMMISSION

ADOPTION

§ 2.1. Consent to Adoption

A letter mailed by the natural mother of a child to petitioners constituted sufficient notice of revocation of her consent to adoption of the child. *In re Terry*, 132.

ANONYMOUS THREATS

§ 1. Generally

The trial court's judgment sentencing defendant as a felon for secretly and maliciously transmitting unsigned threatening letters was vacated and the case was remanded for sentencing as a misdemeanor. *S. v. Glidden*, 557.

APPEAL AND ERROR

§ 46. Presumptions Arising from Lower Court Proceedings

Where one member of the Supreme Court recused himself and the remaining members of the court were evenly divided, the Court of Appeals decision was affirmed without precedential value. *Vick v. Davis*, 328.

COMPROMISE AND SETTLEMENT

§ 1.1. Validity and Conclusive Effect

Summary judgment should not have been granted for defendant in an action arising from a construction dispute. *Bolton Corp. v. T. A. Loving Co.*, 623.

CONSTITUTIONAL LAW

§ 28. Due Process Generally

The trial court did not deny defendant due process by failing to grant his motion to dismiss due to a grant of immunity. *S. v. Vines*, 242.

§ 30. Discovery

The trial court did not err by denying defendant's motion to compel the State to disclose the criminal records of its witnesses. *S. v. Wingard*, 590.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not err by denying defendant's motion to appoint a medical expert to assist in the preparation of his defense. *S. v. Johnson*, 193.

The trial court did not err in a prosecution for first degree murder by failing to appoint an investigator for defendant. *S. v. Hickey*, 457.

§ 34. Double Jeopardy

Defendant's failure to object to a mistrial during her first murder trial did not prevent her from receiving relief on double jeopardy grounds. *S. v. Lachat*, 73.

In order to avoid a violation of the constitutional prohibition against double jeopardy in a case in which defendant was convicted of first degree murder and first degree kidnapping, defendant's conviction of kidnapping must be vacated where the State relied on the same evidence of restraint which was an inherent feature of the victim's murder by suffocation to support the restraint element of kidnapping. *S. v. Prevette*, 148.

Defendant's contention that convictions and concurrent prison sentences for first degree rape and first degree kidnapping violated double jeopardy was waived by his failure to object at trial. *S. v. Mitchell*, 661.

CONSTITUTIONAL LAW — Continued

§ 40. Right to Counsel Generally

Defendant was not entitled to appointed counsel where the trial court determined that he was not indigent. *S. v. Carroll,* 136.

§ 49. Waiver of Right to Counsel

Defendant's waiver of counsel at his sentencing hearing was not voluntary and knowing where he had no notice that the trial judge was not going to sentence him as the judge had previously indicated. *S. v. Carroll,* 136.

§ 60. Racial Discrimination in Jury Selection Process

The decision of *Batson v. Kentucky,* --- U.S. ---, 90 L.Ed. 2d 69, holding that a defendant can establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at his trial will not be applied retroactively. *S. v. Jackson,* 1; *S. v. Gilliam,* 293.

The prosecution's use of peremptory challenges to exclude blacks from the jury did not violate defendant's right to a jury drawn from a fair cross-section of the community. *S. v. Jackson,* 1.

§ 63. Exclusion from Jury for Opposition to Death Penalty

The practice of death qualifying the jury does not violate the federal constitution. *S. v. Johnson,* 193.

The trial court did not err in a prosecution for kidnapping, rape and murder by death qualifying the jury. *S. v. Johnson,* 343.

Defendant was not entitled to a new trial on the grounds that death qualified juries are unconstitutional. *S. v. Jones,* 487.

Defendant's rights to due process and trial by jury were not violated by a death qualified jury. *S. v. Sanders,* 602.

The trial court did not err by denying defendant's motion to prohibit death qualification of the jury. *S. v. Wingard,* 590.

§ 80. Death and Life Imprisonment Sentences

The Supreme Court declined to reevaluate decisions upholding the constitutionality of the North Carolina death penalty statutes. *S. v. Johnson,* 343.

Consideration of pecuniary gain as an aggravating circumstance in a robbery-murder case does not violate the Eighth Amendment proscription against cruel and unusual punishment. *S. v. Williams,* 474.

CRIMINAL LAW

§ 4. Distinction between Crimes

Solicitation to commit common law robbery is an infamous crime within the meaning of G.S. 14-3. *S. v. Mann,* 164.

§ 6. Mental Capacity as Affected by Drugs

The trial court did not err by failing to give an instruction on intoxication by drugs. *S. v. Johnson,* 343.

§ 10.1. Indictment for Accessories before the Fact

An indictment charging defendant with being an accessory before the fact to murder which did not charge that defendant was not present when the murder was committed was sufficient. *S. v. Sams,* 230.

CRIMINAL LAW — Continued

§ 10.2. Accessories before the Fact; Competency, Relevancy, and Sufficiency of Evidence

The trial judge did not err by denying defendant's motion to dismiss for insufficient evidence a prosecution for being an accessory before the fact to murder. *S. v. Sams*, 230.

The trial court did not abuse its discretion in a prosecution for being an accessory before the fact to murder by sustaining objections to questions defendant sought to ask two State's witnesses concerning the impact of the death penalty on their testimony. *Ibid.*

§ 15. Venue

The venue in a murder prosecution lay in Buncombe County rather than Ashe County where the Ashe County grand jury returned a finding of no true bill and the Buncombe County grand jury subsequently returned a true bill. *S. v. Vines*, 242.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

In order to avoid a violation of the constitutional prohibition against double jeopardy in a case in which defendant was convicted of first degree murder and first degree kidnapping, defendant's conviction of kidnapping must be vacated where the State relied on the same evidence of restraint which was an inherent feature of the victim's murder by suffocation to support the restraint element of kidnapping. *S. v. Prevette*, 148.

§ 26.8. Former Jeopardy; Mistrial

The trial court erred by denying defendant's motion to dismiss a murder charge on the ground of former jeopardy. *S. v. Lachat*, 73.

§ 29.1. Procedure for Raising and Determining Issue of Mental Capacity to Stand Trial

The trial court had no obligation to conduct an inquiry to determine whether defendant had the mental capacity to stand trial or appear pro se. *S. v. Carroll*, 136.

§ 30. Pleas of the State

The trial court did not err by denying defendant's motion to preclude the State from proceeding on first degree murder where the prosecutor had stated at arraignment that the State did not intend to seek a conviction for first degree murder unless new evidence was discovered. *S. v. Hickey*, 457.

The trial court erred by sentencing defendant for first degree rape where the State made a binding election not to pursue the greater degree of the offense. *S. v. Jones*, 487.

§ 33.1. Evidence as to Commission of Offense and Identity of Perpetrator

The trial court did not err in a prosecution for kidnapping, rape and robbery by allowing the State to introduce into evidence a straight razor and several knives found in the car in which defendants were arrested where the victim had been threatened with a knife. *S. v. Gilliam*, 293.

§ 33.4. Evidence Tending to Excite Prejudice or Sympathy

The trial court did not err in a prosecution for kidnapping, rape and murder by admitting into evidence plaster casts of defendant's teeth and indentations on the deceased's breast and by allowing a demonstration of how defendant's teeth matched the bite marks. *S. v. Johnson*, 343.

CRIMINAL LAW — Continued

§ 34. Evidence of Defendant's Guilt of Other Offenses

There was no prejudice in a prosecution for kidnapping, rape and murder from the admission of testimony from defendant's sister about a fight in which defendant had drawn a knife but had not pointed it at anyone. *S. v. Johnson*, 343.

§ 34.2. Evidence of Defendant's Guilt of Other Offenses; Admission of Inadmissible Evidence as Harmless Error

There was no prejudicial error in a prosecution for felonious breaking or entering and felonious larceny from the erroneous admission of an accomplice's testimony implicating defendant in an unrelated breaking or entering. *S. v. McKoy*, 519.

§ 34.4. Admissibility of Evidence of Other Offenses

Testimony by a kidnapping and rape victim that she hid her jewelry in a car trunk during her confinement there because defendant had assaulted her and taken her jewelry on a prior occasion was competent to explain the victim's unusual behavior and to show that her will had been overcome in part by fears for her safety. *S. v. Young*, 396.

§ 34.5. Admissibility of Evidence of Other Offenses to Show Identity of Defendant

Evidence relating to four other rapes and robberies committed earlier in the year was admissible to prove defendant's identity as the perpetrator of the charged rapes and robberies. *S. v. Johnson*, 417.

§ 42.5. Articles Connected with the Crime; Identification of Object; Articles Other than Clothing and Weapons Taken in Commission of Crime

The introduction of a wedding ring and watch taken from the victim and found in defendant's possession did not raise impermissible inferences in a prosecution for rape, kidnapping, and felonious possession of stolen goods. *S. v. Mercer*, 87.

§ 48. Silence of Defendant as Implied Admission

The trial court did not err by allowing the cross-examination of defendant about exculpatory material defendant had testified to at trial but had not mentioned in a voluntary pretrial conversation with an officer. *S. v. Mitchell*, 661.

§ 70. Tape Recordings

The trial court did not err in a prosecution for first degree rape and first degree sexual offense by admitting the contents of a tape recording found less than a mile from defendant's house in which a voice identified by the victim and her mother as defendant described a sexual fantasy involving the victim. *S. v. West*, 219.

§ 73. Hearsay Testimony in General

The trial judge erred in a prosecution for kidnapping and rape by excluding lab reports of hair and blood analysis. *S. v. Acklin*, 677.

§ 73.1. Admission of Hearsay Statement as Harmless Error

The trial court did not commit reversible error in a first degree murder prosecution by admitting hearsay testimony. *S. v. Hickey*, 457.

There was no prejudicial error in the exclusion of telephone conversations as hearsay. *S. v. Johnson*, 343.

CRIMINAL LAW — Continued

§ 73.3. Statements not within Hearsay Rule; Statements Showing State of Mind

Testimony that the witness had a telephone conversation with a rape victim who was hysterical was properly admitted to show the victim's condition and state of mind. *S. v. Cooper,* 141.

§ 73.4. Statements not within Hearsay Rule; Spontaneous Utterances

The trial court did not err in a first degree murder prosecution by admitting testimony that a bystander told defendant not to shoot his victim any more because he had already killed her. *S. v. Wingard,* 590.

§ 75.1. Voluntariness of Confession; Effect of Fact that Defendant Is in Custody or Under Arrest

An inculpatory statement made by defendant to officers was admissible where, although the investigation had focused on defendant, defendant had not been charged and talked with officers in the familiarity and convenience of his own living room. *S. v. West,* 219.

Defendant's confession was properly admitted where defendant was not deprived of his freedom or restrained in such a manner as to constitute being seized for purposes of Fourth Amendment analysis. *S. v. Johnson,* 343.

§ 75.4. Voluntariness of Confessions Obtained Prior to Appointment of or in Absence of Counsel

An officer did not initiate a conversation with defendant after defendant had previously invoked his right to counsel by going to the jail and presenting defendant with a nontestimonial identification order or by explaining the purpose of the order. *S. v. Young,* 396.

§ 75.7. Voluntariness of Confession; When Warning of Constitutional Rights Is Required

Defendant was not subjected to custodial interrogation when he made a statement while an officer was serving a nontestimonial identification order on him at the jail, and defendant's statement was thus not rendered inadmissible by the officer's failure to inform defendant of his Miranda rights. *S. v. Young,* 396.

A statement made by defendant to an officer without the presence of counsel was not required to be suppressed under G.S. 15A-279(d) where defendant was not undergoing any nontestimonial identification procedures but was merely being served with an identification order. *Ibid.*

§ 81. Best and Secondary Evidence

The trial court did not err by allowing two notes to be read into evidence where the State later produced the original notes. *S. v. Wingard,* 590.

§ 82. Privileged Communications

A preacher was not incompetent to testify under the priest-penitent privilege. *S. v. West,* 219.

The clergy-communicant privilege did not apply where the witness was not an ordained minister or clergyman at the time defendant confessed to him, and the only purpose of defendant's visit to the witness was to confide in a friend and not to seek spiritual comfort and guidance. *S. v. Barber,* 502.

The trial courts have no discretion to compel disclosure when the clergy-communicant privilege exists. *Ibid.*

CRIMINAL LAW — Continued

§ 85.2. Character Evidence Relating to Defendant; State's Evidence Generally

The trial court did not err in a prosecution for first degree sexual offense and first degree rape by admitting statements by defendant's preacher that defendant was sick and needed help. *S. v. West*, 219.

§ 88.1. Conduct and Scope of Cross-examination

The trial court did not violate defendant's right to confront and cross-examine the State's witnesses by refusing to allow him to cross-examine the child rape victim about prior inconsistent statements she made during the competency voir dire. *S. v. Barber*, 502.

§ 89.3. Credibility of Witnesses; Corroboration; Prior Statements of Witness

The trial court did not err by admitting the testimony of an officer as to the consistency of various statements made to him by a State's witness. *S. v. Jones*, 487.

§ 91. Speedy Trial

The trial judge did not err by denying defendant's speedy trial motion to dismiss. *S. v. Sams*, 230.

§ 91.2. Continuance on Ground of Pretrial Publicity

The trial court did not err by denying defendant's motion for a continuance based on pretrial publicity concerning his effort to avoid a death sentence by pleading guilty. *S. v. Johnson*, 343.

§ 91.6. Continuance on Ground that Certain Evidence Has not Been Provided by State

There was no error in the denial of defendant's motion for a continuance in a prosecution for murder and attempted armed robbery. *S. v. Covington*, 127.

§ 91.11. Speedy Trial; Periods Excluded from Time Computation; Mental Examination

The trial court did not err by denying defendant's speedy trial motion to dismiss because defendant was tried within 120 days of indictment if periods for examination in Dorothea Dix and for response to discovery are excluded. *S. v. Johnson*, 343.

§ 96. Withdrawal of Evidence

Defendant was not prejudiced by the admission of his own nonresponsive answer on cross-examination which related evidence that had been excluded upon his motion in limine where the court allowed defendant's motion to strike and instructed the jury not to consider defendant's answer. *S. v. Cooper*, 141.

§ 97.2. No Abuse of Discretion in not Permitting Additional Evidence

The trial judge did not abuse his discretion in a murder prosecution by refusing to reopen the evidence to permit defendant to play a tape recording of the prosecuting witness's first statement to the police. *S. v. Davis*, 315.

§ 101.4. Conduct or Misconduct Affecting or During Deliberation of Jury

The trial court did not err by denying defendant's motion to reopen the evidence during the jury deliberations. *S. v. Mutakbbic*, 264.

The trial court did not err by denying defendant's motion to inquire of the jury which document not in evidence the jury had inquired about. *Ibid.*

CRIMINAL LAW — Continued

§ 102. Argument of Counsel and Prosecutor; Who Is Entitled to Conclude Argument

The trial court erred in denying defendant's motion in a capital case that both defense counsel be permitted to address the jury during defendant's closing argument at the guilt-innocence phase of the trial. *S. v. Eury,* 511.

The trial court did not err in a prosecution for first degree murder by refusing to allow defense counsel to read and argue to the jury the statute which provides a life sentence if the jury cannot unanimously agree on a sentence recommendation. *S. v. Johnson,* 343.

The trial court erred in a kidnapping prosecution by overruling defendant's objection to the prosecutor's reference in his closing argument to defendant's prior crimes. *S. v. Tucker,* 532.

§ 102.5. Conduct of Prosecutor in Cross-examining Defendant

The trial court did not err by allowing a prosecutor to ask defendant on cross-examination a leading question which attempted to expose a fabricated defense and was not an assertion of personal opinion. *S. v. Mitchell,* 661.

§ 102.6. Particular Conduct and Comments in Jury Argument

The prosecutor's closing argument in a prosecution for murder that defendant killed the victim was a reasonable inference from the evidence. *S. v. Covington,* 127.

The trial judge in a prosecution for kidnapping, rape and robbery did not err by permitting the prosecutor to refer to several knives and a straight razor found in defendants' possession at the time of their arrest. *S. v. Gilliam,* 293.

The State's jury argument referring to the workload of law enforcement officers was not improper. *S. v. Mason,* 283.

The State's argument to the jury on the rights of victims was not of such gross impropriety as would be likely to influence the verdict of the jury. *Ibid.*

The trial court did not err in denying defendant's motion for a mistrial following the State's closing argument. *S. v. Mutakbbic,* 264.

A prosecutor's closing argument in a first degree murder trial was not so grossly improper as to require the trial court to act *ex mero motu. S. v. Hickey,* 457.

The trial court did not err by permitting a prosecutor during opening argument to refer to a codefendant. *S. v. Johnson,* 343.

A prosecutor's reference in his closing argument to a highly sensational contemporaneous event which was not a part of the evidence and his indirect reference to media coverage was inappropriate but did not require the trial court to intervene *ex mero motu. S. v. Jones,* 487.

Comments by the prosecutor during his closing argument insinuating that an armed robbery victim was killed in order to prevent her from identifying defendant as one of the robbers were so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu. S. v. Williams,* 474.

The trial court did not err in a first degree murder prosecution by overruling defendant's objections to statements in the prosecutor's closing argument. *S. v. Wingard,* 590.

§ 102.8. Jury Argument; Comment on Failure to Testify

The State's closing argument did not constitute an impermissible comment on defendant's failure to testify. *S. v. Mason,* 283.

CRIMINAL LAW – Continued

Assuming that the prosecutor's comment during jury argument that defendant was exercising his *Miranda* rights "right now to have this trial before you" and his comments about "uncontradicted evidence" amounted to improper comments on defendant's failure to testify, the court's error in overruling objections to these comments was harmless. *S. v. Barber*, 502.

Portions of the prosecutor's jury argument did not amount to an impermissible comment on defendant's failure to testify but merely referred to his failure to contradict the State's evidence or to produce witnesses to corroborate an alibi. *S. v. Young*, 396.

§ 106.2. Sufficiency of Circumstantial Evidence

The trial court in a prosecution for kidnapping, rape, and possession of stolen goods properly determined that a reasonable inference of defendant's guilt could be drawn from the circumstances and denied defendant's motion to dismiss for insufficient evidence. *S. v. Mercer*, 87.

§ 106.4. Sufficiency of Evidence; Proof of Corpus Delicti

The trial court did not err by refusing to dismiss charges of rape and kidnapping because the State failed to establish the corpus delicti of either crime. *S. v. Johnson*, 343.

§ 111.1. Particular Miscellaneous Instructions

The trial court did not commit plain error in its instructions where the charges against a codefendant were dismissed. *S. v. Sams*, 230.

§ 114.2. No Expression of Opinion by Court in Statement of Evidence

The trial court did not improperly convey an opinion while instructing the jury on possible verdicts by repeatedly reciting one portion of the facts. *S. v. Johnson*, 343.

§ 122.1. Jury's Request for Additional Instructions

The trial court did not abuse its discretion in refusing to reinstruct on second degree murder when it reinstructed on first degree murder upon request by the jury. *S. v. Prevette*, 148.

§ 122.2. Additional Instructions upon Failure to Reach Verdict

The trial judge did not coerce a verdict by instructing the jury in accordance with G.S. 15A-1135(b) when first informed that the jury had reached unanimous verdicts on all but one charge. *S. v. Mann*, 164.

§ 126. Polling the Jury

The trial court did not err by denying defendant's motion to poll the jurors after the verdict to determine whether they had considered particular evidence. *S. v. Mutakbbic*, 264.

§ 135.7. Separate Sentencing Proceeding in Capital Case; Instructions

The trial court did not err in a first degree murder prosecution by instructing the jury that if it found that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficient, that it would be the jury's duty to recommend the death penalty. *S. v. Johnson*, 343.

CRIMINAL LAW — Continued

§ 135.8. Separate Sentencing Proceeding in Capital Case; Aggravating Circumstances

The evidence supported the submission to the jury in a first degree murder prosecution of the possible aggravating circumstance that the crime was especially heinous, atrocious or cruel. *S. v. Johnson,* 343.

Consideration of pecuniary gain as an aggravating circumstance in a robbery-murder case does not violate the Eighth Amendment proscription against cruel and unusual punishment. *S. v. Williams,* 474.

§ 135.9. Separate Sentencing Proceeding in Capital Case; Mitigating Circumstances

The trial court did not err in a prosecution for kidnapping, rape and murder in its instructions on mitigating factors by its conjunctive, simultaneous references to both defendant's intoxication and atypical dissociative disorder. *S. v. Johnson,* 343.

The evidence in a prosecution for kidnapping, rape and murder did not require the trial court to submit the mitigating circumstance of age. *Ibid.*

§ 135.10. Separate Sentencing Proceeding in Capital Case; Review; New Sentencing Hearing

Defendant was entitled to a new sentencing hearing on a first degree murder conviction. *S. v. Johnson,* 343.

§ 138.28. Fair Sentencing Act; Aggravating Factors; Prior Convictions

The trial court did not err by sentencing defendant to more than the presumptive term for second degree murder where defendant had admitted under cross-examination participation in other unprosecuted felonies. *S. v. Moore,* 275.

§ 138.29. Fair Sentencing Act; Other Aggravating Factors

The trial judge did not err when sentencing defendant for soliciting common law robbery by finding as a nonstatutory aggravating factor that defendant set a course of criminal conduct in motion which ultimately resulted in other crimes. *S. v. Mann,* 164.

§ 138.35. Fair Sentencing Act; Mitigating Factors; Immaturity

The trial court did not abuse its discretion when sentencing a seventeen-year-old defendant for second degree murder by refusing to find defendant's age as a mitigating factor. *S. v. Moore,* 275.

§ 165. Exceptions and Assignments of Error to Prosecutor's Argument

Appellate review of a prosecutor's argument for gross impropriety in the absence of an objection at trial is not limited to capital cases. *S. v. Jones,* 487.

§ 169.3. Error in Excluding Evidence Cured by Introduction of other Evidence

There was no prejudice in the penalty phase of a prosecution for kidnapping, rape and murder in the exclusion of a psychiatrist's opinion as to defendant's motive in the killing. *S. v. Johnson,* 343.

§ 178. Law of the Case

The Supreme Court's decision in a prior appeal that defendant's confession was admissible was the law of the case. *S. v. Jackson,* 1.

DECLARATORY JUDGMENT ACT

§ 3. Requirement of Actual Justiciable Controversy

The trial judge properly dismissed for lack of a justiciable controversy a declaratory judgment action in which plaintiffs sought to have declared invalid provisions in notes accepted by plaintiffs for the sale of a newspaper which prohibited competition by plaintiffs. *Sharpe v. Park Newspapers of Lumberton,* 579.

DIVORCE AND ALIMONY

§ 19.5. Modification of Alimony Decree; Effect of Separation Agreements

The trial judge did not err by not modifying a separation agreement which was incorporated into a divorce judgment where defendant presented no evidence that the circumstances of either party had undergone a material change subsequent to the incorporation. *Cavenaugh v. Cavenaugh,* 652.

§ 21.3. Enforcement of Alimony Awards; Evidence and Findings

The trial judge must make findings of fact concerning defendant's ability to carry out the terms of a separation agreement before ordering specific performance. *Cavenaugh v. Cavenaugh,* 652.

The trial court erred by concluding that defendant did not have an adequate remedy at law to collect arrearages under a separation agreement. *Ibid.*

§ 30. Equitable Distribution

The Supreme Court adopted the analytic rather than the mechanistic approach for determining whether proceeds representing a settlement recovered by a spouse upon a claim for his or her personal injury sustained during the marriage constitutes marital property subject to distribution. *Johnson v. Johnson,* 437.

There is no presumption in North Carolina that property acquired during the marriage is marital property. *Ibid.*

EMINENT DOMAIN

§ 5.10. Amount of Compensation; Entitlement to Interest

The legal rate of interest provided by G.S. 136-113 as the measure of additional compensation for delay in payment in condemnation actions is deemed presumptively reasonable, but the landowner may rebut the rate's reasonableness by evidence that the prevailing market rates are higher than the statutory rate. *Lea Company v. N.C. Bd. of Transportation,* 254.

The "prudent investor" standard is adopted for determining the appropriate interest rate to be used in calculating additional compensation for delay of payment in condemnation actions. *Ibid.*

Compound interest rather than simple interest should be allowed for delayed payment in condemnation cases if the evidence shows that during the pertinent period the "prudent investor" could have obtained compound interest in the market place. *Ibid.*

FRAUD

§ 12. Sufficiency of Evidence

Plaintiff's forecast of evidence was insufficient to support claims against four physicians for constructive or actual fraud in concealing from her the alleged fact that X rays taken shortly after her 1974 automobile accident revealed a number of

FRAUD — Continued

fractures which had not been discovered at the time the X rays were taken. *Watts v. Cumberland County Hosp. System*, 110.

Summary judgment was properly granted for defendant on a claim that he assisted plaintiff's physicians in fraudulently concealing from her the true nature of her injuries in an effort to cover up earlier malpractice. *Watts v. Cumberland County Hosp. System*, 321.

HOMICIDE

§ 4.1. First Degree Murder; Poisoning

The trial court was not required to instruct the jury on intent to kill in a prosecution for murder by poisoning because intent to kill was not an element of the crime. *S. v. Johnson*, 193.

§ 15. Relevancy of Evidence

Testimony concerning defendant's statement that he had "unfinished business" in the area to take care of upon his release from prison was relevant on the issue of defendant's intent to kill the victim. *S. v. Prevette*, 148.

There was no error in the trial judge's evidentiary rulings in a first degree murder prosecution. *S. v. Blake*, 632.

The trial court did not err by allowing a witness to define "rollers" as used in a threatening note from defendant to his victim. *S. v. Wingard*, 590.

Defendant failed to show in a first degree murder prosecution that he was prejudiced by the admission of irrelevant testimony that the victim was pregnant. *Ibid.*

§ 15.4. Expert Evidence

The trial court did not err in a prosecution for first degree murder by overriding defendant's objections to the testimony of a pathologist that the victim's wound was not a self-defense type of wound. *S. v. Saunders*, 308.

§ 18. Evidence of Premeditation and Deliberation Generally

The trial court erred in a murder trial which occurred before the effective date of G.S. Ch. 8C by permitting the State's expert to testify that in his opinion defendant was able to form the specific intent to kill, but there was no prejudice because defendant was also convicted on the theory of felony murder. *S. v. Johnson*, 343.

§ 21.5. Sufficiency of Evidence of First Degree Murder

There was sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder by stabbing the victim with a knife. *S. v. Jackson*, 1.

The State presented sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder by suffocation. *S. v. Prevette*, 148.

There was sufficient evidence of deliberation to carry a charge of first degree murder to the jury. *S. v. Saunders*, 308.

§ 21.6. Sufficiency of Evidence of Felony Murder

The trial court properly denied defendant's motions to dismiss in a first degree murder prosecution based on felony murder. *S. v. Vines*, 242.

HOMICIDE — Continued

§ 21.9. Sufficiency of Evidence of Manslaughter

There was sufficient evidence in a prosecution for involuntary manslaughter from which the jury could find that a child's death resulted from having been violently handled or shaken and that defendant was the child's exclusive custodian at the time of the injuries. *S. v. Evans*, 326.

§ 23. Instructions in General

The trial court did not err in a prosecution for first degree murder by denying defendant's request for jury instructions on lesser-included offenses. *S. v. Hickey*, 457.

The trial court did not err in its instructions to the jury in a first degree murder prosecution. *S. v. Blake*, 632.

§ 26. Instructions on Second Degree Murder

The trial court did not err in a prosecution for murder and attempted armed robbery by instructing the jury that defendant could be found guilty of either perpetrating the murder himself or of aiding and abetting another in the perpetration thereof. *S. v. Covington*, 127.

§ 30. Submission of Lesser Offense of Second Degree Murder on Charge of Premeditated and Deliberate Murder

The trial court did not err in a first degree murder prosecution by failing to instruct the jury on second degree murder. *S. v. Davis*, 315.

§ 30.1. Submission of Lesser Offense of Second Degree Murder Committed by Poisoning

The trial court in a prosecution for first degree murder by poisoning did not err by failing to instruct the jury on second degree murder. *S. v. Johnson*, 193.

The trial court did not err in a prosecution for first degree felony murder by refusing to submit to the jury possible verdicts of second degree murder and involuntary manslaughter. *S. v. Vines*, 242.

§ 30.2. Submission of Lesser Offense of Manslaughter

The trial court did not err in a prosecution for first degree murder by failing to submit voluntary manslaughter as a possible verdict. *S. v. Blake*, 632.

§ 30.3. Submission of Lesser Offense of Involuntary Manslaughter

Defendant was not entitled to have involuntary manslaughter submitted to the jury in a prosecution for first degree murder by poisoning. *S. v. Johnson*, 193.

The trial court did not err in a first degree murder prosecution by failing to instruct the jury on involuntary manslaughter. *S. v. Wingard*, 590.

INDICTMENT AND WARRANT

§ 3. Jurisdiction of Grand Jury

Indictments which alleged that both a kidnapping and murder occurred in Buncombe County were valid on their face, and evidence that the murder actually occurred in Ashe County did not raise a fatal variance. *S. v. Vines*, 242.

§ 8.4. Election between Offenses or Counts

The trial court did not err in a first degree murder prosecution by denying defendant's motion to compel the State to disclose prior to trial the theory on which it sought to convict him. *S. v. Wingard*, 590.

INFANTS

§ 17. Juvenile Delinquent; Confessions

The evidence showed that a reasonable person in the sixteen-year-old defendant's position would not have believed that he was free to go or that his freedom of action was not being deprived in a significant way so that defendant was "in custody" when he confessed. *S. v. Smith,* 100.

A juvenile's confession was inadmissible where it resulted from the "functional equivalent" of custodial interrogation initiated by the police in the absence of a parent after the juvenile had invoked his right to have a parent present during questioning. *Ibid.*

INSURANCE

§ 122. Fire Insurance; Conditions

The trial court erred by granting defendant's motion for a directed verdict in an action under a fire insurance policy. *Chavis v. State Farm Fire and Casualty Co.,* 683.

JURY

§ 5.2. Discrimination and Exclusion in Selection

Defendant was not denied his constitutional right to a trial by an impartial jury composed of a fair cross-section of the community. *S. v. Johnson,* 343.

§ 6. Voir Dire Examination Generally; Practice and Procedure

The trial court did not err by not permitting defense counsel to ask prospective jurors how they gauged the importance of the parent-child relationship and whether they could consider evidence of child abuse as a mitigating circumstance for sentencing purposes. *S. v. Johnson,* 343.

The trial court did not err in a first degree murder prosecution by overruling defendant's motion for individual voir dire and sequestration of prospective jurors. *S. v. Wingard,* 590.

§ 7.7. Waiver of Right to Challenge for Cause

A party who has a peremptory challenge available when a challenge for cause is denied must then exercise a peremptory challenge to remove the unwanted juror in order to preserve his right to appeal the unsuccessful challenge for cause. *S. v. Johnson,* 417.

Defendants failed to preserve the denial of challenges of veniremen for appeal. *S. v. Sanders,* 602.

§ 7.11. Disqualification for Scruples against or Belief in Capital Punishment

The trial court in a first degree murder prosecution did not err by denying defendant's motion to prohibit the prosecution from death qualifying the jury. *S. v. Vines,* 242.

The trial court properly excused for cause a potential juror who clearly expressed her feeling that she would be unable to determine the guilt of another regardless of the circumstances. *S. v. Johnson,* 343.

§ 7.12. Disqualification for Scruples against Capital Punishment; What Constitutes Disqualifying Scruples

The trial court did not err by excusing a potential juror who expressed a clear refusal to invoke the death penalty before defendant had the opportunity to question and rehabilitate her. *S. v. Johnson,* 343.

JURY — Continued

§ 7.13. Number of Peremptory Challenges

A defendant tried for first degree murder was entitled to only six rather than fourteen peremptory challenges where the prosecution announced prior to jury selection that it would not seek the death penalty. *S. v. Jackson*, 1.

§ 7.14. Manner of Exercising Peremptory Challenges

The decision of *Batson v. Kentucky*, --- U.S. ---, 90 L.Ed. 2d 69, holding that a defendant can establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at his trial, will not be applied retroactively. *S. v. Jackson*, 1.

The prosecution's use of peremptory challenges to exclude blacks from the jury did not violate defendant's right to a jury drawn from a fair cross-section of the community. *Ibid.*

Defendants failed to show that the prosecutor's use of peremptory challenges to excuse blacks from the venire violated the test set forth in *Swain v. Alabama*, 380 U.S. 202. *S. v. Gilliam*, 293.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

The trial court properly refused to dismiss kidnapping charges for insufficient evidence. *S. v. Tucker*, 532.

§ 1.3. Instructions

The trial court did not commit prejudicial error when it first instructed the jury that the State had to prove that defendant confined or restrained the victim for the purpose of facilitating rape and robbery, then, in response to requests for repeated instructions, included facilitation of flight. *S. v. Mason*, 283.

The trial court committed plain error in a kidnapping prosecution by instructing the jury on restraint when the indictment alleged only removal. *S. v. Tucker*, 532.

§ 2. Punishment

Double jeopardy principles preclude separate punishment for first degree rape and first degree kidnapping where the rape is used to elevate the kidnapping to first degree. *S. v. Mason*, 283.

MASTER AND SERVANT

§ 55.3. Workers' Compensation; Particular Injuries as Constituting Accident

The Industrial Commission's findings justified its conclusion that plaintiff suffered an injury by accident. *Gunter v. Dayco Corp.*, 670.

§ 68. Occupational Diseases

The Industrial Commission's findings and conclusion that a byssinosis plaintiff was partially disabled were without error. *Hendrix v. Linn-Corriher Corp.*, 179.

§ 69. Workers' Compensation; Amount of Recovery Generally

The Industrial Commission erred by awarding a byssinosis plaintiff with a partial disability full compensation for the time he was unable to find gainful employment and a reduced rate for the five weeks he earned minimum wage at a restaurant. *Hendrix v. Linn-Corriher Corp.*, 179.

MASTER AND SERVANT – Continued

§ 73.1. Workers' Compensation; Loss of Vision or of Eye

Plaintiff's eye injury was compensable under G.S. 97-31(24) rather than under Subsections (16) and (19) where plaintiff did not lose the injured eye or suffer any loss of vision. *Little v. Penn Ventilator Co.*, 206.

An award of $2,500 for a serious, permanent eye injury was proper and equitable. *Ibid.*

§ 75. Workers' Compensation; Medical and Hospital Expenses

Awards for expenses for future medical treatments are appropriate when such treatments are required to "effect a cure" or "give relief" even if they will not lessen the period of disability. *Little v. Penn Ventilator Co.*, 206.

Where the Commission found that plaintiff faces a substantial risk of future medical complications from an eye injury, an award of future medical expenses for treatments to monitor his condition was proper. *Ibid.*

§ 95. Workers' Compensation; Right to Appeal or Review

The defendant in a byssinosis action did not waive its right to challenge a determination of partial disability by not preserving exceptions to specific findings of fact by the Deputy Commissioner. *Hendrix v. Linn-Corriher Corp.*, 179.

The defendant in a byssinosis case did not waive its right to challenge the compensability of plaintiff's disease by failing to assign as error a conclusion that plaintiff had a compensable occupational disease. *Ibid.*

§ 97.2. Workers' Compensation; Remand on Ground of Newly Discovered Evidence

The Court of Appeals did not err by denying defendant's motion to remand a byssinosis award for newly-discovered evidence. *Hendrix v. Linn-Corriher Corp.*, 179.

MUNICIPAL CORPORATIONS

§ 30.15. Zoning; Nonconforming Uses Generally

A zoning board of adjustment acted arbitrarily and capriciously in reaching its conclusion allowing a grain storage facility to continue as a "nonconforming situation" where that conclusion was unsupported by the facts found by the board. *Godfrey v. Zoning Bd. of Adjustment*, 51.

§ 30.16. Zoning; Nonconforming Use; Time and Existence of Use

A grain storage facility was not a "nonconforming situation" which could legally be permitted to be continued following a judicial determination that a purported rezoning under which the facility was constructed constituted unlawful spot zoning. *Godfrey v. Zoning Bd. of Adjustment*, 51.

§ 30.17. Zoning; Nonconforming Use; Nature and Extent of Use or Vested Right

The issue of whether landowners acquired a vested right to continue a grain storage facility as a nonconforming use was not presented in this appeal. *Godfrey v. Zoning Bd. of Adjustment*, 51.

§ 31. Zoning; Judicial Review in General

Landowners could properly challenge a zoning amendment through a declaratory judgment action and were not required to attempt to obtain injunctive relief. *Godfrey v. Zoning Bd. of Adjustment*, 51.

NARCOTICS

§ 4. Sufficiency of Evidence

The evidence of trafficking in marijuana was sufficient to support a reasonable inference that defendant was a participant in the planning of the crime and the transportation of the marijuana. *S. v. Diaz*, 545.

§ 4.3. Sufficiency of Evidence of Constructive Possession

There was substantial evidence that defendant was in constructive possession of marijuana growing in a field behind his house. *S. v. Beaver*, 643.

§ 5. Verdict

The trial court erred in a prosecution for trafficking in marijuana by denying defendant's motion to set aside the verdict. *S. v. Diaz*, 545.

NEGLIGENCE

§ 6.1. Application of Res Ipsa Loquitur

The trial court properly directed a verdict for defendant in an action to recover for damages suffered when a camper top came off defendant's pickup truck and struck plaintiff's vehicle. *Sharp v. Wyse*, 694.

PARENT AND CHILD

§ 2.2. Child Abuse

There was sufficient evidence in a prosecution for involuntary manslaughter from which the jury could find that a child's death resulted from having been violently handled or shaken and that defendant was the child's exclusive custodian at the time of the injuries. *S. v. Evans*, 326.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 16.1. Sufficiency of Evidence of Malpractice Generally

Plaintiff's forecast of evidence was insufficient to support claims against four physicians for constructive or actual fraud in concealing from her the alleged fact that X rays taken shortly after her 1974 automobile accident revealed a number of fractures which had not been discovered at the time the X rays were taken. *Watts v. Cumberland County Hosp. System*, 110.

RAPE AND ALLIED OFFENSES

§ 3. Indictment

An indictment alleging the rape of a "child under the age of 13 years" did not allege a criminal offense for a rape which allegedly occurred before the 1 October 1983 amendment to G.S. 14-27.2. *S. v. Howard*, 140.

§ 4. Relevancy and Competency of Evidence

The trial court erred in a prosecution for second degree rape by admitting the testimony of a physician regarding rape trauma syndrome and statements made to him by the victim and her mother regarding the rape and the victim's subsequent symptoms. *S. v. Stafford*, 568.

RAPE AND ALLIED OFFENSES – Continued

§ 4.1. Competency of Evidence of Improper Acts

There was no prejudicial error in the admission of defendant's admission to his preacher of the purchase of pornographic material and ladies' underwear. *S. v. West*, 219.

§ 6. Instructions

The trial court did not err by instructing the jury that a knife with a three or four-inch blade was a deadly weapon. *S. v. Mason*, 283.

The trial court did not err in instructing the jury that vaginal intercourse is penetration, however slight, of the female's "sex organ" by the male sex organ rather than giving defendant's requested instruction that vaginal intercourse is the slightest penetration of the female "vagina" by the male sex organ. *S. v. Johnson*, 417.

The trial court's instruction in a prosecution for first degree rape and first degree sexual offense that "a knife is a dangerous weapon" did not constitute plain error. *S. v. Young*, 396.

§ 6.1. Instructions on Lesser Degrees of Crime

The trial court in a first degree rape case erred in failing to instruct the jury on attempted first degree rape with respect to one victim. *S. v. Johnson*, 417.

§ 7. Verdict

Double jeopardy principles preclude separate punishment for first degree rape and first degree kidnapping where the rape is used to elevate the kidnapping to first degree. *S. v. Mason*, 283.

§ 19. Taking Indecent Liberties with Child

The trial court did not err in a prosecution for first degree rape and taking indecent liberties by refusing to admit testimony that the victim's grandmother bore animosity for defendant. *S. v. Mutakbbic*, 264.

ROBBERY

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

The State introduced sufficient evidence to permit a rational trier of fact to find beyond a reasonable doubt that defendant committed the offense of armed robbery. *S. v. Hope*, 302.

§ 5.2. Instructions Relating to Armed Robbery

The trial court did not err by instructing the jury that a knife with a three or four-inch blade was a deadly weapon. *S. v. Mason*, 283.

Where an instrument used to commit a robbery appears to be a dangerous weapon and there is no evidence to the contrary, it would be proper to instruct the jury to conclude that the instrument was what it appeared to be, but the jury should not be so instructed if there is evidence that the instrument was not such a weapon. *S. v. Allen*, 119.

The trial court erred in an armed robbery prosecution by instructing the jury that an instrument which appears to be a weapon capable of inflicting a life threatening injury is in law a dangerous weapon. *Ibid.*

ROBBERY — Continued

§ 5.4. Instructions on Lesser Included Offenses

The trial court did not commit egregious error by failing to instruct on common law robbery as a lesser included offense of armed robbery where defendant testified that the gun which he had carried had not been loaded. *S. v. Mitchell,* 661.

RULES OF CIVIL PROCEDURE

§ 4. Process

The trial court erred in granting defendant's motion for summary judgment in an action arising from an automobile accident where the issuance of alias or pluries summonses had tolled the statute of limitations. *Smith v. Starnes,* 613.

SEARCHES AND SEIZURES

§ 15. Standing to Challenge Lawfulness of Search

Defendant lacked standing to seek suppression of tennis shoes seized when his codefendant was arrested because defendant had no possessory interest in the house or room where the shoes were seized and was not present at the house when the codefendant was arrested. *S. v. Sanders,* 602.

§ 35. Scope of Search Incident to Arrest

The trial court did not err by admitting tennis shoes seized when defendant was arrested where the tennis shoes were discovered around the bed where defendant was standing when arrested. *S. v. Sanders,* 602.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

Petitioners could not contest the Department of Human Resources' final decision finding respondent eligible for Medicaid benefits. *Forsyth Co. Bd. of Social Services v. Div. of Social Services,* 689.

UTILITIES COMMISSION

§ 27. Establishment of Rate Base; Test Period

The Utilities Commission did not improperly apply G.S. § 62-133(c) in calculating a water utility's annual operating revenues and expenses. *State ex rel. Utilities Comm. v. The Public Staff,* 26.

§ 35. Property Included in Rate Base; Over Adequate Facilities

The Utilities Commission's conclusion that two-thirds of a water utility's investment in a ¾-ton truck should be excluded from the rate base was supported by the evidence. *State ex rel. Utilities Comm. v. The Public Staff,* 26.

§ 38. Establishment of Rate Base; Current and Operating Expenses

The Utilities Commission in a water utility case improperly included legal fees in the utility's operation expenses where the fees were incurred contesting a penalty. *State ex rel. Utilities Comm. v. The Public Staff,* 26.

The Utilities Commission's decision to exclude from a water utility's cost of service expenditures related to an unsuccessful expansion attempt was supported by substantial evidence. *Ibid.*

§ 57. Judicial Review; Specific Instances where Findings Are Sufficient

The Utilities Commission's findings in a water utility case were sufficient to allow appellate review. *State ex rel. Utilities Comm. v. The Public Staff,* 26.

WORD AND PHRASE INDEX

ACCESSORY BEFORE THE FACT

To murder, indictment and evidence sufficient, *S. v. Sams*, 230.

ADOPTION

Revocation of consent, *In re Terry*, 132.

AGGRAVATING FACTORS

Especially heinous, atrocious or cruel murder, *S. v. Johnson*, 343.

Pecuniary gain, *S. v. Williams*, 474.

Prevention of identification, *S. v. Williams*, 474.

Setting in motion a course of criminal conduct, *S. v. Mann*, 164.

Unprosecuted felony, *S. v. Moore*, 275.

ALIAS OR PLURIES SUMMONS

Statute of limitations, *Smith v. Starnes*, 613.

ANTI-COMPETITIVE PROVISIONS

Sale of newspaper, *Sharpe v. Park Newspapers of Lumberton*, 579.

ARMED ROBBERY

Failure to instruct on common law robbery, *S. v. Mitchell*, 661.

Toy pistol, *S. v. Allen*, 119.

Use of force, *S. v. Hope*, 302.

BEST EVIDENCE RULE

Order in which documents introduced, *S. v. Wingard*, 590.

BITE MARKS

On victim, *S. v. Johnson*, 343.

BLOOD ANALYSIS

SBI lab report admissible, *S. v. Acklin*, 677.

BYSSINOSIS

Partial disability, *Hendrix v. Linn-Corriher Corp.*, 179.

CAMPER TOP

Detached from pickup, *Sharp v. Wyse*, 694.

CHALLENGE FOR CAUSE

Review of denial—
- necessity for peremptory challenge, *S. v. Johnson*, 417.
- necessity for renewal of challenge, *S. v. Sanders*, 602.

CHILD

Death from violent handling or shaking, *S. v. Evans*, 326.

CLERGY-COMMUNICANT PRIVILEGE

Inapplicable, *S. v. Barber*, 502.

CONDEMNATION

Interest for delay in payment, *Lea Company v. N.C. Bd. of Transportation*, 254.

CONFESSION

Defendant not deprived of freedom, *S. v. Johnson*, 343.

Interview at home without *Miranda* warnings, *S. v. West*, 219.

Law of the case on admissibility, *S. v. Jackson*, 1.

Statement during service of nontestimonial identification order, *S. v. Young*, 396.

CONSTRUCTIVE FRAUD

By physicians, *Watts v. Cumberland County Hosp. System*, 110.

CONSTRUCTIVE POSSESSION

Marijuana growing in field, *S. v. Beaver*, 643.

CORPUS DELICTI

Evidence in rape and kidnapping trial, *S. v. Johnson*, 343.

COUNSEL, RIGHT TO

Conversation not initiated by officer after invocation of, *S. v. Young*, 396.

Nonindigent defendant, *S. v. Carroll*, 136.

Waiver at sentencing hearing not voluntary, *S. v. Carroll*, 136.

COVENANT NOT TO COMPETE

Sale of newspaper, *Sharpe v. Park Newspapers of Lumberton*, 579.

CROSS-EXAMINATION

Leading question rather than assertion of personal opinion, *S. v. Mitchell*, 661.

CUSTODIAL INTERROGATION

Defendant not subjected to, *S. v. Young*, 396.

DISCOVERY

Criminal records of State's witnesses, *S. v. Wingard*, 590.

DOUBLE JEOPARDY

Kidnapping and rape, *S. v. Mason*, 283.

Mistrial in prior case, *S. v. Lachat*, 73.

Murder and kidnapping, *S. v. Prevette*, 148.

State's announcement of intent to proceed on lesser charge, *S. v. Hickey*, 457.

Unequivocal arraignment on lesser offense, *S. v. Jones*, 489.

EQUITABLE DISTRIBUTION

Personal injury settlement, *Johnson v. Johnson*, 437.

EXCITED UTTERANCE

Statement of bystander to murder, *S. v. Wingard*, 590.

EYE INJURY

Workers' compensation, *Little v. Penn Ventilator Co.*, 206.

FIRE INSURANCE

Refusal to authorize access to bank records, *Chavis v. State Farm Fire and Casualty Co.*, 683.

FRAUDULENT CONCEALMENT

By marriage and family counselor, *Watts v. Cumberland County Hosp. System*, 321.

By physicians, *Watts v. Cumberland County Hosp. System*, 110.

GRAIN STORAGE FACILITY

Nonconforming situation, *Godfrey v. Zoning Bd. of Adjustment*, 51.

HAIR ANALYSIS

SBI lab report admissible, *S. v. Acklin*, 677.

IMMUNITY

Motion to dismiss for grant of, *S. v. Vines*, 242.

INDICTMENT

Rape of child under the age of thirteen years, *S. v. Howard*, 140.

INDIGENT

Defendant not, *S. v. Carroll*, 136.

INFAMOUS CRIME

Solicitation to commit common law robbery, *S. v. Mann*, 164.

INFAMOUS CRIME—Continued

Transmitting unsigned threatening letters, *S. v. Glidden*, 557.

INSECTICIDE

Murder with, *S. v. Johnson*, 193.

INSTRUCTIONS

Additional on failure to reach verdict, *S. v. Mann*, 164.

INTEREST

Delay in condemnation payment, *Lea Company v. N.C. Bd. of Transportation*, 254.

INTOXICATION BY DRUGS

Instruction not given, *S. v. Johnson*, 343.

INVOLUNTARY MANSLAUGHTER

Failure to instruct on in murder case, *S. v. Hickey*, 457; *S. v. Wingard*, 590; *S. v. Blake*, 632.

Violent handling or shaking of child, *S. v. Evans*, 326.

JEWELRY

Stolen from kidnapping and rape victim, *S. v. Mercer*, 87.

JURY

Appellate review of denial of challenge for cause, *S. v. Johnson*, 417; *S. v. Sanders*, 602.

Challenge for cause for refusal to determine guilt of another, *S. v. Johnson*, 343.

Death qualified, *S. v. Johnson*, 193; *S. v. Vines*, 242; *S. v. Jones*, 489; *S. v. Wingard*, 590; *S. v. Sanders*, 602.

Individual voir dire and sequestration denied, *S. v. Wingard*, 590.

Peremptory challenges of blacks, *S. v. Jackson*, 1; *S. v. Gilliam*, 293.

JURY—Continued

Question concerning child abuse during voir dire, *S. v. Johnson*, 343.

Underrepresentation of blacks on jury list, *S. v. Johnson*, 343.

JURY ARGUMENT

Both defense counsel in capital case, *S. v. Eury*, 511.

Comments on defendant's failure to testify not prejudicial, *S. v. Barber*, 502.

Conscience of the community, *S. v. Hickey*, 457.

Other offenses, *S. v. Tucker*, 532.

Prosecutor's reference to codefendant in opening, *S. v. Johnson*, 343.

Reference to sensational event outside evidence, *S. v. Jones*, 489.

Rights of victims, *S. v. Mason*, 283.

State's case uncontradicted not comment on failure to testify, *S. v. Mason*, 283; *S. v. Young*, 396.

That defendant killed the victim, *S. v. Covington*, 127.

Work load of law officers, *S. v. Mason*, 283.

JUVENILE

Right to have parent present during questioning, *S. v. Smith*, 100.

KIDNAPPING

Instruction on restraint when indictment alleged removal, *S. v. Tucker*, 532.

Removal from truck to commit rape, *S. v. Tucker*, 532.

KNIVES

Instruction that knife was deadly weapon, *S. v. Mason*, 283.

Not identified by victim, *S. v. Gilliam*, 293.

LAW OF THE CASE

Admissibility of confession, *S. v. Jackson*, 1.

LETTERS

Transmitting threatening as misdemeanor, *S. v. Glidden*, 557.

LIBRARY

Construction dispute at U.N.C., *Bolton Corp. v. T. A. Loving Co.*, 623.

MARIJUANA

Disjunctive instruction and ambiguous verdict, *S. v. Diaz*, 545.

Growing in field, *S. v. Beaver*, 643.

Unloading trawler, *S. v. Diaz*, 545.

MARITAL PROPERTY

Personal injury settlement, *Johnson v. Johnson*, 437.

MEDICAID BENEFITS

Standing of local agency to appeal award, *Forsyth Co. Bd. of Social Services v. Div. of Social Services*, 689.

MEDICAL EXPERT

Refusal to appoint, *S. v. Johnson*, 193.

MEDICAL MALPRACTICE

Fraudulent concealment by physicians, *Watts v. Cumberland County Hosp. System*, 110; by family counselor, *Watts v. Cumberland County Hosp. System*, 321.

MENTAL CAPACITY TO STAND TRIAL

No obligation to conduct inquiry ex mero motu, *S. v. Carroll*, 136.

MINE SHAFT

Murder victim pushed down, *S. v. Vines*, 242.

MIRANDA WARNINGS

Interview at home without, *S. v. West*, 219.

MIRANDA WARNINGS – Continued

Unnecessary where defendant not interrogated, *S. v. Young*, 396.

MISTRIAL

Murder case, necessity for findings, *S. v. Lachat*, 73.

MITIGATING FACTORS

Age of defendant in murder case not considered, *S. v. Moore*, 275; *S. v. Johnson*, 343.

Conjunctive instruction on intoxication and emotional disturbance, *S. v. Johnson*, 343.

MOTION TO REOPEN EVIDENCE

During jury deliberations denied, *S. v. Mutakbbic*, 264.

To play tape recording denied, *S. v. Davis*, 315.

MOTIVE

Psychiatrist's opinion as to, *S. v. Johnson*, 343.

MURDER

Accessory before the fact, *S. v. Sams*, 230.

Argument on effect of jury disagreement on death sentence, *S. v. Johnson*, 343.

Election between theories not required, *S. v. Wingard*, 590.

Ex-lover's boyfriend, *S. v. Davis*, 325.

Expert testimony on intent, *S. v. Johnson*, 343.

N.C. State student, *S. v. Jackson*, 1.

Number of peremptory challenges, *S. v. Jackson*, 1.

Pathologist's testimony that wound not self-defense type, *S. v. Saunders*, 308.

Poisoning, *S. v. Johnson*, 193.

Premeditation and deliberation evidence sufficient, *S. v. Jackson*, 1; *S. v. Prevette*, 148; *S. v. Saunders*, 308.

Suffocation, *S. v. Prevette*, 148.

MURDER – Continued

Testimony that victim pregnant, *S. v. Wingard*, 590.

"Unfinished business" statement by defendant, *S. v. Prevette*, 148.

Victim pushed down mine shaft, *S. v. Vines*, 242.

NEWSPAPER

Covenant not to compete in sale of, *Sharpe v. Park Newspapers of Lumberton*, 579.

NONCONFORMING SITUATION

Grain storage facility, *Godfrey v. Zoning Bd. of Adjustment*, 51.

NONTESTIMONIAL IDENTIFICATION ORDER

Statement during service of, *S. v. Young*, 396.

OPENING ARGUMENT

Reference to codefendant, *S. v. Johnson*, 343.

OTHER OFFENSES

Admission harmless error, *S. v. McKoy*, 519.

Competent to show identity, *S. v. Johnson*, 417; to show will overcome by fear, *S. v. Young*, 396.

Improperly argued by prosecutor, *S. v. Tucker*, 532.

PEREMPTORY CHALLENGES

Removal of black veniremen, *S. v. Jackson*, 1; *S. v. Gilliam*, 293.

POISON

Murder by, *S. v. Johnson*, 193.

POLLING OF JURY

To determine consideration of certain evidence, *S. v. Mutakbbic*, 264.

PRETRIAL PUBLICITY

Continuance denied, *S. v. Johnson*, 343.

PRETRIAL STATEMENTS

Opinion of officer on consistency, *S. v. Jones*, 487.

PRIEST-PENITENT PRIVILEGE

Not applicable, *S. v. West*, 219.

PRIOR INCONSISTENT STATEMENTS

Cross-examination not unduly limited, *S. v. Barber*, 502

PRIVATE INVESTIGATOR

Denial of funds for, *S. v. Hickey*, 457.

RAPE

Admission of purchase of pornography and ladies' underwear, *S. v. West*, 219.

Animosity of grandmother for defendant, *S. v. Mutakbbic*, 264.

Child under thirteen, indictment for, *S. v. Howard*, 140.

Ex-husband, *S. v. Young*, 396.

Instruction defining vaginal intercourse, *S. v. Johnson*, 417.

Knife as dangerous weapon, *S. v. Young*, 396.

Minister's statement that defendant sick, *S. v. West*, 219.

Six-year-old victim, *S. v. Barber*, 502.

Telephone conversation with hysterical victim, *S. v. Cooper*, 141.

Wendover rapist, *S. v. Johnson*, 417.

RAPE TRAUMA SYNDROME

Inadmissible, *S. v. Stafford*, 568.

REOPENING EVIDENCE

Motion during jury deliberations, *S. v. Mutakbbic*, 264.

To play tape recording denied, *S. v. Davis*, 315.

RES IPSA LOQUITUR

Camper top detached from pickup in motion, *Sharp v. Wyse*, 694.

ROLLERS

Reference to police, *S. v. Wingard*, 590.

SBI LAB REPORTS

Hair and blood analysis admissible, *S. v. Acklin*, 677.

SENTENCING

Instruction on weighing aggravating and mitigating circumstances, *S. v. Johnson*, 343.

Waiver of counsel, *S. v. Carroll*, 136.

SEPARATION AGREEMENT

Adequate remedy at law, *Cavenaugh v. Cavenaugh*, 652.

Failure to find ability to pay, *Cavenaugh v. Cavenaugh*, 652.

SETTLEMENT

Ratification of insurer's, *Bolton Corp. v. T. A. Loving Co.*, 623.

SPEEDY TRIAL ACT

Prior order granting continuance, *S. v. Sams*, 230.

Time for mental examination and discovery, *S. v. Johnson*, 343.

STATE OF MIND

Telephone conversation admissible to show, *S. v. Cooper*, 141.

STATUTE OF LIMITATIONS

Alias or pluries summons, *Smith v. Starnes*, 613.

SUMMONS

Failure to deliver to sheriff within thirty days, *Smith v. Starnes*, 613.

TAPE RECORDING

Found close to defendant's house, *S. v. West*, 219.

TEETH

Cast of defendant's admissible, *S. v. Johnson*, 343.

TELEPHONE CONVERSATIONS

Admissible to show state of mind, *S. v. Cooper*, 141.

Hearsay, *S. v. Johnson*, 343.

TENNIS SHOES

Seized incident to arrest, *S. v. Sanders*, 602.

THREATENING LETTERS

Not infamous offense, *S. v. Glidden*, 545.

VAGINAL INTERCOURSE

Instruction defining, *S. v. Johnson*, 417.

VENUE

Kidnapping and murder in separate counties, *S. v. Vines*, 242.

VERDICTS

Additional instructions on failure to reach, *S. v. Mann*, 164.

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Construction dispute, *Bolton Corp. v. T. A. Loving Co.*, 623.

WATER UTILITY

Cost of unsuccessful expansion attempt, *State ex rel. Utilities Comm. v. The Public Staff*, 26.

Legal fees for contesting fine not operating expense, *State ex rel. Utilities Comm. v. The Public Staff*, 26.

Transfer of stock, *State ex rel. Utilities Comm. v. The Public Staff*, 26.

WATER UTILITY—Continued

Truck partially excluded from rate base, *State ex rel. Utilities Comm. v. The Public Staff*, 26.

WITNESSES

List of State's, *S. v. Covington*, 127.

WORKERS' COMPENSATION

Eye injury, *Little v. Penn Ventilator Co.*, 206.

Future medical expenses, *Little v. Penn Ventilator Co.*, 206.

WORKERS' COMPENSATION —Continued

Injury while learning new job, *Gunter v. Dayco Corp.*, 670.

Meaning of "relief," *Little v. Penn Ventilator Co.*, 206.

ZONING

Grain storage facility not nonconforming situation, *Godfrey v. Zoning Bd. of Adjustment*, 51.

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina