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SUPREME COURT OF NORTH CAROLINA

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OF
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ORDERS OF THE COURT

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

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

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

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

GEORGE HEATH WHITAKER ..... Apex

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

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

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Executive Secretary
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The State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

LEWIS W. DONAVANT v. ALLEN S. HUDSPETH, M.D.

No. 429PA85

(Filed 29 August 1986)

1. **Evidence § 29.3— hospital records—no admissibility under business records exception to hearsay rule**

In a medical malpractice action the Court of Appeals erred in holding that hospital records were admissible as substantive evidence under the business records exception to the hearsay rule where the part of the records objected to, that "[Defendant] apparently was concerned about the possibility" that veins implanted during heart bypass surgery on plaintiff had been put in incorrectly, was not based on firsthand knowledge of the preparer and the contested record itself did not clearly indicate that defendant had expressed such a concern to the author of the report. Furthermore, the author of subsequent reports which repeated the objectionable information stated that his source was the first report, which was shown to have been prepared based upon information from unidentified sources other than the only possible non-hearsay source, defendant, and the subsequent reports were therefore inadmissible.

2. **Evidence § 34.6— statement by physicians to another physician—no exception to hearsay rule**

A statement made by one physician to another regarding the non-testifying physician's observations of the patient and statements by yet a third physician regarding his concerns about the patient's condition did not come within the hearsay exception of statements made by a patient to a treating physician.

3. **Partnership § 1— doctors working together not partners—statement by one not admission of other**

Though another doctor and defendant worked for the same hospital and worked together as a team, and both treated plaintiff, they were not partners, and statements made by the other doctor were thus not admissible as a vicarious admission of defendant.

4. **Evidence § 50— information obtained from fellow physician—insufficient basis for expert opinion**

Though medical information obtained from a fellow physician who has treated the same patient is sufficiently reliable to be used by a testifying physician as a partial basis for his expert opinion, such information is not independently admissible into evidence.

5. **Evidence § 33— hearsay evidence not falling within recognized exception—admissibility**

The requirement that hearsay evidence not falling within a recognized exception to the hearsay rule and offered because of necessity and a reasonable possibility of truthfulness may be resorted to only when more probative evidence on the point cannot be procured through reasonable efforts is a salutary rule and applies to hearsay evidence offered in a trial conducted prior to the effective date of the N. C. Rules of Evidence.

6. **Physicians, Surgeons and Allied Professions § 15.1— expert opinion—basis—information from another doctor**

Facts and data known to and provided by other health care professionals to physicians may be considered reliable and may be used by the physician in forming his expert opinion, but the opinion must be one formed by the physician relying on his personal knowledge and expertise; therefore, the trial court in a medical malpractice action properly excluded any statement by plaintiff's expert medical witness regarding an opinion based solely on the statement of another doctor because at that time the witness had not in fact formed an independent opinion but had merely adopted an opinion allegedly formed by another cardiologist.

7. **Physicians, Surgeons and Allied Professions § 15.1— expert opinion—statement by one doctor to another as basis—unreliability of information**

Although generally statements by one treating physician to another are inherently reliable and may be used as the basis for an expert opinion and are admissible in evidence to show the basis for the expert opinion, when the trial judge determines on *voir dire* that the source of the physician's statement is in fact unreliable, he may exclude the statement as evidence for any purpose.

Justice MARTIN concurring.

DEFENDANT'S petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 75 N.C. App. 321, 330 S.E. 2d 517 (1985) was allowed 19 September 1985.

In this medical malpractice action, the plaintiff alleges, *inter alia*, that the defendant surgeon negligently sutured vein grafts in backwards (unreversed) during coronary artery bypass surgery, causing four of the five grafts to become occluded (blocked) shortly after the surgery, resulting in pain and disability and necessitating repeat bypass surgery. From a judgment entered by

Judge Long in Forsyth County Superior Court on 28 July 1983 upon a jury verdict in favor of the defendant, the plaintiff appealed to the Court of Appeals. The Court of Appeals reversed and ordered a new trial. Heard in the Supreme Court on 12 February 1986.

Young, Haskins, Mann, Gregory & Young, by Robert W. Mann, and Cofer and Mitchell, P.A., by Eddie C. Mitchell, for plaintiff-appellee.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by J. Robert Elster, Michael L. Robinson and J. Stephen Shi, for defendant-appellant.

BILLINGS, Justice.

In March of 1979, the plaintiff, then aged 43, consulted Dr. Joseph Gaddy, a cardiologist in Winston-Salem, because of chest pain (angina). Dr. Gaddy referred the plaintiff to Dr. Fred Kahl, a cardiologist at North Carolina Baptist Hospital in Winston-Salem, for tests to determine whether coronary bypass surgery was indicated. Dr. Kahl concurred with Dr. Gaddy that the bypass operation was appropriate.

Dr. Kahl recommended the defendant, a surgeon at North Carolina Baptist Hospital, to perform the surgery. The seven-and-one-half-hour bypass procedure was performed on 29 March 1979. Dr. Kahl did not attend or participate in the surgical procedure. Shortly after the surgery was completed, Dr. Kahl was called to the hospital where he performed a cardiac catheterization on the plaintiff. A cardiac catheterization is a procedure within the peculiar expertise of cardiologists and results in angiogram films, a type of X-ray moving picture of the bypass grafts. These films were reviewed by Dr. Kahl and the defendant and on 2 October 1979 were acquired by Dr. Gaddy who mailed them to Dr. Usher, a cardiologist in South Carolina. The films apparently were lost when Dr. Usher mailed them back to Dr. Gaddy addressed to Baptist Hospital and as a result were not available for trial. The parties stipulated that the films were lost and that neither party contends that the other intentionally lost or destroyed them. By 6 June 1979 when another cardiac catheterization was performed, three of the five grafts had become occluded. According to the plaintiff's evidence, in 1982 four of the five grafts were occluded

and the plaintiff was again operated on by a surgeon in Milwaukee, Wisconsin. Also according to the plaintiff's evidence, at the time of trial he was permanently and totally disabled to work although the second bypass procedure was successful and his health was slowly improving.

Plaintiff offered testimony by Dr. Gaddy that Dr. Gaddy had reviewed the angiogram films taken on the evening after the first bypass procedure and that in his opinion the films showed that the veins had been put in "backwards" or "unreversed"; that is, in such a way that the valves in the veins, if competent, would obstruct the blood flow to the heart.

Dr. Dudley Johnson, a cardiac surgeon who in 1982 performed the second bypass procedure on the plaintiff, testified that in his opinion the vein grafts had been sewn in in an unreversed fashion during the 29 March 1979 bypass and that the failure properly to reverse the grafts contributed to the grafts' closing.

The defendant denied that the veins were sewn in backwards or that he was ever concerned that they might have been sewn in backwards. The defendant also offered evidence to the effect that to sew in backwards a vein with incompetent or nonoperating valves would not make any difference since such valves would not obstruct blood flow.

The parties agreed to a nine-member majority verdict. The jury, by a nine-to-two vote (the record does not indicate why there were only eleven members on the jury) rendered a verdict in favor of the defendant on the liability issue.

The plaintiff assigns as error the rulings of the trial judge that certain evidence offered by the plaintiff was inadmissible. The proffered evidence consisted of the following:

1. Testimony by Dr. Gaddy regarding the substance of a telephone conversation between Dr. Gaddy and Dr. Kahl concerning the plaintiff two or three days after the 29 March 1979 bypass surgery. Dr. Gaddy would have said that Dr. Kahl told him that the post-surgery cardiac catheterization was done because of concern that the veins had been placed in backwards; that although the catheterization showed that the veins were indeed in backwards, because the veins were incompetent and the blood flow was ade-

quate, Dr. Kahl and Dr. Hudspeth decided not to risk reoperation.

2. One sentence from each of six reports or letters contained in the hospital records relating to the plaintiff as follows:

   A. In a report of the results of the 29 March 1979 cardiac catheterization, prepared by "Lynn Orr, M.D. for Frederic R. Kahl, M.D.," and signed by Dr. Kahl, a sentence stating that "The patient did well both intra and postoperatively, but Dr. Hudspeth apparently was concerned about the possibility that the saphenous vein grafts had been sutured in unreversed, and for this reason this emergency procedure was performed."

   B. In a letter dated 2 April 1979 from Dr. Kahl to Dr. Gaddy, a statement that "Because of concern that the saphenous vein grafts were not reversed when they were inserted, Dr. Hudspeth asked me to perform a repeat arteriogram immediately after surgery."

   C. In an 11 June 1979 letter from Dr. Kahl to Dr. Gaddy reporting the results of a 4 June 1979 admission and 6 June 1979 cardiac catheterization, a statement in the history portion of the letter that:

      "Because of the question about whether the vein grafts had been reversed at the time of surgery, he underwent selective graft angiography several hours following his surgery and all grafts were patent and each of the 5 vessels bypassed were seen."

   D. A part of a history of present illness in an admission history and report of physical examination on 4 June 1979 signed by Dr. Kahl stating: "The patient was evaluated with a second catheterization for coronary angiography on the same day several hours after surgery as there was some question as to whether the veins had been placed with the grafts in reverse position (i.e. with valves obstructing the flow)."

   E. In a report of the 6 June 1979 cardiac catheterization results, a statement, referring to the earlier bypass, that: "The patient did well both intra and postopera-

tively but Dr. Hudspeth apparently was concerned about the possibility that the saphenous vein grafts had been sutured in unreversed and for this reason emergency arteriograms of the bypass grafts were performed on the night of surgery."

F. A portion of a discharge summary following the 4 June 1979 admission, prepared by Dr. Kahl, stating that: "The patient had a five-vessel repair and several hours after his surgery there was some question of whether the veins had been reversed and coronary angiography revealed that there was good flow through all the grafts."

I.

[1] We first consider the holding by the Court of Appeals that the hospital records were admissible as substantive evidence under the business records exception to the hearsay rule. Because this case was tried during the 18 July 1983 session of Forsyth County Superior Court, in considering this question we apply the law of evidence as it existed prior to the 1 July 1984 effective date of the North Carolina Rules of Evidence, N.C.G.S. Chapter 8C.

This Court has long recognized a rule which allows the admission, over an objection based upon the prohibition of hearsay evidence, of hospital records as entries made in the regular course of business. 1 *Brandis on North Carolina Evidence* § 155 (1982). *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962). In *Sims*, this Court stated that the requirements for admission of hospital records are:

> The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam*. The court should exclude from jury consideration matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay.

Id. at 35, 125 S.E. 2d at 329.

The simple fact that a record qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial. *See Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964) (another point in this case was disapproved by *McPherson v. Ellis*, 305 N.C. 266, 287 S.E. 2d 892 (1982)).

The defendant filed a motion *in limine* to prohibit the plaintiffs from tendering the portions of medical records signed jointly or singly by Drs. Orr and Kahl "reciting as 'history' that a cardiac catherization [sic] test was requested on the evening of March 29, 1979, because 'Dr. Hudspeth apparently was concerned about the possibility that the saphenous vein grafts had been sutured in unreversed,' or words to that effect." The grounds for the motion were that Dr. Hudspeth had denied under oath ever saying or even thinking that the veins might have been sewn in unreversed; Dr. Orr testified in deposition that he did not obtain the information from Dr. Hudspeth, Dr. Hudspeth had never made any such statement to him, and Dr. Orr had no personal knowledge of the information contained in the report; and that Dr. Kahl testified under oath that he had no discussions with Dr. Orr about the history portion of the 29 March catheterization report and had no recollection of Dr. Hudspeth stating to him that the catheterization was needed because of concern that the veins might have been put in unreversed. There is no indication in the record of a ruling on the motion *in limine*.

When the matter came on for trial before Judge Long and a jury, the plaintiff tendered Plaintiff's Exhibit 2 which consisted of the unexpurgated medical reports which are the subject of the defendant's objection. Plaintiff's Exhibit 2 was stipulated to be authentic. The trial judge conducted a *voir dire* hearing and sustained the defendant's objection. Thereafter, the medical records, excluding the portions to which the trial court had sustained defense objections, were received into evidence without objection as Plaintiff's Exhibit 3. In addition to the reports prepared by Dr. Orr and Dr. Kahl, the medical records included a discharge summary signed by the defendant from which no deletions were made.

As stated in 1 *Brandis on North Carolina Evidence* § 8, "Except [when the *relevancy* of the proffered evidence depends upon

the existence of some other fact which also requires proof], it is the sole province of the judge to determine preliminary questions of fact upon which admissibility depends." *See also State v. Whitener*, 191 N.C. 659, 132 S.E. 603 (1926); N.C.G.S. § 8C-1, Rule 104(a).

The defendant's position throughout this litigation has been that one of the requirements for admission of the contested portions of the medical records as part of a business record, i.e., that they were made by persons having knowledge of the data set forth and were not hearsay on hearsay, has not been met.

The first of the records which contains reference to a reason for the post-operative catheterization was the report of the results of the catheterization prepared by Dr. Orr. The report stated that "Dr. Hudspeth *apparently* was concerned about the possibility that the saphenous vein grafts had been sutured in unreversed." (Emphasis added.) This phraseology does not clearly indicate that Dr. Hudspeth had expressed such a concern to the author of the report; in fact, if it suggests anything, it is that a concern was *not* expressed by Dr. Hudspeth directly to the author.

According to testimony of Dr. Orr given in a pretrial deposition and received during *voir dire*, on 29 March 1979 he was a second-year fellow in the Section of Cardiology at North Carolina Baptist Hospital. He was on call on that day, which meant that he would help to perform any study that occurred after usual hours, and was not working for anyone in particular. He assisted Dr. Kahl in performing the cardiac catheterization on the plaintiff and prepared the report. He stated that, although he asked the people present in the catheterization lab when he got there what was going on and why they were doing the catheterization, he did not talk to Dr. Hudspeth. He stated that in writing the report he used the word "apparently" because he had not talked to Dr. Hudspeth directly and had not heard Dr. Hudspeth say why the study was being done. He does not recall who told him that there was concern about the position of the vein grafts.

The report states that it was prepared by Lynn Orr, M.D., for Frederic R. Kahl, M.D. and is signed "F. R. Kahl." Dr. Kahl was called by the plaintiff as a witness and testified that he had no independent recollection of talking to Dr. Hudspeth about the

cardiac catheterization. The plaintiff offered no other evidence regarding the method of preparation of the medical records or the source of the statement about Dr. Hudspeth's apparent reason for requesting the catheterization.

Although we agree with the plaintiff that "evidence of practice and a reasonable assumption that general practice was followed in regard to a particular matter," Cleary, *McCormick on Evidence* § 310 (1972), is sufficient to establish *prima facie* that the business record was prepared from personal knowledge, in the case *sub judice* the defendant presented positive evidence that the report in question was prepared by Dr. Orr and that he did not talk with Dr. Hudspeth and had no firsthand knowledge about the reasons for Dr. Hudspeth's requesting the catheterization. The trial judge conducted a *voir dire* hearing on admissibility and after hearing evidence regarding the source of the information contained in the hospital record, ruled that the contested portion of the report was inadmissible. The record does not reflect a request by either party that the trial judge make findings of fact; therefore, he was not required to set out his findings on the preliminary questions necessary to determination of the admissibility of the evidence. N.C.G.S. § 1A-1, Rule 52. In the absence of findings, we presume that the trial judge found the facts consistent with all of the evidence and which support his ruling. *See Fungaroli v. Fungaroli*, 51 N.C. App. 363, 276 S.E. 2d 521, *cert. denied*, 303 N.C. 314, 281 S.E. 2d 651 (1981); *see also State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984).

The trial judge's ruling that the excluded portion of the catheterization report was not rendered admissible by the business record exception to the hearsay rule was proper.

We note that the Court of Appeals stated that "While the reports may have been prepared by an intern or resident, the reports were signed by Dr. Kahl. In the absence of fraud, one who signs a writing is presumed to do so with full knowledge and assent as to its contents." 75 N.C. App. at 324, 330 S.E. 2d at 52. The cases cited by the Court of Appeals as authority have no application to the question presented here. *Williams v. Williams*, 220 N.C. 806, 18 S.E. 2d 364 (1942), holds that in the absence of fraud or a showing that the person who signed a paper writing was willfully misled or misinformed as to its contents, a person

cannot be relieved of the obligations contained in his agreement simply because he was mistaken as to the contents of the writing. In *State v. King*, 67 N.C. App. 524, 313 S.E. 2d 281 (1984) the court said that the rule in civil cases that a person signing a paper writing is presumed to have signed with full knowledge of its contents also applies in criminal cases. Neither of these cases suggests a rule that a person who signs a paper writing is presumed to have firsthand knowledge of facts or data contained in the paper writing; they have no applicability to the question of sufficiency of the evidence necessary for laying the foundation for introduction of business records into evidence against a person who did not sign the records.

Dr. Kahl's signature on the report prepared by Dr. Orr does not alter our conclusion that the trial judge properly excluded the contested portion of the report, for his signing the report in no way conflicts with the positive evidence that the source of the information placed by Dr. Orr in the report was not Dr. Hudspeth.

Regarding the remainder of the medical records and the portions of the histories contained therein which refer to the reason for performing the cardiac catheterization, Dr. Kahl stated that it was correct that the subsequent record, discharge summary and letter to Dr. Gaddy all picked up that same bit of information from that original statement in the March 29, 1979, report and "We repeated it, and evidently, we did not question it, yes."

Here, again, the defendant contends that the information placed in the subsequent medical reports as history was not placed there "by persons having knowledge of the data set forth," *Sims v. Insurance Co.*, 257 N.C. at 35, 125 S.E. 2d at 329, for the author of the letter and reports stated that his source was the first report, which was shown to have been prepared based upon information from unidentified sources other than the only possible non-hearsay source, Dr. Hudspeth.

The plaintiff nevertheless contends that Dr. Kahl was not relying solely on Dr. Orr's report, for aside from the report, Dr. Kahl must have learned from Dr. Hudspeth the reason for the request for the highly-unusual emergency cardiac catheterization almost immediately after bypass surgery.

In Dr. Kahl's letter of 2 April 1979 to Dr. Gaddy, Dr. Kahl states: "Because of concern that the saphenous vein grafts were

not reversed when they were inserted, *Dr. Hudspeth asked me to perform a repeat arteriogram immediately after surgery.*" (Emphasis added.) While this statement does not in fact state that Dr. Hudspeth personally told Dr. Kahl of the reason for the repeat arteriogram, it suggests that he did. If the letter is admissible as a business record because it was contained in the hospital records and Dr. Kahl, the author of the letter, had firsthand knowledge of a statement therein made by Dr. Hudspeth, Dr. Hudspeth's statement in the report would be admissible as a statement of a party opponent, a recognized exception to the hearsay rule. *See* N.C.G.S. § 8C-1, Rule 801(d).

Dr. Hudspeth was called by the plaintiff as an adverse witness. He denied ever being concerned about the possibility of the veins having been sewn in backwards and ever having made a statement suggesting a concern.

The defense called the coordinating supervisor for the operating room who was present during the plaintiff's surgery. She testified before the jury that she remembered no discussion by anyone in the operating room about vessels being possibly reversed.

The nurse anesthetist who attended the plaintiff both during the bypass surgery and during the subsequent cardiac catheterization stated that she left the plaintiff at 7:15 p.m. but was called back to the intensive care unit at about 8:30 p.m. and moved the plaintiff from intensive care to the cardiac catheterization lab. When she got to the cardiac catheterization lab for the catheterization on the plaintiff, Dr. Hudspeth was there. She "did not hear Dr. Hudspeth state a reason why the catheterization was being done." She further testified that: "I did not hear any statement in the catheterization lab either during the catheterization or afterwards about the veins being put in backwards," although she was present with the patient throughout the procedure, and "[d]uring the emergency catheterization, Dr. Hudspeth and Dr. Kahl were there together looking at the film. I heard one of them say 'Everything looks good. There's good flow.' " She also said: "I have never heard Dr. Hudspeth make any statement about why he had a catheterization done on Mr. Donavant on the night of March 29, 1979."

Dr. Kahl, called as a rebuttal witness by the plaintiff, testified that his independent recollection of the events on the night of 29 March 1979 was not clear. He stated:

> The only independent recollection that I have regarding the emergency angiogram that was performed on March 29th was that . . . I was beeped on my radio pager to call the hospital. I spoke with someone in the hospital, and I am not sure who, and obviously was asked to come in and do an emergency cardiac catheterization. My next recollection of that evening is that we were doing or had done the cardiac catheterization on Mr. Donavant, and I was pleased that things went so well and that he had relatively little trouble with the arteriogram and that we were pleased with the results of the arteriogram. *I don't have any independent recollection of talking to Dr. Hudspeth or viewing the films with him.* [Emphasis added.]

Jacqueline Donavant, the plaintiff's wife, testified that following the bypass procedure Dr. Hudspeth came into the waiting room and asked for permission to perform a procedure to find out if the blood was flowing properly, stating to her that one of his concerns was that "In the process of putting these veins in your husband's heart, I am afraid they have been put in backwards." After stating that she gave Dr. Hudspeth permission to do the catheterization and that he said they were going to do it "right away, as soon as possible," she stated that she "looked up, and Dr. Kahl was there."

Dr. Gaddy testified on *voir dire* to a telephone conversation with Dr. Kahl sometime between 30 March and 2 April 1979 in which Dr. Kahl stated that the plaintiff "underwent an emergency catheterization after surgery because of concern that the valves, that the veins were not properly reversed, that they were in backwards so to say." Although in his testimony Dr. Gaddy did not say that Dr. Kahl ascribed any particular statement to Dr. Hudspeth, he gave the following answers to questions on *voir dire* regarding the decision not to re-perform surgery:

> Q. Did Dr. Kahl tell you who was participating with him in the decision making process that you described at the time on the night of surgery?

A. Yes.

Q. Who did he tell you?

A. Dr. Hudspeth.

Thus it appears that there was a factual question which had to be resolved prior to determination of the admissibility of the contested portions of the business records; i.e., whether the entries of those portions ascribing to Dr. Hudspeth a concern about the orientation of the veins were the result of Dr. Kahl's firsthand knowledge of concern expressed by Dr. Hudspeth. The resolution of facts preliminary to admissibility of evidence is within the province of the trial judge. 1 *Brandis on North Carolina Evidence* § 8 and cases cited therein. *See* also N.C.G.S. § 8C-1, Rule 104(a). The trial judge ruled that the contested portions of the medical records were not admissible, but, again, he was not requested to make findings of fact and did not indicate how he resolved the preliminary factual question. "Findings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party." N.C.G.S. § 1A-1, Rule 52 (1983). If no findings of fact are required, the findings which support the trial judge's ruling are deemed implicit in the ruling. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370; *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969). Based upon the presumed finding that Dr. Kahl did not have firsthand knowledge regarding the information contained in the contested portions of the medical reports, we reverse the Court of Appeals' holding that exclusion of those portions of the medical records for substantive use was error.

II.

Turning now to the telephone conversation which Dr. Gaddy testified that he had with Dr. Kahl sometime between 30 March and 2 April 1979, we again note that it is unclear whether in the conversation as described by Dr. Gaddy, Dr. Kahl attributed any statement regarding the vein valve orientation to Dr. Hudspeth. Assuming that we read the description as indicating that Dr. Hudspeth made an admission that the veins were in backwards, the information was offered not by the testimony of Dr. Kahl but through Dr. Gaddy's testimony regarding what Dr. Kahl said. Dr. Kahl does not deny the conversation; he stated that he did not *remember* talking with Dr. Gaddy between 29 March and 2 April.

The question facing the Court is whether Dr. Kahl's hearsay statement is admissible substantively as an exception to the hearsay rule.

If the statements of Dr. Kahl to Dr. Gaddy are admissible as an exception to the hearsay rule, further hearsay attributable to Dr. Hudspeth would be admissible as a statement of a party opponent. Other portions of the statement recite what actions were taken and observations made by Dr. Kahl and do not involve hearsay on hearsay.

The plaintiff contends that Dr. Kahl's statement is substantively admissible for one or more of the following reasons:

A. It was made by one treating physician to another treating physician in the usual course of professional practice solely for medical and diagnosis [sic] purposes.

B. It was a vicarious admission of the defendant.

C. It was a declaration against Dr. Kahl's interest.

D. It is reliable because of sufficient attending circumstantial guarantees of trustworthiness.

[2] In this State the General Assembly now has provided as part of N.C.G.S. § 8C-1, Rule 803(4), that statements made by a patient to his physician[1] for purposes of medical diagnosis or treatment are inherently reliable and therefore admissible through the testimony of the physician. Whether the previous rule was as liberal as is present Rule 803(4) is questionable, *see* 1 *Brandis on North Carolina Evidence* § 161, but even if it was, in the case *sub judice*, the testimony offered through Dr. Gaddy was not a statement made by the patient regarding his condition but was a statement made by one physician to another regarding the non-testifying physician's observations of the patient and statements by yet a third physician regarding his concerns about the patient's condition. This testimony does not come within the hearsay exception of statements made by a patient to a treating physician. *See id.*

1. Rule 803(4) does not limit the permissible testifying recipient of the statement to a treating physician so long as the purpose of the declarant's statement is to obtain medical treatment for himself. *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985).

[3] We also reject the plaintiff's assertion that because the two physicians, Dr. Kahl and Dr. Hudspeth, both treated the plaintiff, Dr. Kahl's statements are admissible as a vicarious admission of Dr. Hudspeth. The case of *Simmons v. Georgiade*, 55 N.C. App. 483, 286 S.E. 2d 596, *rev. denied*, 305 N.C. 587, 292 S.E. 2d 571 (1982), relied upon by the plaintiffs, is not applicable to the facts of this case. In *Simmons*, the Court of Appeals quoted and applied the following from 2 *Stansbury's North Carolina Evidence* § 170 (Brandis Rev. 1973):

> "The extrajudicial declarations of an alleged partner cannot be used (except as against himself) to prove the existence of the partnership . . . or that the declarant was engaged in the firm's business at the time . . . *But if these facts are independently established*, his declarations within the scope of his authority as a partner are admissible against other members of the partnership as well as against himself, in an action between the partnership and an outsider."

55 N.C. App. at 497, 286 S.E. 2d at 605. [Emphasis added by the Court of Appeals.]

In the case *sub judice*, there is no evidence that the defendant and Dr. Kahl were partners[2] or that Dr. Kahl made his statement to Dr. Gaddy within the scope of his authority as a partner. Rather, the evidence was that Dr. Kahl was an Associate Professor of Medicine and Cardiology at Bowman Gray School of Medicine and a staff physician at the North Carolina Baptist Hospital as a cardiologist; that Dr. Hudspeth was on the staff of the North Carolina Baptist Hospital, Cardiothoracic Surgery Section; that Dr. Kahl and the defendant have independent specialties but "work together as a team." The fact that two people work for the same organization and even that they work as a team does not establish a partnership relationship, giving rise to authority of

2. In *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968) this Court extended the rule quoted above to "joint adventurers" as well as partners, accepting the definition of joint venture from *In re Simpson*, 222 F. Supp. 904, 909 (M.D.N.C., 1963) as " 'an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term.' " The evidence in this case does not show that Dr. Kahl and the defendant were "joint adventurers."

one to speak for the other. We therefore find from the evidence no relationship between Dr. Kahl and the defendant which would make statements of Dr. Kahl the vicarious admissions of the defendant.[3]

We also reject the plaintiff's contention that the statements attributed by Dr. Gaddy to Dr. Kahl were declarations against Dr. Kahl's interests. Dr. Kahl was not a party to the action; therefore the admission of his out-of-court statement was dependent upon his unavailability, upon the statement being against his own interests when made, and upon his awareness that the statement was against his interests. 1 *Brandis on North Carolina Evidence* § 147. Dr. Kahl was called as a rebuttal witness by the plaintiff and stated that he had no recollection of the telephone conversation with Dr. Gaddy. We need not decide in this case whether the inability to recall a conversation which Dr. Gaddy said took place made Dr. Kahl "unavailable," for we do not find that the statements contained in the conversation as described by Dr. Gaddy qualify as statements against Dr. Kahl's interests. The substance of the conversation as described by Dr. Gaddy was as follows:

> I was informed by Dr. Kahl that the surgery on Mr. Donavant had gone well, although there had been some degree of delay initially because of having to go from one leg to the other to harvest adequate veins and that the post-surgical, the surgery itself went fine, but that he underwent an emergency catheterization after surgery because of concern that the valves, that the veins were not properly reversed, that they were in backwards so to say. He told me that he underwent the catheterization, that the catheterization showed that all of the grafts were open, all of the grafts had good flow, but that they were indeed not reversed properly, but because of the incompetent veins, it really didn't

3. We can conceive of working arrangements where, although the persons involved are not "partners" or "joint venturers," one person either expressly or impliedly authorizes another to speak for him. We have found no cases recognizing in North Carolina that hearsay statements made by one person impliedly authorized to speak on a subject for another may be received in evidence as an admission of the authorizing person. *See* N.C.G.S. § 8C-1, Rule 801(d)(C). However, we do not need to decide that question, for the evidence in this case does not show that Dr. Hudspeth either explicitly or by implication because of a regular course of dealing authorized Dr. Kahl to speak for him to referring physicians regarding the subject matter of Dr. Hudspeth's treatment of and concern about their mutual patient.

make a difference because of flow. They appeared to flow well, and at that time, the decision was made, since there's flow in all grafts, to just follow the patient as he is rather than go back and reperform surgery and try to find more vein material which had already been difficult to find to begin with.

When asked whether he agreed with the decision not to do anything more, given the results shown on the angiogram, Dr. Gaddy stated: "if the patient's doing well and all grafts are open and there's blood flowing, I think the decision at that time would be to, I thought that was a reasonable decision because I didn't have any basis to say it's good or bad." Thus, the plaintiff's evidence was that another cardiologist, the one who had referred the plaintiff to Dr. Kahl, did not find *Dr. Kahl's* decision subject to criticism. Although the content of the statement suggested that Dr. Hudspeth's performance might be subject to criticism, because the declarant was Dr. Kahl and his performance as described in the statement was "reasonable," it cannot be said that "[t]he fact stated was against the declarant's interest when made, and he was conscious that it was so." *Id.*

[4, 5] Finally, the plaintiff asks that we rule that any statement made by one physician to another regarding treatment of their mutual patient is reliable, i.e., that the physician-to-physician communication establishes "circumstantial guarantees of trustworthiness," N.C.G.S. § 8C-1, Rule 803(24), which justifies reliance on the statement and its substantive use at trial. We note that in the cases decided by this Court applying the evidentiary rules which predated adoption of the North Carolina Rules of Evidence, we consistently stated that when testimony as to information relied upon by an expert is offered to show the basis for the expert's opinion, "it is not offered as substantive evidence." *State v. Huffstetler*, 312 N.C. 92, 107, 322 S.E. 2d 110, 120 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). In recognizing that "medical information obtained from a fellow-physician who has treated the same patient" is sufficiently reliable to be used by a testifying physician as a partial basis for his expert opinion, this Court emphasized that such information "is not independently admissible into evidence," *Booker v. Medical Center*, 297 N.C. 458, 479, 256 S.E. 2d 189, 202 (1979). *See also State v. Wade*, 296 N.C. 454, 464, 251 S.E. 2d 407, 412 (1979) ("We emphasize again that such testi-

mony [content of conversation with defendant to show basis for psychiatrist's opinion] is not substantive evidence."). In requesting that we recognize a general exception to the hearsay rule based upon reliability of physician-to-physician communication, the plaintiff argues that N.C.G.S. § 8C-1, Rules 803(24) and 804(5) are "no more than a codification of the principles of the Common Law theretofore existing generally, and existing particularly in North Carolina." We do not disagree with the plaintiff that even before adoption of the North Carolina Rules of Evidence this Court recognized that the list of recognized exceptions to the hearsay rule was not all inclusive and that other hearsay evidence should be allowed in cases where "necessity and a reasonable probability of truthfulness" were demonstrated. *State v. Vestal*, 278 N.C. 561, 582, 180 S.E. 2d 755, 769 (1971). Even if we were to establish a rule applicable to cases tried before adoption of the North Carolina Rules of Evidence (and therefore possibly applicable only to this case) that physician-to-physician hearsay is sufficiently reliable to justify its use as substantive evidence where necessity is demonstrated, we fail to be convinced of the necessity for its use in the case *sub judice*. "Necessity" as explained in *Vestal* meant " 'some good reasons for not requiring the appearance of the utterer.' " *Id.* In addition to other requirements, both Rule 803(24) and Rule 804(5) require that "the statement [be] more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts," a requirement which minimizes the temptation to rely on hearsay evidence unnecessarily. We believe the requirement that hearsay evidence not falling within a recognized exception to the hearsay rule and offered because of "necessity and a reasonable probability of truthfulness" may be resorted to only when more probative evidence on the point cannot be procured through reasonable efforts is a salutary rule and applies to hearsay evidence offered in a trial conducted prior to the effective date of the North Carolina Rules of Evidence.

Assuming, *arguendo*, that Dr. Kahl was unavailable because of his inability to recall the conversation and that statements by one physician to another regarding past treatment of a mutual patient are sufficiently trustworthy to justify reliance upon their truthfulness, we note that in the case *sub judice*, not only was more probative evidence available of Dr. Hudspeth's concern

about the orientation of the vein grafts, evidence of statements of the concern made by him was actually presented to the jury. Mrs. Donavant testified that Dr. Hudspeth said to her after the bypass surgery and before the cardiac catheterization that,

> "In the process of putting those veins into your husband's heart, I am afraid they have been put in backwards. If that is the case, his heart will not receive the sufficient amount of blood that he needs, because the valves will block the flow of blood . . . . We have to find out. We have to find out right away if these things have been put in this way, because if he is not getting the sufficient amount of blood and oxygen to his heart, we will have to go back in and operate on him."

This is direct evidence that the defendant had expressed a concern about the unreversed position of the veins and that the concern was the reason for requesting a cardiac catheterization—the point which the plaintiff sought to prove by the hearsay statement of Dr. Kahl.

Therefore, evidence more probative of the defendant's concern about the position of the vein grafts than the hearsay statement of Dr. Kahl was available to the plaintiff, and for that additional reason it was not error for the trial judge to exclude the hearsay statement as substantive evidence at trial.

Likewise, we find that use of the portion of the statement attributed by Dr. Gaddy to Dr. Kahl that the angiogram films showed that the veins were unreversed was not "necessary," because more probative evidence of what the films showed, i.e., statements by Dr. Gaddy and Dr. Usher that they had personally reviewed the films and had concluded that they showed unreversed vein grafts, was available and was presented.

Finally, insofar as the statement of Dr. Kahl contained reference to Dr. Hudspeth's reason for requesting the post-operative cardiac catheterization, any presumption of reliability arising from the physician-to-physician communication has been rebutted by the same evidence that established to the trial judge's satisfaction that Dr. Kahl's entries in the medical records were not based upon firsthand knowledge.

III.

We next consider the plaintiff's contention that the excluded portions of the medical records and the substance of the telephone conversation between Dr. Gaddy and Dr. Kahl were admissible as evidence of the basis for the opinion of one of the plaintiff's experts, Dr. Gaddy.

At the time of the trial in this case[4] N.C.G.S. § 8-58.14 (1981) provided as follows:

> Upon trial [an] expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests, [sic] otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Although N.C.G.S. § 8-58.14 does not provide that the party offering the opinion of an expert has a right to place before the jury the otherwise inadmissible facts and data upon which the expert's opinion is based, this Court in *State v. Wade*, 296 N.C. at 462, 251 S.E. 2d at 412 said:

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

As we have already noted, in *Booker v. Medical Center*, 297 N.C. 458, 479, 256 S.E. 2d 189, 202, this Court held that "medical information obtained from a fellow-physician who has treated the

4. N.C.G.S. § 8-58.14 was repealed effective 1 July 1984. 1983 N.C. Sess. Laws Ch. 1037 § 9. Rule 705 of the North Carolina Rules of Evidence contains virtually identical language.

same patient [is] 'inherently reliable' within the meaning of [the rules allowing inadmissible information to be used as a basis for an expert's opinion]." Also, the evidence showed and we take judicial notice of the fact that physicians constantly rely on medical records in making treatment decisions regarding their patients.

The medical records were first tendered as evidence during the plaintiff's examination of Dr. Hudspeth. At that time, Dr. Gaddy had not testified and the records were not offered for the limited purpose of showing the basis for Dr. Gaddy's opinion. The trial judge sustained the defendant's objection to the contested portions of the records.

Later, Dr. Gaddy was called as a witness for the plaintiff. He stated that he uses all the information he can find out about his patients to monitor and treat them. He said that he either called or was called by Dr. Kahl a few days after the plaintiff underwent surgery. When Dr. Gaddy was asked to relate the substance of the telephone conversation, the defendant objected. Again, Dr. Gaddy had not stated an opinion, and the evidence of the telephone conversation with Dr. Kahl was not offered for the purpose of showing the basis for Dr. Gaddy's opinion. Following a *voir dire* examination, the objection was sustained.

Dr. Gaddy then testified before the jury that he had a 15 to 20 minute conversation with Dr. Kahl about the plaintiff and that he subsequently received a letter from Dr. Kahl dated 2 April 1979. The defendant objected to introduction of the previously-excluded portion of the letter and the trial judge conducted another *voir dire*. Dr. Gaddy responded affirmatively to plaintiff's counsel's question on *voir dire*: "Do you rely on the entire contents received in this letter or any other letter *for part of your medical treatment of patients*?" (Emphasis added.) The defendant's objection to the letter was sustained.

Somewhat later the plaintiff attempted to introduce through Dr. Gaddy the 29 March 1979 catheterization report and the reason stated therein for the catheterization. Again, the offer was not limited, and Dr. Gaddy had not indicated that he had formed an opinion which was based in part upon the report. The defendant's objection was sustained.

The examination of Dr. Gaddy continued, and eventually he stated the following opinion and his bases therefor:

> Based on the testimony of Dr. Usher,[5] the angiograms which I have reviewed, the discourses that I have had with Dr. Usher, hospital records, conversations with Dr. Kahl, and the overall doctor-patient relationship with Mr. Donavant since March of 1979, it is my opinion that Mr. Donavant's veins were sewn in in a non-reversed manner, that is, backwards. It is my opinion to a reasonable degree of medical certainty that this was a very major and very probably the major factor in Mr. Donavant's grafts closing.
>
> . . . .
>
> My impression . . . was that all the veins put in by Dr. Hudspeth were in backwards, including the vein that was still patent and left in by Dr. Johnson when he operated on plaintiff in Milwaukee.

The plaintiff did not ask at that time that the witness further describe the bases for his opinion; neither did he request that previously-excluded evidence be received for the limited purpose of showing the basis for the opinion. *See Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951). Rather, the following exchange took place:

> Q. When did you first form the opinion that you have rendered? When did you first form the opinion that these veins were sewn in without being properly reversed.
>
> MR. ELSTER: Well . . .
>
> THE COURT: Is there an objection?
>
> MR. ELSTER: Yes, sir. I object.
>
> (The jury left the courtroom, voir dire questions were asked, and the matter argued by counsel.)

5. Dr. Usher, a cardiologist at Medical University of South Carolina, examined the angiograms of the postoperative catheterization (which were lost when he mailed them back to North Carolina). Although his testimony is not in the record before this Court, from the plaintiff's brief and the trial judge's instructions to the jury, it is clear that he stated that he formed the opinion that the venous valves in one graft were pointed in the wrong direction, and this apparently is the testimony to which Dr. Gaddy referred.

VOIR DIRE EXAMINATION by Mr. Mann in the absence of the jury: (Witness would have testified as follows:)

EXCEPTION NO. 10

Q. Doctor, when did you first form your opinion?

A. Within the first two or three days after surgery.

Q. As a result of what?

A. As a result of a phone conversation between Dr. Fred Kahl and me.

Q. That was the telephone call that you—

A. I think we—it's the same telephone conversation that I have discussed earlier in which I was told by Dr. Kahl—

Q. You don't have to tell us again, but it's the same one you testified to His Honor outside the presence of the jury?

A. I was told by the cardiologist that I referred to that this is what happened and that's the earliest formulation of my opinion.

Q. Has your opinion been confirmed by the data and supported by all of the data that you've seen since that time?

A. I have seen nothing that changes my opinion.

Q. All right.

COURT: The objection will be sustained.

The jury returned and the record reveals no further questions of Dr. Gaddy during the plaintiff's case in chief.

Although the plaintiff's counsel did not explicitly offer, during the exchange just related, to introduce the substance of the telephone conversation between Dr. Kahl and Dr. Gaddy as the basis for Dr. Gaddy's opinion, it is obvious that such was the purpose for his question. However, the effect of the questions was to allow Dr. Gaddy to express to the jury, not an opinion based upon all of the information identified in his earlier statement, but an opinion based *solely* on his conversation with Dr. Kahl in which, according to Dr. Gaddy, Dr. Kahl had said that a cardiac catheterization had been requested because of a concern that the veins

had been sewn in unreversed and that the resulting angiograms revealed that the veins had indeed been sewn in backwards.

[6] The trial judge properly excluded any statement by Dr. Gaddy regarding an "opinion" based *solely* on the statement of Dr. Kahl, for at that time Dr. Gaddy had not in fact formed an independent opinion but had merely adopted an opinion allegedly formed by another cardiologist. While we have held that *facts and data* known to and provided by other health care professionals to physicians may be considered reliable and may be used by the physician in forming his expert opinion, *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984), we have required that the opinion be one formed by the physician relying "on his personal knowledge and expertise," *State v. Smith*, 315 N.C. 76, 101, 337 S.E. 2d 833, 849 (1985) (applying N.C.G.S. § 8C-1, Rule 703). *See also State v. Mize*, 315 N.C. 285, 337 S.E. 2d 562 (1985) (hospital records including a report by a psychiatrist of observations of the defendant relied upon by second psychiatrist in forming his opinion) (applying N.C.G.S. § 8C-1, Rule 705); *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). In the conversation related by Dr. Gaddy, no facts and data were given to him by Dr. Kahl; Dr. Kahl merely stated a conclusion that the veins were in backwards. His mere statement of a conclusion is an insufficient basis for the formation of an independent opinion by Dr. Gaddy. Therefore, the trial judge did not err in sustaining the defendant's objection to Dr. Gaddy's "opinion" based solely upon the conversation with Dr. Kahl and in excluding the conversation as the basis for that opinion.

Dr. Gaddy was recalled by the plaintiff on rebuttal and testified as follows:

Q. Dr. Gaddy, when you previously testified in this case, you rendered an opinion and cited as the basis for that opinion, a number of things, included among which was a conversation you had some time between March 29 and April 2 with Dr. Kahl. To what extent did you rely on that conversation in rendering your opinion?

A. Significantly.

Q. When did you form the opinion, first form your opinion?

A. The first phone conversation.

Q. I ask you to tell the Court and the jury the substance of that telephone conversation.

MR. ELSTER: Objection, Your Honor. Same grounds.

COURT: Objection's sustained.

If allowed to answer, Dr. Gaddy would have related a conversation which included the following:

> I was told . . . that the surgery went fine, and this patient was doing well, but there was—that an emergency catheterization was performed immediately after surgery because of concern that the valves—the veins were put in, put in such a position that the valves were not reversed properly; that this catheterization was performed; that all grafts were open; that there was good flow; and that, indeed, the valves were in place, were discernible and were in backwards, but were incompetent thereby allowing good flow . . .

We have recited at some length the course of the trial to show that at no time did the plaintiff offer for use in showing the basis for Dr. Gaddy's opinion any of the contested evidence except the telephone conversation between Dr. Kahl and Dr. Gaddy. Therefore, the plaintiff's claim that the trial judge erred in not admitting the medical records for that purpose is overruled. *See State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985); *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 310 S.E. 2d 338 (1984); 1 *Brandis on North Carolina Evidence* § 27 (Supp. 1986).

Also, we note that the plaintiff's offer of the telephone conversation as a partial basis for Dr. Gaddy's opinion occurred during rebuttal and, within the discretion of the trial judge, was excludable as beyond the scope of rebuttal. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911, 64 L.Ed. 2d 264 (1980); *Gay v. Walter*, 58 N.C. App. 360, 283 S.E. 2d 797, *reh. on other grounds*, 58 N.C. App. 813, 294 S.E. 2d 769 (1982); *Castle v. Yates Co.*, 18 N.C. App. 632, 197 S.E. 2d 611 (1973); 6 J. Wigmore, *Evidence* § 1873 (Chadbourn Rev. 1976). However, based upon further questions asked by the trial judge and the statement of defendant's counsel that his objection was on the "[s]ame grounds," it appears that the objection was sustained on the basis that the telephone conversation was hearsay.

The question thus facing this Court is whether information acquired from a presumptively reliable source, such as another treating physician or a medical record, and used by an expert witness in forming an opinion is admissible as the basis for the expert's opinion regardless of the trial court's determination that the particular information was derived from an unreliable source.

[7] We hold that, although generally statements by one treating physician to another are inherently reliable and may be used as the basis for an expert opinion and are admissible in evidence to show the basis for the expert opinion, when the trial judge determines on *voir dire* that the source of the physician's statement is in fact unreliable, he may exclude the statement as evidence for any purpose. If the opinion of the physician testifying as an expert is based solely on the unreliable statement, the physician should not be allowed to state the opinion. If, on the other hand, the opinion is based upon sufficient additional, reliable facts and data, the trial judge may allow the expert to state his opinion notwithstanding his statement that he also relied in part upon unreliable information.

In the case *sub judice*, the unreliability of Dr. Kahl's statement regarding the reason for the emergency catheterization was determined by the trial judge when he excluded portions of the medical records offered under the business records exception to the hearsay rule. Therefore, his exclusion of the similar portion of the telephone conversation as a basis for Dr. Gaddy's opinion also was proper.

A different situation exists with regard to the other portion of the telephone conversation, however, for Dr. Gaddy stated that Dr. Kahl said that he had performed the catheterization and viewed the angiogram and "indeed, the valves were in place, were discernible and were in backwards." While we said earlier in this opinion that one physician may not base his opinion *solely* on the statement of opinion of another physician, when a physician as an expert witness bases an opinion upon reliable information *including* a consistent opinion of another physician, the second physician's opinion is admissible. *See State v. Mize*, 315 N.C. 285, 337 S.E. 2d 562.

In the case *sub judice*, Dr. Gaddy testified that his opinion that the veins were put in backwards was based upon his own re-

view of the angiogram films as well as the consistent testimony of Dr. Usher and the statements of Dr. Kahl. Therefore, if the plaintiff had offered into evidence only that portion of Dr. Kahl's telephone conversation which related his evaluation of the angiogram films, it would have been admissible. However, when an offer of evidence is made, some of which is admissible and some of which is inadmissible, it is not the responsibility of the trial judge to separate the admissible from the inadmissible evidence, and in the absence of an appropriately-limited offer by the proponent of the evidence, the trial judge's ruling excluding the evidence will be upheld on appeal. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E. 2d 395 (1965).

We also have carefully examined the record in this case and conclude that admission of the contested portions of the evidence *for the limited purpose of showing the basis for Dr. Gaddy's opinion* would not likely have changed the result. Dr. Gaddy, like Dr. Kahl, is a cardiologist. He stated that "Reading and interpreting angiograms is one of the primary responsibilities of a cardiologist." He also stated that he had viewed the angiogram films of the 29 March 1979 cardiac catheterization and that "there were definitely vein venous valves which were not oriented in the proper position." Therefore, Dr. Gaddy's opinion was based largely on his firsthand observation of the best evidence of the vein orientation. His opinion was bolstered by similar opinions by Dr. Usher, who also had viewed the angiogram films, by Dr. Johnson, who had performed the second bypass surgery, and by the testimony of Mrs. Donavant that Dr. Hudspeth had personally expressed his concern to her about the vein orientation.

We cannot determine from the verdict whether the jury was unconvinced that the veins were sewn in backwards or whether they believed that, although the veins were backwards, because the valves were "incompetent," the failure to reverse the veins made no difference and the blood flow was not impeded. We do not believe that Dr. Gaddy's opinion would have been rendered more acceptable to the jury if more detailed bases for his opinion had been admitted; however, it is possible that, had the contested evidence been admitted, the jury would have used it to impeach the testimony of Dr. Hudspeth—an improper purpose. Therefore, even if technically admissible for a limited purpose, the evidence could properly have been excluded by the trial judge on the basis

that the probative value for the proper purpose for which it was receivable was outweighed by its prejudicial effect.

This assignment of error is overruled.

IV.

The plaintiff contends that the trial judge erred in sustaining objections to certain questions asked on cross-examination of Dr. Cordell, a witness for the defendant.

Dr. Cordell testified that he had reviewed the medical record in the case and in his opinion "the actions taken by Dr. Hudspeth on March 29, 1979, were in all respects appropriate and well within the local standard of care." He also testified that he was Chairman of the Department of Thoracic and Cardiovascular Surgery at Baptist Hospital and "a long term friend of the defendant Dr. Hudspeth[;] we work together on the staff."

The plaintiff was not allowed to place before the jury the witness's answer to the question "Dr. Cordell, did you ever criticize Dr. Kahl in any way for the record keeping in this case?" If permitted to answer, Dr. Cordell would have stated that he did criticize Dr. Kahl "for not having better information to go into his hospital record."

Also, when Dr. Kahl was called as a rebuttal witness by the plaintiff, the trial judge ruled that plaintiff's counsel could not question him concerning Dr. Cordell's criticism of his record keeping.

The plaintiff contends that evidence that Dr. Cordell criticized Dr. Kahl for his record keeping regarding the patient in the case *sub judice* and regarding a patient of Dr. Cordell's shows that Dr. Cordell was biased because "Dr. Cordell, a key defense witness, obviously did not want anything in any medical record that might be construed helpful to a plaintiff in a subsequent malpractice action." We have reviewed the questions and answers contained in the *voir dire* examinations of Dr. Cordell and Dr. Kahl and do not find therein anything that suggests that Dr. Cordell criticized Dr. Kahl for placing accurate information in his records which would be helpful to a patient in a malpractice action. His criticism regarding the records of the plaintiff related to the inclusion of the information which the trial judge found to be unreliable.

"The extent of cross-examination with respect to collateral matters is largely within the discretion of the trial court." 1 *Brandis on North Carolina Evidence* § 42. We hold that the trial judge did not abuse his discretion in excluding the testimony regarding Dr. Cordell's criticism of Dr. Kahl's record keeping. No question of Dr. Cordell's bias against Dr. Kahl as a witness for the plaintiff is asserted by the plaintiff. Dr. Cordell's bias in favor of the defendant was clearly established by his admission that they were long term friends and co-workers. We agree with the Court of Appeals that exclusion of this evidence was not prejudicial to the plaintiff.

V.

Finally, plaintiff challenges the jury instructions, arguing that the pattern jury instructions were similar to those which this Court disapproved in *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984). Plaintiff concedes that no objection was taken to the instructions as given and that the case was tried prior to the *Wall* decision. By failing to call the trial court's attention to alleged errors in the jury charge, plaintiff has waived his right to appellate review. N.C. R. App. P. 10(b)(2); *Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 317 S.E. 2d 372 (1984).

The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the trial court for reinstatement of the verdict and judgment.

Reversed and remanded.

Justice MARTIN concurring.

I concur in the result reached. Had the case been tried under the new North Carolina Rules of Evidence, Chapter 8C of the General Statutes of North Carolina, I would find the challenged evidence to be admissible.

STATE OF NORTH CAROLINA v. FRANK MORRIS PENLEY

No. 166A85

(Filed 29 August 1986)

1. **Homicide § 16— dying declaration—admissibility**

The trial court in a first degree murder case did not err in admitting as a dying declaration the video tape recording of the victim's identification of defendant, since at the time the victim identified defendant, the victim was in a hospital bed in an intensive care unit, was attached to a ventilator, and was being fed through tubes running through his nose and into his stomach; deceased gave the statement the day before he died; and a witness testified that she heard a nurse ask the victim several days before he died if he knew he was dying and the victim responded affirmatively.

2. **Criminal Law § 73— victim's identification of defendant—subsequent death—admissibility of statements**

Statements made by a murder victim, before he knew of his impending death, in which he identified defendant as the person who shot him possessed circumstantial guarantees of trustworthiness to make them admissible under N.C.G.S. § 8C-1, Rule 804(b)(5) where nothing in the record tended to show that the victim had any motivation to tell anything other than the truth to those investigating the shooting; from the moment he was found until his death, the victim never wavered in his identification of defendant as the man who shot him; and all information contained in the statements complained of was corroborated by the victim's dying declaration or other admissible evidence. Furthermore, the victim's statements identifying the defendant as the man who shot him obviously were offered as evidence of a material fact and were more probative on the point than any other evidence which could be procured by reasonable efforts, and the admission of the statements of the victim served the general purposes of the Rules of Evidence and the interests of justice.

3. **Criminal Law § 73— hearsay testimony—written notice required—court's assumption that requirement was met**

Where the State specifically indicated to the trial court that it was relying *inter alia* on N.C.G.S. § 8C-1, Rule 804(b)(5) in offering into evidence statements by a murder victim, and defendant raised no objection based upon an absence of written notice, it was permissible for the trial court to assume that the statutory requirement of written notice was met.

4. **Criminal Law § 75.9— statement volunteered by defendant—admissibility—detailed specific findings required**

The trial court did not err in allowing into evidence statements defendant made to police officers after he indicated that he wanted an attorney before answering any questions, though the trial court would have been well advised to make detailed specific findings, where an officer's testimony concerning the events surrounding defendant's inculpatory statement was uncontroverted; and the officer's testimony indicated quite clearly and without conflict that, after first indicating that he would exercise his right to counsel, defendant

himself initiated further communication and conversations with the officer and voluntarily waived his rights after they had been fully explained to him.

5. Criminal Law § 75.9— defendant's spontaneous statement—admissibility

The trial court did not err in allowing the State to introduce a statement which defendant made to police after he had retained counsel but without counsel present since the statement in question was spontaneous and no interrogation in any form occurred at the time.

6. Homicide § 23.2— proximate cause of death—requested instructions given in substance—no error

There was no merit to defendant's contention in a murder case that the trial court erred in its instructions to the jury on the question of the proximate cause of the victim's death, since the court agreed to give and did give in substance the instruction on proximate cause requested by defendant.

7. Homicide § 21.2— death resulting from injuries inflicted by defendant—sufficiency of evidence

There was no merit to defendant's contention that the State's evidence was insufficient to support a finding that the gunshot wound allegedly inflicted by defendant was the proximate cause of the victim's death where there was expert medical testimony that the victim died from pneumonia which was directly related to the gunshot wound.

8. Criminal Law § 102— reopening of defendant's argument properly allowed—limitation of argument proper

The trial court did not abuse its discretion in allowing defense counsel to reopen his closing argument to argue six contentions prepared by defendant *pro se* but in denying argument with regard to 17 other contentions which the court found to be either unsupported by the evidence presented, improper subjects for jury argument, or repetitions of defense counsel's arguments made during his closing argument the previous day. N.C.G.S. § 84-14.

9. Constitutional Law § 31— appointment of pathologist—denial of request proper

The trial court's denial of defendant's motions for the appointment of a pathologist or other medical experts was not error, although defendant arguably made a threshold showing of a specific necessity for the assistance of such experts, since defendant was provided with a copy of the autopsy report prepared by the pathologist who performed the autopsy; defendant did not show what, if anything, an additional pathologist could have offered in his defense; he did not show that he was deprived of a fair trial or that he would have been materially assisted in the preparation of his defense had his motions been granted; and defendant had available to him and used ample medical expertise in preparing and presenting his defense. N.C.G.S. §§ 7A-450(b), 7A-454.

10. Criminal Law § 138.14— mitigating factors outweighed by one aggravating factor—finding not erroneous

Defendant did not show that the trial court abused its discretion in finding that the single aggravating factor of prior convictions outweighed the seven mitigating factors found.

11. Criminal Law § 124— verdict sheets improperly filled out—acceptance of verdict proper

The trial court did not err in accepting the jury's verdicts where the verdict sheets returned by the jury had the word "yes" in the space provided for the word "guilty" and the date "1 March 1985" in the space provided for the words "not guilty," since the trial court asked the jury foreman specific questions as to the jury's intent when the verdict sheets were completed; the foreman stated as to each verdict that he put the date in the incorrect space and that he meant nothing other than to indicate the date; the entire jury agreed with the foreman; and the jury was polled and each juror individually agreed with the verdicts as submitted.

APPEAL by the defendant from judgments and commitments entered on 1 March 1985, by *Ferrell, J.*, in Superior Court, CATAWBA County. Heard in the Supreme Court 12 March 1986.

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko and Laura E. Crumpler, Assistant Attorneys General, for the State.

Randy D. Duncan for the defendant-appellant.

MITCHELL, Justice.

The defendant was convicted upon proper indictments for first degree murder, first degree kidnapping and robbery with a firearm. He was sentenced to serve consecutive sentences of life in prison for first degree murder, forty years for first degree kidnapping and forty years for robbery with a firearm.

The defendant appealed the murder conviction and the resulting life sentence to this Court as a matter of right under N.C.G.S. § 7A-27(a). The defendant's motion to bypass the Court of Appeals on his appeal of the kidnapping and robbery convictions was allowed by this Court on 8 April 1985.

By his assignments, the defendant contends that the trial court made many errors. He contends that the trial court erred by permitting the State to introduce a video tape recording of the victim's identification of him from a photographic lineup. He argues that the trial court erred by allowing the introduction of testimony concerning various statements made by the victim, as well as statements made by the defendant while in custody. He contends that the trial court erred in its jury instructions concerning the proximate cause of the victim's death and by denying

the defendant's motion for the appointment of a pathologist. He argues that the trial court erred by finding that his prior convictions were an aggravating factor and that this factor outweighed the mitigating factors. Finally, he contends that the trial court erred by denying his motion to dismiss and by limiting his trial counsel's closing argument. We find no error.

The State's evidence tended to show that around 3:00 p.m. on 23 December 1983, Jones Triplett was traveling down a dirt road leading to his home. He testified that he was looking to the side of the road and saw a man, later identified as Jack Hammond, the victim, lying on the ground. Triplett got out of his car and walked over to the victim. The victim stated, "I have been shot." His coat and the right side of his body were covered with blood. Triplett went to his house, called an ambulance, and then went back and sat with the victim. The victim was lying on his back and said "that it was not his friend but someone else" who shot him and that "it was a small Volkswagen van . . . ." He said that he had been shot at "a cafe . . . Pete's Cafe."

Dan Carlsen testified that he was employed by the Hickory Police Department and was on duty on 23 December 1983. He went to Frye Hospital at approximately 6:00 p.m. where he found the victim in the emergency room being attended by a physician. The victim told Carlsen that he did not know the name of the person who shot him but that Steve, the owner of Pete's, knew the person's name. The victim said that he was shot while walking from his assailant's house to a brown Volkswagen, and that the person who shot him "sold televisions and microwaves."

Steve Lieb testified that he was the manager of Pete's in Hickory. He knew the victim as a patron. On 23 December 1983, the victim arrived at Pete's sometime in the morning and began drinking beer. The defendant was also present drinking beer. Lieb called a taxi for the victim. It arrived "around lunchtime" and he told the victim his taxi had arrived. He did not see the defendant or the victim leave that day. He did see the defendant in Pete's "an hour or so" after the victim's taxi arrived.

Allen Robbins testified that on 23 December 1983, he was employed as a taxi driver for the Yellow Cab Company in Hickory. He testified that "about the middle of the day" he drove his taxi to Pete's and parked. The victim then "came out and got in

the car and then" the defendant "come out and said, 'you don't have to hire a cab, I will take you home.' " The defendant then paid Robbins the fare for his trip to Pete's.

Gary Wayne Lafone testified that on 23 December 1983, he was employed as a criminal investigator with the Hickory Police Department. On the day of the shooting he went to Frye Hospital where he interviewed the victim in the emergency room. The victim was wearing an oxygen mask and "his answers were not long, but in short sentences and was somewhat difficult to understand due to the mask and due to his injuries." The victim stated that he "[l]eft Pete's with a man in a small Volkswagen. Not a van, tan. Was to sell television and microwave. Back in drive behind house. Twenty minute drive from Pete's lunch. Steve Lieb saw man I left with."

On 24 December 1983, Lafone again interviewed the victim in the hospital. The victim again gave a description of his assailant and an account of the events occurring on 23 December 1983. The victim stated:

> We left Pete's in a Volkswagen. It was old brownish color, light tan or brown. It was real old, seventy model, small station wagon. We pulled off the street to the back door. Cement block house. It was in the city. We got to the house and I pulled my rings off and put them in my pocket. He said you don't trust me, do you? I told him that I trusted him . . . I asked him to take me to get my car. I walked out the door and he shot me in the back. I did not have any feelings in my legs and I felt it burning. I asked him to take me to the hospital and he said that he would. He put me in the back of the station wagon and took me to some woods where he put me out. The house was a cement block house.

Lafone testified that on 24 December 1983, the defendant was in custody. The defendant was advised of his Miranda rights, and "[h]e appeared attentive and understood . . . the rights that were read to him." Lafone testified that the defendant requested an attorney and was allowed to make several telephone calls. The defendant was unable to contact the attorney he desired. The defendant then said, "Who says that I did any of those things" while pointing to the warrants. Lafone advised the defendant that he could not answer his questions and would not talk to him without

an attorney. The defendant then stated that he did not want an attorney and signed a waiver of rights form.

The defendant first denied any knowledge of the incident. He then admitted to being at Pete's and paying the victim's taxi fare but denied leaving with the victim. He then stated that he and "Sonny" Burwell were at Pete's where they met the victim. The victim asked them to take him to the police station to get his car. The defendant told Lafone:

> [w]e all got in the car and left. I thought he was too drunk to . . . get his car so I asked if he wanted to go to my house and drink a beer . . . . We were in the basement. I was on the telephone and the man and Sonny was talking. I heard something mentioned about quaaludes. Sonny gave the man a bag and they started out the door and I followed them. As the man stepped out the back door, Sonny shot him . . . . Sonny came and asked if he could borrow my car and I told him yes . . . . I don't know what he did with the man.

The defendant then signed a consent form authorizing the search of his residence and vehicle.

On 29 December 1983, a photographic lineup containing six photographs was prepared. A photograph of Horace "Sonny" Burwell was included. The victim was unable to identify anyone in the lineup, including Burwell.

Finally, Lafone testified that the victim gave a description of the property that his assailant had taken from him: a wallet containing one hundred and forty-four dollars, a personal check, several credit cards, a Shriner's ring valued at two thousand two hundred dollars, and another ring for which he had paid seven hundred dollars. The victim also gave another statement concerning the shooting which basically corroborated his prior statement. In addition he stated that when he was shot the defendant "came over took my wallet out of my pocket and my rings and my keys and my knife, everything that I had in my pockets, . . . and I don't have any of it left."

Horace "Sonny" Burwell testified that he and the defendant are cousins and that he did not know the victim. On 23 December 1983, he was at home all day in his apartment. Bill Wetsill, a neighbor in the apartment complex, was there visiting. Burwell

testified that he and Wetsill "spent the day together there." He stated that he did not go anywhere near the premises of Pete's on 23 December 1983 and that he had not been there in "at least ten years."

William Wetsill testified that on 23 December 1983, he and Burwell "were together a lot at each other's places during the day." Burwell did not leave his presence during the middle of the day on 23 December 1983.

Allen Reece testified that he was employed as a wrecker driver on 24 December 1984. At the request of the Hickory Police Department, he picked up the defendant's Volkswagen station wagon and stored it in his building on that date.

David Spittel, a forensic serologist with the State Bureau of Investigation, testified that on 3 January 1984, he assisted the Hickory Police Department in the examination of the defendant's 1970 Volkswagen. He found a "large blood stain on the aluminum rocker panel of the passenger opening" and found slight blood smears in other areas of the car. He collected samples of the blood in the car and conducted some preliminary tests.

Mark Nelson, a forensic serologist, testified that he was employed by the State Bureau of Investigation in the crime laboratory. He performed tests on the blood found in the defendant's car, on blood samples taken from the victim and from the defendant, and on the blood found on a business card in the victim's possession. He testified that "the blood from the automobile was the same as that from the victim and was dissimilar to that of the defendant." The blood sample taken from the business card was also consistent with the victim's blood and not consistent with the defendant's blood.

Steven Bryant, an investigator with the Hickory Police Department, also testified. On 7 February 1984, he, Officer Lafone, and a Mr. Hunt were in an elevator with the defendant and were escorting him to jail. Without being asked any questions the defendant voluntarily stated: "I know what you are doing and it is not going to do you any good. You are not going to find the damn rings." Bryant testified that no response was made by anyone to the defendant's statement.

Officer Lafone testified that on 24 December 1983, he showed the victim a photographic lineup containing six photographs. The defendant's photograph, taken in 1971, was included and was labeled with the number "5." The victim "went straight to photograph number five and made the comment, 'that is the man.'" The victim then was asked which one. He replied, "number five, that is the man that shot me. I can't be positive without my glasses."

Delores Whittington testified that she had known the victim for approximately ten years and had dated him for six or seven years. While visiting him in the hospital in February 1984, several days before he died, she heard a nurse ask the victim: "Jack, you know you are dying, don't you?" The victim responded affirmatively. The nurse then told him that his guardian angel was waiting for him, and that all he had to do was to reach out and his guardian angel would take him. He nodded affirmatively. Whittington testified that the nurse asked, "are you afraid, and she said it is normal to be afraid, and he whispered low, it is normal to be afraid and she said, God is with you and are you ready?" Whittington stated that the nurse initiated the conversation about death. Whittington further testified that the subject of death had arisen before in her conversations with the victim, and "he told me many times that he knew that he would not return home."

Timothy Hammond, the victim's son, also testified. On 7 February 1984, he was visiting his father in the hospital when several police officers, including Officer Lafone, were also present. A photographic lineup was conducted and video taped. The victim was wearing his glasses. Timothy Hammond testified that during the lineup his father was "so weak . . . he could not pick his arm up flat from the bed and so I helped him by holding his arm behind the elbow and below his shoulder." Timothy Hammond testified that he did not have any information as to which photograph in the lineup was the defendant's. He had not been told anything concerning the photographs used in the lineup. He did not attempt to guide his father's hand in making an identification, and when his father's hand moved it was of his own power and volition. He stated that his father made an identification by pointing to the defendant's photograph. Following his father's identification an officer stated the number of the photograph and

asked if that was the number the victim had identified. The victim responded by nodding his head because he was unable to speak. The victim was in the hospital's intensive care unit at the time and was very ill. He died at 2:52 p.m. on the following day—8 February 1984.

Dr. James Parker, an expert in the field of forensic pathology, testified that he performed an autopsy on the victim. In his opinion, the victim died of pneumonia. He testified that there was a direct relationship between the gunshot wound and the pneumonia. He testified that the wound the victim sustained "compressed and damaged his spinal cord to the point that . . . he was paralyzed from the waist down and . . . this, of course, rendered him immobile . . . ." Further, the victim had blood clots in his lungs that became infected and caused the pneumonia. Dr. Parker stated that, "there was a direct relationship from the injury to the spinal cord, his being immobile, the throwing of blood clots, they were all secondary to the gunshot."

The defendant presented evidence after the State rested. Dr. Fred Owens testified that on 14 January 1984, he examined the victim and found him to be extremely short of breath. He determined that this was because a blood clot had moved from his lower extremities into his lung. He testified that the victim was making good progress towards recovering from the gunshot wound "but still had potential complications from that injury."

Dr. Johannes Kystra testified as an expert in the field of internal medicine and pulmonary diseases. He testified that he had examined the medical records of the victim along with other reports including the autopsy report. From a review of all the medical records and reports he stated that he "came to the conclusion that the immediate cause of death as it was described in the medical records was with no doubt pneumonia." Further, he testified "that it was impossible to see a direct cause and effect relationship" between the gunshot wound and the victim's death.

By his first assignment of error the defendant contends that the trial court erred in allowing the State to introduce a video tape recording of the victim's out of court identification of the defendant in a photographic lineup. The defendant argues that the photographic lineup was impermissibly suggestive and, therefore, violated his due process rights.

Following a *voir dire* examination of Officer Lafone and Timothy Hammond, the trial court reviewed the transcript of a suppression hearing involving this evidence which had been held on 13 August 1984. The trial court concluded that, "as to the February 7, 1984, video tape, the court finds . . . [t]hat the display of the photographic lineup was not so unnecessarily suggestive as to violate the due process right of the defendant and that the same is admissible."

Without question "[i]dentification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate a defendant's right to due process." *State v. Grimes*, 309 N.C. 606, 609, 308 S.E. 2d 293, 294 (1983). Further, "[t]his Court has said that to determine the suggestiveness of pretrial identification, the test is whether the totality of circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *Id.*

After a review of the above principles, we find no error in the trial court's conclusion that the pretrial identification procedure was not so impermissibly suggestive as to violate the defendant's right to due process. The trial court's findings are supported by competent evidence in the record and are therefore conclusive on appeal. *State v. Taylor*, 280 N.C. 273, 279, 185 S.E. 2d 677, 681 (1972). The findings support the trial court's conclusion. We also note that each member of this Court has viewed the video tape of the victim's identification of the defendant, and we find nothing impermissibly suggestive about the procedure actually used.

The defendant also argues that the video tape recording procedure violated his sixth amendment right to counsel. This argument is clearly erroneous. The defendant had no constitutional right to counsel during the photographic lineup. *State v. Carson*, 296 N.C. 31, 38, 249 S.E. 2d 417, 422 (1978).

[1] The defendant next argues that the video tape recording of the victim's identification of him amounted to inadmissible hearsay. After hearing the evidence presented on *voir dire* and considering the transcript of testimony presented at the suppression hearing in the case *sub judice*, the trial court found that "as to

the February 7, 1984, video tape . . . the procedure was at the time when the deceased knew or had [a] reasonable belief . . . that his death was imminent." The trial court admitted the video tape and the victim's statements at the time it was made as dying declarations.

The video tape and the testimony as to what the victim said during the photographic identification on 7 February 1984 are hearsay. The question before this Court is whether they were properly admitted as dying declarations.

Dying declarations have long been admissible as exceptions to the hearsay rule in North Carolina. *State v. Hamlette*, 302 N.C. 490, 495-96, 276 S.E. 2d 338, 342 (1981). For a dying declaration to be admissible the declarant must be unavailable as a witness at trial and his statement must have been a "statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." N.C.G.S. § 8C-1, Rule 804(b)(2) (Cum. Supp. 1985).

Delores Whittington testified that she heard a nurse ask the victim several days before he died if he knew he was dying, and that he responded affirmatively. Further, Whittington testified that the subject of death had arisen before and that the victim had told her "many times that he knew that he would not return home." The evidence presented at the motion hearing showed that at the time the victim identified the defendant, the victim was in a hospital bed in an intensive care unit, was attached to a ventilator, and was being fed through tubes running through his nose and into his stomach. The victim gave the statement at issue on 7 February 1984 and died the next day.

We cannot say that the trial court erred by admitting the video tape and statements made by the victim on 7 February 1984 as dying declarations. At the time of trial the victim was dead and, therefore, unavailable to testify. The evidence clearly supports the trial court's finding that when the victim identified the defendant on 7 February 1984, he believed his death was imminent. The victim's statement obviously concerned the cause or circumstances of his impending death. This assignment is without merit.

The defendant next argues that the admission of the victim's dying declarations violated the sixth amendment to the Constitu-

tion of the United States which guarantees an accused "the right . . . to be confronted with the witnesses against him." This contention is without merit. *State v. Stevens*, 295 N.C. 21, 31-33, 243 S.E. 2d 771, 777 (1978).

The defendant also argues that the evidence at issue was inadmissible because "its probative value [was] substantially outweighed by the danger of unfair prejudice . . . ." N.C.G.S. § 8C-1, Rule 403 (Cum. Supp. 1985). Unfair prejudice is defined as "an *undue* tendency to suggest decision *on an improper basis*, commonly, though not necessarily, an emotional one." *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986) (emphasis added). The evidence in question, however, could only be viewed as having a *due* tendency to suggest a decision on a *proper basis*. Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. *Id.* "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E. 2d 55, 59 (1986). We find no abuse of discretion by the trial court in allowing the admission of evidence concerning the victim's dying declaration.

[2] The defendant next assigns as error the trial court's actions in admitting testimony concerning other statements by the victim, before he knew of his impending death, in which he identified the defendant as the person who shot him.

N.C.G.S. § 8C-1, Rule 804, which became effective 1 July 1984 provides, *inter alia*:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions [for former testimony, statements under belief of impending death, statements against interest and statements of personal or family history] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the state-

> ment is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C.G.S. § 8C-1, Rule 804(b) (Cum. Supp. 1985). In *State v. Triplett*, 316 N.C. 1, 340 S.E. 2d 736 (1986), this Court established guidelines for the admission of hearsay testimony under Rule 804(b)(5); however, those guidelines "apply only to those cases in which the trial begins after the certification date of this opinion." *Id.* at 9-10, 340 S.E. 2d at 741. The guidelines announced in *Triplett* do not apply here because the trial in the case *sub judice* commenced on 25 February 1985, and the opinion in *Triplett* was certified on 18 February 1986.

In *Triplett* we stated that in cases to which the guidelines shall not apply because the trial was commenced before that opinion was certified, "the appellate courts will examine each appeal on a case-by-case basis to determine whether the ruling of the trial judge admitting or excluding evidence under Rule 804(b)(5) may be sustained based on the contents of the record on appeal." *Id.* at 10, 340 S.E. 2d at 741. We have examined each of the statements of the victim implicating the defendant. We conclude, based on an examination of the record, briefs, and transcript, that the statements of the victim had the required "circumstantial guarantees of trustworthiness" under Rule 804(b)(5) and that testimony concerning them was properly admitted.

In weighing the "circumstantial guarantees of trustworthiness" under Rule 804(b)(5) it is appropriate to consider among other factors (1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, (4) the nature and character of the statement,

and (5) the relationship of the parties. *State v. Triplett*, 316 N.C. at 10-11, 340 S.E. 2d at 742. In the present case, the personal knowledge of the victim is obvious. Nothing in the record on appeal tends to show that the victim had any motivation to tell anything other than the truth to those investigating the shooting. From the moment he was found until his death, the victim never wavered in his identification of the defendant as the man who shot him. Additionally, all information contained in the statements complained of was corroborated by the victim's dying declaration or other admissible evidence. There simply is no reason, based upon the record on appeal in this case, to believe that the victim's statements to the police were not truthful. *See generally State v. Triplett*, 316 N.C. 1, 340 S.E. 2d 736 (1986); *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983) (decided prior to the adoption of the current Rules of Evidence); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971) (same). Such statements by the victim implicating the defendant certainly possessed circumstantial guarantees of trustworthiness equivalent to those required under the other hearsay exceptions of Rule 804(b) for former testimony, statements against interest, or statements of personal or family history. The victim's statements had the "equivalent circumstantial guarantees of trustworthiness" necessary to make them admissible in the present case.

[3] To be admissible as "other exceptions" under Rule 804(b)(5), however, it is not enough for the statements to have the required circumstantial guarantees of trustworthiness. The statements must also be offered as evidence of a material fact, be more probative on the point for which offered than any other evidence which the proponent can procure through reasonable efforts, and serve the general purposes of the Rules of Evidence and the interests of justice. The victim's statements identifying the defendant as the man who shot him obviously were offered as evidence of a material fact and more probative on the point than any other evidence which could be procured by reasonable efforts. We also conclude that the admission of the statements of the victim served the general purposes of the Rules of Evidence and the interests of justice. Finally, N.C.G.S. § 8C-1, Rule 804(b)(5) requires that written notice of the State's intention to offer a statement under that rule's provisions for "other exceptions" be given to the defendant in advance of the offering of the statement in evidence.

The record on appeal in this case shows that the District Attorney made it clear at trial that he was seeking to introduce the testimony concerning the victim's statements under the general exception of Rule 804(b)(5). The record on appeal does not reveal an objection by the defendant based upon any failure of the State to comply with the rule's written notice requirement. Neither does the defendant contend on appeal that written notice was not given. Therefore, since the State specifically indicated to the trial court that it was relying *inter alia* on Rule 804(b)(5), and the defendant raised no objection based upon an absence of written notice, it was permissible in this pre-*Triplett* case for the trial court to assume, as do we, that the statutory requirement was met.

The trial court did not err in admitting the testimony of the witnesses concerning the victim's statements to them identifying the defendant as the person who shot him. This assignment of error is without merit.

[4] Next, the defendant argues that the trial court erred by permitting the State to introduce statements the defendant made to police officers after he indicated that he wanted an attorney before answering any questions. Officer Lafone testified on *voir dire* that on 24 December 1983, the defendant was in custody and was advised of his Miranda rights. The defendant requested an attorney and was allowed to make telephone calls to contact one; however, he was unable to contact the attorney he desired. While pointing at the warrants the defendant then said: "Who says that I did any of those things." Lafone told the defendant that if he wished to contact an attorney, no one present could talk with him or answer his questions without an attorney present. The defendant then said that he did not want an attorney, signed the waiver of rights form, and gave an inculpatory statement. Lafone testified *inter alia* that the defendant "appeared to be attentive and understood the form and the rights that were read to him." Following the *voir dire* examination of Lafone the trial court concluded that "the defendant's constitutional rights were not violated and that due process was afforded him . . . ."

The defendant assigns error to the trial court's admission of his inculpatory statement into evidence. He contends that his statement was taken in violation of the requirements 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). He further contends that the trial court erred by admitting testimony concerning his statement without making specific findings of fact as to whether he waived his rights.

In *Edwards*, the Supreme Court of the United States held that when an accused invokes his right to counsel during custodial interrogation, a valid waiver of that right cannot be established by showing only that he thereafter responded to further police initiated custodial interrogation after being advised of his rights. The Supreme Court stated that in such situations the accused is not subject to further police interrogation until counsel has been made available to him, "unless the accused himself initiates further communication with the police." *Id.* at 484-85, 68 L.Ed. 2d at 386.

In *State v. Lang*, 309 N.C. 512, 521, 308 S.E. 2d 317, 321 (1983), this Court discussed *Edwards* at length and emphasized that it "established 'in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was.' *Oregon v. Bradshaw*, --- U.S. ---, ---, 103 S.Ct. 2830, 2834, 77 L.Ed. 2d 405, 411 (Plurality opinion) (1983)." We emphasized that for this reason, it is "crucial that there be a finding of fact as to who initiated the communication between the defendant and the officers which resulted in his inculpatory statement while in custody and after he had invoked the right to have counsel present during interrogation." 309 N.C. at 521, 308 S.E. 2d at 321-22. We also emphasized that even if the communication with officers was initiated by the defendant, the burden remains upon the State to show a waiver of the right to counsel. *Id.*

In the case *sub judice*, the trial court would have been well advised to make specific findings in detail as to who initiated the conversation between the defendant and Officer Lafone which led to the defendant signing the waiver of rights and making his statement. Nevertheless, the trial court did not commit reversible error in this case by failing to do so. This Court has stated:

> When the admissibility of an in-custody confession is challenged the trial judge must conduct a *voir dire* to determine whether the requirements of *Miranda* have been met

> and whether the confession was in fact voluntarily made. The general rule is that the trial judge, at the close of the *voir dire, should* make findings of fact to show the bases of his ruling. If there is a *material* conflict in the evidence on *voir dire* he *must* do so in order to resolve the conflict. If there is no conflict in the evidence on *voir dire*, it is not error to admit a confession without making specific findings of fact, although it is always the better practice to find all facts upon which admissibility of the evidence depends. In that event the necessary findings are implied from the admission of the confession into evidence. If there is a conflict in the evidence which is *immaterial* and has no effect on the admissibility of the confession, it is not error to admit the confession without findings because the purpose of specific findings of fact is to show, for the benefit of the appellate court on review, the factual bases of the trial court's determination of admissibility. Thus, where a conflict in the evidence is immaterial and does not affect the admissibility of the challenged statement, findings are not required, although, again, it is always the better practice to make findings.

State v. Riddick, 291 N.C. 399, 408-09, 230 S.E. 2d 506, 512 (1976) (citations omitted). As the thrust of *Edwards* was to provide a brightline procedural rule further insuring that defendants would not be pressured by police to waive their *Miranda* rights, the principles set forth in the foregoing quotation from *Riddick* are equally applicable in cases such as this which involve waivers under *Edwards*.

Officer Lafone's testimony concerning the events surrounding the defendant's inculpatory statement was uncontroverted. No evidence was introduced tending to conflict with his testimony in any way. Officer Lafone's testimony indicated quite clearly and without conflict that after first indicating that he would exercise his right to counsel, the defendant himself initiated further communication and conversations with Lafone and voluntarily waived his rights after they had been fully explained to him. Therefore, "the necessary findings are implied from the admission of the confession into evidence." *State v. Riddick*, 291 N.C. at 409, 230 S.E. 2d at 512. The trial court did not err by concluding that "the defendant's constitutional rights were not violated" and admitting the defendant's statement into evidence.

[5] The defendant next argues that the trial court erred by allowing the State to introduce a statement that he made to the police after he had retained counsel but without counsel present. The defendant had apparently been released following his arrest on 24 December 1983. On 7 February 1984, the defendant was once again in custody and was being taken to jail. While riding in an elevator with several police officers, the defendant said: "I know what you are doing and it is not going to do you any good. You are not going to find the damn rings." Officer Bryant testified that no one had asked the defendant any questions, nor was any response made to his statement. The evidence in the record before us shows that the defendant's statement was spontaneous and that no interrogation in any form occurred at that time. This assignment of error is feckless. *Edwards v. Arizona*, 451 U.S. at 484-85, 68 L.Ed. 2d at 386. *See generally Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966).

[6] The defendant next argues that the trial court erred in its instructions to the jury on the question of the proximate cause of the victim's death. Before the trial court instructed the jury, the defendant's counsel submitted a request for a particular instruction on the definition of proximate cause. The trial court agreed to instruct the jury on "proximate cause as requested by the defendant in substance." We have reviewed the record and find that the trial court did in fact give the defendant's requested instruction in substance. After the completion of his instructions to the jury, the trial court asked if there was anything further for the defendant. The defendant's counsel specifically objected to several portions of the instructions, but he did not object to the court's instruction on proximate cause or make any further suggestions concerning proximate cause. The defendant therefore waived the right to raise this issue on appeal. N.C. App. R. 10(b)(2). Further, the defendant has shown nothing that even hints that plain error occurred. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

[7] By his next assignment the defendant contends that the trial court erred in denying his motion to dismiss the first degree murder charge at the close of all the evidence. The defendant contends that the State's evidence was insufficient to support a finding that the gunshot wound was the proximate cause of the victim's death. This assignment of error is without merit.

At the close of the State's evidence and at the close of all the evidence, the defendant moved to dismiss the charge of first degree murder. In *State v. Riddick*, 315 N.C. 749, 759, 340 S.E. 2d 55, 61 (1986), we recently stated the test for determining whether a motion to dismiss should be granted:

> 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.)

In *State v. Jones*, 290 N.C. 292, 298, 225 S.E. 2d 549, 552 (1976), this Court said:

> To warrant a conviction for homicide the State must establish that the act of the accused was a proximate cause of death. Criminal responsibility arises only if his act caused or directly contributed to the death. '[T]he act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is a natural result of the criminal act.'

(Citations omitted.)

In Dr. Parker's opinion the victim died of pneumonia; however, he testified that there was a direct relationship between the gunshot wound and the pneumonia. He testified that the wound the victim sustained "compressed and damaged his spinal cord to

the point that . . . he was paralyzed from the waist down and . . . this, of course, rendered him immobile . . . ." This condition caused blood clots to form in the victim's lungs. The blood clots became infected and caused pneumonia. Dr. Parker stated, "there was a direct relationship from the injury to the spinal cord, his being immobile, the throwing of blood clots, they were all secondary to the gunshot." Viewing all of the evidence in the light most favorable to the State and giving it all reasonable inferences, we conclude that there was substantial evidence introduced tending to show that the gunshot wound was the proximate cause of the victim's death. This assignment is without merit.

[8] Following the completion of the defense counsel's closing argument, the trial court recessed until the following morning. When court reconvened the defense counsel made a motion to reopen his closing argument to argue a list of twenty-three contentions contained in a writing prepared by the defendant *pro se*. The record shows that the trial court considered each request individually and approved six of the requested contentions and allowed counsel to argue them to the jury. The trial court denied permission to argue the remaining seventeen contentions because he found them to be either unsupported by the evidence presented, improper subjects for jury argument, or repetitious of the defense counsel's arguments made during his closing argument the previous day. The defendant now contends that the trial court abused its discretion when it refused to allow his counsel to argue his remaining contentions to the jury.

Under N.C.G.S. § 84-14 counsel may argue to the jury "the whole case as well of law as of fact." "Trial counsel should be given wide latitude to argue to the jury all of the law and facts presented by the evidence and all reasonable inferences therefrom. But counsel may not travel outside of the record and argue facts not supported by the evidence." *State v. Bruce*, 315 N.C. 273, 283, 337 S.E. 2d 510, 517 (1985) (citations omitted). The arguments of counsel must be left largely to the discretion of the trial court.

The record shows that the trial court in the case *sub judice* reviewed each of the defendant's twenty-three contentions. As to each of the contentions that the trial court refused to allow counsel to argue to the jury, the trial court made specific findings

that they were either unsupported by the evidence or had been argued to the jury the previous day. Upon an examination of the record, transcript, and briefs before us, we cannot say that the trial court abused its discretion.

[9] The defendant next argues that the trial court committed reversible error when it twice denied his motions for the appointment of a pathologist or other medical experts to assist in preparing his defense. In support of his motions at trial the defendant argued that an expert was needed because there was a question as to what caused the victim's death. When the defendant first made his motion for the appointment of a medical expert the trial court denied it "in view of the defendant being furnished a copy of the autopsy report." The second time the defendant made the motion the trial court denied the motion noting that it was a matter within his discretion.

N.C.G.S. § 7A-454 provides that "[t]he court, *in its discretion*, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State." (Emphasis added.) 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 indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the *other necessary expenses of representation.*" (Emphasis added.) *See generally State v. Artis*, 316 N.C. 507, 342 S.E. 2d 847 (1986) (defendant must show particular need).

When applying the statute in *State v. Watson*, 310 N.C. 384, 390, 312 S.E. 2d 448, 453 (1984) we said:

> [T]he Court first recognizes that 'all defendants in criminal cases shall enjoy the right to effective assistance of counsel and that the State must provide indigent defendants with the basic tools for an adequate trial defense or appeal.' We have held, however, that *the state has no constitutional duty to provide an expert witness to assist in the defense of an indigent.* This is a question properly left within the sound discretion of the trial judge. The applicable rule is that expert assistance need only be provided by the state when the defendant can show it is probable that he will not receive a

> fair trial without the requested assistance . . . or upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense. Mere hope or suspicion that favorable evidence is available is not sufficient.

(Emphasis added) (citations omitted).

Since the decision in *Watson*, however, the Supreme Court of the United States has addressed the issues surrounding the appointment of experts to assist indigent defendants. In *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985), the Supreme Court dealt with the question of whether an indigent defendant was constitutionally entitled to the services of an appointed psychiatrist. We have pointed out that in *Ake*:

> 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 assistance 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 interests if the assistance is not provided. 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.

State v. Johnson, 317 N.C. 193, 344 S.E. 2d 775 (1986) (citations omitted). The Supreme Court explicitly limited the holding in *Ake* to cases in which the defendant made a threshold showing of specific necessity for the assistance of the expert he sought to have appointed by the court. *Id.* This requirement was subsequently reaffirmed in *Caldwell v. Mississippi*, 472 U.S. 320, 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)." *State v. Jackson*, 317 N.C. at 1, 343 S.E. 2d at 814.

Application of the factors enunciated in *Ake* leads us to the conclusion that the trial court's denial of the defendant's motions

for the appointment of a pathologist or other medical experts was not error. Although the defendant arguably made a threshold showing of a specific necessity for the assistance of such experts, he was provided with a copy of the autopsy report prepared by Dr. Parker, the pathologist who performed the autopsy on the victim. The defendant has not shown what, if anything, an additional pathologist could have offered in his defense. He has not shown that the failure of the trial court to grant his motions deprived him of a fair trial or that he would have been materially assisted in the preparation of his defense had those motions been granted. To the contrary, the record shows that during the trial, Dr. Kystra, a specialist in pulmonary medicine at Duke Medical Center, and Dr. Fred Owens, a specialist in lung diseases and intensive care, testified for the defense. Their testimony was to the effect that the gunshot wound inflicted upon the victim had not been a proximate cause of his death. The defendant certainly had available and used ample medical expertise in preparing and presenting his defense. The assistance of the experts sought by the defendant clearly would have been of little if any value to him, and there was no risk of an erroneous deprivation of expert assistance as a result of the trial court's denial of the defendant's motions. Therefore, the trial court did not err in denying those motions. *Ake*, 470 U.S. at 77, 84 L.Ed. 2d at 62. It is manifestly apparent that the defendant was not prejudiced in the slightest by the trial court's denial of his motions for the appointment of medical experts to assist him in his defense.

[10] The defendant next contends that the trial court erred when it found his prior convictions to be an aggravating factor when sentencing him for robbery and kidnapping. This contention is without merit. N.C.G.S. § 15A-1340.4(a)(1) (1983).

The defendant also argues that the trial court abused its discretion when it found that this single aggravating factor outweighed the seven mitigating factors found. A trial court may "properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa." *State v. Ahearn*, 307 N.C. 584, 596-97, 300 S.E. 2d 689, 697 (1983). The weight to be given mitigating and aggravating factors is a matter solely within the trial court's discretion, and the balance struck by the trial court will not be disturbed if supported by the record. *Id.* The defendant has not shown that the trial court abused its

discretion when weighing the seven mitigating factors against the single aggravating factor in the case *sub judice*. This assignment of error is without merit.

[11] Next, the defendant argues the trial court erred when it accepted the jury's verdicts. The verdict sheets returned by the jury had the word "yes" in the space provided for the word "guilty" and the date "1 March 1985" in space provided for the words "not guilty." The defendant's counsel objected to the trial court's acceptance of the verdicts in the form presented. The trial court then asked the jury foreman specific questions as to the jury's intent when the verdict sheets were completed. The foreman stated, as to each verdict, that he put the date in the incorrect space and that he meant nothing other than to indicate the date. The entire jury agreed with the foreman. The jury was polled, and each juror individually agreed with the verdicts as submitted.

We stated in *State v. Smith*, 299 N.C. 533, 535-36, 263 S.E. 2d 563, 564 (1980), that "if the verdict substantially answers the issue(s) so as to permit the trial judge to pass judgment in accordance with the manifest intention of the jury, then the verdict should be received and recorded." The verdict forms and the recorded proceedings during and after the return of the verdicts show that the intention of the jury was absolutely and unequivocally clear. No doubtful or insufficient verdicts were received in the case *sub judice*. The trial court properly received the verdicts and entered judgments and sentences accordingly.

Finally, the defendant's brief presents a throng of additional assignments of error which are not supported by argument or authority. We therefore deem them to have been abandoned and neither reach nor decide them. N.C. App. R. 28(a); *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976).

The defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. PAUL LOWERY

No. 513PA84

(Filed 29 August 1986)

1. **Criminal Law § 92.1— conspiracy to commit murder—joinder of offenses against two defendants proper**

The trial court did not err in granting the State's motion for joinder of defendant with a murder victim's husband for trial and in refusing to grant defendant's motions for severance, since both defendant and the victim's husband were charged with conspiracy to murder the victim; all of the offenses arose out of the scheme or plan to effectuate her murder; and joinder was thus proper. Furthermore, defendant and the victim's husband did not have antagonistic defenses, and defendant's being tried with the victim's husband did not create a risk of conviction on the basis of guilt by association. N.C.G.S. § 15A-926 (b)(2); N.C.G.S. § 15A-927(c)(2)a and b.

2. **Criminal Law § 89.8— plea agreement with witness—defendant's right to be informed not violated**

Defendant's rights under N.C.G.S. § 15A-1054(c) and his constitutional due process rights were not violated by the district attorney's alleged failure to disclose a plea agreement with a witness who testified against defendant, since there was no formal agreement between the State and the witness; defendant's counsel was aware sufficiently in advance of trial that the witness was going to testify for the State under a hope of leniency to have brought out in cross-examination the circumstances under which the testimony was being offered; and evidence that the witness entered a guilty plea pursuant to a plea bargain after he testified did not show that the district attorney's statement with regard to no plea bargain was untrue but was consistent with statements of the witness and his attorney that they hoped they could plea bargain.

3. **Constitutional Law § 45— failure of counsel to perfect appeal—no denial of effective assistance of counsel**

Where defendant alleges that he was denied effective assistance of counsel, trial counsel's failure to perfect defendant's appeal is not a basis for granting a new trial.

4. **Constitutional Law § 48— alleged failure of counsel to develop alibi defense—no denial of effective assistance of counsel**

There was no merit to defendant's contention that he was denied effective assistance of counsel because counsel failed to develop an alibi defense, since counsel did call two alibi witnesses; failed to make pretrial preparation; failed to object to hearsay testimony, since the testimony in question was admissible; failed to request arrest of judgment on the conspiracy conviction, since the conspiracy conviction was not merged in the murder conviction; failed to conduct an adequate examination of witnesses, since the appellate court will not second-guess trial counsel's strategy; and failed to examine adequately the victim's children.

5. Criminal Law § 93— new evidence on rebuttal—no error

Defendant was not prejudiced where the trial court allowed the State to present new evidence on rebuttal, since defendant was not denied an opportunity to challenge or rebut the new evidence.

6. Conspiracy § 6— testimony of co-conspirator—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for first degree murder and conspiracy to commit murder, though the evidence consisted mainly of the testimony of a co-conspirator, since testimony of a co-conspirator is competent to establish a conspiracy and a co-conspirator's unsupported testimony is sufficient to sustain a verdict.

7. Homicide § 20.1— photograph of victim—admissibility

In a prosecution of defendant for first degree murder and conspiracy to commit murder, the trial court did not err in admitting into evidence a photograph of the victim which was properly authenticated by a pathologist whose testimony it illustrated, a key to the victim's home, and gloves purportedly given to a co-conspirator by the victim's husband.

8. Constitutional Law § 28— codefendant's conspiracy and murder convictions merged—defendant's convictions not merged—no denial of equal protection

Defendant was not denied equal protection when a co-defendant's motion for merger of the conspiracy conviction with the first degree murder conviction was granted but defendant's convictions were not merged, since the codefendant was not present at the actual murder and his liability was predicated solely on his participation in the conspiracy, while defendant, on the other hand, not only conspired to murder the victim but also actually participated in killing her.

APPEAL by defendant from judgments entered by *Smith, J.*, at the 2 April 1979 Special Criminal Session of Superior Court, ROBESON County.

The defendant was convicted by a jury of first-degree murder and conspiracy to commit murder. Following a sentencing hearing, upon the jury's recommendation the defendant was sentenced to life imprisonment for the murder. He was sentenced to a concurrent ten-year term for the conspiracy. Although the defendant's trial counsel was appointed to represent the defendant on appeal, no appeal was perfected because of the mistaken opinion by counsel that at a subsequent trial the defendant would run the risk of a death sentence. (*See* N.C.G.S. § 15A-1335.) The defendant successfully prosecuted a habeas corpus petition to the United States District Court for the Eastern District of North Carolina which on 4 September 1984 filed a modified order directing the North Carolina Supreme Court "to either permit petitioner a belated appeal or retry him within 30 days or a writ of

habeas corpus will be issued directing his release." On 19 September 1984, this Court granted the Attorney General's petition for writ of certiorari pursuant to North Carolina Rules of Appellate Procedure, Rule 21(a)(1) and allowed the defendant to bypass the Court of Appeals on the conspiracy conviction. Heard in the Supreme Court on 10 March 1986.

Lacy H. Thornburg, Attorney General, by Tiare B. Smiley, Assistant Attorney General, for the State.

Wayne Eads and David H. Rogers for defendant-appellant.

BILLINGS, Justice.

Both the defendant and his co-defendant, James Small, testified at their joint trial. The State's evidence tended to show that James Small solicited numerous people to kill his estranged wife, Evelyn Small, and that Vincent Johnson and the defendant agreed to kill Mrs. Small and accomplished the murder following Small's instructions. State's witness Vincent Johnson testified that after several unsuccessful attempts, he and the defendant went to Mrs. Small's house on the evening of 14 November 1978 and entered the back door with a key supplied by Small. While the two children of Mr. and Mrs. Small were asleep and Johnson kept watch, the defendant first tried to smother Mrs. Small and then strangled her to death. At the trial, Mr. Small denied that he had asked or hired anyone to kill his wife. The defendant presented two alibi witnesses and denied having been asked to kill or having killed the victim. The State presented several witnesses in its case in chief and over 15 more in its rebuttal case to establish the conspiracy and subsequent murder.

Small was convicted of first-degree murder and conspiracy to commit murder. Judgment was arrested on the conspiracy conviction and he was sentenced to death on the murder conviction. However, in *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980), this Court remanded the case to the Superior Court of Robeson County for the entry of a verdict of guilty of accessory before the fact to murder and imposition of a life sentence. The Court found no other errors in Small's trial.[1]

1. In response to this Court's decision, the legislature enacted N.C.G.S. § 14-5.2, effective 1 July 1981, abolishing the distinction in guilt and sentencing between an accessory before the fact and a principal.

The defendant contends that his conviction should be reversed because (1) the charges against the defendant and James Small were improperly joined for trial, (2) the State failed to disclose promises or inducements offered to the State's witnesses, (3) he was denied effective assistance of counsel, (4) the State was allowed to introduce non-rebuttal evidence on rebuttal, (5) the evidence was insufficient to support his conviction, and (6) the introduction into evidence of certain real and demonstrative evidence was prejudicial error. Additionally, the defendant contends that his conviction for conspiracy should have been merged with his murder conviction. We find no error in defendant's trial or sentence.

I.

[1] Defendant's first assignment of error is that the trial judge erred in granting the State's motion for joinder of him with Small for trial and refusing to grant his motions for severance.

On 12 March 1979, the District Attorney moved pursuant to N.C.G.S. § 15A-926 for a joint trial of James Small and Paul Lowery. On 19 March 1979, Small's attorney filed an objection to joinder. On 2 April 1979, the day of trial, Small's attorney filed a motion to sever and Lowery's attorney filed a motion objecting to joinder, asking for separate trials on the grounds

> That a separate trial of the charges against the defendant is necessary to achieve a fair determination of the guilt or innocence of the defendant in that the defenses of the defendants in this case are antagonistic, that defendant Lowery will be deprived of corroborative evidence in an alibi defense, and that his defense will be less persuasive.

When the case was called for trial, Judge Smith conducted a hearing on these motions.

Mr. Donald Bullard, the defendant's attorney at trial, argued that the defendant and Small had antagonistic defenses. Mr. Bullard said that, in an effort to show that someone other than the defendant committed the murder, he wanted to call Small as a witness to question him about the eight solicitations to commit murder with which he had been charged. He contended that without evidence that others were solicited, the defendant's alibi defense would be less persuasive.

Judge Smith denied the motions for severance but said that "based on the statement that you made to me this morning, we might get down the road and I might decide at that point that they should be severed and—. . . If that be the case, I wouldn't hesitate to declare a mistrial as to one Defendant, and proceed on the other."

During jury selection the District Attorney asked to have the record reflect that in spite of the allegations of antagonistic defenses and antagonism between Small and Lowery, the attorneys were coordinating their challenges to prospective jurors. The following exchange took place:

> MR. E. BRITT: Object to the Solicitor making another statement which we consider to be for newspaper publicity.
>
> MR. BULLARD: Your Honor, there has not—
>
> THE COURT: Just a minute. If I understood you all, today, you said the defense was not antagonistic.
>
> MR. BULLARD: That's right. Did not say that the individuals were antagonistic either.
>
> THE COURT: I understood that.

On 13 April 1979, after presentation of the State's and Small's cases, the defendant's attorney moved for a mistrial on the basis that the jury

> cannot separate the defendant Lowery from the defendant Small any longer because of these statements which tend to involve indictment of solicitation. I think the jury at this time is highly prejudiced. I feel that they would convict Paul Lowery if they also would convict Mr. Small on the basis of guilt by association, and part of this association is the fact that they are being tried together, Your Honor.

The judge noted that Small had so far denied the other solicitations and that the testimony was not prejudicial to Lowery.

Joinder of defendants for trial is statutorily authorized

a. When each of the defendants is charged with accountability for each defense; or

b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

1. Were part of a common scheme or plan; or

2. Were part of the same act or transaction; or

3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

N.C.G.S. § 15A-926(b)(2) (1983).

Both Small and the defendant were charged with conspiracy to murder Mrs. Small, and all of the offenses arose out of the scheme or plan to effectuate her murder; thus joinder was proper. *See State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L.Ed. 2d 1091 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

Even though properly joinable for trial pursuant to N.C.G.S. § 15A-926, charges against two or more defendants should not be joined or should be severed if "it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants," N.C.G.S. § 15A-927(c)(2)a (1983), or "it is found necessary to achieve a fair determination of the guilt or innocence of [a] defendant," N.C.G.S. § 15A-927(c)(2)b (1983). The ruling of a trial judge joining defendants for trial as authorized by N.C.G.S. § 15A-926 or denying severance is discretionary and is reversible on appeal only upon a showing that joinder denied the appealing defendant a fair trial. *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982); *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982); *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981). Even though the defendants in a joint trial may offer antagonistic or conflicting defenses, that fact alone does not necessarily warrant severance. "The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *State v. Nelson*, 298 N.C. 573, 587, 260 S.E. 2d 629, 640 (1979), *cert. denied sub nom. Jolly v. North Carolina*, 446 U.S. 929, 64 L.Ed. 2d 282 (1980).

The defendant contended at trial[2] and contends on appeal that he and Small had antagonistic defenses and that a joint trial deprived him of a fair trial. We disagree.

Both Small and the defendant denied any complicity in or knowledge of the offenses. The defendant presented evidence of alibi which was discredited and rebutted by the State.

It is true that one strategy employed by the attorney for Small was to suggest that the defendant killed Mrs. Small in retaliation against Small for reporting to the police that the defendant had, a few days before the murder, stolen approximately $3,000 from Small. There are two reasons why we are convinced that joint trial with Small resulted in no unfair prejudice to this defendant by reason of Small's trial strategy. First, the jury obviously rejected Small's theory, for it convicted both defendants, thus finding that Small solicited Lowery to commit the murder and that the murder was not committed in retaliation against Small. Second, a portion of the argument made by Small was actually favorable to the defendant Lowery, for the theory was that because Small and the defendant were at odds with each other, the defendant was not a person whom Small would have solicited to kill his wife.

As we said in *State v. Nelson*, 298 N.C. at 588, 260 S.E. 2d at 641:

> We conclude that defendants here were not denied a fair trial by the joinder notwithstanding the conflicts in their testimony. This is not a case where the state simply stood by and relied on the testimony of the respective defendants to convict them. The state itself offered plenary evidence of both defendants' guilt. Neither defendant testified directly to the other's guilt. Both denied any participation in the crime. Each defendant was subject to cross-examination by the other. Had separate trials been granted, Jolly could have testified to the same matters tending to implicate Nelson at Nelson's separate trial. The conflict between each defendant's respective testimony was not of such magnitude when considered in the context of other evidence that the jury was likely to infer from that conflict alone that both were guilty.

2. For purposes of deciding the question presented, we will disregard defense counsel's concession during jury selection that the "defense" was not antagonistic.

Although he first objected to joinder because he thought joinder would prevent his calling Small as a witness to question him about solicitation of other people, the defendant now contends that he was prejudiced by evidence that Small had solicited a number of people to kill Mrs. Small. He argued that being tried with Small created a risk of conviction on the basis of guilt by association. If we were convinced that juries were unable to separately evaluate the guilt or innocence of defendants tried jointly because of a tendency to determine guilt by association at trial, we would never uphold joint trials of criminal defendants.

From our review of the transcript, it is abundantly clear that the trial court's decision was carefully reasoned and continually re-examined with respect to the question of prejudice to this defendant by evidence of Small's other solicitations. We are further convinced that the joinder of the defendant for trial with Small did not result in the admission of evidence harmful to the defendant which would not have been admissible in a severed trial and that he was not prejudiced by the joinder.

This assignment of error is overruled.

II.

[2] In his second assignment of error, the defendant contends that the trial judge abused his discretion by denying the defendant's motion for disclosure by the State of all promises and inducements offered to its witnesses in return for their testimony at trial. The defendant refers primarily to an alleged deal that the State made with Vincent Johnson. Although he says that Carson Locklear, Marilyn Lowery and Hazel Lowery, among others, might also fall into the category of persons receiving favorable treatment from the State in exchange for their testimony, he does not pursue in his brief any argument regarding their testimony.

N.C.G.S. § 15A-1054(c) (1983) provides as follows:

> (c) When a prosecutor enters into any arrangement authorized by this section [providing for charge reductions or sentence concessions in consideration of truthful testimony], written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to

any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests or justice require, the court must grant a recess.

The obligation on the prosecutor to divulge the information required by N.C.G.S. § 15A-1054(c) does not depend upon a request by the defendant. Nevertheless, the defendant filed with the prosecutor on 15 December 1978 a request for voluntary discovery which contained the following:

(1) To divulge, in a written or recorded form, any statements made by a co-defendant which the State intends to offer in evidence at the trial of the Defendant, PAUL LOWERY, and to divulge, in written or recorded form, the substance of any oral statement made by a co-defendant which the State intends to offer in evidence at said trial. *That the District Attorney divulge* to the attorneys for the Defendant, PAUL LOWERY, *any and all agreements heretofore entered into between the State and any co-defendant or witnesses to be called in the trial of this case against the Defendant, PAUL LOWERY, with regard to plea bargaining or leniency or other favorable actions on behalf of said witnesses in return for said witnesses' agreement to testify against the Defendant, PAUL LOWERY,* in this case or which were subsequently offered to said witness or witnesses prior to said witnesses's [sic] testimony. [Emphasis added.]

Judge Robert L. Gavin held a hearing on various discovery motions in this case on 25 January 1979. At that time he ordered the District Attorney "to divulge to Defense Counsel, in written or recorded form, any statements made by a Co-Defendant of the Defendant James Lenard Small," but he denied the rest of the request in paragraph "l," saying "I think that there is always the possibility of plea bargain." Although the judge was apparently acting under a misapprehension that plea bargain agreements were not subject to disclosure, the District Attorney stated: "I will state for their benefit, as to the remainder of paragraph 'L' [sic] there have been no agreements between the State and any Co-defendant."

At this point in the hearing, one of Small's attorneys said that he had previously asked permission from Mr. Jacobson, counsel for Vincent Johnson, to speak with Mr. Johnson but was denied permission. To refute the prosecutor's statement that no agreement had been made with Mr. Johnson, counsel for Small related the following conversation with Mr. Jacobson:

> I replied, very quickly, "Then, what you are saying is that your client has gotten some sort of plea bargain arrangement whereby he will testify against my client and Paul Lowery for his life, and your client will not be prosecuted for his life," and Mr. Jacobson immediately said, "That's right."

The District Attorney repeated that there had been no agreements and said that "If Mr. Jacobson feels that he's got something, some sort of agreement, that's his business, but I certainly haven't agreed to it." The judge once again said, mistakenly, that "there is nothing in our statute that requires it" and refused to order disclosure of agreements between the State and witnesses.

The issue surfaced again at trial during the District Attorney's direct examination of Vincent Johnson:

Q. [BY JOE FREEMAN BRITT:] All right. Is this your lawyer sitting here, Mr. Robert Jacobson?

A. Yes, sir.

Q. Vincent, have you been promised one thing on earth—

MR. E. BRITT: Objection.

Q. —in exchange for your testimony here?

MR. E. BRITT: Object.

THE COURT: Overruled.

THE WITNESS: No, sir.

Later, outside the presence of the jury, counsel for Small examined Mr. Jacobson, Vincent Johnson's lawyer, regarding an agreement with the District Attorney as follows:

Q. I ask you, sir, if I did not say to you in an angry manner that "What you are saying is thatyou [sic] have an agreement that your client will testify against my client Small

and Paul Lowery, for their lives, and that your client won't be tried for his life"?

MR. J. BRITT: Object to what he told the man.

THE COURT: Overruled.

. . .

THE WITNESS: You may have.

. . .

Q. (BY MR. E. BRITT:) I ask you, sir, if you did not say to me, "Ah, well, that's right"? Did you use those words to me, Mr. Jacobson?

A. I don't remember that.

. . .

A. I don't remember exactly, but I don't believe I did.

Q. Mr. Jacobson, did you have an agreement, either tacit or verbal, with Joe Freeman Britt or anyone of his assistants in his office that if your client testified in this case on behalf of the State that your client would not later be tried for his life?

A. I have had no such agreement.

. . .

A. I have not received any understanding of that sort from Mr. Britt or anyone from his office.

. . .

THE WITNESS: I did not have the understanding or knowledge. I had the hope.

During the State's rebuttal, the District Attorney asked SBI Agent Wade Anders if Vincent Johnson had "ever been promised anything to your knowledge in this case, by yourself or anyone else?" Anders answered that he had not.

On appeal the defendant contends that his rights under N.C.G.S. § 15A-1054 and his due process rights under the fifth and fourteenth amendments to the United States Constitution

have been violated by the prosecution's failure to disclose an agreement with Vincent Johnson in exchange for his testimony against this defendant.

After oral argument in this Court, the defendant filed a motion to supplement the record on appeal to include documents that show Vincent Johnson's 22 May 1979 guilty plea to second-degree murder and conspiracy to commit murder in exchange for a maximum sentence of 20-25 years in prison for the murder with a concurrent 10-year sentence for the conspiracy and a recommendation not to be housed in the same place as Small or Lowery. The defendant also filed a motion for appropriate relief on the grounds that the documents in Johnson's file are newly-discovered evidence of an indirect promise of leniency to Johnson. We allow the motion to supplement the record on appeal and have examined the documents relating to Johnson's plea of guilty and sentence. We conclude, however, that the defendant's assignment of error must be overruled and his request for a new trial be denied because, although the record clearly reveals a plea bargain between the State and Johnson, there is no evidence that the agreement had been made at the time Johnson testified as a witness at the defendant's trial. All of the evidence produced by the defendant and Small shows that Johnson and his attorney were cooperating with the prosecution without the benefit of a formal agreement but with the hope, perhaps even an expectation based upon familiarity with the District Attorney's practices, that if Johnson testified in the case against the defendant and Small, the State would enter into a plea bargain afterwards.

We hold that the defendant's rights under N.C.G.S. § 15A-1054(c) were not violated, for not only was there no formal agreement between the State and Vincent Johnson, the defendant's counsel was aware sufficiently in advance of trial that the witness was going to testify for the State under a hope of leniency to have brought out in cross-examination the circumstances under which the testimony was being offered.

A defendant's right to due process of law is violated if the State knowingly makes use of perjured testimony in a prosecution against him, *Mooney v. Holohan*, 294 U.S. 103, 79 L.Ed. 791 (1935), or fails to disclose upon request information in the State's possession which would materially aid the defendant in his de-

fense, *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963). "[E]vidence of any understanding or agreement as to a future prosecution would be relevant to [a state's witness'] credibility and the jury [is] entitled to know of it." *Giglio v. United States*, 405 U.S. 150, 155, 31 L.Ed. 2d 104, 109 (1972).

The defendant's contention that his due process rights were violated is based upon his assumption that the testimony of Johnson and Johnson's counsel and the statement of the District Attorney that no agreement had been made were untrue. The only evidence which he has offered to cast doubt upon their statements is the fact that after Johnson testified he entered a guilty plea to second-degree murder pursuant to a plea bargain and received a sentence of 20-25 years in prison. However, that evidence is not inconsistent with the statements of Johnson and his attorney that they hoped the District Attorney would enter into a plea bargain if Johnson testified or with the District Attorney's statement that he had ceased to make deals "when I got burned with" one defendant who "backed up from the truthful testimony."

Unlike the case *sub judice*, in the cases relied upon by the defendant either the existence of an actual agreement was concealed from the defendant, *Campbell v. Reed*, 594 F. 2d 4 (4th Cir. 1979); *State v. Morgan*, 60 N.C. App. 614, 299 S.E. 2d 823 (1983), or evidence favorable to the accused had been suppressed by the prosecution, *Giles v. Maryland*, 386 U.S. 66, 17 L.Ed. 2d 737 (1967); *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215. As we have noted, the fact that the witness was going to testify for the State and had a hope that as a result he would receive lenient treatment by the District Attorney was known to the defendant in advance of trial and was not concealed from him. We find no due process violation.

Although an instruction to scrutinize the testimony of an accomplice would not be sufficient in itself to alleviate prejudice resulting from the failure to reveal an agreement had there been one, we note that the jury was properly instructed that Vincent Johnson was an accomplice and as such that his testimony should be examined "with greater care and caution."

This assignment of error is overruled.

III.

In his third assignment of error, the defendant argues that he was denied a fair trial and due process because of ineffective assistance of counsel, citing *State v. Weaver*, 306 N.C. 629, 640-41, 295 S.E. 2d 375, 382 (1982). *Weaver* sets out the following standard for evaluating claims of ineffective assistance of counsel: "In applying the test to the case at bar we must decide whether counsel's performance was 'within the range of competence demanded of attorneys in criminal cases.' *McMann v. Richardson*, 397 U.S. at 771, 90 S.Ct. at 1449, 25 L.Ed. 2d at 773." *See*, however, *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984), and *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985), which adopted the test enunciated in *Strickland* for use in North Carolina.

The defendant says that there were roughly nine areas in which trial counsel was deficient: (1) failure to develop an alibi defense; (2) lack of pretrial preparation; (3) failure to object to hearsay testimony; (4) failure to request arrest of judgment on the conspiracy conviction; (5) ineffective direct examination of Lowery; (6) ineffective cross-examination of Small; (7) ineffective treatment of the Small children; (8) ineffective examination of other witnesses; (9) failure to appeal.

[3] To take the last point first, trial counsel's failure to perfect defendant's appeal did not affect counsel's effectiveness at trial and has now been compensated for by full review on this appeal. Such a failure of counsel is not a basis for granting a new trial. *State v. Mathis*, 293 N.C. 660, 239 S.E. 2d 245 (1977).

[4] As will be discussed later in this opinion, the defendant's conspiracy conviction was not merged in the murder conviction; therefore counsel's failure to request arrest of the conspiracy judgment was not defective representation.

Trial counsel properly did not object to the testimony identified in defendant's appellate brief as inadmissible hearsay because the statements were in fact admissible. All of the statements identified in the defendant's brief as objectionable either were statements made by the defendant to the testifying witnesses and admissible as statements of a party opponent, *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977); 2 *Brandis on North Carolina*

Evidence § 167 (1982), or statements made by co-conspirators Small or Johnson in furtherance of the conspiracy and admissible as acts and statements of a co-conspirator, *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975); 2 *Brandis on North Carolina Evidence* § 173 (1982).

Defendant contends that trial counsel failed to do any pretrial preparation except to file a discovery motion. He specifically objects to the lack of a *Brady*[3] motion requesting disclosure of statements made by the victim's two children, Jamie and Amy Small, and the failure of his counsel to join in Small's motion for change of venue. At trial, Amy Small identified Vincent Johnson as the person who entered her mother's room on the night of the murder. We note, however, that the defendant's request for voluntary discovery did contain a *Brady* request, and there is nothing in the record to indicate that counsel was not in fact apprised of the children's statements. Since Small's motion for change of venue was denied by the trial court, we fail to see how defendant's counsel's failure to join the motion on behalf of the defendant makes his assistance ineffective. Further, nothing has been presented to this Court which suggests that the defendant was unable to receive a fair trial in Robeson County.

The defendant's complaint about counsel's examination of witnesses is in effect a request to this Court to second-guess his counsel's trial strategy. This we decline to do. As this Court said in *State v. Milano*, 297 N.C. 485, 495, 256 S.E. 2d 154, 160 (1979), quoting from *Sallie v. North Carolina*, 587 F. 2d 636, 640 (4th Cir. 1978), *cert. denied*, 441 U.S. 911, 60 L.Ed. 2d 383 (1979): "Trial counsel are necessarily given wide latitude in these matters. Ineffective assistance of counsel claims are 'not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.' "

We ordinarily do not consider it to be the function of an appellate court to second-guess counsel's tactical decisions, such as whether in the case *sub judice* to conduct only a brief examination of the victim's son, Jamie Small, or whether to attempt to suggest to the jury that another witness was possibly the accomplice who assisted Johnson in the murder.

3. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215.

Finally, we note that trial counsel did in fact attempt to develop the defendant's alibi defense by calling two witnesses. Both witnesses were substantially discredited by the State. Again, we do not substitute our judgment for that of trial counsel as to whether other alibi witnesses, if available, would have been helpful.

The trial of the defendant and Small lasted for several days, and the State presented a strong case against the defendant. Although both the defendant and Small were convicted and Small was sentenced to death, defense counsel was able to persuade the jury not to recommend the death penalty for the defendant.

We have reviewed the entire record and are convinced that counsel's representation was "within the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson*, 397 U.S. 759, 771, 25 L.Ed. 2d 763, 773 (1970), and that counsel made no errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Strickland v. Washington*, 466 U.S. at 687, 80 L.Ed. 2d at 693.

This assignment of error is overruled.

IV.

[5] Defendant contends that the trial judge abused his discretion in permitting the State to introduce evidence in rebuttal, arguing that during rebuttal the State was permitted to retry its entire case and to prove new matters. Our review of the record indicates that the questions propounded to rebuttal witnesses were, for the most part, properly designed to rebut matters produced during presentation of the defendants' evidence. N.C.G.S. § 15A-1226.

On appeal, defendant specifically objects to the questioning on rebuttal of Hazel Lowery, his "common-law" wife.

Ms. Lowery had not previously testified. She testified that the defendant had asked her what she did with a key he had given to her and said that the key "caused him to get gassed." N.C.G.S. § 15A-1226(a) (1983) provides, in pertinent part, that "[t]he judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the

other party must be permitted further rebuttal." *See State v. Goldman*, 311 N.C. 338, 317 S.E. 2d 361 (1984). Defendant acknowledges that N.C.G.S. § 15A-1226(a) appears to permit the introduction of new evidence during rebuttal and does not contend that he was denied the right to present further rebuttal. He nevertheless argues that in practice the statute is a "patent affront" to his constitutionally guaranteed protection against double jeopardy and the right to due process of law.

Double jeopardy principles are not applicable to evidence introduced at the rebuttal phase of a trial. The protections against double jeopardy provide only that a person may not be unfairly subjected to multiple trials or multiple punishments for the same offense. *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984).

Nor do we agree that defendant's right to due process of law was violated. The order of presentation of evidence at trial and the limitations on the right to present new evidence on rebuttal are designed primarily to ensure the orderly presentation of evidence. It is the trial judge's duty to supervise and control the trial, including the manner and presentation of evidence, matters which are largely left to his discretion. *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983). In the absence of a procedure which prevents the defendant from having an opportunity to challenge or rebut new evidence offered by the State, we fail to see how allowing the State to present new evidence on rebuttal violates the defendant's right to due process. In the present case, we find that the trial judge did not abuse his discretion in permitting the State to question Ms. Lowery and other rebuttal witnesses.

This assignment of error is overruled.

V.

[6] Defendant next argues that the trial judge erred in failing to dismiss for insufficiency of the evidence the charges of first-degree murder and conspiracy to commit murder. In order for criminal charges properly to be submitted to the jury, the State must present substantial evidence of each essential element of the offenses charged and that the defendant was the perpetrator. *State v. Judge*, 308 N.C. 658, 303 S.E. 2d 817 (1983). Substantial evidence must be existing and real, but it does not have to exclude every reasonable hypothesis of innocence. *Id.* "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 . . . ." *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17. A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982).

In the present case, defendant concedes, and we agree, that the State offered substantial evidence through the testimony of Vincent Johnson of each essential element of first-degree murder and conspiracy to commit murder. Defendant contends, however, that Johnson's testimony is neither believable nor uncontroverted because he was a co-conspirator and accomplice in the crimes charged and because his credibility has been challenged due to alleged nondisclosure of promises made to him in return for his testimony. Defendant points to inconsistencies in the evidence.

It is well-established that the testimony of a co-conspirator is competent to establish a conspiracy and that a co-conspirator's unsupported testimony is sufficient to sustain a verdict. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983); *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974). In considering a motion to dismiss, the trial court is concerned only with the sufficiency of the evidence, not with the weight of the evidence. *State v. Gonzalez*, 311 N.C. 80, 316 S.E. 2d 229 (1984). The credibility issues raised by the defendant go to the weight of the evidence, not its sufficiency. We find that Johnson's testimony in this case provided substantial evidence of all the essential elements of the offenses charged, and a reasonable inference of defendant's guilt could be drawn from this evidence. Johnson testified that he, Small, and the defendant met and discussed the murder of Mrs. Small, reached an agreement to kill her, and discussed a number of methods to effectuate the murder. Johnson further testified that on 14 November 1978, he accompanied the defendant to the Small home where the defendant entered Mrs. Small's bedroom and strangled her.

This assignment of error lacks merit and is overruled.

VI.

[7] Defendant next contends that the trial judge abused his discretion by permitting the introduction into evidence of a photograph of the victim's face, a key, and a pair of brown gloves. The photograph was introduced during direct examination of the pathologist to illustrate testimony concerning the condition of the victim's eye. The pathologist had testified that during the autopsy he observed hemorrhages in the sclera (white portion) of one of the victim's eyes. Prior to introducing the black and white photograph of the face, the prosecutor established that the pathologist had held the eye open so that the photograph could be taken. Defendant objected, arguing, out of the presence of the jury, that the photograph was taken in an altered condition, i.e., with the eye propped open rather than closed, and that the photograph was highly inflammatory and prejudicial inasmuch as it displayed "a very horrible view of an eye of a deceased person in which, when the flashbulb of the camera went off, the eye itself seem[ed] to light up and come alive." On appeal defendant also argues that a proper foundation was not laid for the introduction of the photograph in that the doctor did not take the photograph and did not specifically identify it but stated only that he recognized it. We find no merit to these arguments.

The autopsy conducted on the victim included an examination of her eyes. A finding of hemorrhaging in the sclera was significant in determining that death was caused by strangulation. To conduct the examination, the pathologist necessarily lifted the victim's eyelids open. The photograph illustrated the pathologist's findings. A "posed" photograph is admissible when properly authenticated by the witness as being an accurate representation of conditions as he saw them. *See* 1 *Brandis on North Carolina Evidence*, § 34 (1982); *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). It has long been the law in this State that a photograph, despite its unpleasant depiction, is competent evidence when properly authenticated as representing a correct portrayal of conditions observed by the witness and used to illustrate the witness's testimony. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983); *State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574 (1981).

The photograph need not have been taken by the witness, provided he can testify as to its accuracy as a representation. *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214. The record in the present case discloses that the pathologist sufficiently authenticated the photograph and stated that it could illustrate his testimony concerning the hemorrhaging found in the sclera of the victim's eye. We have viewed the photograph and, while it is indeed unpleasant, we do not agree that the trial judge abused his discretion by allowing its admission into evidence.

Defendant also objects to the introduction of a key to the victim's home, saying:

> The State also sought to introduce as evidence a key, purportedly the same key given by defendant James Small to Paul Lowery for the purpose of unlocking Evelyn Small's rear door to her house in order to gain entry on the night of her killing. That key was marked for identification purposes as State's Exhibit 22. (T p. 2481) The key was introduced over the objection of the defense. (T p. 2481, 11. 6-9.)

Actually, State's Exhibit 22 was a key recovered from Felton Brewer, who apparently had told SBI agents that Small had offered him money to kill Mrs. Small and had given him the key. The State's theory at trial was that Small had hired the defendant to murder Mrs. Small. The theory was made more credible by proof that Small had contacted others to accomplish the act prior to contacting the defendant. The key was therefore relevant as evidence and defendant has shown no unfair prejudice by its introduction. A key purportedly given to the defendant was not introduced into evidence because it was never found after he, according to Hazel Lowery, threw it away in the backyard.

The gloves which defendant argues were improperly introduced were those purportedly given to Vincent Johnson by Small. Johnson attempted to identify the gloves at trial but was interrupted by objections interposed by both defendants' counsel. Defendant contends that the gloves should not have been introduced into evidence because they were never identified. Defendant argues that he was prejudiced by the introduction of the exhibit because it was "later argued to the jury as being part of an elaborate preplanning of this killing." A second pair of brown gloves which were identified as those given by Small to defendant

Lowery were introduced without objection, thereby effectively eliminating any prejudice to the defendant by introduction of the gloves recovered from Johnson. This assignment of error is meritless.

VII.

[8] Finally, defendant, a Lumbee Indian, claims that the trial judge erred and denied him equal protection when he granted co-defendant Small's motion for merger of the conspiracy conviction with the first-degree murder conviction and refused to merge the defendant's convictions.

Inasmuch as no motion was made by the defendant for merger, we assume that it is his contention that the trial judge should have granted merger *ex mero motu* when he granted Small's motion to merge his conspiracy conviction into the murder conviction. The failure of the trial judge to merge defendant's convictions neither violated the defendant's equal protection rights nor constituted error.

The evidence at trial established that Small was not present at the actual murder; his liability for the murder was predicated solely on his participation in the conspiracy. As Justice Exum, speaking for the Court, explained in *State v. Small*, 301 N.C. at 428 n. 14, 272 S.E. 2d at 141 n. 14:

> We have consistently held that the crime of conspiracy is a separate offense from the accomplishment or attempt to accomplish the intended result. Thus, the offense of conspiracy does not merge into the substantive offense which results from the conspiracy's furtherance. A defendant may be properly sentenced for both offenses. *See, e.g., State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964); *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963). It would be otherwise, however, were a defendant convicted of the substantive offense solely on the basis of his participation in the conspiracy. In such a case, proof of guilt of the substantive offense would necessarily include (indeed, would be equivalent to) proof of involvement in the conspiracy, and the defendant could not be properly punished both for conspiracy and the separate offense. *See, e.g., State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972), discussing the rationale of merger of the underly-

ing felony into the homicide charge in cases of felony murder. *See also State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), and *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976), pointing out that the merger requirement may depend upon the theory of the case submitted by the judge to the jury. It should be noted that in the instant case, Judge Smith instructed the jury to find defendant guilty of murder upon proof that defendant had conspired to commit the murder. Given this theory of the case (a theory we reject today), the offense of conspiracy merged into the offense of murder. Accordingly, Judge Smith arrested judgment on the conspiracy conviction.

According to the evidence, the defendant, on the other hand, not only conspired to murder Mrs. Small, he also actually participated in killing her. The reason for the different treatment of his conspiracy conviction from that given to Small's conspiracy conviction was the difference in the evidence and theory forming the basis for the murder convictions, not the different races of the two individuals involved.

This assignment of error is overruled.

Defendant received a fair trial free of prejudicial error.

No error.

ANN S. SHELTON AND ROBERT F. SHELTON, JR. v. MOREHEAD MEMORIAL HOSPITAL, LINDA T. ROSS, ADMINISTRATRIX OF THE ESTATE OF ROBERT J. ROSS, J.D., ROBERT P. SHAPIRO, M.D., STUART M. BERGMAN, M.D. AND THE BOARD OF TRUSTEES OF MOREHEAD MEMORIAL HOSPITAL, INCLUDING JOSEPH G. MADDREY, JOHN E. GROGAN, JAMES M. DALY, JR., ROY C. TURNER, JOYCE JOHNSON, WILLIAM O. STONE, JESSE L. BURCHELL, GARLAND S. EDWARDS, WILLIAM R. FRAZIER AND GERALD JAMES, INDIVIDUALLY, AND THE EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF MOREHEAD MEMORIAL HOSPITAL, INCLUDING SHELTON DAWSON, J.D., HENRY A. FLEISHMAN, M.D., EDWARD L. GROOVER, M.D., BARRY L. BARKER, M.D., DAVID LEE CALL, M.D., JOHN R. EDWARDS, M.D. AND JAMES B. PARSONS, M.D., INDIVIDUALLY

No. 563PA85

(Filed 29 August 1986)

1. **Evidence § 29.3; Hospitals § 3.2— medical review committee—no discovery of records**

N.C.G.S. § 131E-95, which affords protection from discovery of the records and proceedings of a hospital's medical review committees, applies in actions against hospitals for corporate negligence, since the purpose of the statute, *i.e.*, the promotion of candor and frank exchange in peer review proceedings, would be thwarted if discovery were allowed; furthermore, it is not impossible for injured persons to hold hospitals accountable for their medical review committee's negligence, since information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings, nor should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee.

2. **Hospitals § 3.2— board of trustees—no medical review committee**

A hospital's board of trustees is not a medical review committee within the meaning of the Hospital Licensure Act.

3. **Evidence § 29.3; Hospitals § 3.2— chief executive officer—no member of medical review committee—records not immune from discovery**

A chief executive officer of a hospital was not a member of a medical review committee so as to make documents in his possession and information known to him immune from discovery pursuant to N.C.G.S. § 131E-95.

4. **Evidence § 29.3— medical review committee records—immunity from discovery—no common law privilege**

There was no merit to defendants' contention that any information or documents relating to peer reviews of the individual physicians not protected under N.C.G.S. § 131E-95 were immune from discovery and use as evidence under a common law privilege, since whatever common law privilege existed in North Carolina was codified in § 95.

5. Evidence § 29.3— hospital records—extent of immunity from discovery

In an action against defendant hospital for corporate negligence, the trial court erred in denying plaintiffs' motion to compel the corporate defendants to answer an interrogatory that defendants "identify and state the name, address and telephone number of the custodian" of certain documents, since the protection afforded by N.C.G.S. § 131E-95 is not compromised by merely identifying existing documents and giving pertinent information concerning their custodians, but it is the contents of the documents which the statute may or may not protect from discovery.

Justice MARTIN dissents.

ON defendants' and plaintiffs' petitions for further review of the Court of Appeals decision, 76 N.C. App. 253, 332 S.E. 2d 499 (1985), which affirmed in part and reversed in part an order of *Judge Morgan* entered 3 August 1984 in ROCKINGHAM County Superior Court.

Graham, Cooke, Miles & Bogan by Donald T. Bogan for plaintiffs.

Tuggle, Duggins, Meschan & Elrod, P.A. by Joseph E. Elrod III; J. Reed Johnston, Jr. and Sally A. Lawing for defendants, Morehead Memorial Hospital, the Board of Trustees of Morehead Memorial Hospital (and various named individual members thereof) and the Executive Committee of the Medical Staff of Morehead Memorial Hospital (and various named individual members thereof).

EXUM, Justice.

This is a medical malpractice action in which plaintiffs claim first that they were injured by the negligence of defendants, Drs. Robert J. Ross (now deceased) and Robert P. Shapiro. Second, plaintiffs claim that defendants Hospital, its Board of Trustees, and the Executive Committee of its Medical Staff were negligent in allowing Drs. Ross and Shapiro to continue to practice at the hospital after they knew or should have known that these physicians were not fit to practice medicine and had continuously failed to treat patients in accordance with ordinary standards of care pertaining to their profession. This is a claim for what has been called the "corporate negligence" of a hospital, which occurs when the hospital violates a duty owed directly by it to the patient. *Bost v. Riley*, 44 N.C. App. 638, 262 S.E. 2d 391 (1980). The case

involves whether and to what extent N.C.G.S. § 131E-95 precludes discovery of various records which may be in the corporate defendants' possession relating to their knowledge of the competence of the individual physicians and various personnel investigations and decisions which the corporate defendants might have made regarding the individual physicians' tenure at the hospital.

Judge Morgan, presiding in Rockingham County Superior Court, concluded that these records were privileged and could not be discovered. The Court of Appeals concluded that under N.C.G.S. § 131E-95 the records of the Medical Staff's Executive Committee were protected from discovery but the records of the Hospital's Board of Trustees were not. We modify and affirm the decision of the Court of Appeals.

I.

Plaintiffs allege in their complaint that on 5 January 1983 Dr. Ross, assisted by Dr. Shapiro, negligently performed on Mrs. Shelton a total hysterectomy. As a result of this alleged negligence, Mrs. Shelton had to undergo several additional surgical procedures, whereby she has suffered physically and mentally and incurred substantial expenses. Mr. Shelton's action is for loss of consortium due to the alleged injuries suffered by his wife. Plaintiffs also allege the corporate defendants knew or should have known of the unfitness of Drs. Ross and Shapiro to practice their profession before Mrs. Shelton's surgery; yet these defendants failed to take appropriate corrective actions against their physicians.

In March 1984 plaintiffs served interrogatories upon the corporate defendants requesting them to identify, among other things, all records relating to personnel decisions, disciplinary investigations, peer evaluations, credential and competence reviews, and patient complaints relating to Drs. Ross and Shapiro. In April 1984 plaintiffs requested production of these documents. Defendants filed objections to the interrogatories and the motion to produce on the ground the information requested was "not discoverable or admissible by virtue of North Carolina General Statute § 131E-95."

Having noticed the deposition of Amos Tinnell, a former chief executive officer of the hospital, plaintiffs in June 1984 issued a

subpoena duces tecum to Tinnell, directing him to produce at his deposition documents similar to those about which plaintiffs had inquired in their interrogatories and moved defendants to produce. Defendants, again relying on N.C.G.S. § 131E-95, moved for a protective order that plaintiffs not be permitted to question Tinnell so as to disclose "any matters considered or decided by any medical review committee." The motion also asked that the subpoena "requiring production of confidential material be stricken." Tinnell, himself, moved to quash the subpoena duces tecum on the grounds the documents sought from him were protected by N.C.G.S. § 131E-95.

Plaintiffs moved to compel the corporate defendants to answer the interrogatories relating to and produce the documents in question.

On 3 August 1984 Judge Morgan denied the motion to compel, quashed the subpoena duces tecum, and ordered that Tinnell not be questioned in his deposition regarding "any matters relating to the hospital's medical review processes, including the credentialing and investigation processes, except with the express permission of counsel for the hospital."

Judge Morgan also found that his rulings affected a substantial right of the plaintiff and that there was no reason for delay in obtaining appellate review of this order. See N.C.R. Civ. P. 54(b). Plaintiffs appealed, assigning error to the trial court's: (1) denying plaintiffs' motion to compel discovery; (2) ordering that Tinnell not be questioned about matters relating to the hospital's medical review processes; and (3) quashing the subpoena duces tecum issued to Tinnell.

The Court of Appeals, without discussing the appealability of the order, concluded first that under the Bylaws of the Medical and Dental Staff of Morehead Memorial Hospital, the Executive Committee of the Medical Staff was a "medical review committee," as defined by N.C.G.S. § 131E-76(5). The Court of Appeals also concluded that the trial court properly quashed the subpoena duces tecum and properly ordered that Tinnell not be questioned regarding his participation in the Executive Staff's review processes. Finally, the Court of Appeals held that documents and proceedings before the hospital's Board of Trustees were not protected from discovery under either N.C.G.S. § 131E-95 or the

common law. We allowed both parties' petitions for further review.

II.

As to the appealability of Judge Morgan's rulings, we conclude his orders are interlocutory, do not affect a substantial right of the plaintiffs, and are not appealable of right. N.C.G.S. § 7A-27 (1986); *First Union Nat'l Bank v. Olive*, 42 N.C. App. 574, 257 S.E. 2d 100 (1979). Nevertheless, because of the significance of the legal issues involved, we have elected under our supervisory powers and Appellate Procedure Rule 2 to entertain the appeal.

III.

[1] The statutes in question here are contained in the Hospital Licensure Act, codified as Article 5, Chapter 131E of the General Statutes.[1] The stated purposes of the Act are "to establish hospital licensing requirements which promote public health, safety and welfare and to provide for the development, establishment and enforcement of basic standards for the care and treatment of patients in hospitals." § 75. The Act defines "medical review committee" in pertinent part as "a committee . . . of a medical staff of a licensed hospital . . . which is formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing." § 76(5). Section 95 of the Act provides:

> (a) A member of a duly appointed medical review committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement or proceeding undertaken, made, or performed within the scope of the functions of the committee.
>
> (b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, 'Public records defined,' and shall not be subject to discovery or introduction into evidence in any civil action against a hospital or a provider of professional health services which results from matters

1. Since all statutes referred to will be in Chapter 131E, references will be only to section numbers in that chapter.

which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.

§ 95.

The question before us is whether and to what extent section 95 of the Act prohibits discovery of the documents and testimony sought by plaintiffs through their interrogatories, motions to produce and compel discovery, and deposition of and subpoena duces tecum issued to Tinnell.

Plaintiffs concede that the Medical Staff's Executive Committee is a "medical review committee" as that term is used in the Act. Plaintiffs further concede that § 95 of the Act protects from discovery medical review committee proceedings which relate to the surgery forming the basis of plaintiffs' negligence claims against Drs. Ross and Shapiro. Plaintiffs argue, however, that proceedings of medical review committees which relate to plaintiffs' corporate negligence claims are not protected by § 95 because such claims do not result "from matters which are the subject of evaluation and review by the committee." Plaintiffs' argument is that when a claim is filed against the hospital itself, as a corporate entity, grounded in allegations of the hospital's own negligence in performing peer evaluations and reviews, § 95 affords no protection from discovery of the records and proceedings of the hospital's medical review committees. We disagree.

Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which

the statute seeks to accomplish. *Crumpler v. Mitchell*, 303 N.C. 657, 281 S.E. 2d 1 (1981); *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977). The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently. *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614.

The stated purposes of the Hospital Licensure Act are to promote the public health, safety and welfare and to provide for basic standards for care and treatment of hospital patients. Section 95 of the Act protects from discovery and introduction into evidence medical review committee proceedings and related materials because of the fear " 'that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. . . . [The Act] represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.' " *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 436, 293 S.E. 2d 901, 914, *appeal dismissed and disc. rev. denied*, 307 N.C. 127, 297 S.E. 2d 399 (1982), *quoting Matchett v. Superior Court of Yuba County*, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320-21 (1974).

It would severely undercut the purpose of § 95, *i.e.*, the promotion of candor and frank exchange in peer review proceedings, if we adopted plaintiffs' construction of the statute, for it would mean these proceedings were no longer protected whenever a claim of corporate negligence was made alone or coupled with a claim of negligence against an individual physician.

Neither do we think the language of the statute, considered in context, permits the construction plaintiffs urge. Subsection (a) of § 95 constitutes a broad grant of immunity from liability for damages "in *any* civil action on account of *any* act, statement or proceeding undertaken, made or performed within the scope of the functions of the committee." (Emphases supplied.) Subsection (b) of § 95 protects documents and related information against discovery or introduction into evidence "in *any* civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee." (Emphasis supplied.) A civil action against a hospital grounded on the alleged negligent performance of the hospital's medical review com-

mittees is by the statute's plain language a civil action resulting from matters evaluated and reviewed by such committees.[2]

Plaintiffs contend that the construction we adopt will make it impossible for injured persons to hold hospitals accountable for their medical review committees' negligence. Again, we disagree.

The statute protects only a medical review committee's (1) proceedings; (2) records and materials it produces; and (3) materials it considers. But the statute also provides:

> [I]nformation, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee or a person who testifies before the committee may testify in a civil action but cannot be asked about his testimony before the committee or any opinions formed as a result of the committee hearings.

§ 95.

These provisions mean that information, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee. *Eubanks v. Ferrer*, 245 Ga. 763, 267 S.E. 2d 230 (1980).

The statute is designed to encourage candor and objectivity in the internal workings of medical review committees. Permitting access to information not generated by the committee itself but merely presented to it does not impinge on this statutory pur-

2. The following cases support our conclusion that the statute's protections apply in actions for corporate negligence: *Bost v. Riley*, 44 N.C. App. 638, 262 S.E. 2d 391 (1980); *West Covina Hospital v. The Superior Ct. of Los Angeles County*, 153 Cal. App. 3d 134, 200 Cal. Rptr. 162 (1984); *Matchett v. The Superior Ct. of Yuba County*, 40 Cal. App. 3d 623, 115 Cal. Rptr. 317 (1974); *Elam v. College Park Hospital*, 132 Cal. App. 3d 332, *modified*, 183 Cal. Rptr. 156 (1982); *Segal v. Roberts*, 380 So. 2d 1049 (Fla. App. 1979); *Hollowell v. Jove*, 247 Ga. 678, 279 S.E. 2d 430 (1981); *Eubanks v. Ferrer*, 245 Ga. 763, 267 S.E. 2d 230 (1980); *Jenkins v. Wu*, 102 Ill. 2d 468, 468 N.E. 2d 1162 (1984); *Texarkana Memorial Hospital v. Jones*, 551 S.W. 2d 33 (1977).

pose. These kinds of materials may be discovered and used in evidence even though they were considered by the medical review committee. This part of the statute creates an exception to materials which would otherwise be immune under the third category of items as set out above.

IV.

[2] Defendants argue that the hospital's Board of Trustees is a medical review committee as defined in the Act. The plain language of § 76(5) will not permit such a conclusion. This section describes a medical review committee as "a committee . . . of a medical staff of a licensed hospital, or a committee of a peer review corporation or organization. . . ." A board of trustees of a hospital simply cannot fit within this statutory language. It is not a committee of a medical staff, nor is it a committee of a peer review corporation or organization. This is so even though, as defendants argue, the board reviews personnel recommendations of the medical review committees and has ultimate decision making authority upon these recommendations by virtue both of the hospital's bylaws and § 85 of the Act.[3]

[3] Contrary also to defendants' contention, we find nothing in the hospital's or medical staff's bylaws which makes Tinnell, as Chief Executive Officer, a member of the medical staff's committees. The medical staff's bylaws do provide that Tinnell, as Chief Executive Officer, "shall be invited to attend" meetings of the medical staff's executive committee.

Documents in the possession of and information known to the hospital's board and Tinnell are not thereby immune from discovery and use as evidence under § 95. Documents and information which are otherwise immune from discovery under § 95 do not,

3. The following cases from other jurisdictions support our conclusion on this point: *West Covina Hospital v. The Superior Ct. of Los Angeles County*, 153 Cal. App. 3d 134, 200 Cal. Rptr. 162 (1984); *Matchett v. The Superior Ct. of Yuba County*, 40 Cal. App. 623, 115 Cal. Rptr. 317 (1974); *Mercy Hospital v. Dept. of Professional Regulation, Bd. of Medical Examiners*, 467 So. 2d 1058 (Fla. App. 3d 1985); *Segal v. Roberts*, 380 So. 2d 1049 (Fla. App. 1979); *Hollowell v. Jove*, 247 Ga. 678, 279 S.E. 2d 430, 434 (1981); *Anderson v. Breda*, 700 P. 2d 737 (Wash. 1985); *State, Good Samaritan Medical Center-Deaconness Hospital Campus v. Maroney*, 365 N.W. 2d 887 (Wis. App. 1985). *But see Texarkana Memorial Hospital v. Jones*, 551 S.W. 2d 33 (1977).

however, lose their immunity because they were transmitted to the board or Tinnell, or both.

V.

[4] Defendants assert on appeal, not having relied on either ground in the trial court, that any information or documents relating to peer reviews of the individual physicians not protected under § 95 are immune from discovery and use as evidence under a common law privilege and the statutory physician patient privilege. N.C.G.S. § 8-53 (1986). Our Court of Appeals in *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 293 S.E. 2d 901, did apply what it identified as a common law privilege in holding minutes of meetings and "good faith communications of" hospital peer review committees immune from discovery and use as evidence. The cases relied on in *Cameron* for the existence of such a privilege were libel actions in which the defense of qualified privilege arises where:

> '(1) a communication is made in *good faith*, (2) the subject and scope of the communication is one in which the party uttering it has a valid interest to uphold, or in reference to which he has a legal right or duty, and (3) *the communication is made to a person or persons having a corresponding interest, right, or duty.*'

Cameron v. New Hanover Memorial Hospital, 58 N.C. App. at 436, 293 S.E. 2d at 915, *quoting Presnell v. Pell*, 298 N.C. 715, 720, 260 S.E. 2d 611, 614 (1979) (emphases in original). We have found no case other than *Cameron* in North Carolina which has applied the defense of qualified privilege in libel actions to render peer review proceedings immune from discovery and introduction into evidence. Even *Cameron* appears to have limited its application to medical review committees. A federal court in *Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), recognized a common law medical review privilege applicable to a hospital staff's medical review committees.

In *Cameron* the statutory predecessor to § 95 was enacted after the filing of the complaint but before the case was decided on appeal. The *Cameron* court recognized that the policy in this predecessor statute "is grounded in our common law." 58 N.C. App. at 437, 293 S.E. 2d at 915. The Court of Appeals in the in-

stant case concluded that whatever common law privilege existed in North Carolina "has been codified in section 95." 76 N.C. App. at 258, 332 S.E. 2d at 503. We agree with this conclusion.

With regard to the statutory physician-patient privilege, suffice it to say that this privilege was never invoked in the trial court. It is impossible for us to say from the record before us which information and which documents might fall within the ambit of the privilege. The privilege is, moreover, not absolute but qualified; the trial court may require disclosure of privileged information under the statute "if in his opinion the same is necessary to a proper administration of justice." N.C.G.S. § 8-53 (1986). Consequently, we leave it to the trial court on remand to apply this privilege according to its terms to whatever information or documents it may be applicable, if the trial court considers it necessary to do so.

VI.

[5] We now proceed to apply the foregoing principles to the various discovery rulings of Judge Morgan. Judge Morgan denied plaintiffs' motion to compel the corporate defendants to answer an interrogatory that defendants "identify and state the name, address and telephone number of the custodian of the following." In the interrogatory there follows a description of various documents relating to personnel decisions, disciplinary investigations, peer evaluations, credentials and competence reviews, and patient complaints relating to Drs. Ross and Shapiro. This ruling was error. The protection afforded by § 95 is not compromised by merely identifying existing documents and giving pertinent information concerning their custodians. It is the contents of the documents which the statute may or may not protect from discovery. Indeed, as this case illustrates, it may be necessary to identify not only the document by name and its custodian, but also the document's source and the reason for its creation. Here, for example, the trial court placed under seal and forwarded to us as part of the record on appeal various documents in possession of defendants.[4]

4. These include: (1) minutes of the hospital's (a) Board of Trustees, (b) Executive Committee of the Medical Staff, (c) Executive Committee of the Board of Trustees, (d) joint meetings between the Board of Trustees and the Medical Staff's Executive Committee, (e) Credentials Committee, (f) Joint Conference Committee, (g) Special Investigative Committee; (2) correspondence between the Board of

Having carefully studied the Bylaws of the Medical and Dental Staff of the hospital, we are satisfied that all of the committees of the Medical Staff mentioned above are "medical review committees" within the meaning of the Act. All of them were formed for the purpose of those kinds of evaluations or for "medical staff credentialing," as set out in § 76(5). Some of the documents identified, consequently, are obviously, by virtue of their description, protected from discovery by § 95, *e.g.*, minutes of the various medical review committees. On the other hand, minutes of the hospital's Board of Trustees and the Board's Executive Committee would appear to be discoverable, except insofar as these minutes contain information or documents otherwise protected by § 95. Section 95 offers no protection to the records and documents furnished by the individual physicians in their applications for hospital privileges. Some of the correspondence would seem to be discoverable unless, again, either it contains information generated at a medical review committee meeting or originated with or at the instance of one of the medical review committees or a member of that committee acting in his capacity as a member.

Insofar as Judge Morgan denied plaintiffs' motion to produce materials which are discoverable under the principles herein announced, it was error. We have already identified some materials which defendants may be required to produce. On remand defendants, as we have indicated, should be required to fully answer plaintiffs' interrogatories so as to identify the nature of the documents in their possession, and the custodians thereof. After the documents have been appropriately identified, the trial court may then decide, under the principles herein announced, which documents should and which should not be produced.

Trustees and Dr. Ross; (3) correspondence between Tinnell and Ross and correspondence between Tinnell and others concerning Dr. Ross; (4) correspondence between Dr. Ross and the president of the Medical Staff's Executive Committee; (5) correspondence from the Medical Staff's Executive Committee to others concerning Dr. Ross; (6) memorandums to and from the Board of Trustees relating to the Medical Committee's Executive Staff meetings; (7) correspondence to and from the Credentials Committee and Tinnell; (8) memos regarding and report of the Special Investigating Committee, including a letter to Dr. Ross; (9) memos regarding and report of Special Concurrent Review Committee; (10) personnel records and documents concerning Dr. Ross's application for hospital privileges; (11) personnel records and documents concerning Dr. Shapiro's application for hospital staff privileges; and (12) letter to Dr. Ross from Medical Records Committee.

Judge Morgan quashed plaintiffs' subpoena duces tecum issued to Tinnell in its entirety. This subpoena commands Tinnell to produce writings which are generally described in plaintiffs' brief as follows:

> (a) all direct complaints, and all direct allegations of misbehavior, unprofessional conduct, professional negligence or incompetence regarding Dr. Ross or Dr. Shapiro received by the witness from any person.
>
> (b) all disciplinary investigations and hearings, all peer evaluations and recommendations, all personnel information, all credentials evaluations and all recommendations to grant, continue or discontinue staff privileges of Dr. Ross or Dr. Shapiro at the Hospital.
>
> (c) all incident reports concerning Dr. Ross's and Dr. Shapiro's treatment of any patient.
>
> (d) all meetings or hearings of the Executive Committee of the Medical Staff, or any other medical staff committee relating to Dr. Ross or Dr. Shapiro.
>
> (e) all meetings or hearings of the Board of Trustees or any members of the Board of Trustees relating to Dr. Ross or Dr. Shapiro.

Under the principles we have set out herein, Judge Morgan erred in quashing the subpoena insofar as it commanded Tinnell to produce documents in categories (a), (c) and (e), except in the latter case insofar as these documents may otherwise be protected by § 95. Judge Morgan correctly quashed the subpoena insofar as it asked for documents in categories (b) and (d).

Finally, on defendants' motion for a protective order regarding Tinnell's testimony, Judge Morgan ruled he could not be "asked any questions about, nor may he give any testimony regarding, any matters relating to the hospital's medical review processes, including the credentialing and investigation processes, except with the express permission of counsel for the hospital." Insofar as Judge Morgan means that Tinnell cannot testify to the medical review processes in which he participated with one of the medical review committees, it is altogether correct. Tinnell, under the principles we have herein announced, may be examined about

information he received solely in his capacity as chief executive officer so long as this material is not otherwise protected by § 95.

The decision of the Court of Appeals, except as herein modified, is affirmed.

Modified and affirmed.

Justice MARTIN dissents.

BENJAMIN A. WHITLEY, EMPLOYEE v. COLUMBIA LUMBER MFG. CO., EMPLOYER, AND INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, INSURER

No. 805PA85

(Filed 29 August 1986)

Master and Servant § 69— workers' compensation—employee totally and permanently disabled—statute governing benefits

An employee who qualifies as being totally and permanently disabled is not precluded by the "in lieu of" clause of N.C.G.S. § 97-31 from recovering lifetime compensation under N.C.G.S. § 97-29 if all his injuries are listed in the schedule of § 31, and language of *Perry v. Furniture Co.*, 296 N.C. 88, to the effect that an employee whose injuries are included in the schedule set out in § 31 may be compensated *exclusively* under that section is overruled.

Justice BILLINGS dissenting.

Chief Justice BRANCH and Justice MEYER join in this dissenting opinion.

ON plaintiff's petition for further review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 78 N.C. App. 217, 336 S.E. 2d 642 (1985), reversing a workers' compensation award by the Industrial Commission.

Charles M. Welling for plaintiff-appellant.

George C. Collie and James F. Wood, III for defendant-appellees.

EXUM, Justice.

This is a workers' compensation case. Plaintiff, Benjamin A. Whitley, sustained injuries to his right arm and left hand while

operating a bench saw in the employment of defendant Columbia Lumber Mfg. Co. The Industrial Commission concluded that plaintiff was totally and permanently disabled and entitled to compensation under N.C.G.S. § 97-29.[1] On appeal to the Court of Appeals defendants did not dispute that plaintiff was totally and permanently disabled as that term is used in section 29. They argued, however, the schedule of benefits codified at section 31 was plaintiff's exclusive remedy. The Court of Appeals, relying on *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978), agreed and reversed the Commission's award. The sole question presented by this appeal is whether an employee who suffers an injury scheduled in section 31 may recover compensation under section 29 instead of section 31 if he is totally and permanently disabled. We hold that he can and reverse the Court of Appeals.

I.

Evidence before the Commission tended to show the following: Plaintiff was injured when a scrap of wood flew out of a saw and struck his right arm and left hand. As a result, plaintiff can lift only ten pounds of weight. Before he was injured he regularly lifted seventy-five to one hundred pounds of lumber. Plaintiff no longer can drive nails with a hammer or work well with his hands.

Plaintiff was born 15 June 1924 and at the time of the hearing was sixty years old. He attended the fourth grade of school. His only substantial work experience was in the lumber industry as a cabinet maker. He can measure lumber but cannot read or write.

An orthopedic surgeon, John H. Caughran, examined plaintiff. His tests showed plaintiff suffered impaired right elbow function, limited right wrist extension, and markedly limited right-hand finger function. Right hand grip strength was twenty-five pounds and left hand grip strength was forty pounds; normal grip strength ranges between one hundred and one hundred thirty pounds.

Dr. Caughran opined that plaintiff could not return to his previous job in the cabinet shop or do other manual labor. He be-

1. All statutes cited in this opinion appear in Chapter 97 of the North Carolina General Statutes. All further statutory citations will be to section numbers within Chapter 97.

lieved, on the basis of plaintiff's age and illiteracy, plaintiff was not a candidate for vocational retraining. He concluded in light of plaintiff's medical infirmities that plaintiff's "job potential is zero."

With this and other evidence before it, the deputy commissioner made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff was born on June 15, 1924. He was in the 4th grade when he stopped attending school to begin working on a farm where he continued to work until he served in the Army from 1942 through November 13, 1943. Although plaintiff can neither read nor write, upon being discharged from the Army, he entered a trade school where he was trained as a cabinet maker.

. . . .

3. On May 24, 1982 plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant-employer when he sustained injuries to his right forearm and left hand while operating a bench saw. . . .

. . . .

5. Plaintiff was . . . examined by Dr. John Caughran, at defendant's request on May 12, 1983 for the purpose of rendering an independent examination. Dr. Caughran was of the opinion that plaintiff had reached maximum medical improvement as of 5/12/83 and that he was permanently and totally disabled as a result of his injuries which Dr. Caughran rated as 30% of the left hand and 75% of the right hand.

. . . .

7. As a result of his injury by accident on May 24, 1982 plaintiff has sustained a 75% permanent partial disability to his right hand and a 30% permanent partial disability of his left hand.

8. Dr. Caughran was of the opinion that plaintiff would never be able to return to his previous work as a carpenter in a cabinet shop operating saws and heavy machinery. Fur-

thermore, the loss of dexterity, loss of motion in the right hand, the profound weakness of the right hand and marked weakness of the left hand also preclude any consideration of plaintiff returning to any type of manual labor.

9. Due to plaintiff's age and his inability to read or write, he is not a viable candidate for job retraining by Vocational Rehabilitation. Consequently, he is permanently and totally disabled as a result of his injury by accident.

* * * *

The above findings of fact and conclusions of law engender the following additional

CONCLUSIONS OF LAW

1. As a result of his injury by accident sustained on May 24, 1982, plaintiff is entitled to compensation for 75% permanent partial disability to his right hand, and 30% permanent partial disability to his left hand. G.S. § 97-31(12).

2. Although plaintiff is permanently totally disabled, all of his injuries are included in the schedule set out in G.S. § 97-31, and the fact that an injury is one enumerated in the schedule of payments set forth under this section precludes the Commission from awarding compensation under any other provision of the Act. . . .

The Full Commission adopted the hearing commissioner's findings of fact, and defendants have excepted to none of these. The Commission, however, amended the deputy commissioner's conclusions of law as follows:

As a result of his injury by accident on 24 May 1982, plaintiff is permanently and totally disabled and is entitled to lifetime benefits under the Act. G.S. 97-2(9), G.S. 97-29.

Upon these findings of fact and conclusions of law, the Commission awarded plaintiff compensation, subject to attorney's fees, for the remainder of his life.

II.

Plaintiff contends the Court of Appeals erred in reversing the Commission's award of lifetime benefits for total and perma-

nent disability as provided by section 29. The Commission found as fact that plaintiff suffered partial medical disability to his arms or, in the language of the Act, partial loss of use of his arms. The schedule of compensation codified at section 31 lists partial loss of use of arms as a compensable injury. The resolution of plaintiff's claim, therefore, depends upon the following language of section 31:

> In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the periods specified, *and shall be in lieu of all other compensation.*

§ 31 (emphasis added).

Defendants contend this Court's interpretation of the "in lieu of" clause in section 31 in *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397, controls this case. The claimant in *Perry* suffered a work-related injury in the employment of the Hibriten Furniture Company. Medical experts agreed that he lost between twenty-five and seventy-five percent of the use of his back. Their testimony indicated that Perry was "probably unable to carry out gainful employment" and "probably disabled from any useful occupation." Perry testified he suffered pain in his back and legs and could not lift or bend without hurting. The Industrial Commission concluded that Perry sustained a fifty percent loss of the use of his back and awarded 150 weeks' compensation pursuant to section 31(23). Perry argued he was entitled to compensation for permanent total disability under section 29. This Court, quoting section 31 and emphasizing the phrase "in lieu of all other compensation," disagreed. It held that section 31 was claimant's exclusive remedy:

> The language of G.S. 97-31 . . . compels the conclusion that if by reason of a compensable injury an employee is unable to work and earn *any* wages he is totally disabled, G.S. 97-2(9), and entitled to compensation for permanent total disability under G.S. 97-29 *unless all his injuries are included in the schedule set out in G.S. 97-31.* In that event the injured employee is entitled to compensation exclusively under G.S. 97-31 regardless of his ability or inability to earn wages in the same or any other employment.

Id. at 93-94, 249 S.E. 2d at 401 (emphases in original).

In *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985), this Court expressed a willingness to depart from the rule stated in *Perry*. The claimant in *Fleming* suffered a work-related back injury which caused chronic back and leg pain. The pain prevented plaintiff from remaining in any one position for an extended period of time. If he sat for a long period of time, his back hurt, and he had to get up. When he stood up, his legs hurt, and he had to sit down. A deputy commissioner found as fact that plaintiff suffered a fifty percent loss of use of his back and awarded 150 weeks' compensation under section 31(23). The Full Commission concluded that plaintiff was totally and permanently disabled within the meaning of section 2(9) and entitled to compensation under section 29. The Full Commission modified the deputy commissioner's award accordingly. The Court of Appeals and this Court affirmed. We stated:

> If an injured employee is permanently and totally disabled as the term is defined by N.C.G.S. 97-2(9), then he or she is entitled to receive compensation under N.C.G.S. 97-29. *See West v. Bladenboro Cotton Mills*, 62 N.C. App. 267, 302 S.E. 2d 645 (1983); *Cook v. Bladenboro Cotton Mills*, 61 N.C. App. 562, 300 S.E. 2d 852 (1983). *See generally* Note, *North Carolina General Statutes Section 97-31: Must it Provide Exclusive Compensation for Workers who Suffer Scheduled Injuries?*, 62 N.C. L. Rev. 1462 (1984).

Fleming v. K-Mart Corp., 312 N.C. at 547, 324 S.E. 2d at 219. Thus, in *Fleming* we permitted a totally and permanently disabled employee to recover lifetime benefits under section 29 even though his injuries were included within section 31.

Although we observed that claimant was entitled to compensation benefits under section 29 "directly," we did not expressly overrule *Perry's* interpretation of the "in lieu of" clause. We said:

> Although it is clear that because plaintiff is totally unable to earn any wages, he is disabled within the meaning of N.C.G.S. 97-2(9) and thus entitled to benefits under N.C.G.S. 97-29 directly, we note that if the Commission had analyzed plaintiff's case by turning first to the schedule of injuries in N.C.G.S. 97-31, it should have come to the same con-

> clusion. N.C.G.S. 97-31(19) states that "[t]otal loss of use of a member . . . shall be considered as equivalent to the loss of such member. . . ." N.C.G.S. 97-31(17) provides that "[t]he loss of . . . both legs . . . shall constitute total and permanent disability, to be compensated according to the provisions of G.S. 97-29." The Commission's findings support a conclusion that plaintiff suffered total loss of use of both of his legs due to arachnoiditis. Therefore, under N.C.G.S. 97-31(17) plaintiff would be entitled to receive benefits under N.C.G.S. 97-29.

Id.

In this case the Commission did not find, and there is no evidence to support a conclusion, that plaintiff suffered total loss of the use of his arms. The question, therefore, is squarely presented whether we continue to observe *Perry's* interpretation of the "in lieu of" clause to preclude a claimant who qualifies as being totally and permanently disabled from recovering lifetime compensation under section 29 if all his injuries are listed in the schedule of section 31.

We believe the time has come to revisit and reconsider the interpretation given to the "in lieu of" clause. In *Harrell v. Harriett & Henderson Yarns*, 314 N.C. 566, 336 S.E. 2d 47 (1985), we instructed the Commission on the proper disposition of the case on remand as follows:

> [T]he Industrial Commission, on remand of this case, may find that claimant had a disability resulting from an occupational disease and make an award under G.S. 97-52 and 97-29. There is also evidence from which the Commission could find that no disability resulted from an occupational disease. It may then award compensation under 97-31(24) for partial loss of lungs. *It cannot, however, make an award under both sections because compensation under G.S. 97-31 is "in lieu of all other compensation."* N.C. Gen. Stat. § 97-31 (1979). *See Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985) . . . .

Id. at 578, 336 S.E. 2d at 54 (emphasis added).

Under this interpretation, the "in lieu of" clause prevents an employee from receiving compensation under both sections 29 and

31. Section 29 is an alternate source of compensation for an employee who suffers an injury which is also included in the schedule. The injured worker is allowed to select the more favorable remedy, but he cannot recover compensation under both sections because section 31 is "in lieu of all other compensation."

For the reasons which follow, we conclude that the "in lieu of" clause does not prevent a worker who qualifies from recovering lifetime benefits under section 29 and *Perry*, to the extent it holds otherwise, should be overruled.

The legislature apparently adopted the "in lieu of" clause in response to this Court's decision in *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570 (1942). When *Stanley* was decided, section 31 did not contain the "in lieu of" clause. The claimant in *Stanley* suffered two scheduled injuries, loss of his left leg and loss of the use of fifty percent of his right foot, in an industrial accident. The Industrial Commission noted that section 31 provided that the loss of both arms or hands, or vision in both eyes " 'shall be deemed permanent total disability,' " and shall be compensated under section 29 but did not state that the loss of the leg and the partial loss of the other foot will constitute such disability. *Stanley v. Hyman-Michaels Co.*, 222 N.C. at 260, 22 S.E. 2d at 572. Thus, the Commission concluded that claimant's exclusive remedy was the scheduled payments provided in section 31. This Court reversed, saying:

> The fact that the Workmen's Compensation Act states that certain injuries shall be deemed permanent and total disability, does not mean that permanent total disability can be found to occur only in those cases where the injuries come strictly within the enumerated class. The loss of both arms, hands, legs or vision in both eyes, under the statute, is conclusively presumed to be permanent total disability, and the Commission is directed so to find; however, the Commission still has power to find that other injuries or combination of injuries occurring in the same accident may result in permanent total disability and when the Commission so finds, the injured employee should be compensated as provided in section 29 of the Workmen's Compensation Act.

Id. at 260, 22 S.E. 2d at 572-73. *Stanley* allowed claimant to prove permanent and total disability and receive compensation under section 29, even though his injuries would have been compensable under section 31. When the legislature convened in the next session, it amended section 31 and added the "in lieu of" clause. 1943 N.C. Sess. Laws ch. 502, § 2.

We do not think the holding discussed above caused the legislature to act; rather our disposition of another issue in *Stanley* provides a more plausible basis for the ensuing legislative action. Section 31 included a provision authorizing the Commission "to make and award a reasonable compensation for any serious bodily disfigurement received by any employee within the meaning of this Act, not to exceed twenty-five hundred ($2,500) dollars." 1929 N.C. Sess. Laws ch. 120, § 31(t). The Commission stated that plaintiff was not entitled to recover scheduled compensation for loss of bodily parts and recover additional compensation under the disfigurement section, when the disfigurement resulted from the same loss of parts for which compensation already had been awarded. This Court reviewed the legislative history of section 31:

> If the legislature intended to restrict compensation for disfigurement to those parts, members or organs of the body for which no compensation is provided in the schedules, we think it failed to express such intention in the statute. . . .
>
> The General Assembly in enacting our Workmen's Compensation Act, undoubtedly gave consideration to the limitation of the recovery to that fixed in the schedules for . . . the original bill as introduced provided: "In cases included by the following schedule, the incapacity in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, and shall be in lieu of all other compensation." However, the Act as adopted . . . does not contain the clause in sec. 31, "and shall be in lieu of all other compensation."

Stanley, 222 N.C. at 262-63, 22 S.E. 2d at 574. We are satisfied this holding in *Stanley* provoked the legislature to enact the "in lieu of" clause to express its intent not to permit compensation for both loss and disfigurement of body parts.

The legislature's subsequent action, moreover, in expanding section 29 strongly suggests its intent not to make section 31 an exclusive remedy for an employee who also qualifies for compensation under section 29. As originally enacted, section 29 limited compensation for total permanent disability to a maximum of 400 weeks. 1929 N.C. Sess. Laws ch. 120, § 29; 1949 N.C. Sess. Laws ch. 823, § 1. The legislature removed the time limitation in 1973. 1973 N.C. Sess. Laws ch. 1308, § 2. Before this amendment, both sections 29 and 30 limited compensation to a determinate period. The legislature's expansion of section 29 in 1973 reflects an obvious intent to address the plight of a worker who suffers an injury permanently abrogating his earning ability. We are guided by several principles of statutory construction in interpreting the legislative action. The polar star is that legislative intent controls. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). In ascertaining that intent, courts should consider the language of the statute, the spirit of the act, and what the statute seeks to accomplish. Equally well recognized is that the Workers' Compensation Act should be liberally construed so that its benefits are not denied by narrow, technical or strict interpretation. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). *Accord Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E. 2d 814 (1986). Further, statutes *in pari materia* are to be construed together and reconciled when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 400, 269 S.E. 2d 547, 561 (1980); *Taylor v. Stevens & Co.*, 300 N.C. 94, 102, 265 S.E. 2d 194, 198 (1980). A construction of section 31 which gives full effect to the legislature's expansion of benefits under section 29 is that the "in lieu of" clause prevents double recovery without making the schedule an exclusive remedy.

The policy of the Workers' Compensation Act supports the interpretation stated above. One purpose of the Act is to compensate injured employees for lost earning ability. "The term disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." § 2(9). *See* 2A Larson, *The Law of Workmen's Compensation* § 57.11 (1983). The Act represents a compromise between the employer's and employee's interests. The employee surrenders his right to common law damages in

return for guaranteed, though limited, compensation. The employer relinquishes the right to deny liability in return for liability limited to the employee's loss of earning capacity.

> [T]he act under consideration contains elements of a mutual concession between the employer and the employee . . . . "Both had suffered under the old system, the employer by heavy judgments . . . the employee through old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it."

Conrad v. Foundry Company, 198 N.C. 723, 725-26, 153 S.E. 266, 268 (1930). Allowing a totally and permanently disabled employee lifetime compensation effectuates the purpose of the Act to compensate for lost earning ability.

This result does not conflict with the purpose of section 31. An employee may recover compensation under section 31 without regard to actual loss of earning ability. *Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764 (1956). Diminished earning ability is conclusively presumed with respect to the losses included in the schedule for the period specified therein. *Harrell v. Harriett & Henderson Yarns*, 314 N.C. 566, 336 S.E. 2d 47 (1985). Although section 31 relieves an employee from proving diminished earning capacity for injuries caused thereunder, it was not, we believe, intended to mean that the presumption of reduced earning capacity should be used to the employee's detriment. The purpose of the schedule was to expand, not restrict, the employee's remedies.

Equity strongly supports the result we reach in this case. Plaintiff was fifty-eight years old at the time he was injured. He enjoys no prospect of gainful employment. He will continue to require benefits for a period long after the compensation authorized by section 31(13) becomes depleted. We do not believe the legislature, as evidenced by the expansion of section 29, intended such an inequitable result to prevail.

Defendants do not dispute the Commission's conclusion that plaintiff is totally and permanently disabled within the meaning

of section 29. They oppose the Commission's award of compensation under section 29 solely on the ground that the "in lieu of" clause prohibits such a recovery. Our decision having eliminated this obstacle, the Industrial Commission's award is reinstated and the decision of the Court of Appeals is

Reversed.

Justice BILLINGS dissenting.

In discussing the rules of statutory construction, the majority opinion overlooks the one rule which I believe decides this case and requires that we affirm the Court of Appeals. As stated in 73 Am. Jur. 2d *Statutes* § 143 (1974): "The interpretation of a statute by the highest courts of a state by which the statute was enacted is generally regarded as an integral part of the statute, ... A statutory construction, once made and followed, should never be altered upon the changed view of new personnel of the court," citing *Burtt Will*, 353 Pa. 217, 44 A. 2d 670 (1945). This is obviously because the legislature has the power, in fact the duty, to change or clarify its statutory provisions if the courts misconstrue them. In the absence of legislation amending a statute following the court's interpretation of it, the conclusion is inescapable that the interpretation is consistent with legislative intent.

Although the majority seems to concede that application of *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978) would require that we affirm the Court of Appeals, the opinion of the majority says: "We believe the time has come to revisit and reconsider the interpretation given to the 'in lieu of' clause." Since 1978 when *Perry* was decided, the North Carolina General Assembly has not seen fit to amend the portion of N.C.G.S. § 97-31 which was construed therein and which controls this case. Because I believe that it is the province of the legislature to change a statute once construed by this Court, not the province of this Court to vacillate regarding the construction to be given to legislation, I dissent from the majority opinion. I would follow *Perry* and affirm the Court of Appeals.

Chief Justice BRANCH and Justice MEYER join in this dissenting opinion.

Justice MEYER dissenting.

For the reasons stated in my dissenting opinion in *Fleming v. K-Mart Corp.*, 312 N.C. 547, 324 S.E. 2d 214 (1985), I dissent.

N.C.G.S. § 97-31 provides that scheduled injuries "*shall be in lieu of all other compensation,* including disfigurement." The majority speculates that the General Assembly in enacting the "in lieu of" clause, expressed an intent not to permit compensation for both loss and disfigurement of body parts, but did not preclude one entitled to scheduled benefits under N.C.G.S. § 97-31 from seeking, in the alternative, total disability benefits under N.C.G.S. § 97-29.

I fail to understand the majority's reasoning in reaching this result. If, as the majority opinion suggests, the legislative object in amending the act to include the words quoted above was to eliminate double compensation for a scheduled loss *and* disfigurement, it would have been unnecessary to use the language "*including disfigurement.*" Had the General Assembly intended this to be the only object of the amendment, use of the words "*all other compensation*" would have been unnecessary. A plain reading of the statute suggests that the language used was carefully chosen to make scheduled benefits the exclusive form of benefit for persons sustaining scheduled injuries.

While it is difficult to ascertain the exact intent of the legislature in enacting the "in lieu of" clause, a contemporaneous summary of the 1943 legislative session's Workmen's Compensation Act amendments states that the purpose of the amendment (1943 N.C. Sess. Laws ch. 502) "probably was to provide for payments during the actual healing period, but in no event for less than the length of time specified in the schedule." "Workmen's Compensation Act," Popular Government, June 1943, at 34. This is consistent with the theory that scheduled injuries are designed to replace *all other forms of compensation* and thus eliminate the need to determine the exact period or extent of disability.

I hasten to add that I would find no objection in the result reached if it resulted from legislation enacted by the General Assembly, rather than by the majority's judicial legislation.

STATE OF NORTH CAROLINA v. CHARLES WALLACE SUMPTER

No. 497A84

(Filed 29 August 1986)

1. **Burglary and Unlawful Breakings § 5.8— breaking or entering of residence—defendant as perpetrator of offense—sufficiency of evidence**

Evidence was sufficient to permit the jury to find that defendant was the person who committed the offense of breaking or entering with the intent to commit larceny at a particular residence where the evidence tended to show that, minutes before the break-in occurred, the doorbell rang; a resident of the house looked out a window and identified defendant standing on the front porch; defendant was carrying a blue jean jacket and had a .22 rifle beside him leaning against the window; the resident did not answer the door and the bell continued ringing, then ceased; moments later the resident heard someone kicking the basement door; and later a blue jean jacket was found on the basement floor.

2. **Burglary and Unlawful Breakings § 5.8; Criminal Law § 34.8— breaking or entering of residence—evidence of similar break-ins—sufficiency of evidence**

Evidence was sufficient to permit the jury to conclude that defendant was the person who committed the offense of breaking or entering with the intent to commit larceny at a particular residence where the evidence tended to implicate defendant in a scheme which embraced the commission of several break-ins in a particular neighborhood; a small dog which had been shot several times and a number of spent .22 cartridges were found on the floor of the residence in question; ballistic tests determined that the shots had been fired from a .22 rifle which was stolen from another home on the same day; and this gun was found in the back seat of the car which defendant stole from a murder victim and wrecked.

3. **Homicide § 21.3— first degree murder—defendant as perpetrator—sufficiency of evidence**

Evidence in a first degree murder case was sufficient to prove that defendant was the person who murdered the victim where it tended to show that defendant had the murder weapon in his possession when he was arrested a few hours after the victim was murdered; defendant also possessed a bottle of liquor of the same brand as that stolen from the victim's home; defendant stole the victim's car; a 12-gauge shotgun stolen from her home was found on the back floorboard; and defendant had blood on his clothing which did not originate from him and was consistent with the victim's and that of only 1.9 percent of the population.

4. **Robbery § 4.3— robbery with a dangerous weapon—sufficiency of evidence**

There was no merit to defendant's contention that the State produced insufficient evidence to support his conviction for robbery with a dangerous weapon where there was direct evidence that a .410 shotgun and other property was taken from the victim's residence and that the .410 shotgun was used to kill the victim; from this evidence the jury rationally could have found

beyond a reasonable doubt that defendant used violence before he left the victim's premises with the stolen property and therefore before the taking was over; and the State therefore produced sufficient evidence that the elements of violence and taking were part of one continuing transaction with the elements of violence and of taking so joined in time and circumstances with the taking as to be inseparable.

5. Criminal Law § 138.24— taking indecent liberties with minor—age of victim as aggravating factor improper

The trial court erred in aggravating defendant's sentence for taking indecent liberties with a minor on the ground that the 13-year-old victim was very young, since the 13-year-old victim was no more vulnerable to the offense of indecent liberties with a minor than other victims of the offense, and she was only two years younger than the maximum age used to define the offense.

Justice MITCHELL concurring in the result.

Justices MEYER and MARTIN join in this concurring opinion.

APPEAL by defendant under N.C.G.S. § 7A-27(a) from judgments entered by *Friday, J.*, at the 18 May 1984 Criminal Session of CATAWBA County Superior Court sentencing defendant to life imprisonment for first degree murder (Case No. 84CRS 3909), and terms of years for two counts of felonious breaking or entering (Case Nos. 84CRS3912 and 84CRS3913), armed robbery (Case No. 84CRS5877) and taking indecent liberties with a minor (Case No. 84CRS5075). The defendant's motion to bypass the Court of Appeals as to the convictions other than murder was allowed.

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

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

EXUM, Justice.

This appeal raises questions involving (1) the sufficiency of the evidence to support the conviction of felonious breaking or entering, murder and armed robbery, and (2) the propriety of the trial court's aggravating the sentence given on the conviction of indecent liberties with a minor. We find the trial court improperly aggravated the sentence given on the conviction of indecent liberties with a minor. Otherwise we find no error in the trial.

I.

John Hinson came home from work around 3:30 p.m. on 23 September 1983 and discovered the lifeless body of his daughter, Elizabeth Hinson Hawkins, lying on the dining room floor. She was wearing the top of her brown Hardee's uniform and was nude from the waist down. She had been shot twice, once in the right side and once in the head. The front entrance door to the house had been forced open. Missing from a closet in the bedroom Hinson shared with his wife were a .410 shotgun and a box of .410 shells; a 12-gauge shotgun and a box of 12-gauge shells; and a bottle of Kentucky Supreme Bourbon.

Hawkins left work at the Hardee's restaurant at 1:30 p.m. on 23 September 1983. A neighbor of the Hinsons saw Hawkins driving her yellow Datsun B-210 toward the Hinson residence at 2:10 p.m. and they waved to each other. Around 2:45, Jeanette Waldrup, Hawkins' sister, observed a white male with brown eyes and a blue shirt driving her sister's car erratically near the Hinson house.

Connie Clark testified that defendant pulled into her driveway in a little yellow car at approximately 2:55 p.m. on 23 September 1983. She went out to talk to him, and he asked her if she wanted to go to a party with him in Tennessee. She saw three firearms and a bottle of liquor, half full, in the car. Defendant appeared to have been drinking. Defendant was showing the guns to Clark's children and one child asked how one gun fired. Clark thought it was a .410 shotgun. Defendant pointed it out the window, shot it in the air and gave the spent shell to the child. Ballistics tests indicated this shell had been fired by the same gun which fired the shots which killed Hawkins. Defendant asked Clark if she had ever shot anyone and she answered, "No, why have you?" Defendant replied that he had but then recanted and said he was only kidding.

Defendant drove away from Clark's house but returned walking around 3:30 p.m. carrying a gun and a bottle of liquor and saying he had wrecked the car. Still carrying the gun and bottle of liquor, defendant walked to the house of a friend, Freddie Small, who agreed to drive defendant home. They passed a marked sheriff's department car and the deputy noticed defendant lie down as if to hide. The deputy stopped the truck and asked the name of

defendant. Defendant identified himself as Charles Sumpter; and the deputy, who had been told to be on the lookout for Charles Sumpter, arrested him. Police confiscated a .410 shotgun and a bottle of Kentucky Supreme Bourbon from the cab of the truck. The driver said the items belonged to defendant. Tests showed the .410 shotgun fired the shells recovered from Hinson's and Clark's homes.[1]

Defendant was taken to the station and asked about the blood on his jeans. Defendant explained that he had been deer hunting, shot a deer, and the blood on the knee of his jeans was from the deer. He also stated that the shotgun taken from him was his. He had bought it at a pawn shop in Lenoir for $85.

The police confiscated defendant's clothing. Bloodstains located on his jeans, shirt, the fly of his undershorts, and his boots were compared to blood samples taken from the victim. The blood on defendant's shirt and jeans was consistent with that of the victim and 1.90 percent of the general population and could not have originated from defendant. A similar comparison between the victim's blood and the blood on defendant's shorts and shoes could not be made because of the small amount of blood on those items, but tests indicated the blood on the shorts had the same enzyme type as that belonging to the victim and a different type from that belonging to defendant.

Defendant spent the night of 22 September 1983 at a house on 501 Table Rock Road in the same neighborhood as the Hinson house. Late in the morning on the next day, while defendant and thirteen-year-old Terri Jackson, the niece of defendant's girlfriend, were alone in the house, defendant pushed Terri down, pulled off her jeans and underpants and touched her with his hand on the front of her body close to where "she went to the bathroom." Terri eluded defendant's grasp, ran out of the house and told the mailman defendant had tried to rape her. Defendant walked away up the street.

A short while after these events occurred, a neighbor saw defendant walking near Dianne Reynolds' house, which was located near 501 Table Rock Road, carrying what appeared to be a

1. Police later recovered the 12-gauge shotgun stolen from the Hinson home on the floorboard of Hawkins' wrecked car.

gun. When Reynolds arrived home from work she discovered the basement door had been broken open and a loaded .22 automatic rifle had been stolen from her bedroom closet. An empty .22 rifle later was recovered from the back seat of Elizabeth Hawkins' car, which defendant stole and wrecked. Richard Dula, the owner of the gun, identified the .22 rifle recovered from Hawkins' car as his own.

Denise Horton, who also lived a short distance away from the house where defendant spent the night, found her back door similarly forced open when she arrived home after spending all day elsewhere. Nothing had been stolen, but items which had been stored in the bedroom in the closet and in drawers were strewn about. A dog was found on the floor dead, shot several times.

Thirteen-year-old Ronald Gordon was staying home sick from school with his seventeen-year-old sister on 23 September 1983. Around noon, Ronald, who lived at 204 Table Rock Road, was awakened by the front doorbell. He looked out the door and saw defendant, whom he knew through a mutual acquaintance, standing outside with a .22 rifle beside him. He noticed defendant also had a blue jean jacket with him. Ronald was afraid to answer the door and went to wake his sister. The doorbell continued to ring, then became silent. Moments later Ronald heard a noise like someone kicking at the basement door. Ronald and his sister ran out of the house and across the street and called the sheriff. When deputies arrived the house was empty and nothing appeared to be missing or to have been disturbed. A blue jean jacket, however, was found on the floor.

Around 1:30 or 2 p.m. on 23 September 1983 the doorbell rang at Faye Crump's home which was located a short distance from the Town and County neighborhood. By the time Mrs. Crump got to the door the caller had begun knocking. The caller, whom Mrs. Crump identified in court as defendant, asked to use the phone. Mrs. Crump permitted him to make a call and then observed him leave, walk down the road, and pick up a rifle which she had not seen before. Defendant returned, rang the doorbell, and asked if there were any .22 shells in the house he could buy. Mrs. Crump said she was sure there were none and defendant thanked her and left.

Defendant's girlfriend, the aunt of Terri Jackson, testified for defendant that defendant often stayed at the Jackson home and played games with Terri, her sister and her brother. She had never seen him assault or molest any of the children. Terri's brother gave similar testimony.

Defendant also called Dr. Harold Haas, a clinical psychologist, as a witness. Dr. Haas had conducted a battery of tests, including personality and intelligence tests as well as tests to detect the presence of brain damage. He found no evidence that defendant was preoccupied with sexual or violent activity. He concluded that defendant possessed relatively modest intelligence and possibly had suffered minimal brain damage. He opined that given these results and defendant's history of substance abuse, if defendant were using intoxicating substances, he would likely act on impulse and exercise poor judgment.

Defendant did not testify.

The jury found defendant guilty as charged of first degree murder of Hawkins on both premeditation and deliberation and felony murder theories; felonious breaking or entering of the residences of John Hinson, Dianne Reynolds, Gladys Gordon, and Denise Horton; robbery with a dangerous weapon from the Hinson residence; and felonious larceny of Hawkins' car and a .22 caliber rifle from the Reynolds residence.

Judge Friday sentenced defendant for the murder conviction, upon the jury's recommendation, to life imprisonment. He sentenced defendant to terms of years for the remaining convictions, all sentences to run consecutively.

II.

Defendant makes several assignments of error challenging the sufficiency of the state's evidence. The test for measuring the sufficiency of evidence may be stated as follows: All evidence admitted, competent or incompetent, favorable to the state must be considered. The evidence must be taken in the light most favorable to the state. The state is entitled to all reasonable inferences that may be drawn from the evidence. Contradictions in the evidence are resolved favorably to the state. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984); *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). Only defendant's evidence which does not

contradict and is not inconsistent with the state's evidence may be considered favorable to defendant if it explains or clarifies the state's evidence or rebuts inferences favorable to the state. *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983); *State v. Burton*, 264 N.C. 488, 142 S.E. 2d 169 (1965). There must be substantial evidence of the facts sought to be proved. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt. *State v. Pridgen*, 313 N.C. 80, 326 S.E. 2d 618 (1985); *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). Evidence is not substantial if it arouses only a suspicion about the facts to be proved, even if the suspicion is strong. *State v. Malloy*, 309 N.C. 176, 305 S.E. 2d 718 (1983).

A.

[1] Defendant contends first that the evidence was not sufficient to permit the jury to find that defendant was the person who committed the offense of breaking or entering with the intent to commit larceny at the Gordon residence.

We disagree. Minutes before the break-in occurred, the doorbell rang. A resident of the Gordon house, Ronald Gordon, looked out a window and identified defendant standing on the front porch. Defendant was carrying a blue jean jacket and had a .22 rifle beside him leaning against the window. Gordon did not answer the door and the doorbell continued ringing, then ceased. Moments later Gordon heard someone kicking the basement door. Later a blue jean jacket was found on the basement floor. From this evidence a jury rationally could conclude beyond a reasonable doubt that defendant was the one who broke into the Gordon house.

B.

[2] In a related argument defendant contends the evidence was not sufficient to permit the jury to conclude that defendant was the person who committed the offense of breaking or entering with the intent to commit larceny at the Horton residence.

The state's evidence linking defendant to the Horton break-in included the following: In addition to this residence, several other residences in the Town and County neighborhood, those of Dianne Reynolds, Denise Gordon and Elizabeth Hawkins were broken

into on 23 September 1983. Defendant was identified ringing the doorbell of the Gordon residence moments before the break-in there occurred. Defendant was also seen walking near the Reynolds residence and driving near the Hinson house. Defendant also rang the doorbell and knocked persistently at the Crump residence, which was located through the woods behind the Town and County neighborhood. When Mrs. Crump answered the door, defendant stated as his reason for calling that he needed to make a phone call. This evidence tends to implicate defendant in a scheme which embraced the commission of several break-ins, including the one committed at the Horton residence.

Furthermore, a small dog, which had been shot several times, and a number of spent .22 cartridges were found on the floor of the Horton residence. Ballistics tests determined that the shots had been fired from the .22 rifle which was stolen from the Reynolds home on 23 September 1983. This gun was found in the back seat of the car which defendant stole from Elizabeth Hawkins and wrecked.

Construing this evidence in the light most favorable to the state, we believe a jury could have inferred beyond a reasonable doubt that defendant was the person who broke into the Horton residence.

C.

[3] Defendant also contends the state produced insufficient evidence to prove that defendant was the person who murdered Elizabeth Hawkins. The evidence linking defendant to this crime is substantial.

Defendant had the murder weapon in his possession when he was arrested a few hours after Hawkins was murdered. He also possessed a bottle of liquor of the same brand as that stolen from the victim's home. Defendant stole the victim's car. A 12-gauge shotgun stolen from her home was found on the back floorboard. Defendant had blood on his clothing which did not originate from him and was consistent with the victim's and that of only 1.9 percent of the population. We hold that the jury on the strength of this evidence rationally could have found beyond reasonable doubt that defendant murdered Hawkins.

D.

[4] Defendant argues finally that the state produced insufficient evidence to support his conviction for robbery with a dangerous weapon as defined by N.C.G.S. § 14-87(a). The state's evidence tended to show the following: The Hinson home was broken into on 23 September 1983. A number of items were stolen from the house, including a .410 shotgun, a 12-gauge shotgun, ammunition for both guns, and a bottle of liquor. All of these items were kept in the same area of the house; all were in defendant's possession shortly after the crime. Elizabeth Hawkins was found in the house dead, slain by a blast from the .410 shotgun taken from the house. Defendant was implicated in break-ins of other, unoccupied homes in the Town and County neigborhood on 23 September 1983. Nothing was taken in these break-ins except a .22 rifle and a bottle of liquor. Defendant rang the doorbell at a home behind the Town and County neighorhood which was occupied and when the door was answered, inquired if he could make a phone call.

Defendant contends that this evidence at most tends to show that he broke into the Hinson residence while it was unoccupied, took the items, and when Hawkins arrived unexpectedly, used force to retain the goods he had already taken. Defendant argues that a jury could not rationally find beyond a reasonable doubt from this evidence that defendant used force before or during the time he took the property he is charged with stealing and the issue remains in the realm of conjecture and speculation. Relying on *State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799 (1983), he says force used to retain property after it is already taken does not transform whatever offenses he committed into robbery.

In *Richardson*, the accused, armed with a stick, threatened a man carrying a duffel bag. The man threw the bag at defendant in self-defense and apparently fled. When the man later tried to retrieve his bag, defendant threatened him again, and the man left without the bag. The state argued defendant committed armed robbery when he threatened the owner when the owner attempted to retrieve the bag. This Court disagreed.

> Although many jurisdictions hold that evidence of a defendant's retention of property through the use of force or intimidation will support an armed robbery conviction, it appears that the majority of jurisdictions hold otherwise. . . . [T]he

> 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.

State v. Richardson, 308 N.C. at 476-77, 302 S.E. 2d at 803.

We disagree that defendant's conviction for armed robbery must be reversed on the authority of *Richardson*. The operative principle in *Richardson* is that use of force or violence must be such as to induce the victim to part with property. This principle gives rise to a corollary that violence must precede or be concomitant with taking in order for the crime of robbery to be committed.

In order to apply these rules it is necessary to define when in a criminal transaction the element of taking is satisfied. For purposes of larceny the element of taking is complete in the sense of being satisfied at the moment a thief first exercises dominion over the property. *See State v. Carswell*, 296 N.C. 101, 249 S.E. 2d 427 (1978). For purposes of robbery the taking is not over until after the thief succeeds in removing the stolen property from the victim's possession.

Our holding in *State v. Hope*, 317 N.C. 302, 345 S.E. 2d 361 (1986), illustrates the application of the rules stated above. In *Hope* defendant entered a clothing store wearing a long blue coat. Defendant went to the back of the store and returned wearing a tan coat. A store attendant stopped defendant and told him the coat he was wearing belonged to the store. Defendant disagreed, and the two walked to the back of the store where they found defendant's blue coat. Defendant started walking towards the exit and was stopped by another attendant. The first attendant pointed out to the second attendant a gun in defendant's waistline. The defendant threatened to kill the second attendant and backed slowly out of the store. Defendant argued there was no evidence he used force until after he already had taken the coat and that his conviction for armed robbery was improper. This Court disagreed. We held that the state produced sufficient evidence to support defendant's conviction for robbery because the evidence showed "one continuing transaction with the elements of violence and of taking so joined in time and circumstances with the taking

as to be inseparable." Our conclusion that the evidence showed one continuing transaction is another way of stating that the taking was not over until the defendant departed from the store with the coat.

In this case there is direct evidence that a .410 shotgun and other property was taken from the Hinson residence and that the .410 shotgun was used to kill Elizabeth Hawkins. From this evidence the jury rationally could have found beyond reasonable doubt that defendant used violence before he left the victim's premises with the stolen property, and, therefore, before the taking was over. The state, therefore, produced sufficient evidence that the elements of violence and taking were part of "one continuing transaction with the elements of violence and of taking so joined in time and circumstances with the taking as to be inseparable."

III.

[5] Defendant assigns error to the trial court's aggravating defendant's sentence for taking indecent liberties with a minor. The trial court aggravated defendant's sentence on the ground that the thirteen-year-old victim was very young.

In *State v. Hines*, 314 N.C. 522, 335 S.E. 2d 6 (1985), this Court stated:

> One of the purposes of sentencing is to impose a punishment commensurate with the offender's culpability. N.C. Gen. Stat. § 15A-1340.4(a) (1983). Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her. . . .
>
> As this Court observed in *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E. 2d 689, 701 (1983) (emphasis in original), *vulnerability* is clearly the concern addressed by this factor [of the victim's age]."

314 N.C. at 525-26, 335 S.E. 2d at 8. From what we said in *Hines* it is apparent that the determination of vulnerability must be

made in light of the crime committed. The offense of indecent liberties with a minor cannot be committed unless the victim is less than sixteen years of age. N.C.G.S. § 14-202.1 (1986). While a thirteen-year-old girl may be more vulnerable than a thirty-year-old woman to sexual assault, we cannot say that the victim's age made her any more vulnerable to the offense of indecent liberties with a minor than other victims of the offense. She was only two years younger than the maximum age used to define the offense. Because she was not for purposes of this offense "very young," defendant must receive a new sentencing hearing on his conviction for taking indecent liberties with a minor.

Case No. 84CRS3909—no error.

Case No. 84CRS3912—no error.

Case No. 84CRS3913—no error.

Case No. 84CRS5877—no error.

Case No. 84CRS5075—new sentencing hearing.

Justice MITCHELL concurring in the result.

I concur in the result reached by the majority. I am unable to concur fully, however, in the majority's reasoning in Part II. D. of its opinion.

We have previously indicated that in armed robbery cases, the exact time relationship between the violence and the actual taking is unimportant. *State v. Hope*, 317 N.C. 302, 305-06, 345 S.E. 2d 361, 363-64 (1986). We have held, instead, that "[i]n 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." *Id.* at ---, 345 S.E. 2d at 364 (emphasis added). I believe the majority's apparent attempt to establish the exact moment when the taking was complete in the present case to be unwise and entirely unnecessary, since under *Hope* the exact time of the taking is unimportant. The majority's conclusion that the State produced suf-

ficient evidence in this case to show that "the elements of violence and taking were part of 'one continuing transaction with the elements of violence and of taking so joined in time and circumstances with the taking as to be inseparable' " is entirely sufficient to support its holding. The majority's statements in Part II. D. concerning the time at which the taking was over will simply add confusion to this area of the law, in my view, and are of no significance in resolving the issue at hand. I do not join in those statements which I view as mere *obiter dicta.*

Justices MEYER and MARTIN join in this concurring opinion.

STATE OF NORTH CAROLINA v. DAVID LEE WHITTINGTON, JR.

No. 350A85

(Filed 29 August 1986)

1. **Rape and Allied Offenses § 5— first degree sexual offense—defendant in possession of knife during assault**

There was no merit to defendant's contention that, because the State's evidence showed that he was not in possession or control of a knife during the commission of the sexual assault, the trial judge erred in failing to dismiss the charge of first degree sexual offense, since the evidence tended to show that defendant engaged the victim in a brief conversation at a car wash; defendant then pulled a knife on the victim and threatened her; defendant grabbed the victim and began dragging her to the rear of the car wash; during this time the victim placed both hands on the blade of the knife to keep it from getting close to her; after defendant had dragged the victim about 80 feet, both fell to the ground and the victim twisted the knife out of defendant's hand and got it away from him; during the struggle the victim lost consciousness; when the victim awakened, she felt defendant penetrate her vagina with his finger; there was thus a series of incidents forming a continuous transaction between defendant's wielding the knife and the sexual assault; the knife was employed during this period of time in an effort to force the victim to give in to defendant's demands; and it was therefore of no consequence that defendant was not in possession of the deadly weapon at the precise moment that penetration occurred.

2. **Kidnapping § 1.2— asportation—sufficiency to support first degree kidnapping conviction**

There was no merit to defendant's contention that there was insufficient evidence presented at trial of a removal separate and apart from the sexual assault as required to support a conviction of first degree kidnapping, since the evidence tended to show that defendant threatened the victim with a knife

at the front of a car wash and then dragged her approximately 80 feet to the rear of the car wash where he sexually assaulted her; asportation of the victim was not a necessary element of the sexual assault; defendant could have perpetrated the offense when he first threatened the victim but instead chose to remove the victim away from a brightly lit area, near houses and the highway, to a darker, more secluded area; and this removal, designed to facilitate defendant's perpetration of the sexual assault, was not a mere technical asportation but was separate and apart from that which is inherent in a first degree sexual offense.

3. **Kidnapping § 2; Rape and Allied Offenses § 7— first degree kidnapping based on first degree sexual offense—punishment for both crimes improper**

Since defendant's conviction of a first degree sexual offense was used to raise the kidnapping to first degree kidnapping in this case, the trial judge erred in sentencing defendant for both crimes.

4. **Rape and Allied Offenses § 4— judge's question of witness—clarification of testimony—question proper**

In a prosecution of defendant for first degree sexual offense, there was no merit to defendant's contention that the trial judge erred in asking the victim whether defendant penetrated her vagina with his finger because this questioning revealed to the jury the judge's "clear" opinion as to defendant's guilt, since the judge's questions in this case merely served to clarify the victim's testimony that defendant had penetrated her "private parts."

APPEAL by defendant from judgment imposing concurrent sentences of life imprisonment and twelve years entered by *Wood, J.*, at the 15 April 1985 Criminal Session of Superior Court, WILKES County, upon jury verdicts of guilty of first-degree sexual offense and first-degree kidnapping. Defendant's motion to bypass the Court of Appeals on appeal of the twelve-year sentence in the kidnapping case was allowed 22 July 1985. Heard in the Supreme Court 12 February 1986.

Lacy H. Thornburg, Attorney General, by Thomas G. Meacham, Jr., Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant brings forward four assignments of error on this appeal. First, defendant contends that the trial court erred in failing to dismiss the charge of first-degree sexual offense since the

evidence was insufficient to support his conviction. Second, he contends that the trial court erred in failing to dismiss the charge of first-degree kidnapping since there was insufficient evidence of a removal separate and apart from the sexual offense. Third, he contends that the trial court erred in denying his motion to dismiss the charge of first-degree kidnapping as the jury could not properly find that the victim was either seriously injured or sexually assaulted. Lastly, defendant contends that the trial judge erred in asking the victim whether defendant penetrated her vagina with his finger. We find merit in defendant's third contention, but only as an error in sentencing.

Defendant was charged with first-degree sexual offense, first-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tended to show that on 19 September 1984, the victim left her home around 9:30 p.m. to go to her job where she worked on the third shift. In route to work, she stopped at a self-service car wash to rinse off her car. As she was cleaning her car, a man walked towards her and asked her if she had change for a dollar. The victim answered negatively and indicated that the dollar bill change machine at the car wash was broken. The victim walked to the rear of her car and showed the man the location of the change machine. When the victim turned around, the man was holding a knife and told her that she "had better do what he said because he had a gun in his back pocket." The knife was about the size of a kitchen butcher knife. The man told the victim to drop the water sprayer, grabbed her from behind, and began dragging her to the rear of the car wash. During this time, the man was choking the victim "real, real bad" and she was "kicking and trying to get away from him," and put both her hands on the blade of the knife to keep it from getting close to her. After dragging the victim about eighty feet, the man and the victim fell to the ground. The victim was able to "twist" the knife out of the man's hand and throw it out of his grasp. The man began hitting the victim in her face and choking her. The victim continued to struggle with the man until she lost consciousness. Sometime later, as the victim regained consciousness, she felt "something hard" against her throat and felt "something in the front" of her pants. The victim felt defendant penetrate her vagina with his finger. She became very upset and jumped up and ran to a house across the street from the car wash. The man got into his car and drove away.

At the trial, the victim identified defendant as the man who attacked her.

Defendant testified in his own behalf. Defendant's testimony was that on 19 September 1984 he stopped at the car wash where the victim was washing her car. He did so because he thought he recognized her car as one he had seen earlier that day from which the passengers shouted racial slurs at him. Before approaching the car, defendant stuck his knife in his pants since he didn't know how many people were in the car. He walked to the stall where the victim was washing her car and asked her if she had any change. The victim told him the change machine didn't work and began squirting water on him. Defendant grabbed her and tried to force her to drop the hose. The victim kicked him, causing the knife to fall from his pants onto the ground. The victim gained possession of the knife. Defendant and the victim, while struggling for the knife, fell to the ground. Defendant forced the victim to release the knife and got into his car and left the car wash.

The jury returned verdicts of guilty of first-degree sexual offense, first-degree kidnapping, and assault with a deadly weapon. Judgment was arrested on the assault conviction.

I.

[1] Defendant contends that the trial judge erred in failing to dismiss the charge of first-degree sexual offense against him since the evidence was insufficient to support his conviction. By this assignment, defendant argues that because the State's evidence showed that he was not in possession or control of the knife during the commission of the sexual assault, the trial judge erred in allowing the case to go to the jury on a theory greater than second-degree sexual offense.

Defendant was convicted of first-degree sexual offense under N.C.G.S. § 14-27.4(a)(2)(a) which provides:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> . . . .
>
> (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
> . . . .

Defendant contends that he did not employ or display a dangerous or deadly weapon during the commission of the sexual assault since prior to the act the victim managed to take the knife away from him and throw it out of his grasp. This Court has examined like arguments in cases under N.C.G.S. § 14-27.2(a)(2)(a), the first-degree rape statute, which uses language identical to that found in N.C.G.S. § 14-27.4(a)(2)(a).

In *State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981), the defendant displayed a knife to the victim after the completion of the first act of rape. The defendant then used the knife to cut off the victim's slip and committed additional acts of rape. On appeal defendant contended that there was insufficient evidence to convict him of first-degree rape on the theory that he employed a deadly weapon in the commission of the offense since the State's evidence did not tend to show that he employed the pocketknife during the actual commission of the rape. In resolving the issue, the Court compared the old rape statute to the new one, N.C.G.S. § 14-27.2 and said:

> In pertinent part, G.S. 14-27.2 provides that forcible, nonconsensual vaginal intercourse constitutes first degree rape if the perpetrator 'employs or displays a dangerous or deadly weapon.' By its terms, the new rape statute no longer requires an express showing by the State that a deadly weapon was used *in a particular manner* to make out a case of the crime in the first degree. In contrast, the prior statute, G.S. 14-21(1)(b) (Cum. Supp. 1977), obligated the State to show specifically that the weapon was used to overcome the victim's resistance or to procure her submission. (Citations omitted.) The current statute, however, simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape *period*. (Emphases in original.)

In footnote 1, the Court stated:

> We perceive that the Legislature intended to make implicit in G.S. 14-27.2 a matter of ordinary common sense: that

> the use of a deadly weapon, in any manner, in the course of a rape offense, always has some tendency to assist, if not entirely enable, the perpetrator to accomplish his evil design upon the victim, who is usually unarmed.

Sturdivant, 304 N.C. at 299, 283 S.E. 2d at 724-25.

In *State v. Powell*, 306 N.C. 718, 295 S.E. 2d 413 (1982), the victim testified that the defendant held a knife to her throat and ordered her to accompany him to an upstairs bedroom where he raped her. The victim further testified that after leaving the downstairs area she did not see the knife again and did not know what happened to it. This Court, relying on the holding in *Sturdivant*, held that the State presented sufficient evidence that a deadly or dangerous weapon was employed in a manner consistent with that contemplated by N.C.G.S. § 14-27.2 to accomplish the rape.

In *State v. Blackstock*, 314 N.C. 232, 241, 333 S.E. 2d 245, 251 (1985), this Court stated that *Sturdivant* "stands for the proposition that if a weapon is employed or displayed in the course of the rape period it is sufficient to support the verdict of guilty upon a charge of first-degree rape." *Id.* The Court defined the time frame encompassing the "rape period" with regard to the infliction of serious personal injury under N.C.G.S. § 14-27.2(a)(2)(b), an element which elevates rape and sexual offense from second to first degree offenses, by saying that "the element of infliction of serious personal injury upon the victim or another person in the crimes of first-degree sexual offense and first-degree rape is sufficiently connected in time to the sexual acts when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury." *Blackstock*, 314 N.C. at 242, 333 S.E. 2d at 252.

We find that these cases are instructive in resolving the case at hand.

At trial, the victim testified that after engaging in a brief conversation with defendant at the front of the car wash, "[defendant] had a knife pulled on me and he said if I didn't do what he said—that I had better do what he said because he had a gun in his back pocket." Defendant grabbed the victim and began dragging her to the rear of the car wash. During this time, the

victim placed both hands on the blade of the knife to keep it from getting close to her. After defendant had dragged the victim about eighty feet, both fell to the ground and the victim "twisted the knife out of his hand and got it away from him." During the struggle, the victim lost consciousness. When the victim awakened, she felt defendant penetrate her vagina with his finger.

This testimony reveals a series of incidents forming a continuous transaction between defendant's wielding the knife and the sexual assault. The knife was employed during this period of time in an effort to force the victim to give in to defendant's demands. Under the holdings in *Sturdivant* and *Powell*, it is of no consequence that defendant was not in possession of the deadly weapon at the precise moment that penetration occurred. The knife had been used during the course of the assault to assist the perpetrator in accomplishing his evil design upon the victim who was unarmed. Therefore, the trial judge correctly denied defendant's motion to dismiss the charge of first-degree sexual offense.

II.

[2] Defendant next assigns as error the trial court's refusal to dismiss the charge of kidnapping against him. The indictment charges defendant with kidnapping the victim "by unlawfully restraining [the victim] and removing [the victim] from one place to another without [the victim's] consent, and for the purpose of facilitating the commission of the felony of sexual offense." Defendant argues that there was insufficient evidence presented at trial of a removal separate and apart from the sexual assault as required to support a conviction of first-degree kidnapping, and therefore the trial judge erred in failing to dismiss the kidnapping charge.

N.C.G.S. § 14-39 provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or *remove from one place to another*, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

N.C.G.S. § 14-39(a) (1981 & Cum. Supp. 1985). (Emphasis added.)

In *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981), the defendant, in attempting to rob a drug store, forced one of the employees from the front to the back of the store in the general area of the prescription counter and safe. This Court held that the victim's removal to the back of the store was an inherent and integral part of the attempted armed robbery and was insufficient to support a kidnapping conviction. The Court in *Irwin* construed the phrase "remove from one place to another" to require "a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *Irwin*, 304 N.C. at 103, 282 S.E. 2d at 446. The Court further stated that "to permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *Id.*

In *State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983), this Court was asked to consider whether the defendants' actions in taking the victim from a store parking lot into the woods behind the store constituted sufficient asportation to support a conviction of kidnapping. The Court held that:

> The facts of this case show that defendants abducted [the victim] from the parking lot of the [name of] food store. She was taken to a wooded area behind the store. Removal of [the victim] from her automobile to the location where the rape occurred was not such asportation as was inherent in the commission of the crime of rape. Rather, it was a separate

> course of conduct designed to remove her from the view of a passerby who might have hindered the commission of the crime. To this extent the action of removal was taken for the purpose of facilitating the felony of first-degree rape. Thus, defendant's conduct fell within the purview of G.S. § 14-39 and the evidence was sufficient to sustain a conviction of kidnapping under that section. The trial judge properly denied defendant's motion to dismiss the charge of kidnapping.

Newman, 308 N.C. at 239-40, 302 S.E. 2d at 180-81.

In *Newman*, the Court, citing *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978), stated that in enacting N.C.G.S. § 14-39, "it was clearly the intent of the Legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed." *Id.*

In *State v. Tucker*, 317 N.C. 532, 346 S.E. 2d 417 (1986), this Court held that the trial judge correctly refused to dismiss the kidnapping charges when the evidence disclosed that defendant exposed the victim to greater danger than was involved in the sexual assaults by removing her from his truck and dragging her down to a river and under a bridge, injuring her in the process, and by insuring that passersby would not witness or hinder the commission of the sexual crimes.

The facts in the instant case show that defendant threatened the victim with a knife at the front of the car wash and then dragged her approximately eighty feet to the rear of the car wash where he sexually assaulted her. Asportation of the victim was not a necessary element of the sexual assault. Defendant could have perpetrated the offense when he first threatened the victim. Instead, he chose to remove the victim away from a brightly lit area, near houses and the highway, to a darker, more secluded area. This removal, designed to facilitate defendant's perpetration of the sexual assault, was not a mere technical asportation. The removal of the victim was separate and apart from that which is inherent in a first-degree sexual offense. Therefore, the trial judge did not err in denying defendant's motion to dismiss the kidnapping charge.

III.

[3] Defendant's next assignment of error also concerns his kidnapping conviction. Defendant contends that the trial court erred in denying his motion to dismiss the kidnapping charge because (1) the State failed to prove that the victim was seriously injured during her encounter with defendant, and (2) the principle of double jeopardy precludes the use of the sexual assault to support the first-degree kidnapping conviction since defendant was also convicted of first-degree sexual offense.

N.C.G.S. § 14-39(b) provides:

> (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 trial judge instructed the jury that it could find defendant guilty of first-degree kidnapping if it found, in addition to the elements set forth in N.C.G.S. § 14-39(a), that the victim "had been sexually assaulted *or* had been seriously injured." The jury returned a verdict of guilty of first-degree kidnapping but did not specify on which theory it relied in reaching its verdict. Such a verdict is ambiguous and should be construed in favor of defendant. *See State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986). This Court is not free to speculate as to the basis of a jury's verdict. Therefore, we must assume that the jury relied on defendant's commission of the sexual assault in finding him guilty of first-degree kidnapping. In *State v. Freeland*, 316 N.C. 13, 21-23, 340 S.E. 2d 35, 39-40 (1986), this Court determined that the legislature did not intend that defendants be punished for both the first degree kidnapping and the underlying sexual assault. Therefore, since defendant's conviction of the sexual offense was used to raise the kidnapping to first-degree kidnapping in this case, the trial judge erred in sentencing defendant for both crimes. *Id.* Since defendant was erroneously subjected to double punishment, it will be necessary to remand this case to the trial court for a

new sentencing hearing. *Id.* The trial court may arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping or it may arrest judgment on the sexual assault conviction. *Id.*

IV.

[4] Lastly, defendant contends that the trial judge erred in asking the victim whether defendant penetrated her vagina with his finger since this questioning revealed to the jury the judge's "clear" opinion as to defendant's guilt in the charged offense of first-degree sexual offense.

At trial the victim testified as follows:

(DIRECT EXAMINATION)

A. And I felt something penetrating my body.

Q. Where did you feel something penetrate your body?

A. In my panties.

Q. Was it, would you state whether or not it was your private parts?

A. Yes, sir, it was.

. . . .

Q. Where was his arms and hands at that time?

A. In my pants.

. . . .

Q. And you felt his hand penetrating you on the inside in your private parts?

A. Yes, sir.

(CROSS EXAMINATION)

Q. Okay, You were screaming while this hard thing was still pressed against your throat?

A. No, sir.

Q. Well, did he remove it from your throat before you started screaming?

A. Sir, I have told you when I felt his hand penetrating my body I don't know what happened. All I know is I got away and I didn't scream until I got . . .

COURT: When you say penetrating your body, what are you talking about? EXCEPTION NO. 3

WITNESS: His fingers.

COURT: Penetrating you where? EXCEPTION NO. 4

WITNESS: In my panties.

COURT: In your, you say your private parts. Are you talking about your vagina? EXCEPTION NO. 5

WITNESS: Yes, sir.

COURT: All right.

The relevant statute, N.C.G.S. § 15A-1222, provides that "the judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." However, the trial judge may question a witness for the purpose of clarifying his testimony and promoting a better understanding of it. *State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383 (1982); *State v. Alston*, 38 N.C. App. 219, 247 S.E. 2d 726 (1978). Such questioning must be conducted in such a manner as to avoid prejudice to either party. *State v. Alston*, 38 N.C. App. 219, 247 S.E. 2d 726. We have carefully reviewed the questions asked by the trial judge to which defendant excepts and find no error in the judge's actions. The questions merely served to clarify the victim's testimony that defendant had penetrated her "private parts." The questions did not intimate the judge's opinion as to the victim's credibility, defendant's guilt, or a factual controversy to be resolved by the jury. *See State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383. This assignment of error is rejected.

In defendant's trial we find no error. For the reasons indicated in Part III of this opinion, this case is remanded to the trial court for a new sentencing hearing.

Remanded for new sentencing hearing.

STATE OF NORTH CAROLINA v. ALMA JEAN ALLEN JOPLIN

No. 517A85

(Filed 29 August 1986)

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

The trial court did not err in denying defendant's motion to dismiss a first degree murder charge for insufficient evidence of premeditation and deliberation where the evidence tended to show that defendant and deceased were romantically involved; defendant told a friend only four days before the shooting that she was going to kill deceased if he did not leave another woman alone; she expressed to another friend suspicions of deceased's infidelity; after having been asked to leave a restaurant where she saw deceased and another woman together, defendant went home to get a gun and returned to wait for deceased, pursuing him after he left the restaurant; defendant urged him to stop so they could talk; when deceased went to defendant's car to talk with her, he was fatally wounded by her pistol; defendant told a friend she had shot deceased, and the friend overheard her say that deceased had been lying to her, she had taken all she could take, and deceased would hurt her no more; defendant also told another bystander she shot deceased because he told her he loved her and would marry her but he went with somebody else; and defendant repeatedly told a deputy sheriff that deceased had lied to her again and she shot him.

2. **Homicide § 28.8— accidental death—failure to include requested instruction—no plain error**

Even if the trial court in a first degree murder case erred in failing to include defendant's requested instruction on accident as a theory of acquittal in his final mandate to the jury, such error was not plain error, since the jury found defendant guilty of first degree murder; the trial court did instruct on accident as a theory of acquittal; and the trial judge gave defendant an opportunity to object for the record to any aspect of the jury instructions and this defendant failed to do.

3. **Homicide § 25— pistol as deadly weapon—killing unlawful and done with malice—no plain error in instructions**

Even if the trial court erred by juxtaposing in his jury instructions the proposition "that a .22 caliber pistol is a deadly weapon" with an instruction that if the jury found defendant intentionally killed deceased with a deadly weapon it could, but was not required to, infer that the killing was unlawful and was done with malice, such error was not plain error.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a life sentence imposed by *Barnette, J.*, presiding at the 10 June 1985 Criminal Session of PERSON County Superior Court, after a jury trial at which defendant was convicted of first degree murder.

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

Malcolm Ray Hunter, Jr., Acting Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

This appeal presents questions concerning the correctness of the trial judge's jury instructions and his denial of defendant's motion to dismiss the first degree murder charge for insufficient evidence of premeditation and deliberation. We find no merit in defendant's assignments of error and hold defendant had a fair trial free of reversible error.

I.

The evidence offered by the state tended to show the following: Defendant and decedent, Selvin Lee Jones, had been romantically involved since 1981 and had discussed marrying. At about 3 a.m. on 17 February 1985, Joplin became suspicious that Jones was seeing another woman when a woman telephoned saying Jones would not be home that night. That evening, Joplin went to the home of Douglas Owens, Jones' friend, to discuss the matter. Joplin carried the gun Jones had given her. On 18 February 1985 Joplin telephoned Thomas Whitt, who had been romantically involved with Cheryl Byrd, to ask if Byrd had been seeing Jones behind Joplin's back. Joplin told Whitt she would kill Jones if he continued to see Byrd.

At 1:45 a.m. on 22 February 1985, Joplin went to Jones' trailer and stayed with Jones until 4:30 a.m. when he left in his truck for work. Joplin followed in her car until she lost sight of Jones' truck. Later, Joplin observed Jones in his truck accompanied by Cheryl Byrd. Joplin followed the pair to the restaurant where Byrd worked as a waitress. When Joplin entered the restaurant, Byrd and Jones ordered her to leave.

Defendant went home, got her gun, and went back to find Jones. She waited in her car down the street from the restaurant. Jones left the restaurant in his truck at 5 a.m. to pick up Owens, his co-worker. After they left Owens' trailer en route for their job in Durham, Owens noticed Joplin following them in her car. She

flashed her lights on and off, passed them, and shouted at them to pull over. Jones pulled into the parking lot of the Country Convenience Mart and stopped. Owens went into the store. As he was preparing to leave the store, defendant ran towards him, saying, "Doug, I've shot Lee; I've shot Lee." Before the ambulance arrived, Owens heard Joplin say she had shot Jones, he had been lying to her, and he would hurt her no more.

Danny Denny, who knew Jones well, noticed Jones leaning into defendant's car. He heard a shot and saw Jones fall. Joplin got out of the passenger side of the car and ran to the driver's side, holding a gun. When Denny asked defendant why she had shot Jones, she replied Jones had told her he loved her and would marry her, but then he went with someone else. Denny later heard defendant tell a deputy sheriff she had shot Jones.

The deputy sheriff at the scene, Steve Hodges, corroborated Denny's version of the events, saying defendant repeated the statement (that Jones lied to her and she shot him) three or four times.

An autopsy revealed Jones died as a result of a bullet wound, the bullet having entered his body at the top of the breastbone and passed down through the heart and into the diaphragm. Had Jones been leaning over when shot, the bullet would have traveled horizontally through his body.

Defendant's testimony tended to show:

She was distressed over Jones' possible infidelity and had contemplated suicide. Twice during the week preceding Jones' death defendant had written suicide notes to her two sons and Jones. She expressed these feelings to Owens, telling him she had a gun and pills.

Joplin went back to the restaurant not to kill Jones but to tell him once more that she loved him before killing herself. Once they arrived at the Country Convenience Mart, Joplin and Jones talked. Joplin said she could not "take it any longer," picked up the gun and aimed it at her chest. Jones, intending to prevent her suicide, grabbed her arm as she fired, causing her to shoot Jones instead of herself. Joplin never intended to shoot Jones. As she was running around to the other side of the car to where Jones lay, she pointed the gun at herself and pulled the trigger, but for

some unknown reason the gun did not fire. Defendant denied ever telling anyone she planned to kill Jones.

Defendant argues in her appeal that Judge Barnette erred in (1) failing to dismiss the first degree murder charge for insufficient evidence of premeditation and deliberation; (2) failing to instruct the jury on the theory of accident during his final mandate; and (3) instructing the jury that they could infer the killing was done with malice if they found defendant killed the deceased with a deadly weapon. We find no merit in any of defendant's contentions.

II.

[1] Defendant first contends the trial court erred in denying her motion to dismiss the first degree murder charge for insufficient evidence of premeditation and deliberation. Defendant's contention is without merit.

On a motion to dismiss for insufficiency of evidence, the trial court must consider all evidence, whether circumstantial or direct, in the light most favorable to the state and give the state every reasonable inference drawn therefrom. *State v. Primes*, 314 N.C. 202, 217, 333 S.E. 2d 278, 287 (1985). The court must determine whether there is substantial evidence of each essential element of the offense, including defendant's role as perpetrator. *State v. Triplett*, 316 N.C. 1, 5, 340 S.E. 2d 736, 739 (1986). Substantial evidence in a criminal case is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion beyond a reasonable doubt. *See generally, State v. Pridgen*, 313 N.C. 80, 326 S.E. 2d 618 (1985); *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980).

In *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983), we defined the elements of premeditation and deliberation as follows:

> Premeditation means thought out beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). Deliberation means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an

> unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982); *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, *cert. denied*, 368 U.S. 851 [7 L.Ed. 2d 49] (1961). The term 'cool state of blood' does not mean that the defendant must be calm or tranquil or display the absence of emotion; rather, the defendant's anger or emotion must not have been such as to overcome the defendant's faculties and reason. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). Premeditation and deliberation refer to processes of the mind. They are not ordinarily subject to proof by direct evidence, but must generally be proved, if at all, by circumstantial evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972); *State v. Walters*, 275 N.C. 615, 170 S.E. 2d 484 (1969).

Id. at 68-69, 301 S.E. 2d at 348-49. The state's evidence tended to show defendant told Thomas Whitt only four days before the shooting that she was going to kill Jones if he did not leave Cheryl Byrd alone. She also expressed to Douglas Owens suspicions of Jones' infidelity. After having been asked to leave the restaurant where she saw Jones and Byrd together, she went home to get a gun and returned to wait for Jones, pursuing him after he left the restaurant. She urged him to stop so they could talk. When Jones went to defendant's car to talk with her, he was fatally wounded by her pistol. Defendant told Owens she had shot Jones, and Owens overheard her say Jones had been lying to her, she had taken all she could take, and Jones would hurt her no

more. Defendant also told another bystander she shot Jones because he told her he loved her and would marry her but he went with somebody else. She repeatedly told a deputy sheriff Jones had lied to her again and she shot him.

When viewed in the light most favorable to the state, the evidence of Joplin's conduct and threatening statements both before and after the killing was strong evidence of premeditation and deliberation. "Contradictions and discrepancies in the evidence are strictly for the jury to decide." *State v. Lowery*, 309 N.C. 763, 766, 309 S.E. 2d 232, 235-36 (1983). The evidence was sufficient to permit the jury to find premeditation and deliberation beyond a reasonable doubt.

III.

[2] Defendant next contends Judge Barnette committed reversible error in failing to include her requested instruction on accident as a theory of acquittal in his final mandate to the jury. We disagree.

Our examination of the record shows Judge Barnette instructed the jury as follows, in pertinent part:

> So I charge that if you find from the evidence one additional thing: If Selvin Lee Jones died by accident or misadventure, that is without wrongful purpose or criminal negligence on the part of the defendant, the defendant would be not guilty.
>
> The burden of proving accident is not on the defendant. Her assertion of accident is merely a denial that she has committed any crime.
>
> The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

Those instructions immediately preceded the final mandate, which included a possible verdict of not guilty, explained thus:

> However, if you do not so find or if you have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty.

After the jurors retired to deliberate, Judge Barnette provided an opportunity for each counsel to object for the record to any

aspect of the jury instructions. Both the prosecutor and defense counsel declined.

The state thus argues defendant waived appellate review on this issue by failing to interpose a timely objection. We agree. 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). 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).

Id. at 39, 340 S.E. 2d at 83-84. *See State v. Tucker*, 317 N.C. 532, 346 S.E. 2d 417 (1986).

Inasmuch as the jury found defendant guilty of first degree murder and the trial court instructed on accident as a theory of acquittal, we are not convinced the result of this trial would have been different had the trial court repeated the theory of acquittal

by accident in his first mandate. This omission, even if error (a point we do not decide), is obviously not plain error.

IV.

[3] In defendant's final assignment of error, she contends Judge Barnette erred by juxtaposing in his jury instructions the proposition "that a .22 caliber pistol is a deadly weapon" with an instruction that if the jury found defendant intentionally killed the deceased with a deadly weapon it could, but was not required to, infer that the killing was unlawful and was done with malice. Defendant concedes that it is constitutionally permissible to instruct on the permissive inference; but she seems to argue that this instruction coupled immediately with an instruction that a .22 caliber pistol is a deadly weapon is tantamount to an expression of opinion on the part of the trial judge that the state has in fact proved the elements of malice and unlawfulness.

Again, defendant did not object to this portion of the instructions. Even if the instructions as cast were error (a point we do not decide), we are not convinced that absent this error the jury probably would have reached a different verdict in this case. Therefore, no plain error was committed.

We conclude that defendant had a fair trial free of reversible error.

No error.

MARGARET H. ANDREWS v. AUGUST RICHARD PETERS, III

No. 422A85

(Filed 29 August 1986)

Rules of Civil Procedure § 52— findings of fact required upon request—specificity

When requested, findings of fact and conclusions of law must be made even on rulings resting within the trial court's discretion, and when findings are required, they must be made with sufficient specificity to allow meaningful appellate review.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 75 N.C. App.

252, 330 S.E. 2d 638 (1985) (*Judge Becton*, with *Judge Whichard* concurring and *Judge Wells* concurring in part and dissenting in part), vacating the order for a new trial on the issue of damages entered 21 December 1983 by *Allsbrook, J.*, presiding in PITT County Superior Court, and remanding the cause for further proceedings.

James C. Mills for plaintiff appellant.

McMullan & Knott by Lee E. Knott, Jr. for defendant appellee.

EXUM, Justice.

The questions presented on appeal are (1) whether in ruling on a motion for a new trial because of excessive or inadequate damages the trial court, if requested, must make findings of fact and conclusions of law; and (2) if so, whether the findings and conclusions of law made in this case are sufficient. We answer the questions "yes" and "no," respectively, and affirm the Court of Appeals.

I.

This is a civil action for damages for intentional assault and battery, arising from a 27 September 1979 incident in which defendant Peters walked up behind his co-worker, the plaintiff Andrews, at their place of employment and tapped the back of her right knee with the front of his right knee, causing her to fall and dislocate her right kneecap. Andrews seeks compensation for medical expenses, loss of income, permanent disability, pain and suffering, and punitive damages. The trial court submitted the case to the jury on the theory of battery, and the jury returned a verdict in Andrews' favor, awarding her $7,500 in damages.

Andrews moved for a new trial on the issue of damages pursuant to Rule 59(a)(6) and (7) of the North Carolina Rules of Civil Procedure,[1] alleging the award was inadequate, resulted from the

1. "Rule 59. . . . (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds: . . . . (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice; (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law . . . ."

jury's passion or prejudice, and was not supported by the evidence. Defendant Peters moved under Rule 52(a)(2)[2] that Judge Allsbrook (1) make findings of fact and conclusions of law in ruling on Andrews' Rule 59 Motion for a new trial, and (2) state what amount of damages he would view as sufficient to preclude a new trial.

Judge Allsbrook on 21 December 1983 granted Andrews' Rule 59 motion, set aside the jury's verdict on the issue of damages and ordered a new trial on this issue. Peters subsequently moved under Rules 52(b) and 60(b)(6)[3] that his previous motion be allowed, that the trial court vacate its order and in lieu thereof increase the award to Andrews to an adequate amount not to exceed $25,000. Judge Allsbrook denied this motion on 29 December 1983.

Defendant Peters appealed to the North Carolina Court of Appeals. A majority of the Court of Appeals panel vacated Judge Allsbrook's 21 and 29 December 1983 orders and remanded the case for additional findings of fact in support of his decision on Andrews' Rule 59 motion. Judge Wells dissented on the ground that Rule 52 did not require findings of fact to support a discretionary ruling on a Rule 59 motion. On that issue alone plaintiff appeals to this Court. We affirm the Court of Appeals' decision.

II.

Andrews offered this evidence of her injuries and damages: Dr. Randolph Williams testified he had treated Andrews after the

2. "Rule 52. . . . (a) Findings. . . . (2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party. . . ."

3. "Rule 52. . . . (b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59."

"Rule 60. . . . (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . . (6) Any other reason justifying relief from the operating of the judgment."

incident complained of for a dislocated kneecap and performed one operation on her knee. His fee was $899.85; the hospital bill was $1,121.50. In March 1981, some six months after Dr. Williams had released Andrews because in his opinion she had reached maximum improvement, Andrews consulted Dr. Harold Vandersea, complaining of pain in her knee, several falls because of weakness in the knee and back trouble. Dr. Vandersea performed two knee operations and finally removed the kneecap. In addition he repaired a ruptured disc in Andrews' back. In his opinion her back condition resulted from her falls, and the knee condition resulted from her September 1979 injury. Dr. Vandersea's bill totaled $2,778; the hospital bill for the operations was $3,062.70. Plaintiff suffered lost wages in the amount of $15,280.65.

After the jury came in with its award of $7,500, Andrews moved for a new trial on the ground of inadequacy of damages and insufficiency of evidence to justify the verdict. The trial court allowed the motion and ordered a new trial on the issue of damages. It entered the following order:

FINDINGS OF FACT:

1. That this matter was originally tried at the 10 October 1983 Civil Session of the Superior Court of Pitt County, North Carolina. That issues were submitted to the jury following the close of evidence in this cause and were answered as follows:

(a) Did the defendant commit a battery upon the plaintiff on September 27, 1979? *Answer:* Yes.

(b) If so, what amount of damages is the plaintiff entitled to recover of the defendant for personal injuries as a result of said battery? *Answer:* $7,500.00.

2. That following the jury verdict and within apt time, the plaintiff filed a motion pursuant to Rule 59 of the North Carolina Rules of Civil Procedure to set said verdict aside and to grant the plaintiff a new trial as to the second issue on the basis that the amount of damages awarded by the jury was inadequate and appeared to have been given under the influence of passion or prejudice; and that the evidence was insufficient to justify the verdict and that the verdict was contrary to law.

3. That the court has thoroughly considered all of the evidence that was given during the course of this trial. That the court has reviewed its notes that were made during the course of the trial. That the court has a distinct recollection of the trial.

4. That the court in its considered discretion is of the opinion that the motion filed by the plaintiff in this cause should be allowed and that the plaintiff should be given a new trial as to the second issue presented to the jury.

CONCLUSIONS OF LAW:

Based upon the foregoing findings of fact, the court does hereby conclude that the court should in its considered discretion grant a new trial to the plaintiff as to the second issue presented to the jury during the trial of 10 October 1983 Civil Session of the Pitt County Superior Court.

A majority of the Court of Appeals began its discussion of the sufficiency of Judge Allsbrook's findings by noting the propositions laid down in *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). In *Worthington* the trial court set aside a jury's award of damages for being excessive and awarded a new trial on this issue. The Court of Appeals reversed on the ground the trial court's order amounted to an abuse of discretion, concluding that the damages awarded by the jury were "clearly within the 'maximum limit of a reasonable range.' . . ." *Worthington v. Bynum and Cogdell v. Bynum*, 53 N.C. App. 409, 412, 281 S.E. 2d 166, 170 (1981). This Court reversed. We held that the ruling of a trial court either granting or denying a motion to set aside a verdict and order a new trial is discretionary with the trial court and should not be disturbed on appeal unless "the record affirmatively demonstrates a manifest abuse of discretion by the [trial] judge." 305 N.C. at 482, 290 S.E. 2d at 602. The Court in *Worthington* rejected the Court of Appeals "broader appellate scrutiny" of such rulings evidenced by that court's application of the standard of whether the verdict was "within the maximum limits of a reasonable range." 305 N.C. at 485, 290 S.E. 2d at 604. The Court said in *Worthington*:

Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by

> the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice. We hold that this is not such a case.

305 N.C. at 487, 290 S.E. 2d at 605.

In the instant case the Court of Appeals noted that in *Worthington* neither party made a Rule 52(a)(2) request for findings of fact or conclusions of law. The Court of Appeals read Rule 52(a)(2) to mandate such findings and conclusions even on a discretionary Rule 59 motion to set aside verdicts as being excessive or inadequate when findings and conclusions are requested. The Court of Appeals said, further:

> Once requested, the findings of fact and conclusions of law on a decision of a motion, as in a judgment after a non-jury trial, must be sufficiently detailed to allow meaningful review. *See Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980) (Rule 52(a)(1)). The trial court's findings of fact are only conclusive on appeal when they are supported by competent evidence. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d 149 (1971).
>
> Here, the trial court made findings of fact in its 21 December 1983 order, but they are not sufficient for a clear understanding of the basis of its decision.

Andrews v. Peters, 75 N.C. App. at 258, 330 S.E. 2d at 642.

We agree with these conclusions. As already noted, Rule 52(a)(2) reads in pertinent part: "Findings of fact and conclusions of law *are necessary* on decisions of *any* motion or order *ex mero motu* only *when requested by a party* and as provided by Rule 41(b)." (Emphases added.) The rule refers to decisions of "*any* motion or order." (Emphasis added.) It does not except from its terms orders made within the trial court's discretion. Even discretionary rulings are subject to limited appellate review under the abuse of discretion standard as expounded, for Rule 59 orders, in *Worthington*. Even if not always essential, it is almost always helpful to an appellate court in applying the abuse of discretion standard to a trial court's discretionary ruling, to have the trial court make whatever findings and conclusions it can muster in support of its ruling. In *Worthington* the Court, sustaining the trial court's ruling against an abuse of discretion attack, was able

to point to the trial court's statement in support of its ruling: "I am satisfied that the jury completely disregarded many of my instructions." For these reasons we conclude that, when requested, findings of fact and conclusions of law must be made even on rulings resting within the trial court's discretion.

We also agree with the Court of Appeals that when findings are required, they must be made with sufficient specificity to allow meaningful appellate review. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982); *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980).

The order here really contains no findings in support of the trial court's decision to set aside the damages issue. Nor does it conclude that the damages appear "to have been given under the influence of passion or prejudice," a conclusion which is required under Rule 59(a)(6). Findings, when requested, should be made in support of this ultimate conclusion in order to facilitate meaningful appellate review of an order setting aside the verdict on damages.

That such findings here are essential to meaningful appellate review of the order is illustrated by defendant's contention on appeal in support of his argument that the order constitutes an abuse of discretion. Defendant argued as appellant in the Court of Appeals that the jury heard conflicting medical testimony on the extent of plaintiff's injuries. Dr. Williams testified that he felt plaintiff had had a satisfactory result following surgery he performed in March 1980, had reached maximum improvement, and had suffered a 10 percent permanent physical impairment to her right knee. At that time she had medical expenses totaling $2,021.35 and lost wages totaling $3,714.22. On the other hand, the testimony of Dr. Vandersea tended to show plaintiff had not had a satisfactory result following the surgery by Dr. Williams. Instead she was required to undergo additional surgery, incur additional medical expenses and suffer additional lost wages. Defendant argued, "Obviously the jury chose to believe the testimony of Dr. Williams and to disbelieve the testimony of Dr. Vandersea. That is the proper function of the jury and the trial judge instructed the jury that it could believe all, part, or none of the evidence. The award of $7500 is clearly in line with the testimony of Dr. Williams."

The trial judge in making his discretionary ruling on the adequacy of the damages should have made findings directed toward the state of the testimony before him and the jury on the subject of damages. The trial judge should have, through appropriate findings, made his view of the evidence on damages clear for the purpose of sustaining his ruling. To the extent there was a conflict between the testimony of Dr. Vandersea and Dr. Williams, which version did the trial judge find to be true? If the trial judge concluded there was no conflict in the damages testimony, he should nevertheless have found what he believed to be the extent of plaintiff's losses for the purpose, again, of supporting his ruling. These findings should have been made with the purpose of supporting a conclusion that the damages verdict appeared to have been made under the influence of passion or prejudice.

Such findings leading to the ultimate conclusion are essential in this case to meaningful appellate review even when that review is limited by the abuse of discretion standard.

For the foregoing reasons the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. KENNETH EARL BELTON AND EUGENE WELDON SADLER, JR.

No. 693A84

(Filed 29 August 1986)

1. **Criminal Law § 92.2— multiple charges against two defendants—joinder proper**

The trial court did not err in joining for trial kidnapping, rape, robbery and sex offenses against two defendants, and there was no merit to one defendant's contention that joinder deprived him of a fair trial in that (1) the other defendant's defense was antagonistic to his because he relied on the weakness of the State's case while the codefendant relied on an affirmative defense which included evidence of an alibi; (2) the codefendant's testimony "implicated" defendant in the crimes by placing him in possession and control of the vehicle stolen from the victim, "impliedly" calling into question defendant's silence; (3) joinder forced defendant to "have to suffer the incredibility and implausibility of [the codefendant's] account"; and (4) the codefendant's testimony connecting him to the stolen vehicle was applicable only to him, and only the codefendant's testimony directly connected defendant to the vehicle. N.C.G.S. § 15A-926(b)(2) and (c)(2).

2. **Rape § 5— rape by defendant—simultaneous rape by codefendant—conviction for both crimes supported by evidence**

Evidence was sufficient to convict defendant both for the rape he committed and for the simultaneous rape his codefendant committed some twenty feet away where the evidence tended to show that defendants committed all the crimes against both victims pursuant to a common plan or purpose; together they kidnapped the victims whom they had earlier agreed to sexually molest; after the rapes and sex offenses were completed, defendants left together in a stolen vehicle which they used together until they were arrested; and having acted in concert throughout their criminal rampage, each was guilty of all crimes committed by either.

3. **Criminal Law § 46.1— flight of defendants—evidence and instructions proper**

The trial court properly admitted evidence and instructed the jury concerning defendants' flight from a law enforcement officer immediately before their arrest, and there was no merit to one defendant's contentions that he did not know that the officer was a police officer or that he ran instinctively only because his codefendant ran; furthermore, even if defendants might have had other reasons for fleeing than consciousness of guilt for the crimes for which they were being tried, this went only to the weight, not the admissibility of, the evidence of flight.

4. **Constitutional Law § 60; Jury § 7.14— exclusion of blacks from jury—failure of defendant to show racial discrimination**

There was no merit to defendants' contention that the State deliberately excluded qualified black men and women from the petit jury solely on the

basis of their race through the exercise of peremptory challenges because the case involved black men charged with raping and kidnapping white women since the State challenged six black and five white prospective jurors; four black jurors and eight white jurors finally sat on the petit jury of twelve, a result which closely paralleled the racial make-up of Cumberland County where the jurors were chosen; as for alternate jurors, the State challenged two blacks and passed one; one black and one white alternate sat; and the challenges complained of affirmatively demonstrated that concerns other than race must have motivated the prosecutor.

5. **Constitutional Law § 34; Kidnapping § 1— convictions for first degree kidnapping and first degree rape—rape used as element of kidnapping—double jeopardy**

The constitutional prohibition against double jeopardy precluded defendants from being convicted for both the first degree kidnapping and first degree rape of two victims, since the rape of one victim was the only sexual assault which could have formed the sexual assault element of the first degree kidnapping convictions involving her, and since defendants were indicted for and convicted of only one rape of the other victim, though the evidence tended to show that the victim was raped twice and forced to perform fellatio, but the court could not assume that the jury, without being instructed that it could do so, found unanimously beyond a reasonable doubt that defendants in fact committed a rape against the victim for which they were not indicted and that it used the unindicated rape to supply the sexual assault element in the crime of first degree kidnapping of the second victim.

6. **Rape § 6— use of deadly weapon or defendants aiding and abetting each other—instruction in the disjunctive not improper**

In a prosecution for first degree rape and first degree sex offense where the trial court instructed that, if in the rapes and sex offenses defendants employed a deadly weapon *or* were aided or abetted by another, they could be found guilty of first degree rape and first degree sex offense, there was no merit to defendants' contention that the charge given in the disjunctive enabled the jury to render a nonunanimous verdict.

7. **Kidnapping § 1.2— asportation of victims—sufficiency of evidence to support first degree kidnapping conviction**

Evidence that defendants, at gunpoint, confined, restrained and removed their victims for some length of time while they drove from a military reservation to Eureka Springs in Cumberland County where they raped and otherwise sexually assaulted their victims was sufficient to support a conviction of defendants for first degree kidnapping, and the confinement, restraint and removal was not an integral part of or inherently necessary for the commission of the crimes of rape and first degree sex offense of which they were also convicted.

Justice MARTIN dissenting in part.

Justices MEYER and MITCHELL join in the dissenting opinion.

Justice MEYER dissenting in part.

State v. Belton

APPEAL by defendants pursuant to N.C.G.S. § 7A-27(a) from judgments imposing life sentences entered on 7 September 1984 by *Johnson (Lynn), J.*, after a joint jury trial at the 29 August 1984 Criminal Session of CUMBERLAND County Superior Court. Belton's petition to bypass the Court of Appeals with regard to a judgment imposing a twenty-year sentence allowed on 13 February 1985.

Lacy H. Thornburg, Attorney General, by David E. Broome, Jr., Assistant Attorney General, for the state.

Adam Stein, Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant appellant Belton.

James R. Parish for defendant appellant Sadler.

EXUM, Justice.

This appeal raises questions involving (1) the propriety of joining defendants for trial; (2) the sufficiency of the evidence to show aiding and abetting; (3) the admissibility of evidence of and instructions on flight; (4) whether the state's peremptory challenges of certain black jurors unconstitutionally deprived defendants of a representative jury; (5) whether defendants' rights under the constitutional prohibition against double jeopardy were violated; (6) whether a jury instruction in the disjunctive violated defendants' rights to a unanimous verdict; and (7) whether there was sufficient evidence of kidnapping. We find a violation of defendants' rights under the constitutional prohibition against double jeopardy and remand for a new sentencing hearing. Otherwise we find no error in the trial.

I.

Each defendant was tried upon a multi-count bill of indictment[1] charging him with two counts of kidnapping, two counts of first degree rape, two counts of armed robbery, and one count of first degree sex offense.

The state's evidence adduced at trial tended to show: On the evening of 21 May 1983, Doris Nunnery and Rebecca White, both white females in their twenties, left Raeford, North Carolina, in

1. Belton's indictment is case No. 83CRS23571; Sadler's, No. 83CRS23581.

Nunnery's 1979 brown Toyota Celica and went to the Dragon Club, a nightclub located on the military reservation at Fort Bragg, North Carolina. At the Dragon Club a black male armed with a pistol ordered both women into the Toyota. A second man armed with a sawed-off shotgun appeared. One of the men ordered White to get in the back seat behind the driver's seat, and she complied. The assailant with the pistol, later identified as Belton, told Nunnery to get in the front passenger's seat, and he himself got in the driver's seat. As they left the Dragon Club's parking lot, the driver handed his pistol to his accomplice in the rear seat, later identified as Sadler, who held both guns on White the entire time the four were in the car. While en route, the women asked their assailants what they wanted. When one man replied that they wanted money, the women told them to take the car, their money, or anything else, and pleaded with the men to release them.

After traveling through rural areas several miles from Fort Bragg for twenty to thirty minutes, the four stopped on a deserted dirt road in the vicinity of Eureka Springs. Belton ordered the women to remove their clothing. Sadler in the rear seat then returned the driver's pistol to him. The women again asked to be released unharmed, and the men replied they would be released, but not before they had sexual relations with the men.

Belton told Sadler to get out of the car and told White to follow him. Sadler took White into a wooded area approximately twenty feet from the car. While aiming his shotgun at her, he made her lie down on the ground where he engaged, without her consent, in sexual intercourse. Still holding his shotgun on White, he made her perform fellatio on him, and then engaged in sexual intercourse a second time. During White's ordeal, Belton confined Nunnery in the automobile. While holding his pistol on her, he engaged in sexual intercourse with her against her will.

The two men left in Nunnery's car, which contained some of the women's clothing and their pocketbooks containing wallets, cash, credit cards, photographs, identification, and makeup. A baby carriage was stored in the trunk.

White succeeded in flagging down a motorist, who took the two women to a nearby phone booth where they telephoned for and ultimately received help.

On 1 June 1983, Detective Alfred F. Payne of the Spring Lake Police Department went to a duplex located at 410 Lake Avenue near where a brown Toyota Celica automobile bearing a Virginia license plate was parked. Detective Payne noticed clothes in a dry cleaner's bag hanging on a hook inside the car with a ticket bearing the name "E. Sadler." He went to the rear of the duplex where he radioed for assistance and saw defendants Belton and Sadler, whom he knew, crossing a trailer park on the other side of a chain link fence from where he was standing. When defendants saw Payne they ran in the other direction. After a brief chase, other Spring Lake police officers apprehended defendants. The Toyota automobile belonged to Nunnery. It contained a sawed-off shotgun, a shotgun shell, and clothing belonging to Sadler. The Virginia license plate affixed to it was stolen. The car's odometer showed approximately 5,000 miles more than when Nunnery had last driven it.

Later that day, Nunnery viewed a live lineup in which she identified defendant Belton as her assailant. The next morning, White independently identified defendant Sadler in another lineup as her assailant. Neither victim was able to identify the other victim's assailant in the lineups.

Defendant Belton presented no evidence.

Defendant Sadler testified that he was playing cards with friends in Spring Lake on the evening of 21 May 1983 until 11:30 p.m. or midnight, when he and Belton left. Other witnesses corroborated this testimony. Sadler said he and Belton hitchhiked to the trailer park where they were to meet a man named Jackson and borrow a car from him so Belton could drive his girlfriend to Miami. They borrowed a brown Toyota Celica with a Virginia license plate, paying Jackson $100 to use the car. Belton and Sadler then picked up Belton's girlfriend at about 4 a.m. in Spring Lake and drove to Miami, where they stayed for three days. Upon their return to North Carolina, they paid Jackson another $50, kept the car and remained in Cumberland County until their arrest. Sadler denied stealing the car or knowing that the car was stolen, and denied ever possessing or owning the sawed-off shotgun. Other defense witnesses testified that defendants did not attempt to conceal the Toyota.

The state presented testimony in rebuttal that Alvin Renna Jackson, the person Sadler indicated loaned defendants the Toyota automobile, was 5 feet 4 inches tall, considerably shorter than the victims' descriptions of either perpetrator. Jackson was unavailable to testify at trial.

The jury found each defendant guilty as charged. It found Sadler guilty of first degree kidnapping, first degree rape, and armed robbery of both victims White and Nunnery. It also found him guilty of a first degree sex offense against White. The jury found defendant Belton guilty of first degree kidnapping, first degree rape, and armed robbery of both victims White and Nunnery. It also found him guilty of a first degree sex offense against White. Theories of aiding and abetting were used to convict Belton in the rape and sex offense Sadler personally committed against White and to convict Sadler of the rape Belton personally committed against Nunnery.

Judge Johnson consolidated for judgment both of Belton's kidnapping convictions with his rape conviction against White and sentenced him to life imprisonment. He also consolidated for judgment Belton's rape conviction against Nunnery and his first degree sex offense conviction against White and sentenced him to a second life term, to begin at the expiration of the first. Finally he consolidated for judgment both of Belton's armed robbery convictions and sentenced him to twenty years' imprisonment to begin at the expiration of his second life sentence. Judge Johnson consolidated for judgment both of Sadler's kidnapping convictions with his rape conviction of White and sentenced him to life imprisonment. He then consolidated for judgment both of Sadler's armed robbery convictions with his conviction for the rape of Nunnery and the sex offense against White and sentenced him to a life term to begin at the expiration of the first life sentence.

We first consider assignments of error advanced only by defendant Belton. Next we consider those assignments advanced by both defendants, defendant Sadler not having made any arguments not also made by defendant Belton.

II.

A.

[1] Defendant Belton first challenges the joinder of his and Sadler's trials. He moved before trial and made repeated motions

during trial for severance, all of which were denied, and moved for mistrial because the severance motions were not granted. Belton argues these rulings deprived him of a fair trial. He claims the joint trial deprived him of the presumption of innocence and his right to rely on the weaknesses of the state's case and forced him "tacitly to accept the [defense] theory of defendant Sadler regardless of [Belton's] faith in either its veracity, merit, or potential for success." We conclude there was no error in joining these defendants for trial nor in denying Belton's motion for severance or mistrial.

The rules for permissible joinder of cases for trial are set out in N.C.G.S. § 15A-926. Subsection (b)(2) of this statute provides:

> Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
>
> a. When each of the defendants is charged with accountability for each offense.

Here since each defendant is charged with accountability for each offense, the statutory prerequisites for joinder are present.[2] Defendant Belton does not contend to the contrary.

Belton's argument is, rather, that his motions for severance should have been granted pursuant to N.C.G.S. § 15A-927(c)(2) as "necessary to promote a fair determination of [his] guilt or innocence." *Id.*

Where two or more defendants are sought to be held accountable for the same crime or crimes, not only is joinder permissible under the statute, but "public policy strongly compels consolidation as the rule rather than the exception." *State v. Nelson*, 298 N.C. 573, 586, 260 S.E. 2d 629, 639 (1979), *cert. denied sub nom. Jolly v. North Carolina*, 446 U.S. 979, 64 L.Ed. 2d 282 (1980); *accord, Parker v. United States*, 404 F. 2d 1193, 1196 (9th Cir. 1968), *cert. denied*, 394 U.S. 1004, 22 L.Ed. 2d 782 (1969). When joinder is permissible under the statute, whether to sever trials or to deny joinder is a question lodged within the discretion of the trial judge whose rulings will not be disturbed on appeal

2. Although the record does not affirmatively show it, we assume the appropriate written motion for joinder was made by the prosecutor. Defendant Belton does not contest the joinder on the ground such a motion was not made.

unless it is demonstrated that joinder deprived defendant of a fair trial. *State v. Boykin*, 307 N.C. 87, 90, 296 S.E. 2d 258, 260 (1982); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976). "Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed." *State v. Nelson*, 298 N.C. at 586, 260 S.E. 2d at 640; *accord, State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968).

Belton claims joinder deprived him of a fair trial for several reasons. First, he says Sadler's defense was antagonistic to Belton's because Belton relied on the weakness of the state's case and Sadler on an affirmative defense which included evidence of an alibi. Second, Belton argues that Sadler's testimony "implicated" Belton in the crimes by placing Belton in possession and control of the vehicle stolen from the victim, "impliedly" calling into question Belton's silence. Third, Belton says joinder forced Belton "to have to suffer the incredibility and implausibility of Sadler's account." Finally, Belton argues that Sadler's testimony connecting Sadler to the stolen Toyota was applicable "only to Sadler," and only Sadler's testimony directly connected Belton to the Toyota.

Recognizing that the propriety of discretionary joinder rests ultimately "upon the circumstances of each case," *State v. Nelson*, 298 N.C. at 586, 260 S.E. 2d at 640, we are completely satisfied that there are no circumstances here which demonstrate that joinder deprived Belton of a fair trial. Mere inconsistencies in defenses do not necessarily amount to the kind of antagonism between defendants joined for trial that deprives one or the other of a fair trial. *Id.* at 573, 260 S.E. 2d 629. Rather, the defenses must be "so irreconcilable that 'the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty' . . . [or] so discrepant as to pose an evidentiary contest more between defendants themselves than between the State and the defendants . . . [resulting in a] spectacle where the State simply stands by and witnesses 'a combat in which the defendants [attempt] to destroy each other.'" *Id.* at 587, 260 S.E. 2d at 640.

This case presents none of this kind of antagonism between defendants. Indeed, we perceive no real antagonism at all between defendants at trial. Sadler's testimony tended to exculpate

both defendants and was, on its face at least, favorable to both Sadler and Belton. Belton got the benefit of it without having to testify and subject himself to cross-examination. Although the jury chose ultimately not to believe it, Sadler's version of the events was not on its face so inherently implausible that Sadler's very telling of it deprived Belton of a fair trial. Neither was Sadler's testimony all that directly connected Belton with the stolen vehicle. The victims of the crimes positively identified both Belton and Sadler as their assailants and the thieves who took the car. Rather than being all that implicated Belton in the theft of the car, Sadler's testimony was all that explained how he and Belton might have gained possession of the car in a lawful manner rather than in the unlawful manner described by the victims of the crimes. Finally, Belton was not forced to accept Sadler's story tacitly or otherwise. Belton had a right to tell his own story, a right which for whatever reason he freely chose not to exercise.

Belton relies on *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258, and *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, in support of his argument that joinder of his cases with those of Sadler deprived him of a fair trial. In both *Boykin* and *Alford* this Court found error in the consolidation and awarded defendants new trials. Both cases are easily distinguishable. In both *Boykin* and *Alford* this Court concluded that joinder of trials against two defendants prevented one of the defendants from offering exculpatory evidence which would have been available had the cases not been joined. This record does not indicate that joinder precluded Belton from offering exculpatory evidence which would have been available had he been tried separately.

B.

[2] Defendant Belton assigns error to the trial court's denial of his motion to dismiss for insufficiency of evidence the charges of first degree rape and first degree sex offense committed against White. He argues the evidence was insufficient to show that Belton aided and abetted Sadler in committing these crimes against White because it tended to show only that Sadler committed these crimes some twenty feet from Nunnery's automobile where, simultaneously, Belton was raping Nunnery.

We disagree, finding *State v. McKinnon*, 306 N.C. 288, 293 S.E. 2d 118 (1982), controlling on this point. McKinnon was con-

victed both for the rape he committed and for the simultaneous rape his cohort Andrew Rich committed nearby. McKinnon, Rich, and others had approached a group of three males and two females who were seated in a parked car. The armed assailants ordered all the victims to disrobe, robbed them of personal belongings, and separated the males from the females. Rich then proceeded to rape one of the females while McKinnon raped the other. McKinnon argued the trial court erred in denying his motions to dismiss the charges against him of rape of Rich's victim on the ground the evidence was insufficient to show he aided and abetted Rich. We rejected McKinnon's argument saying:

> Evidence for the State was plenary that defendant was not only present at the scene of the crimes committed by Andrew Rich but that he was actively aiding, encouraging and participating in the robbery of all the victims, the stripping of their clothes and the removal of the girls to an area separate from the male victims where the sex crimes took place. The evidence indicates that defendant and Rich were in close proximity to one another while Angela Graham was being sexually assaulted. Both defendants ordered the girls to remove their clothes and both had firearms in their possession. McCoy testified that Rich and defendant had the firearms 'drawed on *them*.' (Emphasis added.) Clearly, defendant was an active participant in the crimes committed against Graham by Rich. Thus, there is sufficient evidence that defendant and Rich shared the community of unlawful purpose necessary for aiding and abetting.

McKinnon, 306 N.C. at 299, 293 S.E. 2d at 125.

So it is here. After defendants and their victims arrived in the car at the deserted place on a dirt road Belton, who was driving, asked Sadler in the back seat whether they were going to do what they had planned. Sadler replied that they did not have time; whereupon Belton said, "Hell yes, we are, too." Belton then ordered both women to undress, told Sadler to get out of the car and told the victim White to follow Sadler. Some twenty feet from the car Sadler raped and committed a first degree sex offense against White.

"An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises,

counsels, instigates or encourages another to commit the offense." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E. 2d 298, 305 (1981). Obviously the evidence was enough to permit a jury reasonably to infer that Belton was both present at the scene, and instigated and encouraged the sexual assaults Sadler committed against White.

We are buttressed in our view by another decision in which this Court held:

> It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979).

Clearly defendants Sadler and Belton committed all the crimes against both victims pursuant to a common plan or purpose. Together they kidnapped the victims, and they had earlier agreed to sexually molest them. After the rapes and sex offenses were completed, defendants left together in the stolen vehicle, which they used together until they were arrested. Having acted in concert throughout their criminal rampage, each is guilty of all crimes committed by either.

We therefore overrule this assignment of error by Belton.

III.

A.

[3] Both defendants assign as error the trial court's admission of evidence and jury instructions concerning their flight from a law enforcement officer immediately before their arrest. At trial, Spring Lake Police Detective Al Payne testified for the state that while he was investigating Nunnery's Toyota parked near 410 Lake Avenue in Spring Lake, he observed defendants approaching him from the other side of a four-foot high chain link fence. When they spotted Payne, defendants ran. Other police officers apprehended the pair minutes later. Defendant Belton in his brief

claims this evidence is irrelevant because he was unaware at the time that Payne was a law enforcement officer and instinctively followed Sadler. Payne had questioned Sadler previously on unrelated charges of breaking and entering. Defendant Sadler, who had testified, "We thought he was coming to arrest us about the B & E so we took off," claims the evidence of flight pertains only to the above-mentioned unrelated break-ins and thus is not probative evidence of guilt of the crimes charged herein.

As for Belton's arguments, there is no evidence to support them. The record contains no evidence that Belton did not know Payne was a police officer or that he ran instinctively only because Sadler ran. There is, indeed, evidence that Payne had arrested Belton's brother "a couple of days before" the flight on a charge of larceny. But even if Sadler and Belton might have had other reasons for fleeing than consciousness of guilt for the crimes for which they were being tried, this goes only to the weight, not the admissibility of, the evidence of flight. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). Irick contended evidence of his alleged flight from police could pertain to his operation at the time of a reportedly stolen vehicle, rather than to his knowledge of and participation in certain burglaries, which he denied. This Court said:

> Defendant's position is not the law in this jurisdiction. So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper. *See State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973).
>
> In North Carolina evidence of flight does not create a presumption of guilt but is only some evidence of guilt which may be considered with the other facts and circumstances in the case in determining guilt.

Id. at 494, 231 S.E. 2d at 842.

Although proof of flight, standing alone, is never sufficient to establish guilt, *id.*, the evidence of flight and the instruction pertaining thereto were properly submitted for the jury's consideration and evaluation. We therefore overrule this assignment of error by both defendants.

B.

[4] Defendants claim the state deliberately excluded qualified black men and women from the petit jury solely on the basis of their race through the exercise of peremptory challenges because this case involves black men charged with raping and kidnapping white women. Both defendants argue that Judge Johnson committed reversible error in denying their motion for a mistrial based on this procedure, which they claim violated their rights under the North Carolina and United States Constitutions to a jury drawn from a fair cross-section of the community.

Defendants rely solely on the fact that the state used eight of its fourteen peremptory challenges, including challenges to alternates, to excuse black jurors. The record reveals the following: When voir dire for jury selection began, the jury box consisted of six whites and six blacks. The state challenged three black jurors peremptorily and passed three. Belton peremptorily challenged one of the three black jurors passed by the state but this juror was replaced by a black who ultimately was accepted by all parties. Later defendant Belton peremptorily challenged another black juror passed by the state in seat number nine, but again a black juror passed by all parties ultimately sat in this seat. In all, not including alternates, twelve black jurors were ultimately tendered to the state. Of these the state peremptorily challenged six and passed six. The state peremptorily challenged five white jurors. Four black jurors and eight white jurors finally sat on the petit jury of twelve. In the selection of two alternate jurors, three blacks were called. The state peremptorily challenged two and passed one. The state also peremptorily challenged one white prospective alternate. One black and one white alternate ultimately were seated. In the selection of both the petit jury of twelve and the two alternate jurors, the state peremptorily challenged eight blacks and passed seven. It peremptorily challenged six white jurors.

Since this case was argued in this Court, the United States Supreme Court has held:

> Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors . . . so it forbids the States to strike black veniremen on the assump-

> tion that they will be biased in a particular case simply because the defendant is black.

Batson v. Kentucky, 476 U.S. ---, ---, 90 L.Ed. 2d 69, 88 (1986). *Batson* also established a procedural framework for determining whether the state's peremptory challenges were based on the view that black jurors were unqualified simply because they were black. Under this framework,

> 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, *Castaneda v. Partida*, [430 U.S. 482] at 494, 51 L.Ed. 2d 498, 97 S.Ct. 1272, 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.' *Avery v. Georgia*, [345 U.S. 599] at 562, 97 L.Ed. 1244, 73 S.Ct. 891. 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.

Id. at ---, 90 L.Ed. 2d at 87-88.

Batson overruled *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). *Swain* had held that in a single, given case peremptorily challenging blacks merely because of membership in the group was not a denial of equal protection. The *Swain* Court noted that peremptory challenges were often

> exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty . . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited

knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

380 U.S. at 220-21, 13 L.Ed. 2d at 772-73. The Court in *Swain* said:

> With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterward. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

Swain, 380 U.S. at 221-22, 13 L.Ed. 2d at 773.

The Court in *Swain* said that in any particular case there was a presumption that the state was using its peremptory challenges "to obtain a fair and impartial jury to try the case before the court," 380 U.S. at 222, 13 L.Ed. 2d at 773. This presumption could not be overcome "by allegations" that all blacks were removed from the jury or that they were removed because they were blacks. "Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it." 380 U.S. at 222, 13 L.Ed. 2d at 773-74. The *Swain* Court referred to its decision as follows:

> We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged.

380 U.S. at 223, 13 L.Ed. 2d at 774.

The *Swain* Court said that it might be possible for a defendant to rebut the "presumption protecting the prosecutor" by showing that a prosecutor in a given county,

> in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors . . . and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries . . . . If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

380 U.S. at 223-24, 13 L.Ed. 2d at 774. The *Swain* Court noted that no black person had served on a petit jury in the county in question in either a civil or a criminal case since about 1950. The Court held this fact was not enough to show the state's denial of equal protection because both prosecutors and defendants participated in the jury selection process, and the record did not demonstrate the extent to which prosecutors alone caused this result.

Batson holds that facts surrounding the exercise of peremptory challenges in a single, given case may make a prima facie showing that the prosecutor is challenging blacks solely on the basis of race, thereby rebutting the presumption of regularity in the exercise of such challenges. *Batson* thus overrules *Swain*'s holding that more than one case must be examined in order for a defendant to make this showing. *Batson* also overrules the *Swain* holding that it is proper and not a violation of equal protection to challenge peremptorily blacks in a single, given case solely on the ground that such persons by reason of their race may harbor favorable biases toward defendants who are members of the same group.

This Court in *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814 (1986), has concluded that *Batson* should not be applied retroactively and "will only be applicable to those cases where the jury selection took place after the *Batson* decision was rendered" on 30 April 1986. *Id.* at 21, 343 S.E. 2d at 826.

Defendants here do not, of course, rely on *Batson* for relief; and under our holding in *Jackson*, *Batson* can afford them no relief. They rely instead on an argument emanating from the Sixth Amendment's guarantee of an impartial jury, made applicable to the states through the Fourteenth Amendment. *See Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed. 2d 690 (1975); *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 491 (1968).

This argument is best expounded in *McCray v. Abrams*, 750 F. 2d 1113 (2nd Cir. 1984). The Second Circuit in *McCray* concluded that although *Swain* then controlled the question of the permissibility of peremptory challenges on the basis of race under the Equal Protection Clause, "[w]e are not . . . required to read *Swain* as setting the standards for all other provisions of the Constitution." 750 F. 2d at 1124. The Second Circuit relied on a number of United States Supreme Court cases decided after *Swain* and construing the Sixth Amendment's guarantee of an impartial jury to conclude first that a criminal defendant is entitled to a venire from which distinctive groups of persons have not been systematically excluded, in order to insure insofar as practicable that the venire represents a fair cross-section of the community. Second, the Court concluded the purpose of this fair cross-section requirement as to the venire is to give the defendant a fair possibility of being tried by a petit jury which itself is representative of the community. The Second Circuit recognized the Sixth Amendment as construed by the Supreme Court did not guarantee a petit jury fairly representative of the community, but it concluded that it did guarantee a defendant a fair chance at such a petit jury. The *McCray* Court went on to hold that a defendant could establish a prima facie violation of his right to the possibility of a representative petit jury by showing first, that the group alleged to have been excluded is a "cognizable group in the community" and second,

> there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.

Id. at 1131-32.

Although most state courts have either adhered to the *Swain* approach or for other reasons have rejected the argument defendants make,[3] several state courts, whose cases were cited and relied on in *McCray*, have reached conclusions similar to that reach in *McCray* with regard to the peremptory challenge question on the basis of various jury trial guarantee provisions in their respective state constitutions. *People v. Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E. 2d 499 (1979); *State v. Crespin*, 94 N.M. 486, 612 P. 2d 716 (N.M. App. 1980).

Defendants ask us to adopt the Second Circuit's Sixth Amendment analysis in *McCray* and, barring that, to interpret Article I, section 24 of the North Carolina Constitution, guaranteeing a criminal defendant the right to a jury trial, to preclude the state from challenging peremptorily prospective jurors solely on the basis of their race or group affiliation in any case.

We need not, however, reach in this case the question of whether we should employ under either the Sixth Amendment or Article I, section 24 of the North Carolina Constitution the fair cross-section analysis used by the Second Circuit in *McCray* and state courts in California, Florida, Massachusetts and New Mexico in the cases previously cited. The reason is that even under this analysis defendant must demonstrate from the facts surrounding the jury selection in his case "a substantial likelihood,"[4] "a strong likelihood,"[5] "a likelihood,"[6] or "it is likely,"[7] that jurors were peremptorily challenged solely because of their race or group affiliation rather than because of any particular bias in the given case. Even under *Batson*'s due process analysis defendant must show that the circumstances surrounding the prosecutor's exercise of peremptory challenges to remove members of defendant's race "raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Batson v. Kentucky*, 476 U.S. at ---, 90 L.Ed. 2d at 88.

3. These cases are collected in *State v. Neil*, 457 So. 2d 481, 484 n. 3 (Fla. 1984).

4. *McCray v. Abrams*, 750 F. 2d 1113, 1132 (2d Cir. 1984).

5. *People v. Wheeler*, 22 Cal. 3d 258, 280, 583 P. 2d 748, 764 (1978).

6. *Commonwealth v. Soares*, 377 Mass. 461, 490, 387 N.E. 2d 499, 517 (1978).

7. *State v. Neil*, 457 So. 2d 481, 485 (Fla. 1984).

In *McCray* the prosecutor had peremptorily challenged all blacks and Hispanics who had been tendered to the state when defendant's trial counsel objected, identifying several of these challenged venirepersons who were excused without any discernible reason to believe they would be biased. Thereafter only one black juror was eventually seated as an alternate. No blacks sat on the petit jury of twelve. The Second Circuit concluded these circumstances were enough to make out a prima facie showing of racially motivated peremptory challenges. Likewise in *Wheeler*, a case in which defendants were black and the victim white, the prosecutor peremptorily challenged every black called to the box resulting finally in a trial by an all-white jury. In *Soares*, another case in which the victim was white and defendants black, the prosecutor challenged twelve of thirteen prospective black jurors resulting in a jury of eleven whites and one black. In *Neil* both defendant and the victim were black. The state used its peremptories to remove all prospective black jurors from the petit jury of twelve. One black eventually sat as an alternate. The courts in *Wheeler*, *Soares* and *Neil* concluded, respectively, that defendants had made out at least prima facie cases of constitutionally impermissible racially motivated peremptory challenges. In *State v. Crespin*, 612 P. 2d 716 (N.M. App. 1980), however, the prosecutor peremptorily challenged the only prospective black juror in the venire. The Court held this fact was not enough to make out a prima facie case of a racially motivated peremptory challenge.

We are confident the circumstances surrounding the peremptory challenges in the instant case show no likelihood and raise no inference that the challenges were being exercised solely on account of race. As for the petit jury of twelve, the state passed as many blacks as it challenged. It challenged six black and five white prospective jurors. Four black jurors and eight white jurors finally sat on the petit jury of twelve, a result which closely paralleled the racial make-up of Cumberland County where the jurors were chosen.[8] As for alternate jurors, the state challenged two blacks and passed one. One black and one white alternate sat. The challenges complained of affirmatively demonstrate that con-

8. Cumberland County was 64.1 percent white and 30.77 percent black. County and City Data Book, Statistical Abstract Supp. 1983 (10th ed.). Defendant Belton, himself, challenged peremptorily two blacks who had been passed by the state but who were ultimately replaced by blacks ultimately passed by all parties.

cerns other than race must have motivated the prosecutor. We, therefore, overrule this assignment of error.

C.

[5] Defendants next contend the prohibition against double jeopardy in the Fifth Amendment to the federal constitution[9] precludes them from being convicted for both the first degree kidnapping and first degree rape of Nunnery and White. For the reasons stated in our recent decision in *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986), we agree.

Defendant Freeland was convicted of first degree kidnapping, rape and sex offense arising out of a single incident. We noted in *Freeland*:

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

Id. at 21, 340 S.E. 2d at 39. Recognizing that the kidnapping statute made the rape an element of the first degree kidnapping, we held in *Freeland* the legislature, when it enacted the statute, did not intend for a defendant to be convicted and punished both for the elemental crime (the rape) and the crime of which it was an element (first degree kidnapping).[10] We remanded *Freeland* for

9. The Fifth Amendment's double jeopardy prohibition is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 2d 707 (1969).

10. *Id.* at 23, 340 S.E. 2d at 40-41. *But see State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986), where this Court reached a different result in the context of a

resentencing, suggesting that the trial court could either (1) arrest judgment on the first degree kidnapping conviction and resentence defendants for second degree kidnapping or (2) arrest judgment in either the rape or the sex offense convictions. For a similar result on similar facts see *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986).

As to both defendants and both victims the trial court instructed the jury that in order to convict of first degree kidnapping the jury must find, among other things, that the respective victim "had been sexually assaulted." With regard to the victim Nunnery, there was only one sexual assault, the first degree rape. Since the rape of Nunnery was the only sexual assault which could have formed the "sexual assault" element of the first degree kidnapping convictions involving her, under *Freeland* defendants could not be convicted and punished for both crimes.

Here Judge Johnson consolidated for judgment Belton's two convictions for first degree kidnapping with his conviction for first degree rape of White, the latter of which carries a mandatory life sentence. N.C.G.S. §§ 14-27.2(b) (1981); 14-1.1(a)(2) (1981). He did the same for Sadler's like convictions. He then sentenced both defendants to life imprisonment in their respective consolidated cases. Defendants' first degree kidnapping convictions, therefore, did not augment their sentences.

Nevertheless, we conclude defendants' *convictions* for both first degree kidnapping and rape violate the prohibition against double jeopardy found in the United States Constitution.

Where two crimes may not be punished because of the prohibition against double jeopardy, neither may convictions for both crimes stand. *Ball v. United States*, 470 U.S. 856, 84 L.Ed. 2d 740 (1985); *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35; *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66 (1967). In *Freeland* we said: "The general rule is that the double jeopardy clause of the Federal Constitution protects an individual ' "from being subjected to the hazards of trial and possible *conviction* more than once for an alleged offense." ' " *Freeland*, 316 N.C. at 21, 340 S.E. 2d at 39, *quoting Missouri v. Hunter*, 459 U.S. 359, 365, 74 L.Ed. 2d 535,

breaking and larceny case on the basis of what this Court perceived to be a different legislative intent.

542 (1983) (emphasis ours). *Midyette* held a defendant convicted of assault with a deadly weapon cannot also be convicted of resisting a public officer when the assault was the means by which the public officer was resisted. The United States Supreme Court said in *Ball* that, for double jeopardy purposes, " 'punishment' must be the equivalent of a criminal conviction and not simply the imposition of a sentence." 470 U.S. at 861, 84 L.Ed. 2d at 746.

We also find double jeopardy violations in defendants' convictions of crimes against the victim White. There is evidence that Sadler and Belton (Belton by reason of aiding and abetting) raped White twice and forced her to perform fellatio once but were indicted for and convicted of only one first degree rape and first degree sex offense against White.

The argument is made that since the unindicted rape of White could have been used by the jury to supply the "sexual assault" element of the White kidnapping, no double jeopardy violation results from convictions of both kidnapping and that rape of White for which defendants were indicted and convicted. The difficulty with this argument is that it requires this Court to assume the jury, without being instructed that it could do so, found unanimously beyond a reasonable doubt that defendants in fact committed a rape against White for which they were not indicted. Secondly, it requires us to assume the jury, again without being instructed that it could do so, used the unindicted rape of White to supply the sexual assault element in the crime of first degree kidnapping against White.

We are not at liberty to make such assumptions. In analogous situations when alternative theories of conviction have been available to a jury and it cannot be discerned from the jury instructions or the form of the verdict upon which theory the jury relied, this Court has held that it cannot assume the jury adopted a theory favorable to the state; instead, the Court has construed the ambiguity in favor of defendant.

In *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981), the Court said:

> When a defendant is convicted of first degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this latter conviction

> provides no basis for an additional sentence. It merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested. [Citations omitted.] When, however, a defendant has been convicted of first degree murder on a theory of premeditation and deliberation and in the process commits some other felony, the other felony is not an element of the murder conviction although the other felony may be part of the same continuous transaction. Defendant may in such cases be sentenced upon both the murder conviction and the other felony conviction. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). But when a jury is properly instructed upon both theories of premeditation and deliberation and felony murder, and returns a first degree murder verdict without specifying whether it relied on either or both theories, the case is treated as if the jury relied ujpon the felony murder theory for purposes of applying the merger rule. Judgment imposed on a conviction for the underlying felony must be arrested. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975), *death sentence vacated*, 428 U.S. 903 (1976).

Id. at 261-62, 275 S.E. 2d at 477-78.

Likewise, in *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986), in determining whether defendant's conviction and sentencing for both felony breaking or entering and felony larceny violated the prohibition against double jeopardy, Justice Meyer, writing for the Court, made the following observation:

> On the felony larceny charge, two felony theories were presented to the jury in the alternative—N.C.G.S. § 14-72(b)(2), breaking or entering, and N.C.G.S. § 14-72(a), property worth more than $400.00. The jury did not specify the theory it relied upon, and it would be pure speculation to suggest which theory it relied upon. We, therefore, for the purposes of deciding this case, construe this ambiguous verdict in favor of the defendant, *State v. Williams*, 235 N.C. 429, 70 S.E. 2d 1 (1952), and assume that the felony larceny verdict was predicated upon a finding that defendant committed the larceny pursuant to the breaking or entering. Thus, we assume that the predicate crime of breaking or entering was

used to raise the larceny charge to the compound crime of felony larceny.

Id. at 450-51, 340 S.E. 2d at 706.

Consistent with this position, in *State v. Moore*, 315 N.C. 738, 340 S.E. 2d 401 (1986), the Court reversed a conviction for kidnapping because we found that, of the three purposes for the restraint or removal of the victim which the jury was allowed to consider, one was not supported by the evidence. Although the other two purposes would have supported the conviction if the jury had indicated its reliance on either, we said:

> The jury did not indicate which of the three purposes that it was allowed to consider formed the basis for its verdict. Although two of the purposes which the jury was allowed to consider were supported by the evidence, we cannot say that the verdict was not based upon the purpose erroneously submitted.

Id. at 749, 340 S.E. 2d at 408.

The United States Supreme Court has long recognized that a conviction cannot stand merely because it could have been supported by one theory submitted to the jury if another, invalid theory also was submitted and the jury's general verdict of guilty does not specify the theory upon which the jury based its verdict. *Williams v. North Carolina*, 317 U.S. 287, 87 L.Ed. 279 (1942); *Stromberg v. California*, 283 U.S. 359, 75 L.Ed. 1117 (1931).

State v. Price, 313 N.C. 297, 327 S.E. 2d 863 (1985), runs counter to all of the above authorities. In *Price* defendant was convicted of first degree rape and first degree kidnapping based on evidence that he abducted, raped, and performed cunnilingus on the victim. Defendant was neither indicted for nor convicted of any offense based on the act of cunnilingus. Nevertheless, the Court held that since the jury might have relied on the cunnilingus to satisfy the sexual assault element of the kidnapping offense, "[p]roof of the rape was not required to satisfy this element of the crime. Therefore, no principle of double jeopardy was violated by entry of judgments that the defendant committed both rape in the first degree and kidnapping in the first degree." *Id.* at 305, 327 S.E. 2d at 868.

The holding on the double jeopardy issue in *Price* departs radically from the Court's theretofore consistently adopted view that appellate courts cannot assume, simply because the jury *could* have found a fact to exist, that it did so. We now decide that *Price* should no longer be considered authoritative on this question. Insofar as *Price* is inconsistent with our holding herein on the double jeopardy question, it is overruled.

In the present case, we cannot say that the jury's verdict of guilty of first degree kidnapping was based upon its finding beyond a reasonable doubt that the defendant Sadler raped Ms. White a second time, for there is nothing in the trial judge's instruction or in the jury's verdict to indicate that it made that finding. Because we cannot say that the jury's verdict of first degree kidnapping was based upon a sexual assault other than the ones forming the basis for the other two convictions, the verdict is ambiguous and must be construed in favor of the defendant.

The result is that defendants' convictions of both first degree kidnapping and rape against Nunnery cannot both stand. Their convictions of first degree kidnapping and *both* first degree rape and first degree sex offense against White cannot all stand. This is true even though the combination of convictions because of the manner in which they were consolidated for judgment resulted in no additional punishment attributable to any of the kidnapping cases.

We remand both defendants' cases to the trial court. That court may arrest judgment on both first degree kidnapping charges as to each defendant and enter instead two verdicts of guilty of second degree kidnapping as to each defendant and resentence defendants accordingly. In the alternative, the trial court may arrest judgments in the rape against Nunnery and the rape or sex offense against White as to each defendant and resentence defendants accordingly.

D.

[6] Defendants next challenge Judge Johnson's instructions to the jury that if in the rapes and sex offenses defendants employed a deadly weapon *or* were aided and abetted by another, they could be found guilty of first degree rape and first degree

sex offense. They argue that the charge given in the disjunctive enables the jury to render a nonunanimous verdict; that is, some jurors could find only that defendants used a deadly weapon and others only that they aided and abetted one another. This instruction, defendants claim, violated their right to a unanimous verdict.

This legal argument has been resolved against defendants in *State v. Creason*, 313 N.C. 122, 326 S.E. 2d 24 (1985), and *Jones v. All American Life Insurance Co.*, 312 N.C. 725, 325 S.E. 2d 237 (1985).

We further note in the case at bar that the jury unanimously found defendant Sadler guilty of the rape committed by Belton against Nunnery. Likewise it unanimously found defendant Belton guilty of the rape and sex offense committed by Sadler against White. The jury thus must have found unanimously that in the commission of each of these crimes each defendant was aided and abetted by the other.

There is, therefore, no merit in this assignment of error.

E.

[7] Finally, both defendants argue the trial court erred in failing to dismiss the kidnapping charges for insufficient evidence. They rely 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 the course of the armed robbery the clerk forcibly was moved to the back of the store in order to facilitate the robbery. We held this asportation to be such an inherent and integral part of the robbery that it would not support a separate conviction for kidnapping.

Irwin is distinguishable from the case at bar. Here defendants accosted their victims on the military reservation at Fort Bragg, North Carolina. They then forced the victims at gunpoint into one of the victims' automobiles and traveled through rural areas for twenty to thirty minutes until at a deserted dirt road in the vicinity of Eureka Springs they raped and otherwise sexually assaulted their victims. Even if North Carolina has no jurisdiction

over crimes occurring on the Fort Bragg military reservation, as defendants argue, we can take judicial notice that Eureka Springs is some distance off the reservation and in Cumberland County. Defendants confined, restrained and removed their victims for some length of time while they drove from the military reservation to Eureka Springs in Cumberland County. This confinement, restraint, and removal was not an integral part of or inherently necessary for the commission of the crimes of rape and first degree sex offense.

We find no merit in this assignment of error.

Conclusion

Except for the double jeopardy violations, we find no error in the trial of this case. Because of the double jeopardy violations, we remand the case to the trial court in order that a new sentencing hearing be conducted and sentences imposed in conformity with this opinion.

No error in trial; remanded for new sentencing hearing.

Justice MARTIN dissenting in part.

I respectfully dissent from part of the reasoning and conclusion of section III.C. of the majority's opinion.

Preliminarily, I note that on page 31 of its slip opinion the majority relies upon *State v. Midyette*, 270 N.C. 229, 154 S.E. 2d 66 (1967), without acknowledging that, in response to recent decisions of the Supreme Court of the United States, *Midyette* was expressly overruled by *State v. Gardner*, 315 N.C. 444, 454, 340 S.E. 2d 701, 708 (1986). *Accord State v. Freeland*, 316 N.C. 13, 23, 340 S.E. 2d 35, 41 (1986).

In the instant case the jury found that Belton and Sadler were both guilty of rape and kidnapping of the victim Nunnery. Because in each defendant's case the rape of Nunnery was the only possible "sexual assault" establishing the fifth element of kidnapping in the first degree, I agree under the *Freeland* and *Mason* cases (a) that either Belton's conviction of rape of Nunnery must be vacated or his conviction of kidnapping be reduced from kidnapping in the first degree to kidnapping in the second degree and (b) that either Sadler's conviction of rape of Nunnery must be

vacated or his conviction of kidnapping be reduced from kidnapping in the first degree to kidnapping in the second degree.

I disagree, however, with the majority's conclusions (a) that Belton's convictions of one count of rape of White, one count of sexual assault of White, and one count of kidnapping of White cannot stand simultaneously, and (b) that Sadler's convictions of one count of rape of White, one count of sexual assault of White, and one count of kidnapping of White cannot stand simultaneously. Had the record showed that the "sexual assault" of White which provided the fifth element of kidnapping in the first degree been either the crime of rape or of sexual offense of which each defendant was convicted separately, I would agree with the majority's conclusion. *See Freeland.* Here, however, there was substantial evidence of a second rape by Sadler of White with Belton aiding and abetting—of which rape neither defendant was convicted—which provided proof sufficient to establish the fifth element. White testified that after Sadler forced her at gunpoint to disrobe and to lie on the ground with her legs spread,

> A. [H]e raped me.
>
> Q. Did any part of him enter any part of you at that time?
>
> A. Yes, sir.
>
> Q. What part of him entered what part of you?
>
> A. His penis entered my vagina.
>
> Q. Was that with your consent?
>
> A. No, sir, it was not.
>
> . . . .
>
> Q. What happened next?
>
> A. He then, after a couple of minutes, he told me to spread my legs again and he raped me again vaginally.

This situation is virtually identical to that of *State v. Price*, 313 N.C. 297, 327 S.E. 2d 863 (1985), in which this Court held unanimously that evidence of an unindicted sexual assault of the victim was sufficient to support the fifth element of kidnapping in the first degree. This issue having been squarely considered and de-

cided by this Court just last year, it should not be so lightly overruled.

> The salutary need for certainty and stability in the law requires, in the interest of sound public policy, that the decisions of a court of last resort affecting . . . social values, deliberately made after ample consideration, should not be disturbed, under the doctrine of stare decisis, except for the most cogent reasons . . . .

1 Strong's N.C. Index 3d *Appeal and Error* § 69 (1976) (footnotes omitted). For this reason I dissent.

Justices MEYER and MITCHELL join in this dissenting opinion.

Justice MEYER dissenting in part.

I join in the dissent of Justice Martin. I am writing separately in order to register my dissatisfaction with the majority's treatment of the defendants' peremptory challenge claim. Specifically, I disagree with the mode of analysis employed by the majority in discussing the defendants' argument that the prosecutor's use of peremptory challenges to exclude blacks violated their sixth amendment right to an impartial jury selected from a fair cross-section of the community.

As the majority correctly notes, the defendants explicitly argue that this Court should adopt the reasoning of *McCray v. Abrams*, 750 F. 2d 1113 (2d Cir. 1984); *People v. Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); and *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E. 2d 499 (1979), which hold that a prosecutor's use of peremptory challenges to remove jurors on the basis of race can constitute a violation of a defendant's right to a jury selected from a fair cross-section of the community. However, while devoting several pages to a discussion of the holdings in these cases, the majority concludes that it is unnecessary to reach a decision as to whether to adopt the *McCray-Wheeler-Soares* fair cross-section analysis due to the fact that the defendants have failed to make out a prima facie showing of racially motivated peremptory challenges. I believe that this treatment constitutes an abdication of this Court's responsibility as the highest appellate court in this State to *completely* adjudicate *all* issues which are properly presented to it. I realize that there are times that a

court may wish to "side step" an important issue when the briefs and oral arguments fail to do the issue justice. Such is not the case here. The briefs on this issue by counsel for both defendants are excellent. This Court was presented with a request to adopt a new method of analyzing fair cross-section claims. This request was accompanied by scholarly, well-researched, well-written briefs. This issue is squarely before us. I think it is incumbent upon this Court to expressly adopt or reject the contention made by these defendants. The majority's lengthy discussion of the question, and its ultimate failure to decide it, accomplishes virtually nothing. Of course, the one thing it does accomplish is to preserve decision on the issue for a future case presenting the same argument in the context of "death qualification" of the jury, thus presenting an opportunity to eviscerate our death penalty statute.

Having criticized the majority for its failure to explicitly adopt or reject the *McCray-Wheeler-Soares* fair cross-section analysis, I now set out my position on this question. I am of the opinion that the fair cross-section analysis utilized in those cases should be rejected by this Court. My opinion is based on several factors.

Initially, I am convinced that the sixth amendment fair cross-section analysis set forth in *McCray* has been completely eviscerated by the ruling of the United States Supreme Court in *Lockhart v. McCree*, --- U.S. ---, 90 L.Ed. 2d 137 (1986). In that case the defendant argued that the removal for cause of jurors unalterably opposed to the death penalty prior to the guilt-innocence determination phase of a bifurcated capital trial violated his sixth amendment right to have a jury selected from a representative cross-section of the community. The Court refused to utilize the fair cross-section requirement to invalidate the use of either for-cause or peremptory challenges and reaffirmed the well-settled principle that the fair cross-section guarantee does not require that petit juries—as opposed to jury venires—reflect the composition of the community at large. *Id.* at ---, 90 L.Ed. 2d at 147-48. *See also Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed. 2d 690 (1975). The ultimate holding in *McCray*—that the use of peremptory challenges may constitute a violation of a defendant's sixth amendment right to a jury drawn from a fair cross-section of the community—was emphatically rejected by the Supreme Court in

McCree. This is clearly in accord with the holdings of the majority of courts which have addressed the issue that a prosecutor's use of peremptory challenges to exclude minorities from the petit jury does not infringe upon the fair cross-section requirement. *See, e.g., United States v. Whitfield*, 715 F. 2d 145 (4th Cir. 1983); *United States v. Childress*, 715 F. 2d 1313 (8th Cir. 1983), *cert. denied*, 464 U.S. 1063, 79 L.Ed. 2d 202 (1984); *Weathersby v. Morris*, 708 F. 2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046, 79 L.Ed. 2d 181 (1984); *Willis v. Zant*, 720 F. 2d 1212 (11th Cir. 1983), *cert. denied*, 467 U.S. 1256, 82 L.Ed. 2d 849 (1984); *Allen v. Hardy*, 586 F. Supp. 103 (N.D. Ill. 1984); *State v. Wiley*, 144 Ariz. 525, 698 P. 2d 1244 (1985); *Doepel v. United States*, 434 A. 2d 449 (D.C. App.), *cert. denied*, 454 U.S. 1037, 70 L.Ed. 2d 483 (1981); *Blackwell v. State*, 248 Ga. 138, 281 S.E. 2d 599 (1981); *People v. Williams*, 97 Ill. 2d 252, 454 N.E. 2d 220 (1983), *cert. denied*, 466 U.S. 981, 80 L.Ed. 2d 836, *reh'g denied*, 467 U.S. 1268, 82 L.Ed. 2d 864 (1984); *State v. Williams*, 458 So. 2d 1315 (La. App. 1984), *writ denied*, 463 So. 2d 1317 (La. 1985); *Nevius v. State*, 101 Nev. 238, 699 P. 2d 1053 (1985); *State v. Raymond*, 446 A. 2d 743 (R.I. 1982).

Furthermore, I do not believe that article I, section 24 of the North Carolina Constitution should be interpreted in such a manner as to adopt the *McCray-Wheeler-Soares* cross-section analysis —the distinct minority view. I am of the opinion that the analysis employed in *McCray, Wheeler*, and *Soares* has the practical effect of extending the fair cross-section requirement to the petit jury. These cases acknowledge that the Supreme Court has never extended the fair cross-section requirement to the petit jury, but conclude that the requirement does guarantee a defendant a "fair chance" at such a jury. The sixth amendment and article I, section 24 of the North Carolina Constitution do guarantee a defendant a "fair chance" at a jury selected from a representative cross-section of the community. This right, however, is protected not by extension of the fair cross-section requirement to the petit jury, but through the effective protections afforded in the selection of the venire, the large number in the jury venire, and the limited peremptory challenges. Through these protections, both parties are accorded a fair opportunity to select an impartial and representative jury. The possibility that a prosecutor will systematically eliminate a defendant's "fair chance" at a representative cross-section by systematically removing blacks or other racial

minorities—*McCray*'s ultimate concern—has been eliminated by the holding in *Batson v. Kentucky*, --- U.S. ---, 90 L.Ed. 2d 69 (1986), alluded to in the majority opinion.

This Court has never construed article I, section 24 of the North Carolina Constitution as extending the fair cross-section requirement to the petit jury. Several considerations counsel against doing so. First, because the venire is drawn from random lists, it is inevitable that there will be times when the list will include but a few members of a particular group. If the fair cross-section requirement were extended to the petit jury, the selection of individuals of that group to serve as jurors might be necessary. This process of individual selection would be fraught with the potential for abuse and the appearance of impropriety and partiality. Second, a requirement that the petit jury actually mirror the community would create an administrative nightmare. Third, assigning jurors as representatives of specific groups might influence the deliberative process by accentuating identifiable differences among jurors. Fourth, it is conceivable that a prospective juror who evidences an actual, specific bias could not be excluded if his removal would destroy the representative cross-section. *See* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715 (1977).

For these reasons, I would vote to expressly reject the defendants' argument under both the United States Constitution and the North Carolina Constitution.

VARONICA L. JACKSON AND RUFUS H. JACKSON v. HEATH D. BUMGARDNER

No. 670A84

(Filed 29 August 1986)

1. **Physicians, Surgeons and Allied Professions § 11— malpractice—failure to replace IUD—birth of healthy child—sufficiency of complaint to state claim**

Plaintiff's complaint stated a claim recognizable in this state for medical malpractice where the injury complained of was defendant's improper failure to replace an intrauterine device, resulting in plaintiff wife's pregnancy and the consequent birth of a healthy child.

2. Physicians, Surgeons and Allied Professions § 21— malpractice—unwanted pregnancy and healthy child—items of damages—loss of consortium only damages to husband

In a medical malpractice action where the injury complained of is an unwanted pregnancy and a healthy child, recovery of damages is limited to such costs as the hospital and medical expenses of the pregnancy, pain and suffering connected with the pregnancy, lost wages, and, where claimed, loss of consortium, but recovery may not include the costs of rearing the child, offset by the "benefits" incident to raising a normal, healthy child, since to permit recovery of child-rearing expenses would be contra to the holding and rationale of *Azzolino v. Dingfelder*, 315 N.C. 103, which is that "life, even life with severe defects, cannot be an injury in the legal sense," and since a determination of child-rearing costs offset by "benefits" would be based on speculation and conjecture. Therefore, plaintiff husband, who claimed no damages for loss of consortium, alleged no damages recoverable in this state.

3. Contracts § 25— contract to retain or replace IUD alleged—insufficiency of complaint to state claim

Plaintiffs' complaint failed to state a claim for breach of contract where plaintiffs alleged that defendant agreed to retain or replace an intrauterine device during the course of two surgical procedures performed by defendant, but plaintiffs' complaint showed that the contract between plaintiffs and defendant was to perform the two operations in an attempt to alleviate plaintiff wife's health problems, which defendant did; defendant's "promise" to retain or replace the IUD was merely incidental to this contract; and under the circumstances alleged in plaintiffs' complaint, defendant's failure to retain or replace the IUD after undertaking to do so would be at most negligence in the performance of his professional duties.

Justice MARTIN concurring in part and dissenting in part.

ON discretionary review of a decision of the Court of Appeals, 71 N.C. App. 107, 321 S.E. 2d 541 (1984), reversing an order by *Bailey, J.*, dismissing plaintiffs' complaint, entered at the 14 November 1983 Civil Session of Superior Court, HARNETT County. Heard in the Supreme Court 8 April 1985; reargued 9 June 1986.

Nance, Collier, Henderson & Wheless, by James R. Nance, Jr., for plaintiff-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson, Jodee Sparkman King, and William H. Moss, for defendant-appellant.

FRYE, Justice.

The question before this Court is whether plaintiffs' complaint states a claim recognizable in this State for medical malpractice and breach of contract where the injury complained of is defendant's improper failure to replace an intrauterine device, resulting in plaintiff wife's pregnancy and the consequent birth of a healthy child. We hold that the complaint states a recognizable claim for medical malpractice as to plaintiff wife.

In January 1979, plaintiff Varonica Jackson consulted defendant physician because she was experiencing abnormal uterine bleeding. She was admitted to Betsy Johnson Memorial Hospital on 29 January 1979 where defendant performed a D and C (dilation and curettage) and a cervical biopsy. She continued to have problems, and on 3 April 1979, defendant again operated on the plaintiff for a suspected ovarian cyst.

At the time, plaintiff wife was relying on an intrauterine device (IUD) for prevention of pregnancy. Plaintiffs allege that they could not afford to have another child, that they both discussed their situation with defendant, and that before each operation, defendant promised both of them to replace the IUD if it became necessary to remove it during the surgery. Plaintiff wife alleges that she was informed that this precaution had indeed been taken and that she continued to have the IUD's protection. On 22 July 1980, according to plaintiffs' complaint, they discovered that plaintiff wife was pregnant and that defendant had not in fact retained or replaced her IUD. The plaintiffs had a healthy baby the following February.

Plaintiffs brought suit against defendant on 22 July 1981, alleging medical malpractice and breach of contract and seeking damages for plaintiff wife's pregnancy and for the cost of rearing the new baby. Defendant answered, denying most of plaintiffs' allegations and seeking to have plaintiffs' complaint dismissed under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. After a hearing at the 14 November 1983 Civil Session of Superior Court, Harnett County, Bailey, J., dismissed plaintiffs' complaint on that basis. Plaintiffs appealed to the Court of Appeals, which reversed.

On a motion to dismiss for failure to state a claim upon which relief can be granted, N.C. R. Civ. P. 12(b)(6), all allegations of fact

are taken as true but conclusions of law are not. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E. 2d 222 (1985).

A.

[1] With this standard in mind, we turn first to plaintiffs' tort claim. To state a claim for medical malpractice, plaintiff must allege a breach of duty by the physician and damages proximately resulting from this breach. The scope of a physician's duty to his patient is set forth by Justice Higgins in *Hunt v. Bradshaw*, 242 N.C. 517, 521-22, 88 S.E. 2d 762, 765 (1955):

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient . . . . If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable.

(Citations omitted.) The first requirement is further refined by the "same or similar communities" standard and N.C.G.S. § 90-21.12. *Wall v. Stout*, 310 N.C. 184, 192 n. 1, 311 S.E. 2d 571, 577 n. 1 (1984).

The pertinent parts of plaintiffs' complaint that relate to their malpractice claim are:

> III. That at the time complained of the Defendant held himself out to skillfully practice and to follow up to date standards currently used by medical doctors practicing with [sic] the Dunn, North Carolina, area as well as the North Carolina Medical Community in general, and that he further

held himself out as a skillful practitioner in the surgical placement of intrauterine devices commonly known as IUD [sic].

IV. That on or about January 30, 1979, and at times prior thereto, the Plaintiff, VARONICA L. JACKSON, was a patient of the Defendant and that she sought out the services of the Defendant because of uterine bleeding.

. . . .

VII. That on January 29, 1979, VARONICA L. JACKSON, was admitted to Betsy Johnson Memorial Hospital and was operated on by the Defendant and as a result was given a D and C as well as a biopsy of the cervix.

VIII. The [sic] prior to the D and C being given by the Defendant, the Defendant promised that if he had to take out the intrauterine device that was already located within the Plaintiff that he would place it back within the Plaintiff, and represented to both Plaintiffs that there would be no difficulty with regard to the replacement of the intrauterine device.

IX. That thereafter in April of 1979 the Plaintiff, VARONICA L. JACKSON, continued to have problems which manifested themselves as pain in the right lower quadrant; that she again sought the services of the Defendant who again selected the hospital and staff for the performance of another operation having diagnosed her as having an ovarian cyst.

. . . .

XI. That at the time of the said operation in April, the Plaintiffs and each of them discussed with the Defendant the retention of the intrauterine device in the Plaintiff, VARONICA L. JACKSON, and that the Defendant repeatedly represented to the Plaintiffs that the intrauterine device would remain therein.

XII. That thereafter the Plaintiff was informed, believed, and alleges that she was protected from the possibility of pregnancy by the interuterine device located within her.

XIII. That therafter and on July 22, 1980, the Plaintiffs discovered that the said VARONICA L. JACKSON was pregnant

and further discovered that the intrauterine device purportedly retained in the Plaintiff had not in fact been retained.

XIV. That the Plaintiffs already had the responsibility of other children and were unable to financially bear the responsibility of additional children which facts were discussed and which were well known to the Defendant.

XV. That the Defendant was negligent in failing to warn the Plaintiffs and each of them of the removal of the intrauterine device, the failure to advise them that the intrauterine device had been removed, that she was subject to become pregnant, and that the Defendant failed to replace the intrauterine device as he had agreed to do.

XVI. That as a direct result of the negligence of the Defendant, the Plaintiff became pregnant and a child was born to the Plaintiffs in February of 1981.

XVII. That as a further result of the negligence of the Defendant and his failure to replace the intrauterine device, the Plaintiffs have been caused to suffer damages for medical expenses for the Plaintiff, VARONICA L. JACKSON, for the birth of said child, for the general cost and maintenance of said minor child from the date of his birth until such time as he shall become of legal age or emancipated, and have thus been damaged in a sum in excess of Ten Thousand and no/100 ($10,000.00) Dollars.

While plaintiff wife sought defendant's assistance for uterine bleeding, according to the complaint she also informed him that she did not want to lose the protection of the IUD as a result of his medical treatment. There are many reasons for a woman wishing to avoid pregnancy, some of which are matters of personal inclination and some of which are related to health. For some women pregnancy can create a serious and foreseeable risk of death. Whatever a woman's reason for desiring to avoid pregnancy, when a physician undertakes to provide medical care or advice to her for that purpose, he or she must provide the professional services in that case, just as in the rendering of professional services in any instance, according to the established professional standards. Just as in any other case, a failure to measure up to the established standards results in negligence which becomes actionable if the negligence proximately causes legal injury.

Applying the traditional tort principles set forth above to the allegations in plaintiffs' complaint, it is clear that the complaint alleges sufficient facts to withstand a motion to dismiss under Rule 12(b)(6) as to plaintiff wife. The complaint alleges that she consulted defendant in his professional capacity for medical treatment for uterine bleeding, that defendant undertook to treat her by performing operations on two separate occasions, and that defendant promised that her intrauterine device would be replaced, if it became necessary to remove it during the operations. These facts are sufficient to establish that plaintiff wife was defendant's patient and that he therefore owed her a legal duty. The complaint alleges that defendant completely failed to replace the IUD and further failed to warn plaintiff wife of this omission, despite the fact that he knew she relied upon it for prevention of pregnancy, had other children, did not want to become pregnant, and would suffer economic hardship if she did become pregnant. The complaint also alleges that defendant thereby breached his duty to her to exercise reasonable care and diligence in the application of his knowledge and skill in treating her. Plaintiff wife was thus left unprotected against pregnancy and unaware of her loss of protection. As a result, she became pregnant and suffered the very result that she had specifically sought defendant's professional assistance in avoiding. Plaintiff wife has therefore alleged sufficient facts to show the existence of a duty, breach of that duty, and damages resulting from the breach.

This case is one of first impression before this Court.[1] We have accordingly investigated the law in other jurisdictions to see how these jurisdictions have ruled on cases similar to the one at bar.

Confusion admittedly exists in the terminology used to describe actions in which negligence is alleged in some fashion to have resulted in pregnancy and the birth of a child. Generally speaking, however, the term "wrongful conception" or "wrongful pregnancy" has been used to describe cases similar to the instant case to distinguish them from so called "wrongful life" and "wrongful birth" cases. *See generally Miller v. Johnson*, 231 Va. 177, 343 S.E. 2d 301 (1986).

1. The Court of Appeals, however, has recognized a claim of this type. *See Pierce v. Piver*, 45 N.C. App. 111, 262 S.E. 2d 320 (1980).

Our survey shows that the vast majority of courts which have considered wrongful conception cases have viewed the case as being indistinguishable from an ordinary medical malpractice action where the plaintiff alleges a breach of duty on the part of a physician and resulting injury for failure to perform that duty. At least twenty-nine jurisdictions have considered the issue and have recognized a cause of action in tort.[2] Our research disclosed only one jurisdiction that currently denies a claim in tort, and that jurisdiction allows one in contract. *See Szekeres v. Robinson*, --- Nev. ---, 715 P. 2d 1076 (1986). We find both the reasoning and the results of these authorities quite persuasive.

Defendant, however, argues that this Court's recent decision in *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E. 2d 528 (1985), prevents this jurisdiction from joining the impressive list of jurisdictions recognizing a cause of action in tort for medical malpractice where the negligence of the physician results in the plaintiff's pregnancy. Defendant reads *Azzolino* as holding that all

2. Alabama—*Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); Arizona—*University of Arizona v. Superior Court*, 136 Ariz. 579, 667 P. 2d 1294 (1983); Arkansas—*Wilbur v. Kerr*, 275 Ark. 239, 628 S.W. 2d 568 (1982); California—*Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Connecticut—*Foran v. Carangelo*, 153 Conn. 356, 216 A. 2d 638 (1966); District of Columbia—*Flowers v. Dist. of Columbia*, 478 A. 2d 1073 (D.C. 1984); Delaware—*Coleman v. Garrison*, 327 A. 2d 757 (Del. Super. Ct. 1974), *modified and aff'd*, 349 A. 2d 8 (Del. 1975); Florida—*Jackson v. Anderson*, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970); Georgia—*Fulton-DeKalb Hosp. Authority v. Graves*, 252 Ga. 441, 314 S.E. 2d 653 (1984); Illinois—*Cockrum v. Baumgartner*, 95 Ill. 2d 193, 447 N.E. 2d 385, *cert. denied sub. nom. Raja v. Michael Reese Hosp. & Med. Center*, 464 U.S. 846, 78 L.Ed. 2d 139 (1983); Indiana—*Garrison v. Foy*, --- Ind. App. ---, 486 N.E. 2d 5 (1985); Kansas—*Byrd v. Wesley Medical Center*, 237 Kan. 215, 699 P. 2d 459 (1985); Kentucky—*Hackworth v. Hart*, 474 S.W. 2d 377 (Ky. 1971); Maine—*Macomber v. Dillman*, 505 A. 2d 810 (Me. 1986); Maryland—*Jones v. Malinowski*, 299 Md. 257, 473 A. 2d 429 (1984); Michigan—*Bushman v. Burns Medical Center*, 83 Mich. App. 453, 268 N.W. 2d 683 (1978); Minnesota—*Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169 (Minn. 1977); Missouri—*Miller v. Duhart*, 637 S.W. 2d 183 (Mo. Ct. App. 1982); New Hampshire—*Kingsbury v. Smith*, 122 N.H. 237, 442 A. 2d 1003 (1982); New Jersey—*P. v. Portadin*, 179 N.J. Super. 465, 432 A. 2d 556 (1981); New York—*Weintraub v. Brown*, 98 A.D. 2d 339, 470 N.Y.S. 2d 634 (1983); North Dakota—*Milde v. Leigh*, 75 N.D. 418, 28 N.W. 2d 530 (1947); Ohio—*Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E. 2d 496 (1976); Pennsylvania—*Speck v. Finegold*, 497 Pa. 77, 439 A. 2d 110 (1981); Tennessee—*Vaughn v. Shelton*, 514 S.W. 2d 870 (Tenn. Ct. App. 1974); Virginia—*Miller v. Johnson*, 231 Va. 177, 343 S.E. 2d 301 (1986); Washington—*McKernan v. Aasheim*, 102 Wash. 2d 411, 687 P. 2d 850 (1984); West Virginia—*James G. v. Casserta*, 332 S.E. 2d 872 (W.Va. 1985); Wyoming—*Beardsley v. Wierdsma*, 650 P. 2d 288 (Wyo. 1982).

"matters inherently incident to the creation of life . . . are . . . not cognizable damages." Because plaintiff wife's damages are all related in some fashion to her pregnancy, defendant argues that she has failed to allege any legally cognizable damages, and her claim should be dismissed accordingly.

Defendant mistakes both the nature of plaintiff wife's claim and this Court's holding in *Azzolino.*

Azzolino involved so-called "wrongful life" and "wrongful birth" claims. These terms are descriptive titles for claims by deformed children and their parents, respectively, against a health care provider for negligent medical treatment or advice that deprives the parents of the opportunity of deciding to abort a deformed fetus. *Azzolino*, 315 N.C. at 107, 337 S.E. 2d at 531. This Court held that the injury alleged in *Azzolino* was the continued existence of the deformed fetus. Because the Court was unwilling to recognize the existence of life, even with severe defects, as a legal injury, the Court concluded that neither wrongful birth nor wrongful life claims were cognizable in this jurisdiction. *Id.* at 108-17, 337 S.E. 2d at 532-37.

Defendant has failed to make a critical distinction between the types of claims involved in *Azzolino* and in the instant case. Mrs. Azzolino did not complain about becoming pregnant; she complained about having a child with certain defects. In reaching its result in *Azzolino*, the Court stressed the fact that defendant Dingfelder was not responsible for the existence of either little Michael Azzolino or his defects. *Id.* at 111, 337 S.E. 2d at 534. ("It should be reemphasized here that the plaintiffs only allege that the defendants negligently caused or permitted an already conceived and defective fetus not to be aborted. The plaintiffs do not allege that the defendants in any way directly caused the genetic defect. Therefore, the only damages the plaintiffs allege they have suffered arise, if at all, from the failure of the defendants to take steps which would have led to abortion of the already existing and defective fetus.") Here, what plaintiff sought was a means to avoid pregnancy itself. The injury she alleges is that she became pregnant. She also alleges that defendant's negligence contributed to her pregnancy. In arguing that plaintiff has alleged no cognizable damages under *Azzolino*, defendant is equating the condition of the pregnant plaintiff with the life of her child.

Rather, it is the fact of the pregnancy *as a medical condition* that gives rise to compensable damages and completes the elements for a claim of negligence.

In concluding that the existence of life is not a cognizable injury, *Azzolino* did not preclude recovery of damages for pregnancy *as a medical condition*. To construe *Azzolino* so broadly would run counter to the principle that for every injury there is a remedy. We do not believe that *Azzolino* requires this result.[3]

Defendant further argues that this Court should not recognize plaintiff wife's claim because a temporary method of birth control is involved. Defendant gives as his reason the fact that these methods have a higher failure rate than permanent methods and may require the active participation of the patient.

We find no rational basis for distinguishing between temporary and permanent methods of birth control for the purpose of determining whether a complaint states a cause of action for medical malpractice resulting in wrongful conception. This conclusion has support in another jurisdiction. In *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971), for example, plaintiffs were the parents of seven children and on the advice of their doctor decided to limit the size of their family. The doctor prescribed a contraceptive, Norinyl; however, the defendant pharmacist negligently supplied Mrs. Troppi with Nardil, a mild tranquilizer. Mrs. Troppi took the Nardil and soon thereafter became pregnant and gave birth to a healthy child. The Michgan court held that these allegations were sufficient to survive a motion to dismiss under Rule 12(b)(6). There appears to be no compelling reason to limit a patient's right to non-negligent health care to permanent sterilization procedures as opposed to the insertion of an IUD. Accordingly, we reject defendant's argument.

We wish to distinguish carefully, however, between cases like the instant case, where plaintiff alleges that defendant's negligence contributed to the pregnancy, and cases where the contraceptive method itself fails.

3. We note that at least one jurisdiction appears by statute to prohibit both "wrongful life" and "wrongful birth" claims but allows "wrongful conception" claims. *See* Minn. Stat. Ann. § 145.124 (Supp. 1986).

In summation, we find that plaintiff's complaint contains sufficient allegations to withstand defendant's motion to dismiss pursuant to Rule 12(b)(6) on plaintiff wife's claim for medical malpractice. We also hold that her claim is one that is recognizable in this State.

B.

[2] We turn now to the question of whether plaintiffs' complaint alleges sufficient facts to withstand a motion to dismiss as to plaintiff husband. A husband's standing to sue for physical injury to his wife is limited to a claim for loss of consortium. *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E. 2d 818 (1980). Because the only claim of injury made by plaintiff husband in this case did not include a claim of loss of consortium due to his wife's injury but was related to the cost of rearing the child, we must consider what damages may be recovered in this action.

Other courts generally take one of two basic positions with respect to allowable damages in cases similar to the instant case. The majority limit recovery to such costs as the hospital and medical expenses of the pregnancy, pain and suffering connected with the pregnancy, lost wages, and where claimed, loss of consortium. *See, e.g., Miller v. Johnson*, 231 Va. 177, 343 S.E. 2d 301. A second line of cases, in addition to the above-mentioned medically related costs, have allowed recovery for the costs of rearing the child, offset by the "benefits" incident to raising a normal, healthy child. *See, e.g., Jones v. Malinowski*, 299 Md. 257, 473 A. 2d 429 (1984).

We believe the result reached by the first group to be the better one, and we hold that plaintiff wife may recover damages for the expenses associated with her pregnancy, but that plaintiffs may not recover for the costs of rearing their child. We reach this result for two reasons.

First, the decision in *Azzolino v. Dingfelder* would prohibit recovery of damages for the costs of rearing the child. In that case this Court held that "life, even life with severe defects, cannot be an injury in the legal sense." *Azzolino*, 315 N.C. at 109, 337 S.E. 2d at 532. Thus, to permit recovery of child-rearing expenses would be *contra* to both the holding and the rationale of *Azzolino*.

Second, we are persuaded by the reasoning of the Supreme Court of our sister state of Virginia, which adopts the majority

view. Applying traditional principles of tort law to the question of the proper measure of damages in wrongful conception cases, the Supreme Court of Virginia recently held that plaintiffs in such cases could recover such directly resulting damages as "medical expenses, pain and suffering, and lost wages for a reasonable period . . . . The mother is also entitled under the general rule to recover damages, if proven, for emotional distress causally resulting from the tortiously caused physical injury." *Miller v. Johnson*, 231 Va. at 184, 343 S.E. 2d at 305. But considering the question of recovery for expenses of rearing a healthy child, the court said:

> Juries may routinely determine the damages resulting from a life that has been terminated or permanently injured. But even those courts that allow recovery of damages for the expenses of child-rearing concede the difficulty of determining the value of the offsetting benefits from the child's life. *See, e.g., Troppi*, 31 Mich. App. at 261, 187 N.W. 2d at 521. Nevertheless, they are willing to impose this burden on juries. We are unwilling to do so because of our conclusion that the results would necessarily be based on speculation and conjecture. Who, indeed, can strike a pecuniary balance between the triumphs, the failures, the ambitions, the disappointments, the joys, the sorrows, the pride, the shame, the redeeming hope that the child may bring to those who love him?

Id. at 184, 343 S.E. 2d at 307. *See also McKernan v. Aasheim*, 102 Wash. 2d 411, 419-20, 687 P. 2d 850, 855 (1984).

We therefore conclude that plaintiff husband's claim must fail because he has alleged no damages recoverable in this State.

While we have applied traditional tort principles in recognizing the validity of plaintiff wife's medical malpractice claim and in limiting the scope of damages, we are not unmindful of the legislature's role in fashioning remedies in accordance with public policy. As with other claims, the legislature in its wisdom may choose to limit or expand or otherwise redefine the basis of recovery.

C.

We turn now to plaintiff's contract claim.

[3] If a physician undertakes to treat a patient, that physician is generally liable for damages resulting from the negligent performance of his or her duties on the tort theory of malpractice, regardless of the availability of other theories of recovery. *See, e.g., Maercklein v. Smith*, 129 Colo. 72, 266 P. 2d 1095 (1954) (doctor performed vasectomy instead of circumcision, and patient sued for battery; when doctor raised as defense a one year statute of limitations, court held that doctor's acts could also amount to negligence, with a longer period of limitations). Accordingly, when the alternative available theory is breach of an underlying contract of employment, most jurisdictions treat the plaintiff's claim as one "essentially tortious in its nature," but hold that "the tort may be waived, allowing a suit in assumpsit." 61 Am. Jur. 2d Physicians and Surgeons § 311 (1981).

Because a physician does not ordinarily insure the success of his treatment, *Lentz v. Thompson*, 269 N.C. 188, 152 S.E. 2d 107 (1967), some jurisdictions that otherwise do not allow suits for breach of contract against physicians will allow such suits when the physician entered into a "special contract" to cure or to obtain a specific result,[4] *e.g., Monroe v. Long Island College Hospital*, 84 A.D. 2d 576, 443 N.Y.S. 2d 433 (1981) (stating New York's current position). At least one commentator is of the opinion that the rule in these jurisdictions, that no suit for breach of contract may be brought against a physician unless it is for breach of a "special contract" to cure or obtain a specific result, is the universal rule. *See* Note, *Medical Malpractice: Contract or Tort: The Vermont Statute of Frauds*, 10 Vt. L. Rev. 99 (1985). However, the rule is not in fact universal. *See Zostautas v. St. Anthony De Padua Hospital*, 23 Ill. 2d 326, 178 N.E. 2d 303 (1961) (same transaction may give rise to both tort and contract causes of action, and actions arising by virtue of medical malpractice are on no different footing than other types of actions); *Stewart v. Rudner*, 349 Mich. 459, 84 N.W. 2d 816 (1957) (contract action allowed where wife, whose earlier pregnancies had resulted in a miscarriage and a stillbirth, contracted with physician for delivery by Caesarian section; physician instead allowed a vaginal delivery that the infant failed to survive, exactly as wife had feared)

4. The classic example of such a contract is found in *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929) ("Hairy Hand" case) (doctor warranted to give patient a "perfect hand" as the result of a skin graft).

(cited approvingly by this Court in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979)).

Our research has disclosed only three reported cases in North Carolina involving breach of contract claims against physicians and dentists in their professional capacity. *See Progner v. Eagle*, 377 F. 2d 461 (4th Cir. 1967) (involving North Carolina law); *Preston v. Thompson*, 53 N.C. App. 290, 280 S.E. 2d 780, *cert. denied*, 304 N.C. 392, 285 S.E. 2d 833 (1981); and *Pierce v. Piver*, 45 N.C. App. 111, 262 S.E. 2d 320 (1980) (all three involving warranties as to the outcome of treatment). The legislature has mandated that plaintiffs show a writing to prove a warranty, guarantee or assurance as to the result of medical treatment or services. N.C.G.S. § 90-21.13(d) (1985). *See also Preston v. Thompson*, 53 N.C. App. 290, 280 S.E. 2d 780, *cert. denied*, 304 N.C. 392, 285 S.E. 2d 833. However, this Court has apparently never been presented with the question of whether to allow a patient to maintain a breach of contract action against a physician.

Defendant in the instant case argues that the contract that plaintiffs allege they made with him is an assurance as to the result of treatment, barred by N.C.G.S. § 90-21.13(d) because plaintiffs do not allege a writing. Alternatively, he urges this Court to extend the statute's coverage to all contracts between patient and physician.

However, examination of plaintiff's complaint discloses that we need not reach defendant's contentions regarding the statute because plaintiffs' claim for breach of contract fails upon a more elemental basis. The pertinent parts of plaintiffs' complaint that relate to their contract are:

> I. That the Plaintiffs reiterate and replead paragraphs I through XVII as fully and completely as if said paragraphs were set forth verbatim and the same are incorporated herein by reference.
>
> II. That the Plaintiffs contracted with the Defendant for the replacement of the intrauterine device and that the failure of the Defendant to replace the intrauterine device constitutes a breach of said oral contract and agreement and that as a result thereof the Plaintiffs have been caused to suffer damages for medical expenses and expenses for the

maintenance, support, and education of the minor child born to the Plaintiffs in a sum in excess of Ten Thousand and no/100 ($10,000.00) Dollars.

Contracts are to be considered as a whole. The heart of the contract is the intent of the parties, which must be determined from the language of the contract and its character, objects, and purpose. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975); *Stanley v. Cox*, 253 N.C. 620, 117 S.E. 2d 826 (1961). Although plaintiffs allege in paragraph II of their second cause of action that they contracted with defendant for the replacement of the intrauterine device, an examination of paragraphs I through XVI of the complaint, repleaded in plaintiffs' second cause of action, discloses that there was no such contract. Plaintiff wife sought defendant's services initially because of uterine bleeding (paragraph IV), and later for abdominal pain (paragraph IX). It was for these problems that defendant actually treated her, first by performing a D and C and, later, surgery for a suspected ovarian cyst (paragraphs VII and IX). Plaintiffs also allege in paragraphs VIII and XI that before each operation, defendant "promised" to retain or replace plaintiff wife's IUD. Taken as a whole with due regard for its character, objects and purpose, the contract between plaintiffs, or plaintiff wife, and defendant was to perform the two operations in an attempt to alleviate plaintiff wife's health problems, which defendant did. Defendant's "promise" to retain or replace the IUD was merely incidental to this contract. Viewed in context, it is clear that defendant never intended to be contractually bound by the "promise." There was thus no contract to retain or replace the IUD for defendant to breach. Under the circumstances alleged in plaintiffs' complaint, defendant's failure to retain or replace the IUD after undertaking to do so would be at most negligence in the performance of his professional duties, as was discussed earlier in this opinion. Since plaintiffs' complaint shows on its face that they are not entitled to recover for breach of contract, dismissal of this cause of action under Rule 12(b)(6) was entirely proper on that ground.

To summarize, we hold the following:

1) plaintiffs' complaint states a claim upon which relief may be granted for medical malpractice recognizable in this State and sufficient for plaintiff wife to withstand defend-

ant's motion to dismiss pursuant to Rule 12(b)(6), but the allegations in the complaint are not sufficient for plaintiff husband to withstand this motion with respect to a malpractice claim;

2) plaintiff wife may not recover damages for the cost of rearing her child; and

3) plaintiffs' complaint fails to state a claim upon which relief may be granted for breach of contract.

Therefore, for all of the reasons discussed herein, the decision of the Court of Appeals reversing the trial judge's order dismissing both of plaintiffs' claims pursuant to Rule 12(b)(6) is affirmed in part and reversed in part.

Affirmed in part; reversed in part.

Justice MARTIN concurring in part and dissenting in part.

I concur in the holding by the majority that the complaint states a cause of action for medical malpractice by Varonica Jackson.

I dissent from the majority's failure to recognize the cause of action of Rufus Jackson for medical malpractice and the plaintiffs' cause of action based on contract. Further, I am of the opinion that the Court should not have addressed the damage issue on the bare record of the pleadings, and that having done so, the majority adopted a standard contrary to settled common law principles.

In order to properly resolve the issues before us, I find it appropriate to review some of the legal background affecting the questions presented to us by this appeal. The Supreme Court of the United States has recognized the right of couples to practice contraception as being protected by the right of privacy under the Bill of Rights to the United States Constitution. *See Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed. 2d 510 (1965) (married couples); *Eisenstadt v. Baird*, 405 U.S. 438, 31 L.Ed. 2d 349 (1972) (unmarried couples). The Court found the right of privacy to be older than the Bill of Rights. *See also* Griswold, *The Right to be Let Alone*, 55 Nw. U. L. Rev. 216 (1960). The Constitution of North Carolina likewise protects the right of privacy. N.C. Const.

art. I, Declaration of Rights. *See State v. Poe*, 40 N.C. App. 385, 252 S.E. 2d 843, *disc. rev. denied*, 298 N.C. 303 (1979). "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

From the above, it follows that a husband and wife have the right to plan their family and to determine, within their abilities, whether and when they will have a child. *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 314 S.E. 2d 653 (1984); *Cockrum v. Baumgartner*, 99 Ill. App. 3d 271, 425 N.E. 2d 968 (1981), *rev'd on other grounds*, 95 Ill. 2d 193, 447 N.E. 2d 385, *cert. denied sub nom. Raja v. Michael Reese Hospital*, 464 U.S. 846, 78 L.Ed. 2d 139 (1983). *See generally* Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 Va. L. Rev. 1311 (1982).

As set forth above, the right of *married couples* to practice contraception is protected by the United States Constitution. *Griswold*, 381 U.S. 479, 14 L.Ed. 2d 510. Although the physical injury in this case was inflicted upon the wife, defendant's negligence violated the husband's constitutional right as to contraception. Defendant's negligence proximately resulted in harm to both plaintiffs, not the wife alone as stated by the majority.

Here, plaintiffs have not alleged loss of consortium but seek only recovery of certain expenses incurred as a result of Mrs. Jackson's pregnancy and the child's birth. *Pierce v. Piver* upheld sub silentio the right of the father to assert a claim based upon negligence of a doctor resulting in an unplanned pregnancy of his wife. 45 N.C. App. 111, 262 S.E. 2d 320, *disc. rev. allowed*, 300 N.C. 198, *appeal dismissed*, 300 N.C. 375 (1980) (after discretionary review was allowed the parties to this litigation settled the dispute and the appeal was thereupon dismissed). Other jurisdictions have recognized the father's standing to sue in wrongful conception and wrongful birth cases. *See, e.g., Robak v. United States*, 658 F. 2d 471 (7th Cir. 1981) (wrongful birth); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Ochs v. Borrelli*, 187 Conn. 253, 445 A. 2d 883 (1982); *DiNatale v. Lieberman*, 409 So. 2d 512 (Fla. Ct. App. 1982) (wrongful birth); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971); *Sherlock v. Stillwater Clinic*, 250 N.W. 2d 169 (Minn. 1977) (wrongful conception); *Kingsbury v. Smith*, 122 N.H. 237, 442 A. 2d 1003 (1982) (wrongful conception).

See Annot., *Medical Malpractice, and Measure and Element of Damages, in Connection With Sterilization or Birth Control Procedures*, 27 A.L.R. 3d 906, §§ 3[a], 4[a], 5[a] (1969 & Supp. 1986). Although Mr. Jackson was not being medically treated by defendant, the complaint alleges that he, along with Mrs. Jackson, discussed their desire to have the IUD replaced in Mrs. Jackson, and defendant repeatedly represented to Mr. Jackson that the device would be so retained. In addition to the allegations of defendant's negligence, plaintiffs' complaint is based upon allegations of defendant's breach of an express contract with plaintiffs. Plaintiffs allege that defendant totally failed to perform his obligations under the terms of the contract with plaintiffs. I conclude that a cause of action has been stated on behalf of Mr. Jackson: he relied upon defendant's exercising reasonable care in retaining the IUD in Mrs. Jackson; he was responsible for the payment of the charges for defendant's services; he was affected emotionally and financially by the conception and birth of the child. N.C.G.S. § 50-13.4(b) (1984). That Mr. Jackson would be damaged by the negligent failure of defendant to reinsert the IUD was reasonably foreseeable. *See Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984). Moreover, to forbid the husband the opportunity to recover for the injury done to him violates his right to "have remedy by due course of law." N.C. Const. art. I, § 18.

The better practice would be to allow the trial court in the first instance to address the issue of what damages are recoverable. The appellate division would then have a full evidentiary record upon which to make a proper analysis as to damages rather than attempting to formulate an abstract rule. The majority has decided damage issues that have not been presented to us upon an evidentiary record and which may never be so presented. Sound judicial discipline would dictate withholding such momentous decisions until all available evidence and arguments can be presented to the Court. Precipitous judgments are to be avoided.

Nevertheless, the majority has plunged ahead and attempted to formulate a special rule of damages in this case. Although the majority relied upon common law principles in determining a cause of action had been alleged, it abandoned that safe harbor in embarking upon a voyage to seek a rule of damages. I write briefly in dissent. The majority has devised a special rule of damages

for the benefit of doctors faced with malpractice claims involving the concept of wrongful pregnancy. Defendant doctors should not have a special rule of damages in this type of medical malpractice case. As the Supreme Court of Wyoming said in recognizing a wrongful conception claim, "[a] ruling denying any damages to appellants would render the medical profession immune from liability for negligent treatment of patients seeking to limit the size of their families." *Beardsley v. Wierdsma*, 650 P. 2d 288, 292 (1982). Under settled common law principles of this state, a defendant is responsible for all damages that proximately result from his negligence. Certainly damages should not be eliminated because of difficulty of proof.

If a rule must be formulated at this time, the Court would be well served by sticking with basic common law rules of damages. Such rules allow plaintiffs to recover all damages that proximately flow from defendant's negligence, including, but not limited to, costs of the childbirth, pain and suffering of Varonica Jackson accompanying the childbirth, mental anguish, and the costs of rearing the child, subject to a deduction or setoff for the value of benefits received by the plaintiffs by having the healthy child. Restatement (Second) of Torts § 920 (1979); *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); *Ochs v. Borrelli*, 187 Conn. 253, 445 A. 2d 883; *Anonymous v. Hospital (1976-11)*, 33 Conn. Supp. 125, 366 A. 2d 204 (1976); *Green v. Sudakin*, 81 Mich. App. 545, 265 N.W. 2d 411 (1978); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511; *Sherlock v. Stillwater Clinic*, 260 N.W. 2d 169. The expenses incurred in caring for and rearing a child whose conception was a proximate result of defendant's negligence is certainly a foreseeable result of defendant's negligence and a compensable injury for which defendant is liable in damages. *See, e.g., Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E. 2d 541 (1964) (once breach of duty is proved, defendant is liable for *all* damages suffered by plaintiff, "notwithstanding the fact that these damages were unusually extensive").

The majority mistakenly relies upon *Azzolino* to prohibit recovery of damages for the costs of rearing a child. The statement in *Azzolino* relied upon by the majority was made with respect to the claim of little Michael Azzolino for "wrongful life." It does not apply to the issue of "wrongful pregnancy" or "wrongful conception," which is the shorthand description of the cause

before the Court at this time. *Azzolino* is further distinguished from our present case in that the negligence in *Azzolino* occurred *after* pregnancy, whereas here the negligence of defendant occurred *before* and actually was a proximate cause of the pregnancy. The federal court for the Middle District of North Carolina made such a distinction in *Gallagher v. Duke University*, 638 F. Supp. 979 (M.D.N.C. 1986).

Finally, with respect to the contract claim, I find that the allegations are sufficient to survive the Rule 12(b)(6) motion. Merely because the contract claim includes by reference the allegations of negligence is not a sufficient basis to deny the contract action. A plaintiff may allege inconsistent causes of action. Defendant relies solely upon N.C.G.S. § 90-21.13(d). Defendant's reliance upon the statute is misplaced. Here, plaintiffs do not allege that defendant guaranteed, warranted, or made an assurance as to the result of the medical treatment. They do not allege that defendant guaranteed in any fashion that Mrs. Jackson would not become pregnant. Plaintiffs allege that defendant totally failed to do that which he promised to do—maintain the IUD in Mrs. Jackson's body. The statute is not applicable to plaintiffs' alleged contractual claim.

The majority purports to hold that "defendant never intended to be contractually bound by the 'promise'" to replace Varonica's IUD. That could be a possible holding upon a summary judgment hearing or upon a motion for directed verdict under N.C.R. Civ. P. 50(a). We are reviewing a ruling on a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6). We are only concerned with the pleadings. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Pleadings are to be liberally construed. Under the theory of notice pleading, a statement of claim is adequate if it gives sufficient notice of the claim to enable defendant to answer and prepare for trial, to allow the application of res judicata, and to show the type of case brought. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Plaintiffs' complaint alleges that before each of the medical procedures defendant represented to both plaintiffs that the IUD would be retained or replaced within Varonica and defendant failed to comply with his representation. The complaint was sufficient to allow defendant to answer and he has done so. It has been sufficient to allow defendant to prepare for trial, it will support the doctrine of res judicata, and

it shows that it is an action for damages for breach of contract. The complaint complies with the requirements of *Sutton v. Duke*. Of course, as the majority concedes, the failure to replace the IUD could constitute negligence on the part of the defendant. That does not exclude the alternative remedy that the actions alleged could also support an action for breach of contract.

It is to be remembered that the law of contracts is to be applied to the relationship between physician and patient. This is particularly true where there is a specification as to what the physician shall do. *See Kennedy v. Parrott*, 243 N.C. 355, 90 S.E. 2d 754 (1956). So it is here. Plaintiffs have stated a proper cause of action based upon breach of contract.

FRANK DEREBERY v. PITT COUNTY FIRE MARSHALL

No. 456PA85

(Filed 29 August 1986)

1. **Master and Servant § 71— workers' compensation—computation of weekly wage—wages from two part-time jobs to be considered**

The Court of Appeals erred in upholding the Industrial Commission's refusal to take into account plaintiff's wages from both part-time employments to compute the average weekly wage plaintiff earned at his principal employment.

2. **Master and Servant § 69— workers' compensation—award of wheelchair accessible housing proper**

Pursuant to N.C.G.S. § 97-29 an employer's obligation to furnish "other treatment or care" may include the duty to furnish alternate, wheelchair accessible housing. In this case the Industrial Commission properly required defendant to furnish such alternate housing where it found that plaintiff's existing quarters were not suitable for his needs as a permanent and totally disabled person and the owner of the home which plaintiff shared with his parents was not willing to make permit structural changes in the house.

Justice BILLINGS dissenting in part and concurring in part.

Chief Justice BRANCH and Justice MEYER join in this dissenting opinion.

ON plaintiff's petition for further review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 76 N.C. App. 67, 332 S.E. 2d 94 (1985), in part reversing a workers' compensation

award and in part affirming the denial of an award by the Industrial Commission.

Marvin Blount, Jr. and Charles Ellis for plaintiff appellant.

Teague, Campbell, Dennis & Gorham by C. Woodrow Teague and Linda Stephens for defendant appellee.

Academy of Trial Lawyers by Paul J. Michaels and Gregory M. Martin, amicus curiae.

EXUM, Justice.

This is a workers' compensation case. The parties stipulated that plaintiff, Frank Leslie Derebery, (1) sustained an injury by accident arising out of and in the course of employment as a volunteer fireman with defendant, Pitt County Fire Marshall, and (2) is totally and permanently disabled as a result of that injury. The Industrial Commission computed plaintiff's average weekly wages with reference to the higher paid of two part-time employments which plaintiff held. The Commission also ordered defendant to provide plaintiff with a wheelchair accessible place to live.

Both parties appealed to the Court of Appeals. The plaintiff contended that the Commission erred in refusing to combine his wages from both employments to compute his average weekly wages. Defendant contended that the award of housing was not permitted under the Workers' Compensation Act. The Court of Appeals, relying on *Barnhardt v. Cab Co.*, 266 N.C. 419, 146 S.E. 2d 479 (1966), held that the Commission properly refused to combine plaintiff's wages because the higher paid of the two was the "employment wherein he principally earned his livelihood," as defined by N.C.G.S. § 97-2(5).[1] The Court also held that the provision of N.C.G.S. § 97-29[2] "requiring payment for 'other treatment or care' . . . can[not] be reasonably interpreted to extend the liability to provide a residence for an injured employee." *Derebery v. Fire Marshall*, 76 N.C. App. at 72, 332 S.E. 2d at 97.

The questions presented by this appeal are whether the Court of Appeals erred in (1) affirming the Commission's refusal

1. This statute is reprinted *infra*, p. 196.

2. This statute is reprinted *infra*, p. 199.

to consider both of plaintiff's part-time employments when calculating his average weekly wage, and (2) reversing the Commission's award of wheelchair accessible housing. We answer both questions affirmatively and reverse the Court of Appeals decision on both points.

I.

At the time he was injured plaintiff was single, nineteen years old and lived with his parents as he had all his life. He worked part time for Sonic Drive-In earning $74.41 a week and part time for Bill Askews Motors earning $87.40 a week.

Plaintiff's accident paralyzed his legs. He will always have to rely principally on a wheelchair for mobility. Plaintiff's physician stated, "with him [plaintiff] essentially being in a wheelchair almost entirely he would need architecturally accessible housing."

Several months after the accident plaintiff received rehabilitation therapy. Plaintiff became capable of living independently. During the time at the rehabilitation center, he expressed a desire to live apart from his parents.

Plaintiff returned to his parents' rented home after the stint at the rehabilitation center. The owner of the home has refused to permit structural modifications to the house. The rear entrance and four of the eight rooms in the house, including the kitchen and bathroom, will not admit plaintiff's wheelchair. As a result, plaintiff cannot get to the stove, must take sponge baths and use a portable commode chair.

Plaintiff introduced into evidence plans for a mobile home, the Enabler, which was designed to accommodate a wheelchair. A registered nurse for the Industrial Commission, Jerri McLamb, testified:

> I feel that the mobile home described in Plaintiff's Exhibit Number 1 would meet Leslie's needs. I am working with five or six paraplegics through my job with the North Carolina Industrial Commission. It is also important to deal with the emotional needs that occur with spinal cord injuries. The emotional problems are certainly most important and that will determine how functional they're going to be and how well they can be rehabilitated.

With this evidence before it, the Commission, adopting the Opinion and Award of the deputy commissioner, made the following pertinent findings and conclusions of law:

FINDINGS OF FACT

. . . .

2. During 1982 and up until 4 March 1983 plaintiff worked on a part time basis for Sonic Drive-In Theater. His average weekly wage with such theater was $74.41.

3. In late 1982 or early 1983 plaintiff also started a job with Bill Atkins [sic] Motors and worked for such company until 4 March 1983. His average weekly wage with the motor company was $87.40. His principal employment was with the motor company and he principally earned his livelihood in such employment.

4. After receiving treatment for his injury by accident plaintiff returned to his home to live with his mother and father. Such home is not suitable for plaintiff's needs as a permanent and totally disabled person. However, the owner of the home does not desire any changes made in his property and no changes have, therefore, been made in the interior of the home.

5. Plaintiff needs to live alone. He is able to take care of his own personal needs. Defendant should furnish plaintiff with a completely wheelchair accessible place to live and provide all reasonable and necessary care for plaintiff's well-being.

CONCLUSIONS OF LAW

1. Plaintiff is permanently and totally disabled as a result of his injury by accident and he is, therefore, entitled to compensation at the rate of $58.27 per week commencing on the date of his accident and continuing for his lifetime. G.S. 97-29; G.S. 97-2(5); . . .

2. Defendant shall furnish plaintiff with all reasonable and necessary treatment or care for the well-being of plaintiff which includes an appropriate place for plaintiff to live in view of his condition.

Upon the foregoing findings of fact and conclusions of law, the Commission entered an award that defendant shall "pay plaintiff compensation at the rate of $58.27 per week and furnish plaintiff with an appropriate place to live in view of his disabled condition . . . ."

II.

[1] Plaintiff contends first that the Court of Appeals erred in affirming the method employed by the Industrial Commission to calculate plaintiff's average weekly wages. At the time plaintiff was injured he was earning $74.41 working part time for one employer and $87.40 per week working part time for another employer. The Commission considered only the wages earned in the employment where plaintiff earned the greater wages to calculate his average weekly wage. Plaintiff contends the Commission should have considered the wages in both part-time employments. We agree.

The last paragraph of N.C.G.S. § 97-2(5) provided on the date of plaintiff's accident:

> In case of disabling injury or death to a volunteer fireman or member of an organized rescue squad or duly appointed and sworn member of an auxiliary police department organized pursuant to G.S. 160A-282 or senior members of the State Civil Air Patrol functioning under Article 11, Chapter 143B, under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman or member of an organized rescue squad or member of an auxiliary police department or senior member of the State Civil Air Patrol was earning in the employment wherein he principally earned his livelihood as of the date of injury.

N.C.G.S. § 97-2(5) (1979). The Commission interpreted the statute as if the legislature employed the word "principally" to distinguish among possible nonvolunteer fire department jobs a volunteer fireman may hold. The cardinal rule of statutory construction is that legislative intent controls. In seeking to ascertain this intent, courts should consider the language of the statute, the spirit of the Act and what the statute seeks to accomplish. *Crumpton v. Mitchell*, 303 N.C. 657, 281 S.E. 2d 1 (1981); *Stephenson v. Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). The statute does

contemplate that persons to whom it applies might have multiple employments. The context of the statute, however, demarcates a person's voluntary and remunerative employments. The legislature employed the term "principally" to distinguish the fireman's volunteer employment from his other, remunerative employment or employments, *i.e.*, "the employment wherein he principally earned his livelihood." The statute insures that the injured volunteer fireman receives compensation commensurate with his proven earning ability as demonstrated by the wages he receives for work done other than in his capacity as a volunteer fireman.

Our interpretation comports with the purpose of the average weekly wage basis as a measure of the injured employee's earning capacity. *See* A. Larson, *The Law of Workmen's Compensation* § 60.00 (1986). This purpose is reflected in the second paragraph of N.C.G.S. § 97-2(5) which states that if all other statutorily provided measures for computing average weekly wages fail, an employee's average weekly wages must be determined by calculating "the amount which the injured employee would be earning were it not for the injury." N.C.G.S. § 97-2(5).

Defendant cites *Barnhardt v. Cab Co.*, 266 N.C. 419, 146 S.E. 2d 479 (1966), in support of his argument that the Commission properly refused to combine plaintiff's earnings to calculate his average weekly wage. In that case claimant worked full time for National Cash Register Company at a weekly wage of $68.00. The claimant also was employed by the Yellow Cab Company part time at a weekly wage of $26.90. Plaintiff was shot in the head and became totally and permanently disabled while working for the cab company. The Industrial Commission combined plaintiff's weekly wages in the part-time and full-time employments to arrive at his average weekly wage. The superior court affirmed the Industrial Commission's award. This Court reversed: "We hold that, in determining plaintiff's average weekly wage, the Commission had no authority to combine his earnings from the employment in which he was injured with those from any other employment." *Barnhardt v. Cab Co.*, 266 N.C. at 429, 146 S.E. 2d at 486. The Court reasoned that combining wages would be unfair to the employer's carrier who charged premiums based on the amount of compensation paid the employee and also to the employer who would have to pay higher premiums.

The Court also made the following observation in an effort to strengthen its holding:

> It is also noted that, even in making the exception for volunteer firemen, the North Carolina Legislature did not permit a combination of wages, but adopted as its basis the wages of his principal employment. Had plaintiff here been injured while serving as a volunteer fireman, instead of while driving a taxi, his compensation would have been based on his average weekly wages from National.

Id. at 429, 146 S.E. 2d at 485 (emphasis in original omitted).

Barnhardt is distinguishable. Plaintiff here was totally and permanently disabled working as a volunteer fireman, not while working for either of his two part-time employers. Furthermore, the justification relied on by the Court in rendering that decision does not apply here. Defendant and its carrier must have known that a volunteer fireman would be employed in another job or jobs and receive compensation therefrom. The dictum in *Barnhardt* which suggests that N.C.G.S. § 97-2(5) does not permit a combination of a volunteer fireman's outside wages is overruled.

We hold the Court of Appeals erred in upholding the Commission's refusal to take into account plaintiff's wages from both employments to compute the average weekly wage plaintiff earned at his principal employment.

III.

[2] Plaintiff next contends that the Court of Appeals erred by reversing the Industrial Commission's award insofar as it required defendant to furnish plaintiff with wheelchair accessible housing.

Before and after his accident, plaintiff has lived with his parents in their rented home. The owner of the house refuses to allow plaintiff's family to modify the house structurally to accommodate plaintiff's wheelchair. Defendant repeatedly has expressed a willingness to provide structural modifications to plaintiff's present residence. He argues, however, that the Act stops short of compelling him to furnish plaintiff with alternate housing accessible by wheelchair.

The parties agree the applicable statutory provisions are contained in the following part of N.C.G.S. § 97-29:

> In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care of [sic] rehabilitative services shall be paid for by the employer during the lifetime of the injured employee.

N.C.G.S. § 97-29.[3] The Court of Appeals held that an employer's statutory duty to provide "other treatment or care" does not extend to furnishing a residence for an injured employee. Initially, we must decide whether these statutory duties reasonably could be construed to include the duty to furnish alternate housing. We believe that they can.

We have long recognized that the Workers' Compensation Act is remedial legislation. The Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents and its benefits should not be denied by a technical, narrow and strict construction. *See Gunter v. Dayco Corp.*, 317 N.C. 670, 346 S.E. 2d 395 (1986); *Cates v. Construction Co.*, 267 N.C. 560, 148 S.E. 2d 604 (1966); *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 139 S.E. 2d 857 (1965).

This liberal construction in favor of claimants comports with the statutory purpose of allocating the cost of work-related injuries first to industry and ultimately to the consuming public. *Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970); *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951).

The legislature's history of expanding the medical benefits provided by N.C.G.S. § 97-29 supports our construing the statute generously in favor of claimants. When the Workers' Compensation Act was enacted, N.C.G.S. § 97-29 made no provision for medical expenses. See 1929 N.C. Sess. Laws ch. 120, § 29. N.C.G.S. § 97-25 was the only provision in the Act which obligated the employer to provide such expenses. N.C.G.S. § 97-25 required the employer to furnish:

3. The word "of" between care and rehabilitative services in the statute is a misprint. It should be "or." *See* 1973 N.C. Sess. Laws ch. 1308, § 2.

> Medical, surgical, hospital, . . . 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.

1929 N.C. Sess. Laws ch. 120, § 25. Under these provisions 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 lessen the period of disability. *See Little v. Ventilator Co.*, 317 N.C. 206, 345 S.E. 2d 204 (1986). Thus, where an employee suffered total and permanent disability, an employer was not obligated to pay medical expenses beyond a ten-week period. *See Millwood v. Cotton Mills*, 215 N.C. 519, 2 S.E. 2d 560 (1930).

The legislature filled this void in the Act in 1947 by amending N.C.G.S. § 97-29 to provide as follows:

> [I]n cases in which total disability is due to paralysis resulting from injuries to a spinal cord, compensation including reasonable and necessary medical and hospital care shall be paid during the life of the injured employee.

1947 N.C. Sess. Laws ch. 823, § 1.

In 1953 the Act was extended to make its provisions applicable to brain injuries. 1953 N.C. Sess. Laws ch. 1135, § 1. In 1971 it was extended to include the loss of hands, arms, feet, legs or eyes and to require the employer to provide other "care." 1971 N.C. Sess. Laws ch. 321, § 1. In 1973 the Act was amended to require employers to provide "rehabilitative services" in addition to "other treatment or care" and was extended to totally and permanently disabled employees without regard to the nature of their injury. 1973 N.C. Sess. Laws ch. 1308, § 2. This legislative history of continued expansion of the scope of N.C.G.S. § 97-29 and finally the inclusion of the words "other treatment or care or rehabilitative services" supports a conclusion that the legislature intends for the statute to include wheelchair accessible housing.

The decisions of this Court also support construing "other treatment or care" to include wheelchair accessible housing. In

Godwin v. Swift & Co., 270 N.C. 690, 155 S.E. 2d 157 (1967), the claimant suffered a head injury which left him blind, partially paralyzed, emotionally unstable and mentally infirm. The Commission concluded that plaintiff was totally and permanently disabled and awarded medical, hospital and nursing expenses for the remainder of claimant's life. The Commission found that claimant needed around-the-clock attention and care. The Commission concluded plaintiff would be better off under the care of his brother and sister-in-law than in a nursing home. The Commission required the employer to pay the brother and his wife $65 per week as compensation for their services on the ground that these services constituted "other treatment and care" not embraced in the medical award for medical, hospital and nursing expenses. This Court upheld the Commission's award, reasoning:

> The statute makes provision for payment for named essential items and services, and adds '*other treatment or care.*' The provision for other treatment or *care* goes beyond and is in addition to the specifics set out in the statute.

Id. at 693, 155 S.E. 2d at 159-60.

Courts in at least two other jurisdictions with statutory provisions similar to ours have concluded that "treatment" or "care" includes the duty to furnish alternate, wheelchair accessible housing. In *Squeo v. Comfort Co.*, 99 N.J. 588, 494 A. 2d 313 (1985), the Supreme Court of New Jersey concluded that construction of a self-contained apartment "could constitute 'medical, surgical or other treatment . . . necessary to cure and' or 'other appliance' within the meaning of the applicable statute."[4] The claimant was

4. "N.J.S.A. 34-15:15 in pertinent part provides:

The employer shall furnish to the injured worker such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the worker of the effects of the injury and to restore the functions of the injured member or organ where such restoration is possible; * * * the Division of Workers' Compensation after investigating the need of the same and giving the employer an opportunity to be heard, shall determine that such physicians' and surgeons' treatment and hospital services are or were necessary and that the fees for the same are reasonable and shall make an order requiring the employer to pay for or furnish the same.

* * * *

When an injured employee may be partially or wholly relieved of the effects of a permanent injury, by use of an artificial limb or other appliance, which

a twenty-four-year-old wheelchair-bound quadriplegic. He requested that his employer provide an apartment attached to his parent's home. After his injury, he was placed in a nursing home with predominantly elderly patients. The nursing home environment caused severe depression. Furthermore, he suffered a number of protracted physical ailments which contributed to his emotional unrest. He attempted suicide three times. Claimant testified he desired to "get on with life" but stated the institutional setting prevented him from doing so. An expert in neuropsychiatry testified on behalf of claimant that claimant had developed ways of adjusting to quadriplegia and aspired to attend college and become gainfully employed. His depression arose from a conflict between his ambitions and his perception of being trapped in a nursing home with people with whom he had nothing in common.

The New Jersey Supreme Court reviewed a number of cases from several jurisdictions before concluding:

> In sum, courts in other jurisdictions governed by statutes similar to ours have been generous in their liberal construction of the language in question. The phrases 'other treatment' and 'appliance' have assumed various forms, ranging from permanent round-the-clock nursing care to the rent-free use of a modular home.

Id. at 603, 494 A. 2d at 321.

The Court went on to affirm the Commission's award of alternate housing:

> Apart from his quadriplegia, which cannot be reversed, and physical complications, which are treated as they arise, Squeo has suffered serious psychological setbacks. No one disputes that these emotional problems are a result of his work-connected injury and its consequences. Nor is it disputed that Squeo's depression is so aggravated by living in the nursing home that he has tried to kill himself on three occa-

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phrase shall also include artificial teeth or glass eye, the Division of Workers' Compensation, acting under competent medical advice, is empowered to determine the character and nature of such limb or appliance, and to require the employer or the employer's insurance carrier to furnish the same."

Id. at 596, 494 A. 2d at 317.

sions. We find these three factors—Squeo's unremitting physical ailments, his age and his having lived independently of his parents for several years prior to the accident, and his psychological dread of institutional living, culminating in three suicide attempts—are sufficient to consider this an unusual case calling for unusual relief.

Id. at 604-05, 494 A. 2d at 322.

In *Peace River Elec. Corp. v. Choate*, 417 So. 2d 831 (Fla. Dist. Ct. App. 1982), *review denied*, 429 So. 2d 7 (Fla. 1983), the Court upheld an award for the rent-free use of a modular home to replace a dilapidated makeshift dwelling consisting of an ancient trailer and a ramshackled wooden shed that were impossible to negotiate by wheelchair. The Court rejected the employer's proposal to remodel plaintiff's existing dwelling because "nothing short of bulldozing the dwelling would serve to remedy the situation." *Id.* at 832. However, claimant's request for alternate housing was denied where the employer had obtained rental housing for claimant and agreed to make modifications as were required. *Lane v. Walton Cottrel Assoc.*, 422 So. 2d 1023 (Fla. Dist. Ct. App. 1982). Both decisions were handed down under a statute which required the employer to furnish "remedial treatment, care and attendance."[5]

The principle which emerges from these cases is that an employer must furnish alternate, wheelchair accessible housing to an injured employee where the employee's existing quarters are not satisfactory and for some exceptional reason structural modification is not practicable. We conclude on the basis of the legislative history surrounding N.C.G.S. § 97-29, this Court's prior interpretation of that statute and the persuasive authority of other courts interpreting similar statutes that the employer's obligation to fur-

5. At the time of these decisions, Florida's Workers' Compensation Act provided:

> "[T]he employer shall furnish to the employee such remedial treatment, care, and attendance under the direction and supervision of a qualified physician or surgeon or other recognized practitioner, nurse, or hospital and for such period as the nature of the injury or the process of recovery may require, including medicines, crutches, artificial members, and other apparatus. . . ."

Fla. Stat. Ann. § 440.13 (West 1971).

nish "other treatment or care" may include the duty to furnish alternate, wheelchair accessible housing.

In this case the Industrial Commission found as fact that plaintiff's existing quarters "are not suitable for plaintiff's needs as a permanent and totally disabled person" and "the owner of the home does not desire any changes made in his property and no changes have, therefore, been made." We believe these findings exemplify the type of unusual case which justifies the Commission's conclusion of law that "Defendant shall furnish plaintiff . . . an appropriate place for plaintiff to live in view of his condition."

Defendant contends the evidence does not support the Commission's findings that plaintiff's existing residence is not suitable to plaintiff's needs. He claims the evidence shows at most that plaintiff requests new housing because of a desire to live independently of his parents.

We disagree. As this Court stated in *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E. 2d 798 (1986):

> The scope of appellate review of questions of fact is limited. The Industrial Commission is constituted as the fact-finding body in workers' compensation cases. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976). The authority to find facts necessary for an award is vested exclusively in the Commission. *Moore v. Electric Co.*, 259 N.C. 735, 131 S.E. 2d 356 (1963). The Commission's fact findings will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding. *Jones v. Desk Co.*, 264 N.C. 401, 141 S.E. 2d 632 (1965). Where, however, there is a complete lack of competent evidence in support of the findings they may be set aside. *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E. 2d 389 (1980); *Logan v. Johnson*, 218 N.C. 200, 10 S.E. 2d 653 (1940).

Id. at 432-33, 342 S.E. 2d at 803.

We believe the record contains evidence which supports the Commission's findings disputed by defendant. The evidence tends to show the following: Plaintiff's present home has not been modified to accommodate his wheelchair. The owners will not per-

mit such modification. Plaintiff cannot enter the bathroom or kitchen. As a result, he cannot use the bath or toilet facilities and he cannot prepare meals for himself. Plaintiff's physician acknowledged that plaintiff needs architecturally modified housing. We believe this evidence supports the Commission's finding of fact that plaintiff's present residence is not satisfactory.

For all the reasons stated above the decision of the Court of Appeals is reversed and this case is remanded with instructions for further remand to the Industrial Commission in order that it may re-enter its award for wheelchair accessible housing and calculate plaintiff's average weekly wage using a method of computation consistent with the principles stated in this opinion.

Reversed and remanded.

Justice BILLINGS dissenting in part and concurring in part.

I dissent from Part III of the majority opinion.

In concluding that the defendant must provide wheelchair-accessible housing to the plaintiff, the majority says that this is an "unusual case," apparently assuming that the decision will have limited applicability. I find nothing very unusual about a young man desiring to move out of his parents' home to live independently. Neither is it unusual for a wheelchair-bound individual to need wheelchair-accessible housing. The fact that the owner of the plaintiff's parents' present home will not permit alteration of the house does not establish such an "unusual" event as to justify imposing upon the defendant an obligation that he otherwise would not have. The preference of the plaintiff's parents to continue renting this particular house which is unsuitable for their son, added to his perfectly natural desire to live independently, is no basis for requiring the defendant to assume the total cost of alternative housing for the plaintiff.

The Workers' Compensation Act provides disability compensation as a substitute for lost wages. That substitute for wages is the employer's contribution to those things which wages ordinarily are used to purchase—food, clothing, *shelter*, etc. There is no provision in the Workers' Compensation Act for the employer, in addition to providing the statutory substitute for wages, to provide the ordinary necessities of life, although in addition to week-

ly compensation based upon the employee's wages the employer must provide compensation for "reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care [or] rehabilitative services." N.C.G.S. § 97-29 (1985). To construe "other treatment or care" to include basic housing is not a "liberal construction," 318 N.C. 192, 199, 347 S.E. 2d 814, 819, of the statute; it is clearly a misconstruction. If housing is the kind of "treatment or care" intended by the statute, are not food, clothing and all of the other requirements for day-to-day living equally necessary for the employee's "treatment or care"? In the context of the Workers' Compensation Act, the "treatment or care [or] rehabilitative services" clearly relate to those necessitated by the employee's work-related injury.

The majority's discussion of the history of N.C.G.S. § 97-29 clearly indicates the limitation intended by the General Assembly. Although originally limited to *medical* and *hospital* care necessitated by paralysis resulting from injuries to the spinal cord (slip op. p. 11), the Act was expanded to include disability from other causes and to expand the kind of care or treatment allowed so that it would not be limited to treatment or care provided in a hospital. None of these amendments expanded the statute to include anything beyond the care, treatment or rehabilitative services related to the employee's medical condition. If the care, treatment or rehabilitative services appropriate for the employee's condition necessitate residence in a special facility, such as a nursing home, hospital or rehabilitation center, the employer must pay for the entire cost, including residence at the facility, because residence there is part and parcel of the treatment, care or rehabilitative services.

An analysis of the case of *Squeo v. Comfort Control Corp.*, 99 N.J. 588, 494 A. 2d 313 (1985), relied upon by the majority, shows the inapplicability of that case to the present one, even if we were persuaded by its reasoning. In that case, the treating physician described the plaintiff's history and condition as follows:

> [Claimant] has had a terribly hard time. The man has had just about every complication that God ever put on this earth for him . . . . [T]he first year was devastating . . . because he went out of one problem into another and then when we saw him, immediately we had to do something to his urinary tract

> and surgery and then . . . we had problems with skin breakdowns, rashes, you name the complications, this poor fellow had it. Then he developed a curvature of the spine and [had to have] corrective surgery and . . . he's had one medical difficulty after another.

Id. at 591, 494 A. 2d at 315.

Further evidence established that the plaintiff had lived independently of his parents for several years before his accident. After the accident, he was confined to a nursing home which was occupied primarily by elderly patients. Claimant became severely depressed as a result of the institutional living and nursing home environment and, on three occasions while in the nursing home, attempted suicide. The testimony of an expert in neuropsychiatry established that, whereas claimant had adjusted to his quadriplegia and wanted to get on with his life by attending college and becoming employed, he became and remained depressed by "the conflict between his ambitions and his perception of his future in the nursing home with older people with whom he had nothing in common." *Id.* at 592, 494 A. 2d at 315. The physician testified further that claimant believed life in a nursing home was not worth living and that claimant would continue to attempt suicide as long as he remained in the nursing home. Even then, the court only required that a suitable addition be added to the claimant's parents' home because under the facts of the case the apartment was a reasonable and necessary *medical* expense (necessary for the claimant whose condition required *care*, not independence). The court additionally required that the employer's interest in the house be secured by a mortgage executed by the claimant's parents "so that if Squeo should no longer use the apartment, the employer would be compensated for any significant value the apartment may add to the property in the event it is sold, rented, or mortgaged." *Id.* at 596, 494 A. 2d at 317.

The attempt by the plaintiff to rely upon that portion of N.C. G.S. § 97-29 which requires the employer to provide "rehabilitative services" likewise fails. In the first place, a common-sense interpretation of the words makes it obvious that "services"[1] does

1. "1. The occupation or duties of a servant. 2. Employment in duties or work for another; especially, such employment for a government . . . . 6. Work done for

not include housing. Additionally "rehabilitation falls under two major headings: physical and vocational," 2 *A. Larson, The Law of Workmen's Compensation* § 61.21 (1986), and the providing of housing to the plaintiff will result in neither his medical nor vocational rehabilitation.

In the case *sub judice*, if we assume that the evidence supports a conclusion that it would be best for the plaintiff to live independently, I submit that (1) the need for the plaintiff to live independently is nothing more than the natural desire of a young man upon reaching his early 20s to establish his own life independent of his parents and is not the effect of his injury, and (2) the only features of the plaintiff's proposed new residence which are necessitated by his injury are those which make it wheelchair-accessible. If we construe the statute to impose any obligation upon the employer to aid the plaintiff in establishing his independence from his parents, it should be only to alter housing provided by the plaintiff to make it suitable to his special needs, i.e., wheelchair-accessible—an obligation which the defendant has consistently been willing to assume.

I concur in the remainder of the Court's opinion.

Chief Justice BRANCH and Justice MEYER join in this dissenting opinion.

STATE OF NORTH CAROLINA v. EARL WAYNE FLOWERS (83CRS564, 83CRS565) AND JOHNNY PERRY WAUGH (84CRS148, 84CRS149)

No. 14A85

(Filed 29 August 1986)

1. Indictment and Warrant § 3— no jurisdiction of grand jury—judgment arrested

Judgment is arrested on defendants' convictions for rape because the Yadkin County Grand Jury which returned the indictments did not have jurisdiction to do so, since evidence at trial tended to show the rapes occurred

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others as an occupation or business . . . . 11. An act of assistance or benefit to another or others; favor . . . ." The American Heritage Dictionary, New College Edition (1980).

in Alexander County; the State produced no evidence that defendants committed these crimes in Yadkin County; the statement in the bill of indictment which alleged that the rapes occurred in Yadkin County was not *prima facie* evidence showing that the rapes occurred there; and N.C.G.S. § 15A-136 provides only for venue of sexual offenses and does not expand the power of grand juries to permit them to return indictments for criminal activity outside their territorial boundaries.

2. **Criminal Law § 66.18— in-court identification of defendant—failure to conduct voir dire—error**

In a prosecution of defendant for first degree kidnapping, the trial court erred in denying defendant's motion for a *voir dire* of the prosecuting witness to determine the admissibility of her in-court identification of him, since the prosecuting witness, on *voir dire* concerning another matter, testified that she identified defendant as one of her assailants because she heard him admit during the other defendant's continuance hearing that he had engaged in sexual relations with her; she elaborated that she did not identify defendant because she recognized his voice but because he admitted having sexual relations with her on the night she was raped; the prosecuting witness thus revealed that she never really recognized defendant at all; and the jury could have concluded as well as the witness and without her opinion that defendant's statement implicated him in the crime.

3. **Criminal Law § 75.5— incriminatory statement under oath—warning against self-incrimination not required**

In a prosecution for first degree rape and first degree kidnapping, defendant's testimony, given at a codefendant's hearing on a motion to continue, that he engaged in consensual sexual relations with the prosecuting witness on the date of the alleged crimes was not given under such coercive circumstances that defendant's constitutional rights were infringed when he was not warned of his right not to incriminate himself.

4. **Kidnapping § 1.2— first degree kidnapping—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first degree kidnapping where it tended to show that, while the prosecuting witness was walking home one evening, a car driven by a man the prosecuting witness did not know but later identified as being one defendant passed; the car slowed, turned down a side street and circled behind her; the car stopped at a stop sign and when it did not proceed into the intersection, she turned and saw a man running up behind her; she screamed; he put his hands around her neck and ordered her to stop screaming or he would kill her; and the man ordered her into the car with defendant who drove out of town.

5. **Criminal Law § 66.17— pretrial identification of defendant suggestive—in-court identification of independent origin**

Though a prosecuting witness's pretrial showup identification of defendant was unnecessarily suggestive, it was nevertheless reliable and was properly admitted into evidence where, during the seven hours the witness was held captive in the confines of defendant's car, she had ample opportunity to observe the unmasked face of her assailant; she gave an accurate description

of him before the showup; her showup identification was unequivocal and made without the slightest hesitation; her reliability was further and convincingly demonstrated by her refusal to implicate a codefendant in a similar showup because she "didn't feel comfortable saying yes or no" and she would "rather say no than put an innocent man through something like this"; and she made the identification less than a week after the incidents.

6. **Criminal Law § 99.2— court's summary of prosecuting witness's testimony—no expression of opinion**

The trial court did not express an opinion that the State had proven a number of facts where he gave a short summary of what the prosecuting witness contended; he admonished the jury to rely on their memory of her testimony, not his; and the purpose of his summary was to facilitate the orderly procession of the trial which at the time of his remarks had been interrupted repeatedly by the jury's being asked to leave the courtroom.

7. **Criminal Law § 119— presumption of innocence—requested instruction not given**

There was no merit to defendant's contention that the trial judge committed reversible error by failing to instruct the jury, as defendant requested, that the presumption of innocence alone was sufficient to support a verdict of not guilty.

Justice MITCHELL concurring.

Justice MEYER joins in this concurring opinion.

APPEAL by defendants under N.C.G.S. § 7A-27(a) from judgments imposing life sentences entered by *Rousseau, J.*, presiding at the 29 October 1984 Criminal Session of YADKIN County Superior Court where defendants were convicted of first degree rape and first degree kidnapping. Defendants' petitions to bypass the Court of Appeals to appeal judgments imposing sentences for a term less than life were allowed.

Lacy H. Thornburg, Attorney General, by Robert A. Mellott, Special Deputy Attorney General, for the state.

John E. Hall for Earl Wayne Flowers, defendant appellant.

Dennis R. Joyce for Johnny Perry Waugh, defendant appellant.

EXUM, Justice.

The questions presented by this appeal are whether the trial court erred in: (1) refusing to dismiss rape charges against both defendants on the ground that the Yadkin County Grand Jury

had no jurisdiction to indict for rape; (2) admitting the prosecuting witness's in-court identification of Waugh; (3) admitting self-incriminating testimony given by Waugh at a prior continuance hearing for Flowers; (4) refusing to dismiss kidnapping charges against Flowers on the ground of insufficiency of evidence, and (5) admitting certain evidence and instructing the jury. We hold that the state produced insufficient evidence that the Yadkin County Grand Jury had jurisdiction to indict for rape and arrest judgment on both defendants' convictions for first degree rape. Concluding that the trial court erred in admitting the prosecuting witness's in-court identification of Waugh, we grant Waugh a new trial on the charge of first degree kidnapping. We find no reversible error in Flowers' trial on the charge of first degree kidnapping.

I.

The prosecuting witness testified as follows: She was walking home in Booneville just past dark on 2 February 1983 when defendant Johnny Perry Waugh forced her into a car driven by defendant Earl Wayne Flowers. She knew neither defendant at that time. Her captors drove her to Winston-Salem, then towards Wilkesboro. After driving for an extended period, they stopped the car on a sandy road. Waugh left the car and Flowers forced her to have intercourse. Then Flowers left the car and Waugh did the same. She did not know where she was when these incidents occurred. Flowers returned and the two defendants interrogated her about herself and her family. Defendants then drove her to Elkin, after stopping in Hiddenite to wash the car, and put her out of the car. She flagged a police car and was taken to the hospital.

In addition, the state produced the following evidence: The prosecuting witness furnished the authorities with a description of her assailants and the car they were driving. Law enforcement officials located a car matching the description given by the prosecuting witness being driven by defendant Flowers. They told Flowers he was suspected of rape and asked if he would agree for the prosecuting witness to look at him. Flowers agreed. The prosecuting witness was driven to Flowers' home, and she identified him as one of her assailants. Flowers was arrested and charged with first degree kidnapping and first degree rape.

On 9 February 1983 law enforcement officials told the prosecuting witness they had another suspect they would like her to see. She was driven to the Wilkes County Sheriff's Department and surveyed defendant Waugh. She stated that although it may be the "biggest mistake" of her life, she could not say truthfully that Waugh was the other assailant.

The state proceeded with its prosecution against Flowers but not Waugh. The prosecuting attorney agreed with Flowers' attorney to continue the state's case against Flowers if Flowers' attorney produced, as he said he could, a man who would testify he was with Flowers and engaged in consensual sexual relations with the prosecuting witness on 2 February 1983. Flowers' attorney produced Waugh who testified under oath as Flowers' attorney promised he would. The prosecuting attorney was present at that hearing and heard Waugh's admissions.

After Flowers' continuance hearing, Waugh accompanied law enforcement agents to various places around Taylorsville where he said he had consensual sexual relations with the prosecuting witness on 2 February 1983. Waugh then was arrested and charged with first degree kidnapping and first degree rape.

Neither defendant put on any evidence.

We first consider an assignment of error common to both defendants. Next we consider assignments of error advanced by defendant Waugh alone. We conclude by considering defendant Flowers' assignments of error.

II.

[1] Defendants request this Court to arrest judgment on their convictions for rape because the Yadkin County Grand Jury which returned the indictments did not have jurisdiction to do so. The prosecuting witness testified that after she was abducted in Booneville (Yadkin County), Flowers drove towards Winston-Salem (Forsyth County). The car stopped at a Food Town store, and Waugh began driving. The prosecuting witness next recognized they were traveling on U.S. Highway 421, and she saw road signs which said Wilkesboro (Wilkes County). She asked her abductors where they were taking her; Flowers said to see his mother in Hickory (Catawba County). They continued driving and at one point the prosecuting witness recognized road markers

which said 18 and 90. North Carolina Highways 18 and 90 intersect at Taylorsville (Alexander County). After some time, the prosecuting witness said, "Your mother sure lives far away. . . ." Flowers remarked, "We done went by mama's." The car then whipped around in the middle of the road and turned onto a sandy road where the rapes occurred. The prosecuting witness did not know where she was at the time. Later, she searched for the sandy road with the aid of the authorities, but she never found it. After the rapes occurred, defendants drove a short distance to a car wash which the prosecuting witness later identified as being in Hiddenite (Alexander County). After washing the car, they drove to Elkin (Surry County) and released her.

At common law a grand jury had jurisdictional power to indict only for crimes committed within the county in which it convened. *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984); *State v. Mitchell*, 202 N.C. 439, 163 S.E. 581 (1932). The legislature has power to extend the grand jury's power beyond the territorial limitation imposed by the common law, but when this case was heard, it had not exercised that power. *See State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864. Thus, the common law rule governed in this state at that time. *Id.*[1] A challenge to the jurisdiction of the grand jury may be raised at any time before, during or after trial. *State v. Randolph*, 312 N.C. 198, 208, 321 S.E. 2d 864, 871; N.C.G.S. § 15A-952(d). The state has the burden of proving that the offense charged in the indictment occurred in the county named in the indictment. *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977); *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975).

In this case the evidence adduced at trial tends to show the rapes occurred in Alexander County. The state produced no evidence that defendants committed these crimes in Yadkin County, the county in which the grand jury which returned the indictments convened.

1. Apparently in response to *Randolph*, the legislature enacted N.C.G.S. § 15A-631 which provides that "the place for returning a presentment or indictment is a matter of venue and not jurisdiction." *See State v. Paige*, 316 N.C. 630, 343 S.E. 2d 848 (1986). N.C.G.S. § 15A-631 became effective 1 July 1985, *see id.*, and does not apply to the indictments in this case which were returned in April 1983 and January 1984.

The state contends that the statement in the bill of indictment which alleges that the rapes occurred in Yadkin County is prima facie evidence showing that the rapes occurred there. The state relies upon language from *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864:

> The statement of the county where the offense took place established *prima facie* jurisdiction of the grand jury to return the indictment. Former N.C.G.S. 15-134 did not change this. It merely limited a defendant's means of attacking the indictment on the ground that the offense occurred in a county other than that named in the indictment. Current N.C.G.S. 15A-135, however, only limits a defendant's means of attacking *venue*. Since the statement in an indictment of the county where the crime allegedly occurred establishes *prima facie jurisdiction*, a challenge to this statement can be asserted at any time as stated in N.C.G.S. 15A-952(d).

Id. at 208, 321 S.E. 2d at 871.

The state misconstrues the import of our language. *Randolph* simply means that if a grand jury states in the indictment that an offense occurred in its county, the state is authorized to act upon the indictment against the accused, if the accused does not object, without any further showing in the pretrial stage of the case. When jurisdiction is challenged, however, the state must produce sufficient evidence to prove that the crime was committed in the county where the grand jury which returned the indictment convened. Thus, the statement in the bill of indictment was not evidence that the rapes occurred in Yadkin County.

The state next argues that even if the record contains no evidence that the rapes occurred in Yadkin County, the common law limitation on the grand jury's jurisdiction does not apply to this case. The state contends that N.C.G.S. § 15A-136 confers jurisdiction in sexual offense cases on the grand jury in "the county where transportation was . . . begun." The statute provides:

> § 15A-136. Venue for sexual offenses.
>
> If a person is transported by any means, with the intent to violate any of the provisions of Article 7A of Chapter 14 (§ 14-27.1 et seq.) of the General Statutes and the intent is followed by actual violation thereof, the defendant may be

tried in the county where transportation was offered, solicited, begun, continued or ended.

N.C.G.S. § 15A-136.

The statute addresses a matter of venue, *i.e.*, the location of the tribunal where a defendant may be compelled to stand trial. Venue becomes an issue, however, only after a grand jury has determined that probable cause to go forward with criminal proceedings against an accused exists. No provisions of the statute expands the power of grand juries to permit them to return indictments for criminal activity outside their territorial boundaries. Any doubt about the effect of the statute is resolved by the title given it by the legislature: "Venue for sexual offenses." 1986 N.C. Sess. Laws ch. 682, § 2.

Because the Yadkin County Grand Jury had no jurisdiction to indict defendants for these rapes, we arrest judgment in the rape cases against defendants. The legal effect of arresting judgment is that the verdicts of guilt and the sentences of life imprisonment are vacated. If the state chooses, it may proceed against the defendants for those offenses upon proper bills of indictment returned by the grand jury in the county where the offenses occurred.

III.

This section is devoted to assignments of error advanced by defendant Waugh.

A.

[2] Defendant Waugh assigns error to the trial court's denial of his motion for a voir dire of the prosecuting witness to determine the admissibility of her in-court identification of him.

In spite of Waugh's objection and request for a voir dire, the prosecuting witness was allowed to testify that Waugh was one of two men who kidnapped and raped her. A voir dire concerning the prosecuting witness's identification of Flowers and a show-up identification procedure as to Waugh was conducted. During this voir dire the prosecuting witness explained why she had earlier said Waugh was one of her assailants. She testified she heard Waugh admit in Flowers' continuance hearing that he engaged in sexual relations with her. The prosecuting witness elaborated

that she was not identifying Waugh because she recognized his voice but because he admitted having sexual relations with her on the night she was raped. The trial court did not instruct the jury to disregard the prosecuting witness's identification of Waugh or declare a mistrial because of it, though Waugh requested the trial court to do both.

Before admitting challenged in-court identification testimony, the trial court should conduct a voir dire, find facts, and determine the admissibility of the testimony. Failure to conduct a voir dire will be deemed harmless where the evidence is clear and convincing that the witness's in-court identification of defendant originated with the witness's observation of defendant at the time of the crime and not from an impermissibly suggestive pretrial identification procedure. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1971).

In this case, the evidence is clear that the witness's in-court identification did *not* so originate. The prosecuting witness's testimony on a voir dire conducted after she had identified Waugh in court revealed she never really recognized Waugh at all. She *concluded* he was one of her attackers because of what he admitted and not by any other identifying characteristic. The jury could have concluded as well as she and without her opinion that defendant's statement implicated him in the crime. While the prosecuting witness's statement did not help the jury understand the identity of the second of her assailants, defendant was unfairly prejudiced by the prosecuting witness's being permitted, improperly, to identify him before the jury. Her in-court identification permitted the jury wrongfully to believe she recognized Waugh from independent recollection. Had the trial court allowed Waugh's motion for a voir dire, the prosecuting witness would not have been permitted to identify before the jury Waugh as one of her assailants. Because it did not and because it did not strike the prosecuting witness's testimony after learning of its unreliability, Waugh must receive a new trial on the first degree kidnapping charge.

B.

[3] Although defendant Waugh must receive a new trial on the charge of first degree kidnapping, we address two related assign-

ments of error he raised which relate to matters which likely will recur at the new trial. Waugh complains that the trial court's admission of testimony he gave at Flowers' continuance hearing, placing him in the company of the prosecuting witness on the evening of 2 February 1983, contravened his privilege against self-incrimination guaranteed by the Fifth Amendment of the United States Constitution and Article I, section 23 of the state constitution.

In response to an inquiry by Flowers' attorney, the prosecuting attorney agreed to continue the state's case against Flowers if his attorney would produce a man who would say under oath he was with Flowers and engaged in consensual sexual relations with the prosecuting witness on 2 February 1983. Though not represented by counsel or informed of his right against compulsory self-incrimination, Waugh testified in this manner. Waugh contends the judge at Flowers' continuance hearing should have informed him he had a right not to testify. Because the judge did not, he says his statements were not properly admissible against him in the trial below. We disagree.

The privilege asserted by defendant does not protect against self-incrimination but against *compelled* self-incrimination. The principle of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), is instructive by analogy. *Miranda* warnings are necessary in the context of custodial interrogation where there are present "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. at 467, 16 L.Ed. 2d at 719. Not every exchange between law enforcement officials and citizens, however, requires that a person be warned of his rights, but only those to which the element of coercion attaches. *See Oregon v. Matheason*, 429 U.S. 492, 50 L.Ed. 2d 714 (1977); *State v. Martin*, 294 N.C. 702, 242 S.E. 2d 762 (1978).

In this case we do not believe Waugh's incriminating testimony at Flowers' hearing was given under such coercive circumstances that his constitutional rights were infringed when he was not warned of his right not to incriminate himself. Though Flowers' attorney was acting with the full complicity of the state, defendant came to the hearing of his own volition and left after-

wards freely. Though he perhaps did not exercise sound judgment in testifying, he did exercise his own judgment. We cannot say defendant was compelled to speak to his detriment. Defendant's assignment of error is overruled.

Waugh also assigns error to the trial court's admission of statements made to law enforcement officials in the wake of his statements at Flowers' continuance hearing on the ground they were tainted by the defect in the first statement. Our conclusion above renders this assignment of error moot.

IV.

The remaining discussion is directed to assignments of error advanced only by defendant Flowers in connection with the conduct of the trial on the kidnapping charge.

A.

[4] Flowers contends the trial court erred in failing to grant his motion to dismiss the charge of kidnapping because the state produced insufficient evidence to prove that he participated in the kidnapping of the prosecuting witness or if he did that she was taken against her will.

The positions taken by defendant—that he didn't do it but if he did she consented—tend to belie the merit of defendant's assignment of error. Evidence produced by the state tends to show that while the prosecuting witness was walking home on 2 February 1983 in Booneville, a car driven by a man the prosecuting witness did not know but later identified as being defendant Flowers passed. The car slowed, turned down a side street and circled behind her. The car stopped at a stop sign and when it did not proceed into the intersection, she turned and saw a man running up behind her. She screamed. He put his hands around her neck and ordered her to stop screaming or he would kill her. The man ordered her into the car with Flowers who drove out of town.

Where two defendants act in concert, both are guilty of the crime. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). It is not necessary for a defendant to do any particular act constituting part of the crime under the principle of concerted action so long as he is present at the scene of the crime and the evi-

dence is sufficient to show he is acting with another who does the acts which constitute the crime pursuant to a common plan or purpose. *Id.*

Construing the evidence given above in the light most favorable to the state, as we must, we conclude that a jury readily could have concluded beyond reasonable doubt that: (1) defendant Flowers acted in concert in the abduction of the prosecuting witness and (2) that she was abducted against her will. We therefore overrule this assignment of error by Flowers.

B.

[5] Flowers next contends the trial court erred in admitting evidence relating to the prosecuting witness's pretrial identification of him. Flowers does not except to her in-court identification.

The prosecuting witness gave police a description of the men she said raped her and their car. She described Flowers as a black male in his mid-twenties, about 5 feet 4 inches tall and weighing about 150 pounds. She noted two identifying features about the car: it had an abnormally small steering wheel and feathers hanging from the rear view mirror. Five days later police located a car fitting that description being driven by Flowers. The police told Flowers the car fit the description of a car they were looking for in connection with a rape and kidnapping and asked Flowers if he would allow the victim to come to his home and look at him. Flowers agreed. When the prosecuting witness arrived she immediately exclaimed: "He is the one that raped me." Flowers protested she was mistaken, and the prosecuting witness looked at Flowers a second time. This time she said, "You know it's you." Flowers contends the pretrial identification procedure was so impermissibly suggestive that it violated his due process rights guaranteed by the United States and North Carolina Constitutions.

We assume that the pretrial identification was suggestive and unnecessarily so.

> Both the United States Supreme Court and this Court have criticized the 'practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup. . . .' *Stovall v. Denno, supra,* 388 U.S. at 302, [18 L.Ed. 2d 1199, 1206 (1967)]; *State v. Matthews,* 295 N.C. 265,

> 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128 (1979); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902 (1976). This Court has recognized that such a procedure, sometimes referred to as a 'showup,' may be 'inherently suggestive' because the witness 'would likely assume that the police had brought [him] to view persons whom they suspected might be the guilty parties.' *State v. Matthews*, *supra*, 295 N.C. at 385-86, 245 S.E. 2d at 739.

State v. Oliver, 302 N.C. 28, 44-45, 274 S.E. 2d 183, 194 (1980); *accord State v. Turner*, 305 N.C. 356, 289 S.E. 2d 368 (1982).

Pretrial showup identifications, though they are suggestive and unnecessary, are not, however, *per se* violative of a defendant's due process rights. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140 (1977). The primary evil to be avoided is the substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. at 198, 34 L.Ed. 2d at 410. *See also State v. Oliver*, 302 N.C. at 45, 274 S.E. 2d at 194. Whether there is a substantial likelihood of misidentification depends on the totality of the circumstances.

> The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

State v. Turner, 305 N.C. at 364, 289 S.E. 2d at 373-74 (*quoting Manson v. Brathwaite*, 432 U.S. at 114, 53 L.Ed. 2d at 154). If under the totality of the circumstances there is no substantial likelihood of misidentification, then evidence of pretrial identification derived from unnecessarily suggestive pretrial procedures may be admitted. *State v. Turner*, 305 N.C. 356, 289 S.E. 2d 368; *State v. Oliver*, 302 N.C. 28, 45, 289 S.E. 2d 183, 194.

Despite our continued disfavor towards the practice of unnecessary showups, considering the totality of the circumstances, we conclude that the prosecuting witness's identification of Flowers was reliable and her pretrial identification was properly admitted into evidence. During the seven hours the prosecuting

witness was held captive in the confines of Flowers' car, she had ample opportunity to observe the unmasked face of her assailant. She gave an accurate description of him before the showup. Her showup identification was unequivocal and made without the slightest hesitation. Her reliability was further and convincingly demonstrated by her refusal to implicate defendant Waugh in a similar showup because she "didn't feel comfortable saying yes or no" and she would "rather say no than put an innocent man through something like this." Finally, the prosecuting witness made the identification less than a week after the incidents. The testimony regarding the prosecuting witness's pretrial identification of defendant Flowers, therefore, was properly admitted.

C.

[6] Defendant complains further that the trial judge improperly expressed to the jury in the following statement his opinion that the state had proven a number of facts:

> COURT: Now, Members of the Jury, you've been in and out of the courtroom a whole lot this morning. Of course you know we started out with this young lady testifying as to what took place on the evening of February the 2nd, 1983. You recall what she contends took place on that night. Where she was taken. That she was out in Elkin. That she was then taken to the hospital. You remember all the facts she's testified about, or what she contends the facts were. . . . Now, that's just to fill you back in to where we were, to where we are now with this witness. Now, of course, you take your own recollection of the facts, not what I might have said about it. All right. Let's continue.

Defendant's argument is feckless. The trial judge was attempting to facilitate the orderly procession of the trial which at the time he made these statements had been interrupted repeatedly by the jury's being asked to leave the courtroom. He qualified his remarks by saying what the prosecuting witness "contends" and admonished the jury to rely on their memory of her testimony, not his.

D.

Defendant Flowers also argues that the trial court committed reversible error by allowing a witness to testify that defendant's

wife was a white female. We disagree. The prosecuting witness already had testified without objection that defendant Flowers told her his wife was Caucasian. Her testimony blunted the impact of any unfair racial prejudice the statement may have engendered in the minds of the jury.

[7] In his final two assignments of error, defendant Flowers objects to the trial court's jury instructions. He argues first that the trial judge committed reversible error by failing to instruct the jury, as defendant requested, that the presumption of innocence alone is sufficient to support a verdict of not guilty.

We disagree. The trial judge instructed the jury as follows:

> The fact that the Defendant has been charged by some law enforcement officer is no evidence of their [sic] guilt. Under our system of justice, when a Defendant pleads not guilty, he is not required to prove his innocence. He is presumed to be innocent. The State of North Carolina must prove to you that the Defendant is guilty beyond a reasonable doubt and on each case.

The instruction requested by Flowers would have needlessly confused the instruction given by Judge Rousseau. To the extent the requested instruction implies that a jury may elect to return a verdict of not guilty though they are persuaded beyond reasonable doubt that the state has proven the crime charged, the instruction does not accord with the law of the state. To the extent that it means the burden of proof is upon the state alone, Judge Rousseau so instructed the jury.

Flowers argues, finally, that the instructions amounted to an impermissible expression of opinion. After instructing the jury about the elements of kidnapping, the trial judge asked, "Any questions about the kidnapping?" Defendant contends the court's instruction was tantamount to an opinion that the state had proven a kidnapping occurred.

Defendant's objection has no merit. The court's statements were simply a shorthand method of referring to the elements of kidnapping about which he had just instructed. Flowers received a fair trial on the charge of first degree kidnapping.

Conclusion

For the reasons stated above: judgment against both defendants for first degree rape is arrested; defendant Waugh must receive a new trial on the charge of first degree kidnapping; defendant Flowers received a fair trial free of reversible error on the charge of first degree kidnapping.

As to Flowers:
Case No. 83CRS564—Judgment arrested;
Case No. 83CRS565—No error.

As to Waugh:
Case No. 84CRS148—Judgment arrested;
Case No. 84CRS149—New trial.

Justice MITCHELL concurring.

I concur. I write separately only to emphasize that in Part III. B. of its opinion the majority quite properly relies upon *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966) *only* "by analogy." *Miranda* does not control with regard to the question of the admissibility, in this joint trial of the defendants, of Waugh's previous in court testimony during Flowers' continuance hearing. *Miranda* dealt with coercive in custody interrogation of a defendant by law enforcement officers. It does not control in situations such as this where the defendant's statement to be entered into evidence was made under oath in court and while the defendant was protected from all improper coercion by a judicial officer.

Justice MEYER joins in this concurring opinion.

IN THE MATTER OF: THE APPEAL OF COLONIAL PIPELINE, A PUBLIC SERVICE COMPANY ENGAGED IN BUSINESS IN NORTH CAROLINA, FROM THE VALUATION OF ITS PROPERTY BY THE NORTH CAROLINA PROPERTY TAX COMMISSION FOR 1981

No. 225PA84

(Filed 29 August 1986)

1. **Taxation § 25.7— gas pipeline system—ad valorem taxes—market value—use of imbedded, historical cost of debt improper**

The Property Tax Commission erred in approving the Revenue Department's use of petitioner's imbedded, historical cost of debt rather than current market cost in arriving at a proper capitalization rate under the income approach to value, since the Revenue Department's appraiser sought to justify use of the imbedded cost of debt on the ground that the debt was assumable by a prospective purchaser, but petitioner's guaranteed debt could not be assumed by a purchaser, and since the record did not support the Property Tax Commission's weighting of the debt and capital components used in its calculation.

2. **Taxation § 25.7— gas pipeline system—ad valorem taxes—projected income stream—inclusion of investment tax credits improper**

The Department of Revenue erred in including in petitioner's projected income stream a figure representing petitioner's average investment tax credits over the past five years, since petitioner would continue to have investment tax credits in the future equivalent to those it had enjoyed in the past only if it continued to invest in depreciable property at the same rate it had invested in the past and tax laws on the subject do not change, and there was no evidence to support the fact that there would be such credits in the future for petitioner.

3. **Taxation § 25.7— gas pipeline system—ad valorem taxes—refusal to reduce property values for economic obsolescence—no error**

The Property Tax Commission did not err in approving the Revenue Department's refusal to reduce FERC valuations of petitioner's system property under the cost approach to value because of "economic obsolescence" attributable to the below market rate of return allowed petitioner by the FERC, since deductions for "economic obsolescence" are matters of appraisal judgment about which reasonable appraisers could differ, and the Commission was not required to adopt one appraiser's view of the matter in the face of an equally plausible contrary opinion.

ON Colonial Pipeline Company's petition for discretionary review of a decision of the Court of Appeals, 67 N.C. App. 388, 313 S.E. 2d 819 (1984), affirming an order of the North Carolina Property Tax Commission entered 4 November 1982.

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

Hunton & Williams, by Henry S. Manning, Jr., and William L. S. Rowe, for appellant Colonial Pipeline Company.

EXUM, Justice.

This is an ad valorem tax case in which the petitioner, Colonial Pipeline Company, hereinafter "Colonial," contends that the North Carolina Department of Revenue, "Department," first, and then the Property Tax Commission, "Commission," overvalued Colonial's system property for ad valorem tax purposes. Colonial contends further that the Court of Appeals erred in affirming the Commission's decision on valuation. Specifically, Colonial contends that it was error for the Court of Appeals to affirm the taxing authorities: (1) use of imbedded book cost of debt, rather than market cost, in arriving at a capitalization rate in the income approach to valuation; (2) inclusion of certain investment tax credits in the stream of income to be capitalized under the income approach to value; (3) refusal to reduce Colonial's system property values as reported to the Federal Energy Regulatory Commission, "FERC," under the cost approach to value because of intervening "economic obsolescence." Largely on the basis of our decision in *In re Southern Railway*, 313 N.C. 177, 328 S.E. 2d 235 (1985),[1] we conclude the Court of Appeals erred as to points one and two. We conclude the Court of Appeals correctly determined point three. We, therefore, reverse in part and affirm in part the Court of Appeals' decision.

I.

Pursuant to subchapter II of chapter 105 of our General Statutes, hereinafter "Machinery Act" or "Act,"[2] the Department valued Colonial's system property (Colonial being a "public service company" subject to ad valorem taxation under § 333(14)) at $1.216 billion. The Department allocated $160 million to North

1. Our decision in *Southern Railway* was rendered after the Commission's and the Court of Appeals' decision in the instant case.

2. Since all references to statutes herein are contained in subchapter II of chapter 105, we shall refer only to section numbers of the chapter.

Carolina. §§ 337, 338. Colonial appealed to the Property Tax Commission.

At the hearing before the Commission, the principal witnesses were Robert H. McSwain, for Colonial, and William R. Underhill, for the Department. McSwain is a Member of the Appraisal Institute, the professional designation of the American Institute of Real Estate Appraisers; a Senior Real Property Appraiser, the professional designation of the Society of Real Estate Appraisers; and a Certified Assessment Evaluator, the professional designation of the International Association of Assessing Officers. He teaches railroad and public utility valuation at the college level and has held various memberships and offices in professional organizations. Underhill is employed by the North Carolina Department of Revenue and is an experienced appraiser of public service companies. He is a member of several professional associations. Both witnesses were qualified as experts in the field of utility appraisal.

The Machinery Act requires that public service companies, such as Colonial, be appraised for ad valorem tax purposes by determining the "true value" of the company's "system property used . . . both inside and outside this State." § 335(b)(1). "System property" is that property used in the company's public service activities and any property under construction "which when completed will be used" in the company's public service activities. § 333(17). True value means "market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell . . . ." § 283. The public service company's entire system property, without geographical or functional division, is appraised and a portion of the appraised value is allocated to North Carolina by various statutory formulae. § 337. *See generally, In re Southern Railway,* 313 N.C. 177, 328 S.E. 2d 235.

Both McSwain and Underhill used three methods of appraisal, prescribed by § 336, commonly referred to as (1) the income approach, (2) the stock and debt approach, and (3) the cost approach. The income approach to value is based on the principle that something is worth what it will earn. Under this approach fair market value is determined by capitalizing at a specified rate

of return future income which the appraiser believes can reasonably be earned on the company's system property. The formula is: value equals income divided by rate. The rate is that rate of return that would be required by a reasonably prudent investor in order to induce the investor to commit capital to the purchase of the property generating the income. The stock and debt approach to value relies simply on a market valuation of the company's outstanding stock and debt. § 336(a)(1). This approach is based on the theory that the value of the company's assets on the left side of the balance sheet should equal the value of its outstanding liabilities and capital on the right side of the balance sheet. The values arrived at in this manner must be adjusted so as to remove the influence of any non-system, non-taxable property. The cost approach starts with the book value of all the company's system property as shown on the books kept by the appropriate state or federal regulatory agencies. Consideration is then given to the replacement or reproduction costs of this property "less a reasonable allowance for depreciation." § 336(a)(2).

Both McSwain and Underhill relied essentially on the same basic facts, business operations and accounting data, in making their appraisals. It is undisputed that Colonial is the nation's largest volume petroleum products pipeline. It delivers refined petroleum products through more than 5,000 miles of pipeline extending from refineries near Houston, Texas to the New York harbor area. Most of the pipeline was built between 1961 and 1978. Colonial's last major construction program ended in 1980, and the company had no major construction plans or programs in effect on 1 January 1981, the date of the valuation of its property. Colonial is a common carrier regulated by FERC. Its stock is owned by ten other corporations, all of which are members of the petroleum industry. As a common carrier Colonial's transportation service must be offered on a non-discriminatory basis, and preferential treatment cannot be given to its stockholders. Colonial has a capital structure of 94% debt, almost all of which is long-term, and 6% equity. Its long-term debt is guaranteed by its stockholders and cannot be assumed by a purchaser of Colonial's assets. FERC authorizes Colonial to earn on an average not more than a 10% rate of return on its FERC valuation. Unlike other utilities, this rate of return is not determined by Colonial's overall

cost of capital and is not influenced by either its capital structure or the capital cost of the components of that capital structure.

McSwain appraised Colonial's system property at $970,000,000. This was based upon an income indicator of value of $965,000,000, a stock and debt indicator of $939,400,000, and a cost indicator of $972,000,000. Underhill's appraisal of Colonial's system value was $1,216,000,000. It was based upon an income indicator of value of $1,186,941,543, a stock and debt indicator of $1,052,739,985, and a cost indicator of $1,279,568,881.

In their income approach to value McSwain and Underhill disagreed as to the amount of the future income stream to be capitalized and as to the weighted capitalization rate to be applied. McSwain capitalized projected net operating income of $135,000,000 at 14%. Underhill capitalized a projected net operating income of $131,187,600 at 11.2% and added to the result $15,623,543 for construction work in progress.

The difference in the projected future net income to be capitalized given by the two appraisers was primarily due to the difference in treatment of certain investment tax credits previously claimed by Colonial. For the years 1976 through 1980 Colonial had an average investment tax credit per year of $12,882,800. Underhill included this amount in his projected future net income; McSwain did not.

Both Underhill and McSwain agreed that in determining the capitalization rate an appraiser should assume that a prudent investor would commit both debt and equity capital to the purchase of Colonial's system property at a ratio of 55% debt and 45% equity. McSwain used a capitalization rate of 14% based on a 16% return on equity weighted at .45 and market rate of return for debt of 12.5% weighted at .55. Underhill, on the other hand, used a capitalization rate of 11.2%. He weighted a 15% rate of return on equity at .45 and an 8% return for debt, equivalent to Colonial's imbedded debt cost, at .55. Underhill admitted that the market cost of debt on 1 January 1981 was 12%. Had he used a 12% market rate for debt, rather than the 8% rate based on Colonial's imbedded debt cost, Underhill's income indicator of value would have been $998,302,351, $188,639,192 less than his income indicator in which he used Colonial's imbedded debt cost and very close to McSwain's income indicator.

Both Underhill and McSwain used similar procedures under the stock and debt approach to value. Both agreed on the value to be ascribed to Colonial's debt. In order to arrive at the value of the capital stock, the stock not being traded on the market, both appraisers capitalized income available to the equity component of Colonial by the market rate of return demanded by investors for similar investments. The difference between their approaches using this method of valuation, which forms the basis for one of Colonial's complaints, is that Underhill, again, included in the projected future stream of income to be capitalized, projected investment tax credits, based on the annual average of credits taken by Colonial in the past. McSwain did not include such credits in his projection of Colonial's future income.

In the cost approach to value the only significant difference between the appraisers' calculations was in their treatment of "economic obsolescence." Both appraisers relied on FERC valuations of Colonial's assets. Underhill adjusted this valuation for working capital, a 6% going concern value and construction work in progress to arrive at a cost indicator value of $1,279,568,881. McSwain arrived at an adjusted FERC valuation of $1,292,322,222, which he reduced by 25.36% to $971,716,313 to allow for "economic obsolescence." McSwain arrived at the 25.36% reduction on these grounds: Investors were demanding a minimum rate of return in the market of 14% for investments similar to Colonial. Because of FERC's ceiling on Colonial's rate of return, Colonial could only earn in 1981 10.45% on its adjusted FERC valuation. The difference between what Colonial could earn and what investors were demanding was 3.55 percentage points. This deficiency amounted to 25.36% of the 14% market rate of return. In McSwain's opinion because investors could not earn what the market demanded by investing in Colonial, the value of Colonial's system property should be reduced accordingly for what he called "economic obsolescence."

With this evidence before it, the Commission adopted Underhill's appraisal, thus approving Underhill's use of the imbedded cost of debt to arrive at an appropriate capitalization rate, his inclusion in the projected future income stream to be capitalized projected investment tax credits, and his refusal to reduce FERC's valuation under the cost approach for economic obsolescence.

II.

[1] Applying the whole record test for appellate review as is required and as we did in *Southern Railway*, we conclude the Commission erred on this record in approving the Department's use of Colonial's imbedded, historical cost of debt rather than current market cost in arriving at a proper capitalization rate under the income approach to value. On a record similar to that now before us we held in *Southern Railway* that the Department was not justified in using imbedded cost of debt to arrive at an appropriate capitalization rate in the income approach to value for ad valorem tax appraisal purposes. *Southern Railway* controls this issue here.

Indeed the record here is even less supportive of the use of imbedded debt cost than it was in *Southern Railway*. There the Department sought to justify use of imbedded debt on the grounds that the debt was assumable by a prospective purchaser. This is the ground upon which Underhill, the Department's witness, sought to justify use of the imbedded cost of debt in the instant case. He said, "It's my opinion under the willing-buyer-willing-seller concept, that the typical purchaser would buy the equity of a typical pipeline company and assume the debt at its existing rate. And this would assume also a typical capital structure." Yet even Mr. Underhill later testified that he understood Colonial's guaranteed debt could not be assumed by a purchaser. Consequently any purchaser would have to refinance the purchase at current market rates.

The Department argues that even if under *Southern Railway* it was improper to use imbedded cost of debt in arriving at a capitalization rate under the income approach to value, the error did not result in a substantially higher valuation than would have been reached under a proper method. This argument rests on a calculation made by the Commission under the income approach to value using a capitalization rate based on market rates rather than imbedded rates. The result comes close to the Department income indicator of value. We have carefully examined the Commission's calculation. The Commission used McSwain's income stream of $135,000,000. It used a cost of debt of 12% and a return to equity of 15%. It then, however, weighted the debt component at .936 and the equity component at .64, giving a weighted capitalization rate of 12.19%. Capitalizing $135,000,000 at 12.19% gives a

value of $1,107,460,000, which is 93.3% of the Department's income indicator of $1,186,941,543. The Commission weighted the cost of debt and return to equity on the same ratio as exists in Colonial's actual capital structure. Yet both appraisers agree that in figuring a capitalization rate for use in the income approach to value, the ratio between cost of debt and return to equity should not reflect Colonial's actual capital structure but should reflect, instead, a more normal capital structure of 45% equity and 55% debt. The reason given is that this is the ratio at which a reasonably prudent buyer willing but under no compulsion to buy would likely commit capital. The record, therefore, does not support the Commission's weighting of the debt and capital components used in its calculation. This weighting looks only at value seen from the perspective of the owner-seller—an approach which we held was impermissible in *Southern Railway* under the willing seller-willing buyer approach to market value.

III.

[2] It is also clear on this record that the Department and, ultimately, the Commission erred in including in Colonial's projected income stream a figure representing Colonial's average investment tax credits over the past five years. Both the Department and Colonial agree that an investment tax credit is a credit allowed against a taxpayer's federal income tax liability in an amount equal to 10% of the taxpayer's investment in certain depreciable property during the tax year. Existence of the credit is dependent upon the taxpayer's investment during the tax year. Once the credit is taken, it no longer exists. Colonial, therefore, will continue to have investment tax credits in the future equivalent to those it has enjoyed in the past only if it continues to invest in depreciable property at the same rate it has invested in the past and tax laws on this subject do not change. There is a stipulation in the record that Colonial's last major construction program ended in 1980 and "since determination of this project in 1980, Colonial . . . has had no major construction plans or programs in effect." There is, therefore, no factual basis on this record for including in Colonial's projected future income stream amounts attributable to future investment tax credits, for there is no evidence to support the fact that there will be such credits in the future for Colonial.

The projected future income stream, moreover, must be based on what could reasonably be expected to be earned on Colonial's system property existing on the date of the appraisal adjusted for work in progress on that date. On Colonial's system property existing on the date of the appraisal, the evidence is that all investment tax credits have been taken. No future investment tax credits will be available.

On a record very similar to the one now before us, we held in *Southern Railway* that it was error for the Commission to include in projected future income to be capitalized deferred income tax expense. The Department sought to justify inclusion on the ground that the deferred taxes would never be paid. We said:

> This testimony demonstrated, and the Department's witness did not contravene it, that in order for deferred income taxes to be perpetually immune from payment, the Railroads would have to maintain increasingly greater levels of investment necessary to obtain new depreciation in amounts sufficient to offset the reduced depreciation attributable to older assets. Further, the accelerated depreciation provisions of the income tax laws would have to remain in place. Railroads' evidence demonstrated that potential buyers and sellers would not appraise the railroad system on the assumption that these kinds of investments would continue to be made, or that accelerated depreciation provisions would be forever with us. This is true notwithstanding the fact that Southern's capital acquisitions over the last several years have been so large that it has continued to accumulate deferral tax expenses and, in fact, has paid no income tax.

In re Southern Railway, 313 N.C. at 194-95, 328 S.E. 2d at 246 (footnote omitted).

We recognize the difference between investment tax credits and deferred income tax expense, the former being explained hereinabove and the latter in *Southern Railway*. Nevertheless, insofar as the inclusion of both in the income stream to be capitalized rests on the notion of continuing future capital expenditures and static tax laws, the decision in *Southern Railway* controls the point. Indeed, the record here is even less supportive of inclusion of investment tax credits in the income stream than the record in *Southern Railway* was of including deferred income tax expense.

First, the derivation of investment tax credits and their relationship to the system property upon which the projected future income stream is in turn derived is clearer than in the case of deferred income tax expense. Second, it is clearer in this case that the investment tax credits attributable to the property to be appraised have in fact been exhausted and will not be available in the future than it was in *Southern Railway* that the deferred tax expense there attributable to the property being appraised would not in the future be available.

The Department attempts to justify inclusion of the investment tax credits in the income stream by noting that on 31 December 1980 Colonial's balance sheet showed construction work in progress in excess of $15,000,000. Underhill, however, adjusted his calculations based on income approach to value by adding $15,600,000 to his income indicator for construction work in progress. Indeed, this seems to be the proper way to account for construction work in progress in determining system property value under § 333(17) of the Machinery Act.

IV.

[3] We find no error, however, in the Commission's approval of the Department's refusal to deduct from the FERC valuations an amount attributable to "economic obsolescence" because FERC has limited Colonial's rate of return to a rate below the market rate. McSwain testified:

> Economic obsolescence is a loss in value due to factors outside the property itself. In this case, because the property did not earn a market rate of return, in my opinion a purchaser would not pay the amount for the property reflected on line 13 [the FERC valuation of Colonial's property]. If he paid that amount for the property, he would receive, based on my projected income, a return of 10.45%.

Arlo Woolery, an expert real estate appraiser, testified for Colonial in support of McSwain's appraisals. He testified:

> I heard Mr. McSwain's testimony that this line 14 is obsolescence. As to whether he actually means to say economic obsolescence, I don't know whether it's economic or functional. I think that whenever you have loss in income, you can have a semantic argument about whether that loss is econom-

ic or functional obsolescence. In fact, now they've even abandoned in some textbooks the term "economic obsolescence", and they've gone to what is called locational obsolescence. They are simply saying a thing becomes obsolescent by virtue of its location, and that allows the obsolescence factor to be applied to land, which is departure from the classical textbook theory that was popular years ago. I think you're going to be seeing that appear in appraisal textbooks more and more.

I would not agree that we can just go ahead and mark off this line 14 and talk about land obsolescence; I'm simply saying that it becomes immaterial what you call it, whether it be functional or economic. The fact remains that if a property does not earn the market rate of return, it has lost value. And if you're using cost as an indicator of value, you must make an adjustment for that loss in income to bring the value to a point where it will earn at the market market [sic] rate. I think Mr. McSwain is talking about economic obsolescence and perhaps some functional underlined on line 14.

He used the figure of 25.36 percent as reduction for obsolescence. I believe Mr. McSwain's testimony was that he reduced it by that amount becuase [sic] of a complicated formula that took into account the fact that Colonial is regulated by FERC and FERC allowed only a 10 percent return on the FERC valuation, and the market rate demand is 14.5 percent.

As to whether that entire calculation would be premised on the assumption that the equity investors of Colonial would be free to choose this type of investment and would weigh then whether he wanted to receive a 10 percent return on his money or 14.5 percent at the market rate, I don't think that either Mr. McSwain or I ever suggested that the investors were taking a 10 percent return on money. As I recall the McSwain appraisal, his overall rate of return was 14 percent. And what he was saying was that investors are looking for a 14 percent rate of return. The fact that FERC may allow 10.59, I believe, as a catch-up rate of return on its rate base—and there's a difference between tax base and rate base, as I'm sure all you gentlemen know. That difference between the 14 percent investors are seeking in the market-

place and the 10.59 being earned on FERC rate base would represent a loss in value due to obsolescence however defined.

Woolery had earlier explained "economic obsolescence" in terms of a reduction in the value of the property because of the erection nearby of an unsuitable improvement, for example, a slaughterhouse.

Underhill testified:

It's my opinion that in any regulated utility company that has a rate base as set by a regulatory agency, that . . . rate base is a reasonable indicator of market value standing alone. It doesn't mean that the final value will not reflect some obsolescence or value less than that figure. But I believe that in the cost approach that rate base figure is a reasonable indicator of market value and does not require an obsolescence adjustment. When I speak of rate base, by that I mean FERC valuation, and that is my reasoning for not applying an economic obsolescence factor.

On this state of the record, we conclude the Commission was justified in not adopting McSwain's view of the necessity of reducing the FERC valuations in the cost approach to value because of "economic obsolescence" attributable to the rate of return allowed by FERC on the rate base found by FERC. Colonial concedes that McSwain's "determination of economic obsolescence is an opinion." This record demonstrates that deductions for "economic obsolescence" are indeed matters of appraisal judgment about which reasonable appraisers may differ. As such, the Commission was not required to adopt McSwain's view of the matter in the face of an equally plausible contrary opinion.

It is difficult, moreover, for us to discern how a rate of return set by a regulatory agency can ever be considered "economic obsolescence." Presumably, the rate of return is a fair rate of return on the regulatory agency's determination of the utility's rate base. Further, prospective purchasers of Colonial's system property would not necessarily be bound by the rate of return set by FERC on this property as it exists in the hands of Colonial. This record, moreover, does not support the notion that economic obsolescence comes within the meaning of "a reasonable allow-

ance for depreciation," as those terms are used in § 336(a)(2) of the Machinery Act.

V.

Because of the errors committed by the Commission in connection with its approval of the use of imbedded cost of debt rather than market cost and inclusion in the income stream of investment tax credits, we conclude Colonial has overcome the presumption of correctness of the appraisals of the Department of Revenue. Colonial's burden was to show that the Department used either an arbitrary or an illegal method of valuation and that the Department's valuation substantially exceeded the fair market value of Colonial's system property. *In re Southern Railway*, 313 N.C. 117, 328 S.E. 2d 235. "An illegal appraisal method is one which will not result in a 'true value' as that term is used in § 283 and, for public service companies, in § 335." *Id.* at 181, 328 S.E. 2d at 239. The methods identified, as we have shown, will not result in true value; therefore, they are illegal.

Further, as we have demonstrated, had the Department used a market rate of return instead of Colonial's imbedded cost of debt, the Department's income indicator of value would have been $998,302,351, substantially less than its income indicator, using imbedded cost, of $1,186,941,543. Also, the Department's treatment of the investment tax credit had the effect of inflating the income stream of Colonial by some $12,282,800 in both the income approach and the stock and debt approach to value. Under the income approach this added some $115,025,000 to the Department's valuation even if the Department's erroneously low capitalization rate of 11.2% is used. It is not clear what effect the Department's inclusion of the investment tax credits in the income stream had on its ultimate valuation under the stock and debt approach.

The errors we have identified affect both the Department's income and stock and debt approach to value—two out of the three indicators used.

We are, therefore, satisfied that erroneous use of imbedded cost of debt and the erroneous inflation of the projected income stream of Colonial by inclusion of future investment tax credits caused the Department's valuations to be substantially higher

than the fair market value of Colonial's system property. *In re Southern Railway*, 313 N.C. 177, 328 S.E. 2d 235.

We reverse the Court of Appeals insofar as it affirmed the Commission's use of imbedded cost of debt and inclusion of investment tax credits in the income stream. We affirm the Court of Appeals insofar as it approved the Commission's rejection of Colonial's reduction of FERC valuations by a factor attributable to "economic obsolescence." We remand the case to the Court of Appeals with instructions that it remand to the North Carolina Property Tax Commission in order that the Commission may determine the system valuation of Colonial's property in a manner consistent with this opinion.

Reversed in part; affirmed in part; remanded.

STATE OF NORTH CAROLINA v. JACKIE LEE SCOTT, JR.

No. 506A85

(Filed 29 August 1986)

1. **Criminal Law § 85.3— prior instances of defendant's sexual misconduct—evidence inadmissible to attack credibility**

In a prosecution of defendant for first degree sex offense, cross-examination of defendant about prior instances of defendant's sexual misconduct was not permissible to attack defendant's credibility pursuant to N.C.G.S. § 8C-1, Rule 608(b), since specific instances of conduct relating to sexual relationships or proclivities fall outside the bounds of admissibility under that rule.

2. **Criminal Law § 34.5— prior instances of defendant's sexual misconduct—evidence too remote in time—evidence not probative on issue of identity**

Evidence of prior instances of defendant's sexual misconduct was not admissible pursuant to N.C.G.S. § 8C-1, Rule 404(b) in a prosecution for first degree sex offense, since the information was not elicited on cross-examination for the purpose of identifying defendant as the perpetrator; defendant's alleged sexual contacts with his sister nine years before trial when defendant was thirteen years old were too remote in time to be probative or relevant; and there were insufficient similarities between the alleged prior misconduct and the present offenses to make the prior incidents probative on the issue of identity.

3. Rape § 4.1— prior instances of defendant's sexual misconduct—door not opened by defendant

There was no merit to the State's contention that defendant opened the door to cross-examination about his prior sexual misconduct by volunteering instances of his wife's sexual misconduct.

4. Rape § 4.1— prior instances of defendant's sexual misconduct—evidence improperly admitted

In a prosecution of defendant for first degree sex offense where the evidence tended to show that he performed cunnilingus on his three and four-year-old nieces, evidence tending to show that eight years before the offenses charged in this case defendant, then aged thirteen, threatened his sixteen-year-old sister with a knife and sexually molested her was too remote and dissimilar from the crimes charged to be probative of defendant's guilt under any theory of admissibility, and the trial court committed reversible error in admitting such evidence.

Justice MITCHELL concurring.

Justices MEYER and MARTIN join in this concurring opinion.

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from two consecutive life sentences imposed after defendant's convictions of two counts of first degree sex offense at the 20 May 1985 Criminal Session of ROWAN County Superior Court, *Morgan (Melzer A., Jr.), J.*, presiding.

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.

EXUM, Justice.

Defendant's appeal presents two evidentiary questions: Whether the trial court committed reversible error in allowing the prosecutor, over objection, (1) to cross-examine defendant concerning specific instances of sexual misconduct unrelated to the offense charged; and (2) to cross-examine his sister, Debra, regarding sexual misconduct between her and defendant occurring some eight years before the offenses charged. We conclude both rulings constituted reversible error, and grant defendant a new trial.

Defendant was convicted of committing first degree sex offense, cunnilingus, against his sister's two daughters, aged four and three years, respectively, at the time of the offenses alleged in the indictments. At that time the two girls and their mother, Debra, were staying with defendant Scott, aged 21, and his fifteen-year-old wife, Crystal, in the Scotts' trailer. The various witnesses' testimony conflicted on precisely when the incident occurred. Generally their testimony placed it during the summer of 1984 when Debra put her daughters to bed and went out for the evening, leaving the Scotts to babysit.

I.

The state's evidence consisted largely of the testimony of the older of the two victims and defendant's wife Crystal. The girl testified as follows: After Debra had put the girls to bed and gone out for the evening, Crystal and defendant went into the girls' bedroom and brought them into the Scotts' own bedroom. There, after all four were disrobed, defendant and Crystal performed cunnilingus on both girls. Defendant told the girls not to tell anyone or "the boogerman will get us out of our bed and stab us in the heart." The older victim also testified she had been molested by Crystal on numerous other occasions, as well as by their mother, Debra, and two of Debra's male friends.

Crystal, who faced prosecution for the crimes, testified she was afraid to watch and did not know whether defendant had oral sex with the girls; but she noted he had "plenty of opportunity." She claimed he forced her to engage in these sexual acts; she complied because he had beaten and assaulted her in the past. Near the end of August 1984 and after six months of marriage, Crystal separated from defendant. They were not living together at the time of trial.

Evidence presented through defendant and his sister Debra, the children's mother, testifying for defendant, tended to show:

Debra and her two daughters moved into the Scotts' trailer during the summer of 1984. Defendant and Crystal, and sometimes Crystal alone, frequently babysat for the girls. On the night in question, which was in early June according to Debra, and June or early July according to defendant, Debra put the children to bed before going out for the evening, but they soon began cry-

ing. Defendant told Crystal to calm them while he showered. When he stepped out of the shower and returned to the bedroom, he found Crystal and the two girls in bed nude. Crystal was engaging in cunnilingus with the girls. Defendant remonstrated with Crystal, telling her "she could get a lot of time for something like that," and told the children not to tell Debra, else Crystal "would get a lot of time and something bad could happen" and the police could get Debra or Crystal. Defendant denied ever engaging in sexual acts with the children.

Debra testified she first learned from defendant in August 1984 that her children had been molested. The older girl, when questioned, confirmed then that Crystal had performed cunnilingus on both girls as defendant had described while defendant was in the bathroom, and that Crystal had committed similar acts in the past.

II.

Defendant first contends the trial court committed reversible error by permitting the state over his objection to cross-examine him concerning specific instances of sexual misconduct to attack his credibility as a witness.

The prosecutor cross-examined defendant concerning his California and North Carolina criminal convictions, which included felony joy-riding, possession of stolen property, contributing to the delinquency of a minor, and breaking, entering and larceny. He also cross-examined defendant thus:

> Q. Mr. Scott, have you ever forced your sister, Debra or Debbie, to have sexual intercourse with you with the use of a knife or threatening to kill her?
>
> MR. HUNDLEY: OBJECTION, Your Honor.
>
> COURT: Members of the jury, evidence of any misconduct, if there should be evidence of any misconduct, is *admitted here for the sole purpose of attacking the credibility of this witness.* You may not convict this defendant on the present charges except because of something he may have done in the past. All right. EXCEPTION NO. 7

A. No sir, but there were times when my sister, my brother and I would, as all little kids do, play little nasty games and things together.

Q. Does that include sexual intercourse?

A. No sir.

Q. Did you ever use a knife to force her to do that?

A. No sir.

Q. Did you ever threaten to kill her if she did not do these things?

A. No sir.

During further cross-examination, when the prosecutor asked if defendant had reported this matter to the police in July when he was in court on another charge, defendant volunteered that he had told Crystal to "straighten . . . up" on the night in question, but had turned her in later when he caught her having sex with a twelve-year-old boy. Subsequently, after a voir dire and over defendant's objection, Judge Morgan permitted the following questioning "for the purpose of attacking and challenging the credibility of defendant":

Q. You were in the trailer with [the boy's] sister, [Melissa,] were you not?

A. [His] sister and Joey Watts.

Q. How old was she?

A. Fifteen.

Q. Do you like fifteen year old girls?

A. No sir.

Q. You were trying to have sex with Melissa, weren't you?

A. No sir. Joey Watts was in there, how was I going to have sex with her when Joey was in there?

Q. There's been—STRIKE THAT.

Do you know Leara Tate?

A. Yes sir.

Q. Did you ever encourage your wife to have relations with Leara Tate while you and her husband took pictures?

MR. HUNDLEY: OBJECTION.

No sir.

COURT: OVER-RULED. Members of the jury—STRIKE THAT. OBJECTION IS OVER-RULED. EXCEPTION NO. 8

Q. Did you, sir?

A. No sir.

Defendant argues such cross-examination is impermissible. The state says the evidence was admissible because (1) Rule 608 (b) permits such evidence to attack defendant's credibility; (2) Rule 404(b) permits evidence of other similar crimes, wrongs or acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake, entrapment or accident; and (3) defendant opened the door for such matters by volunteering information regarding his wife Crystal's sexual activities. We hold the trial court erred in permitting this cross-examination.

[1] Rule 608(b) provides, in pertinent part:

> (b) *Specific Instances of Conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C.G.S. § 8C-1, Rule 608(b) (Cum. Supp. 1985) (emphasis added). Determination of admissibility under this rule rests on whether the alleged prior misconduct elicited at trial was probative of defendant's truthfulness or lack thereof.

Rule 608(b) curtailed former North Carolina practice allowing cross-examination of a defendant for impeachment purposes re-

garding *any* prior misconduct not resulting in a conviction, as long as the prosecutor had a good-faith basis for the questions. *State v. Morgan*, 315 N.C. 626, 634, 340 S.E. 2d 84, 89 (1986). In *Morgan* we dealt with a similar question, and in so doing, set forth requirements for admissibility under Rule 608(b):

> Rule 608(b) addresses the admissibility of specific instances of conduct (as opposed to opinion or reputation evidence) only in the very narrow instance where (1) the *purpose* of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; and (2) the conduct in question *is in fact probative* of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question did *not result in a conviction*; and (4) the inquiry into the conduct *takes place during cross-examination*. If the proffered evidence meets these four enumerated prerequisites, before admitting the evidence the trial judge must determine in his discretion, pursuant to Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues or misleading the jury, and that the questioning will not harass or unduly embarrass the witness. Even if the trial judge allows the inquiry on cross-examination, extrinsic evidence of the conduct is not admissible. N.C.G.S. § 8C-1, Rule 608(b) and Commentary.

Id. at 634, 340 S.E. 2d at 89-90. Our decision in *Morgan* analyzed the types of evidence routinely approved and disapproved as bearing on the question of a witness's credibility. One type routinely disapproved was noted to be "specific instances of conduct relating to 'sexual relationships or proclivities, . . . or violence against other persons.'" *Id.* at 635, 340 S.E. 2d at 90.

Thus, the testimony elicited from defendant during cross-examination, being instances of sexual relations or proclivities, falls outside the bounds of admissibility under Rule 608(b).

[2] We next consider the state's contention that the testimony elicited during the prosecutor's cross-examination was admissible as substantive evidence under Rule 404(b), which provides:

> (b) *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the charac-

ter of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (Cum. Supp. 1985).

The state argues it was proper to question defendant about alleged acts of prior sexual misconduct for the purpose of identifying defendant as the perpetrator.

We disagree. First, it is clear this is not the purpose at trial for which the cross-examination was conducted or permitted. Second, defendant's alleged sexual contacts with his sister nine years before trial when defendant was thirteen years old are too remote in time to be probative or relevant. *Cf. State v. Riddick*, 316 N.C. 127, 134, 340 S.E. 2d 422, 427 (1986) (although prior and present crimes separated by six years, defendant, an adult when the prior crimes were committed, was incarcerated for prior crimes until six months before present crimes, effectively explaining remoteness in time). Third, we find insufficient similarities between the alleged prior misconduct and the present offenses to make the prior incidents probative on the issue of identity. The state showed no common *modus operandi* or "signature" between the crime for which defendant was being tried and those about which he was cross-examined. The challenged testimony, therefore, is not admissible under Rule 404(b).

[3] The state argues finally in support of the propriety of the cross-examination that defendant opened the door for the prosecutor's questions by volunteering instances of *his wife's* sexual misconduct. Even if defendant's testimony about his wife's sexual relations with a twelve-year-old boy opened the door to defendant's being questioned about his alleged involvement in that incident, a point we do not decide, it clearly does not open the door to his being questioned about all the other events unrelated both to this incident and to the crime for which defendant was being tried.

The impermissible cross-examination constitutes reversible error if there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S.

§ 15A-1443(a). The evidence of defendant's guilt was in sharp conflict. We conclude there is a reasonable possibility that the improper cross-examination about defendant's alleged engagement in unrelated sexual acts, which, if not illegal, would be considered by most to be at best bizarre and inappropriate, inflamed the jury against defendant and contributed to the guilty verdict they otherwise might not have reached. The cross-examination, therefore, amounts to reversible error.

III.

[4] The next issue is whether the cross-examination of Debra, eliciting testimony of defendant's sexual activities with her and his assaults against her with a knife constitutes reversible error. We conclude it does.

After Debra had testified for defendant, the state recalled her for rebuttal and cross-examined her regarding sexual activity with her brother, defendant herein, as follows:

(JURY OUT:)

(Attorneys approach the bench)

COURT: The Court will allow questions based upon what is presented to it at the bench, that is a statement made by the present witness on the witness stand with regard to circumstances under which she says her brother, the defendant, forced her to engage in sexual intercourse and threats related thereto.

The defendant's objection to that is over-ruled and exception is noted. EXCEPTION NO. 9 *The Court will allow that under the conditional North Carolina Rule to show unnatural disposition of the defendant.*

. . . .

[JURY IN]

Q. [D]id you make a statement to the police about this matter?

A. Yes, I did.

Q. In that statement did you indicate to the police that your brother, the defendant in this case, had on numerous occa-

sions forced you to have sexual intercourse with him by the use of a knife and that he threatened to kill you?

A. I did not say he used a knife. I said he sexually molested me and threated [sic] me with a knife. Not that he had used a knife.

Q. But, he threatened you with the knife?

A. Yes, he has.

Q. Is that correct?

A. Yes, he has.

Q. How many times do you mean by numerous?

A. We were kids. He was thirteen, I was sixteen, we had fights.

Q. You wouldn't call raping someone a fight, would you?

A. I'm talking about the knife. He pulled a knife on me before, others before then. It was when we were thirteen or fourteen years old.

Q. And, you allowed him to have intercourse with you?

A. Your Honor, I'd like to not answer that on the Fifth Amendment.

COURT: OBJECTION SUSTAINED.

Q. Well, was it your statement then he forced you to have intercourse?

A. That I was threatened at the time and that my brother had molested me and done . . . certain things at times, yes.

Q. Did he tell you if you told anyone he would kill you?

A. Of course.

Q. Of course?

A. Of course. When someone does something to molest you, you don't let it go. He was thirteen years old.

Q. And, you put that in your statement to the police?

A. Yes, I did.

Judge Morgan permitted the cross-examination "to show unnatural disposition of the defendant."

We conclude this was error. Generally, character evidence is inadmissible to prove action in conformity therewith under *McClain*, and Rule 404(a) of the North Carolina Rules of Evidence. As discussed above, Rule 404(b) provides an exception if the evidence provides proof of motive, opportunity, intent, plan, etc. This Court has held admission of evidence of prior sexual conduct tending only to show defendant's propensity for such activity to be reversible error. *See, e.g., State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983); *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982), *cert. denied*, 465 U.S. 1104, 80 L.Ed. 2d 134 (1984). As correctly noted in 1 Brandis on North Carolina Evidence § 92 (2d rev. ed., 1982), the Court has been markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b), *see, e.g., State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978) (sexual assaults on different women within three hours "showing single scheme or plan"). Nevertheless, the Court has insisted the prior offenses be similar and not too remote in time. *See, e.g., State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981) (defendant told victim of prior similar sex crimes); *State v. Rick*, 304 N.C. 356, 283 S.E. 2d 512 (1981) (similar sexual assault thirty minutes after the one for which defendant charged); *State v. Browder*, 252 N.C. 35, 112 S.E. 2d 728 (1960) (defendant engaged in sexual intercourse with stepdaughter regularly over several years immediately preceding trial). In other recent cases cited by the state where the perpetrator's identity was in question, we have required significant similarities and little passage of time between incidents. *See, e.g., State v. Thomas*, 310 N.C. 369, 312 S.E. 2d 458 (1984) (sexual attacks upon young boys traveling alone on foot in the dark after defendant ran or jogged up and spoke to victim); and *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982) (perpetrator in separate assaults exposed himself to both young women, ages 15 and 18, before demanding sexual favors at knifepoint; assaults one month apart).

The state relies on our recent decision in *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986), for the proposition that evidence of other similar sex offenses, if not too remote in time, is admissible against the defendant. *DeLeonardo* held admissible, under the new evidence rules, evidence of sex offenses against de-

fendant's three-year-old daughter in defendant's prosecution for first degree sex offense against defendant's two young sons, because the evidence tended to establish a common plan or scheme to sexually abuse his children. The challenged evidence in *DeLeonardo* plainly was relevant under Rule 401.

In summary, although no rule exists generally permitting evidence of a defendant's "unnatural disposition," we have made exceptions under *McClain* or Rule 404(b) if the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under the Rule 403 balancing test.

In the case at bar, however, the evidence tends to show that eight years before the offenses charged herein, defendant, then aged thirteen, threatened his sixteen-year-old sister with a knife and also sexually molested her. These incidents are not similar to the acts of cunnilingus on three- and four-year-old girls with which defendant is here charged. They occurred when defendant himself was a child eight years ago. This evidence is thus too remote and dissimilar from the crimes charged to be probative of defendant's guilt under any theory of admissibility we have heretofore recognized or which is recognized by the new rules. Its admission was error. For the same reasons given earlier on the improper cross-examination issue, the error entitles defendant to a new trial.

We are bolstered in our opinion by our decisions in *Moore* and *Shane*, reaching the same result as the case at bar, in which the differences in *modus operandi* and time were far less pronounced. In *Moore* the attacks occurred two months apart. One was an especially violent rape, sex offense (fellatio) and physical assault at night in the victim's apartment in which the perpetrator threatened to kill the victim, and the other assault took place during the day in a store where defendant performed cunnilingus on the other victim, otherwise molested but never penetrated her, and never threatened or verbally abused her. In *Shane*, a prosecution for first degree sexual offense, the admission of evidence that defendant had participated in oral sex with a prostitute seven months earlier constituted reversible error.

For the reasons given, defendant is given a

New trial.

Justice MITCHELL concurring.

I concur in the holding of the Court. I write separately to emphasize my view that the evidence of the defendant's alleged sexual contacts with his sister nine years before trial was made irrelevant and therefore inadmissible *solely* because those sexual contacts were too remote in time to be probative or relevant. Had the defendant's alleged sexual contacts with his sister occurred at a time reasonably close to the acts for which he was being tried, I believe evidence of them would have been admissible under Rule 404(b) to show the defendant's intent and to identify the defendant—and not his wife—as the perpetrator of the sex offenses against his sister's little children. *See generally* 1 Brandis on North Carolina Evidence § 92 (2d rev. ed. 1982); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978).

Justices MEYER and MARTIN join in this concurring opinion.

STATE OF NORTH CAROLINA v. LLOYD PHILLIP GAMBRELL

No. 363A84

(Filed 29 August 1986)

Constitutional Law § 31— sanity at time of offense—significant factor at trial—defendant entitled to assistance of psychiatrist

When a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the State is required to provide access to a psychiatrist's assistance on this issue. Defendant made such a showing, though there was some evidence to the contrary, where he offered evidence that physicians at a hospital, 10 weeks after defendant was placed in custody, determined that he was then in need of psychiatric care, treatment and examination; he appeared at that time to be comatose; defendant had been unable to speak cogently with his counsel; he was incapable of responding to questions posed to him in open court; on admission at Dorothea Dix initial professional impressions were that he suffered from "an acute psychosis, probably schizophrenic in type"; defendant was treated therapeutically with psychotropic drugs which were prescribed for him upon his discharge; one of the doctors at Dix recommended that defendant be followed either at the mental health center or by the jail physician after his discharge; defendant's version of the crime as recited in the hospital summary was totally different from actual events; and defendant had a family history of depression and mental illness.

BEFORE *Seay, J.*, presiding at the 11 June 1984 Criminal Session of Superior Court, FORSYTH County, defendant was convicted of first degree murder. Following a sentencing hearing held pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. From judgment imposing a sentence of death, defendant appeals as a matter of right. N.C.G.S. § 7A-27(a) (1981 and Cum. Supp. 1985).

Lacy H. Thornburg, Attorney General, by David Roy Blackwell and Joan H. Byers, Assistant Attorneys General, for the state.

David B. Hough, for defendant appellant.

EXUM, Justice.

Defendant's appeal presents a number of assignments of error. We find his assignment directed to the trial court's denial of his motion to be furnished a psychiatrist to assist in his defense is dispositive of the appeal. We hold the court erred in denying this motion and the error entitles defendant to a new trial.

On 8 November 1983 defendant was arrested and placed in custody for the 4 November 1983 murder of Thomas Edward Burke. He was indicted on 9 January 1984. According to evidence later introduced at defendant's trial Burke was defendant's supervisor at Leinbach Machinery Company in Winston-Salem. On 3 November 1983 Burke questioned defendant about defendant's absenteeism. Burke asked defendant if he disliked working at Leinbach, whereupon defendant stormed out of the room angrily and slammed the door. At 8:30 a.m. on 4 November 1983 defendant entered Burke's office, stated "I have the answer to your question," and, with a sawed-off shotgun, shot Burke in the head, fatally wounding him.

At the guilt-innocence phase of the trial defendant presented no evidence, and the jury found him guilty of first degree murder.

At the sentencing phase of the trial the state offered evidence that defendant had entered a plea of guilty to federal bank robbery in 1977. Defendant offered evidence, including his own testimony, which tended to show that he had led a deprived and harsh childhood. Upon reaching adulthood the defendant married. However, during the marriage he suffered severe emotional prob-

lems. He would often become depressed and despondent. This depression led to bouts of alcohol and drug abuse. Eventually the defendant lost his job and separated from his wife. Shortly thereafter he robbed a federal bank. He turned himself in to the authorities and subsequently pled guilty to the offense.

While in prison the defendant completed his high school education and took several automotive training courses. He also joined the United States Jaycees. Defendant was once disciplined by being placed in solitary confinement. In prison defendant received medicinal, psychiatric therapy.

Upon his release from prison the defendant secured employment with Leinbach Machinery Company through his probation officer. The defendant continued to suffer from depression after his release from prison. His mental and emotional problems were further exacerbated by problems with his mentally ill sister and difficulties at work.

Based upon the evidence introduced during the sentencing phase of the trial, the trial court submitted one aggravating circumstance: that "defendant had been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3). The trial court also submitted eight mitigating circumstances.[1] The jury found the existence of the ag-

1. These were:

"(1) This murder was committed while Lloyd Phillip Gambrell was under the influence of mental or emotional disturbance.

"(2) The capacity of Lloyd Phillip Gambrell to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

"(3) Lloyd Phillip Gambrell was a loving and caring father to his natural daughter and to his stepchildren.

"(4) That during the period 1977 through 1981 the defendant completed certain courses of study.

"(5) Until about two or three weeks before November 4, 1983, Lloyd Phillip Gambrell had been considered a good worker by his supervisor, the deceased.

"(6) During the bank robbery in 1977, no individuals were in any way harmed by Lloyd Phillip Gambrell.

gravating circumstance and the existence of one or more of the mitigating circumstances. The jury went on to find that the mitigating circumstances were insufficient to outweigh the aggravating circumstance and that the aggravating circumstance was sufficiently substantial to call for the imposition of the death penalty, when considered with the mitigating circumstances found. The jury returned a recommendation that the defendant be sentenced to death, and the trial court entered judgment accordingly.

I.

Defendant assigns as error the trial court's denial of his pretrial motion for the appointment of a psychiatrist to assist in his defense. We find merit in this assignment.

Following defendant's indictment for murder on 9 January 1984, his counsel orally moved the court on 16 January that the defendant be committed to a state mental facility for observation and treatment to ascertain whether he had the capacity to proceed with the trial. The trial court found that defendant had been examined that morning by physicians at Forsyth County Memorial Hospital and found to be in need of psychiatric care, treatment, and examination. Defendant had appeared comatose and had been unable to speak cogently with his attorney. In open court defendant seemed incapable of responding to questions posed to him. The trial court then concluded and ordered that the defendant should be sent to Dorothea Dix Hospital for observation and treatment to determine his capacity to proceed with trial.

Defendant was admitted to Dorothea Dix Hospital on 16 January 1984 where he remained until his discharge on 27 February 1984.

On 9 March 1984, the defendant moved in writing that the trial court appoint Dr. Selwyn Rose, M.D., a psychiatrist, and Dr. Steven Bradbard, Ph.D., a psychologist, to "independently evaluate and assess the defendant's mental and emotional capabilities

"(7) During the bank robbery in 1977, no shots were fired by Lloyd Phillip Gambrell or anyone else involved in the said situation.

"(8) Any other circumstances arising from the evidence which the jury deems to have mitigating value."

at the time of" the alleged murder. Defendant's motion asserted that defendant has "in the past suffered from serious mental and emotional illnesses." The motion also asserted that defendant's "mental and emotional status at the time of the alleged capital offense is of paramount importance for use in the defendant's defense and for possible use in establishing a mitigating factor in the event a jury is called upon to recommend a sentence." Finally the motion asserted that without the appointment of a forensic psychiatrist and an assisting psychologist to evaluate defendant's mental and emotional status, defendant because of his indigency "will be unable to properly defend himself against the said capital charges."

In support of this motion for psychiatric assistance, defendant presented the discharge summary and psychiatric evaluation of defendant prepared by Dr. J. D. McRee at Dorothea Dix Hospital and dated 27 February 1984. According to this document defendant's chief complaint upon admission was "I've been hearing and seeing things." "In appearance he was considered a catatonic black male." His speech was slow "with some degree of blocking," and his mood "was considered flat." His thinking was "considered as poor." Defendant suffered from auditory and visual hallucinations and delusions under which he stated "there were beeping objects in the sky that were controlling his mind." His concentration, memory, intellectual functions, judgment and insight were described as poor. His orientation was only to name, and he could not remember his birthday. Dr. McRee's impression on admission was that defendant suffered from "an acute psychosis, probably schizophrenic in type." Psychological testing indicated defendant was experiencing unusually high levels of stress, depression, anxiety, "somatic concerns," and feelings of distrustfulness. Testing did not "suggest a psychotic disorder."

The evaluation also included a brief recitation of the defendant's personal history, including references to a history of depression and mental illness in the defendant's family, defendant's employment problems, and his incarceration. The evaluation gave defendant's description of the incident for which he was charged as follows:

> Patient states that his memory is hazy to the charges for which he was arrested. He states that he went to boss and

asked for his money. He felt that at this time things went out of whack and he told his boss that the boss had made a mistake. The boss told him to return to work. He apparently went out to his van and got his shotgun and came back in and tried to talk with his boss. At first when he came in he stated that he had not been drinking but later he did say that he had been drinking fairly much and that he was drinking at the time. He understood that he told the man that he had found an answer to his problem and that would be to shoot the man.

The evaluation showed defendant had been treated at the hospital with the drugs Haldol and Cogentin. Dr. McRee noted the following at the time of defendant's discharge:

At the present time he seems to be completely recovered from his psychotic episode that was described on admission.

Analysis and Opinions:

In my opinion Mr. Gambrell is capable of proceeding to trial since he understands the nature of his legal situation and is able to cooperate with his attorney. As to responsibility for his actions at the time of the alleged crime I have found no mental defect or mental disorder which would have prevented him from distinguishing right from wrong with respect to the current charge. Patient expresses that he was drinking alcohol at the time that the crime occurred and that his memory is somewhat hazy about what happened. The alcohol was taken on a voluntary basis and therefore does not reduce his responsibility for his actions. It is my impression that the patient probably had an epidose while in jail of alcohol withdrawal syndrome and that this explains his behavior, which included visual and auditory hallucinations and some delusions. These have cleared completely and are no longer present.

Diagnoses:

Axis I: Alcohol withdrawal, delirium, now recovered—291.00

Axis II: Mixed personality disorder with antisocial passive-aggressive paranoid tendencies—301.89

Axis III: Obesity

Dr. McRee prescribed the drugs Haldol and Cogentin for defendant and recommended that defendant be discharged to the sheriff and "followed by the mental health center or the jail physician until such time that disposition is decided."

On 12 March 1984, the trial court denied defendant's motion for the appointment of psychiatric experts. The court's order recited as grounds for the denial that, according to the Dorothea Dix Hospital Discharge Summary:

> [D]efendant was evaluated and . . . had delusions and hallucinations due to alcohol withdrawals. The summary further states that patient no longer shows the delusions and hallucinations which he was experiencing while in jail and at the time of admission. These have cleared completely and are no longer present and there was no evidence presented that would tend to show different findings would or may result from a second evaluation.

On 30 March 1984, defendant, pursuant to N.C.G.S. § 15A-959, filed notice of an intent to raise an insanity defense, but no evidence in support of this defense was offered at trial.

We think *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985), decided after defendant's trial but before his case was argued before us, controls the question presented in favor of defendant's contentions. In *Ake* the holding of the Court was expressed as follows:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one.

470 U.S. at 74, 84 L.Ed. 2d at 60. The Court in *Ake* reversed the Oklahoma Court of Appeals, which had rejected an indigent defendant's argument that he should have been provided the services of a court appointed psychiatrist, and remanded the case for

a new trial, Ake having been convicted and sentenced to death without the assistance of a psychiatric expert.

Both the state and defendant recognize that the principle announced in *Ake* controls the question. The issue resolves itself into whether defendant made "a preliminary showing that his sanity at the time of the offense [was] likely to be a significant factor at trial." *Ake v. Oklahoma*, 470 U.S. at 74, 84 L.Ed. 2d at 60. We think defendant made the necessary preliminary showing.

The state argues defendant did not make the necessary preliminary showing. It relies on that portion of the Dorothea Dix Discharge Summary which recites Dr. McRee's opinion that defendant was capable of proceeding to trial and had no mental defect or disorder which would meet the test of legal insanity. The state relies further on Dr. McRee's "impression" that defendant's behavior, including his visual and auditory hallucinations and his delusions, which had cleared, could be explained by an alcohol withdrawal syndrome.

In determining whether defendant has made the threshold showing required by *Ake*, the trial court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. It should not base its ruling on the opinion of one psychiatrist if there are other facts and circumstances casting doubt on that opinion. The question under *Ake* is not whether defendant has made a *prima facie* showing of legal insanity. The question is whether, under all the facts and circumstances known to the court at the time the motion for psychiatric assistance is made, defendant has demonstrated that his sanity when the offense was committed will likely be at trial a significant factor.[2]

Had those portions of the Dorothea Dix report relied on by the state been all that was before the superior court when it

2. *Ake* held also that an indigent defendant is entitled to state furnished psychiatric assistance on issues relating to his mental state which may arise at a capital sentencing hearing. Defendant does not argue this point, apparently because Dr. McRee did testify for defendant at the sentencing hearing. In doing so, Dr. McRee testified that he "was not really pleased" with his earlier alcohol withdrawal syndrome diagnosis because defendant "had been in jail for some time, and it was so long for an alcohol psychosis to be occurring." Dr. McRee testified that when defendant entered Dorothea Dix "he was psychotic. He was incompetent at that time."

denied defendant's motion, the state's position would be stronger. There were, however, a number of other important facts before the trial court at the time it ruled on defendant's motion. These were: (1) Physicians at Forsyth County Memorial Hospital on 16 January 1984, after defendant had been placed in custody for approximately ten weeks, determined that defendant was then in need of psychiatric care, treatment and examination. (2) Defendant appeared at that time to be comatose. (3) Defendant had been unable to speak cogently with his counsel. (4) Defendant was incapable of responding to questions posed to him in open court. (5) On admission at Dorothea Dix initial professional impressions were that he suffered from "an acute psychosis, probably schizophrenic in type." (6) Defendant was treated therapeutically with psychotropic drugs which were prescribed for him upon his discharge. (7) Dr. McRee recommended that defendant be followed either at the mental health center or by the jail physician after his discharge. (8) Defendant's own version of the crime as recited in the hospital summary. (9) Defendant's family history of depression and mental illness. All these facts were enough to show, even in the presence of some evidence to the contrary, that defendant's sanity at the time of the crime was "likely to be a significant factor at trial."

Indeed, the facts in the instant case are strikingly similar to those in *Ake*. In *Ake*: (1) Defendant's behavior at arraignment four months after the offense was so bizarre as to prompt the trial court, *sua sponte*, to have him examined for competency. (2) A state psychiatrist then found Ake to be "delusional . . . [and] a probable paranoid schizophrenic . . ." and recommended a psychiatric evaluation to determine Ake's competency. (3) On admission to a state hospital Ake was found not to be competent to stand trial, and a psychiatrist testified at a subsequent competency hearing that Ake was psychotic. (4) Six weeks later after having received the antipsychotic drug, Thorazine, three times daily, Ake was determined to be competent to stand trial, and the state resumed proceedings against him. (5) Oklahoma recognizes the defense of insanity, under which the defendant has the initial burden of producing evidence.

In the instant case: (1) Two months after the shooting, physicians concluded that defendant was in need of psychiatric examination and treatment. (2) Defendant's behavior in open court was

bizarre, and he was ordered to undergo psychiatric evaluation. (3) On admission defendant was experiencing hallucinations and delusions, was suffering from depression and anxiety, and was thought to have an acute psychosis. (4) After being administered the psychotropic drug Haldol in the highest recommended daily dosage, see Physicians' Desk Reference, 39th ed., 1201-1205 (1985), defendant's symptoms were ameliorated, and he was thought to be competent to stand trial and not to be legally insane. (5) North Carolina also recognizes the defense of insanity with the burden on defendant to establish his legal insanity to the jury's satisfaction. *State v. Mize*, 315 N.C. 285, 337 S.E. 2d 562 (1985).

These similarities between the instant case and *Ake* bolster our conclusion that here defendant made the necessary threshold showing in support of his motion for psychiatric assistance.

In summarizing its decision the Court in *Ake* said:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.

470 U.S. at 83, 84 L.Ed. 2d at 66.

It is clear, therefore, that the constitution does not give an indigent defendant the right to choose his own psychiatrist or even to receive funds to hire a private psychiatric expert. We reject defendant's contention that he is entitled to such an independent, privately employed psychiatrist. The appointment of state employed psychiatrists may fulfill the state's constitutional obligation. Their employment by the state, we are satisfied, creates no conflict of interest which would disable them from fulfilling the constitutional requirements.

What is required, as *Ake* makes clear, is that defendant be furnished with a competent psychiatrist for the purpose of not only examining defendant but also assisting defendant in evaluating, preparing, and presenting his defense in both the guilt and sentencing phases. Dr. McRee, the psychiatrist who examined defendant at Dorothea Dix Hospital, was not appointed for this purpose and did not serve in this capacity. Dr. McRee's involvement with defendant, consequently, did not fulfill the state's constitutional obligation as *Ake* expounded it.

Defendant, therefore, must be given a new trial at which the court will appoint some competent psychiatrist for the purpose of examining defendant and assisting defendant in evaluating, preparing, and presenting his defense in both the guilt and sentencing phases.

The verdict and judgment entered against defendant are, therefore, vacated and the case remanded to the Superior Court of Forsyth County for a

New trial.

MARY McLAIN CHAVIS v. SOUTHERN LIFE INSURANCE COMPANY

No. 606PA85

(Filed 29 August 1986)

Insurance § 18— life insurance—misrepresentations by insurer—incontestability clause

A clause in a life insurance contract prohibiting the insurer, after a certain period of time, from contesting the policy for any reason other than nonpayment of premiums is not affected by the lapse and reinstatement of the policy; therefore, defendant could not contest the policy on the ground of material misrepresentations by the insured in the application for reinstatement where the contestable period had run while the original insurance contract was in effect.

Justice MEYER dissenting.

ON discretionary review of the decision of the Court of Appeals, 76 N.C. App. 481, 333 S.E. 2d 559 (1985), reversing summary judgment entered in favor of defendant by *Creech, J.*, on 11 May

1984 in WAKE County District Court and remanding for entry of summary judgment in favor of plaintiff.

Merriman, Nicholls, Crampton, Dombalis & Aldridge, P.A., by Nicholas J. Dombalis, II and William W. Merriman, III, for plaintiff-appellee.

Poyner, Geraghty, Hartsfield & Townsend, by David W. Long, Cecil W. Harrison, Jr., and Susanna K. Gilchrist, for defendant-appellant.

EXUM, Justice.

The pivotal issue concerns the interpretation to be given to provisions of a life insurance contract. Specifically, the issue is whether a clause in the contract prohibiting the insurer, after a certain period of time, from contesting the policy for any reason other than nonpayment of premiums is affected by the lapse and reinstatement of the policy. We hold that it is not and affirm the Court of Appeals.

On 19 April 1975, the defendant issued a life insurance policy to plaintiff's husband, Leotha Jim Chavis, in the face amount of $17,000 with the plaintiff named beneficiary. Premiums were to be paid on a monthly basis. The contract of insurance contained the following pertinent provisions:

> THE CONTRACT—This policy and the application therefor, a copy of which is attached hereto and made a part hereof, constitute the entire contract. All statements made by the Insured or in his behalf in the application in the absence of fraud shall be deemed representations and not warranties and no statement shall avoid any payment under this policy or be used in defense of any claim hereunder unless it is contained in one of these instruments.
>
> . . . .
>
> INCONTESTABILITY—After this policy shall have been in force during the lifetime of the Insured for two full years from the date hereof, it shall be incontestable except for non-payment of premium, and except as to the provisions, if any, granting total and permanent disability insurance, and the provisions, if any, granting additional insurance specifically against death by accidental means.

. . . .

REINSTATEMENT—If this policy shall lapse in consequence of default in payment of any premium it may be reinstated at any time within five years upon evidence of insurability satisfactory to the Company and the payment of the defaulted premiums with interest . . . .

On 19 April 1980, the policy lapsed due to nonpayment of premium by the insured. Under the reinstatement provision the insured was entitled to have the lapsed policy reinstated at any time within five years of the default upon a showing of insurability satisfactory to the company and payment of the defaulted premiums with interest. On 25 June 1980, Mr. Chavis completed and returned an application for reinstatement of the policy. On the application for reinstatement Mr. Chavis answered several questions including the following:

> Have you or any person to be insured by this policy had any sickness or injury or been attended by any physician within the past 5 years, or since the issuance of the policy, if later? NO
>
> To the best of your knowledge and belief are all persons to be insured in good health? YES

Mr. Chavis also signed a statement to the effect that all answers given by him on the application were true. The policy was subsequently reinstated upon the payment of the defaulted premiums and interest.

Mr. Chavis continued to make the monthly payments until 25 July 1981 when he died in a house fire. Plaintiff thereupon filed a claim for the proceeds of the policy. The company denied payments under the policy contending that certain statements made by Mr. Chavis in the application for reinstatement were fraudulent and material misrepresentations of fact. Specifically, the company asserted that the defendant had been untruthful when he stated on the application for reinstatement that he had not been ill or attended by a physician within the past five years and that he was in good health.

The plaintiff initiated this action seeking payment of the proceeds with interest plus attorney fees and court costs. The de-

fendant filed its answer alleging that the insured's misrepresentations rendered the reinstatement void and invalid. Both parties subsequently filed motions for summary judgment. The plaintiff's motion for summary judgment was denied 27 January 1984. The defendant's motion for summary judgment was granted 11 May 1984. The Court of Appeals vacated summary judgment in favor of the defendant and remanded the case for entry of summary judgment in favor of the plaintiff ruling that the incontestability clause in the policy foreclosed the defendant from asserting the insured's alleged misrepresentation in the application for reinstatement as a defense to payment of benefits under the policy.

It is well established that contracts for insurance are to be interpreted under the same rules of law as are applicable to other written contracts. *E.g., Motor Co. v. Insurance Co.*, 233 N.C. 251, 63 S.E. 2d 538 (1951); *Woodell v. Insurance Co.*, 214 N.C. 496, 199 S.E. 719 (1938); *Crowell v. Insurance Co.*, 169 N.C. 35, 85 S.E. 37 (1915). One of the most fundamental principles of contract interpretation is that ambiguities are to be construed against the party who prepared the writing. *E.g., O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978); *Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E. 2d 473 (1974); *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295 (1948); *Hardy v. Ward*, 150 N.C. 385, 64 S.E. 171 (1909). Therefore, in an insurance contract all ambiguous terms and provisions are construed against the insurer. *E.g., Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978); *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970); *Jolley v. Insurance Co.*, 199 N.C. 269, 154 S.E. 400 (1930).

Consistent with these principles is the rule that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot thereafter be contested by the insurer on any ground not excepted from the incontestability provision. *Trust Co. v. Insurance Co.*, 173 N.C. 558, 92 S.E. 706 (1917). The incontestability clause contained in the policy in question explicitly states that after the policy had been in force for two years it could not be contested by the company except for nonpayment of premium and except as to the provisions, if any, granting total and permanent disability insurance or granting additional insurance for accidental death. It is clear that none of these exclusions to noncontestability are relevant here. It is undisputed that the insured paid the monthly premiums from the

time of the policy's reinstatement until his death. Also, the insurer is not contesting the provisions of a disability insurance policy. Finally, the reinstatement of the lapsed policy did not constitute the purchase of "additional" life insurance. Reinstatement of a life insurance policy means that the policy is put back into force and effect. 1A J. Appleman & J. Appleman, *Insurance Law and Practice* § 320, at 356 (1981). Reinstatement of a lapsed policy does not result in the issuance of new or additional insurance. Since the incontestability provision does not expressly permit the company to contest the policy on grounds of material misrepresentations by the insured beyond the two-year limit, ordinary rules of contract construction would preclude the company from asserting this defense.

The defendant, however, contends that this Court should adopt the rule that when a lapsed insurance policy is reinstated, the contestability period contained in the original policy is renewed as to misrepresentations in the reinstatement application. We acknowledge that this appears to be the majority view. *See* 1A J. Appleman & J. Appleman, *Insurance Law and Practice* § 320, at 356-58 (1981) (and cases cited therein). However, some jurisdictions have adopted the view that if the contestable period has run the insurer may not assert any defense barred by the incontestability clause, whether such defense arose out of the original contract or out of the application for reinstatement. *See, e.g., Munn v. Robinson*, 92 F. Supp. 60 (W.D. Ark. 1950); *New York Life Insurance Co. v. Dandridge*, 202 Ark. 112, 149 S.W. 2d 45 (1941); *Burnham v. Bankers Life and Casualty Co.*, 24 Utah 2d 277, 470 P. 2d 261 (1970). These cases reason that the reinstatement creates no new contract, but merely revives the original contract to the same extent as if there had been no lapse. If the contestability period has run the company is precluded from asserting a nonreserved defense to the same extent as if no lapse had occurred.

We find this reasoning persuasive. Indeed, in *Petty v. Insurance Co.*, 212 N.C. 157, 161, 193 S.E. 228, 231 (1937), the Court said:

> "The reinstatement of the policy or contract of insurance did not have the effect of creating a new contract of insurance, dating from the time of the renewal. It had the effect only of

continuing in force the original contract of insurance which would, under its terms, have terminated and become void if it had not been reinstated in the manner and within the time provided in the original contract."

The defendant contends the holding in *Petty* compels a decision in its favor. In *Petty* a life insurance policy lapsed due to nonpayment of premiums. The insured subsequently applied for reinstatement of the policy. Under the policy the insured was required to sign a certificate of health in order to obtain reinstatement of the policy. In the certificate of health the defendant was required to answer whether he was in good health and whether he had been sick or required the services of a physician during the past year. He answered these questions "yes" and "no" respectively. The company thereupon reinstated the policy. The insured subsequently died and his beneficiary sought to collect the proceeds. The insurance company refused payment alleging that the insured made material misrepresentations concerning his health in the certificate of health. The jury found that the representation concerning whether he had been sick or required the services of a physician during the past year was untrue and returned a verdict in favor of the company. This Court affirmed, holding that the representation in the certificate of health was required as a condition precedent to reinstatement and that a truthful answer was required. Since the jury found the statement to have been false, the Court ruled that the policy was not in law reinstated. Defendant contends *Petty* is squarely on point and controls the outcome of this case. We disagree.

In *Petty* the Court noted the "representation in the certificate of health was required as a condition precedent to reinstatement." *Id.* at 162, 193 S.E. at 231. Here there is no such requirement in the reinstatement provision. There were only two conditions precedent to reinstatement of this policy should it lapse: presentation of evidence of insurability satisfactory to the company and payment of the defaulted premiums with interest. It is undisputed that the latter condition precedent was fulfilled. The former condition was also met. Evidence was presented to the company concerning the defendant's health (i.e., insurability). The company obviously found this evidence to be satisfactory since it subsequently reinstated the lapsed policy. Since both conditions precedent were met, the policy was reinstated in law.

Petty did not involve, or at least did not consider the effect of, a two-year incontestability clause. *Petty*, as we have noted, recognized that reinstatement of a policy of life insurance does "not have the effect of creating a new contract of insurance, dating from the time of the" reinstatement. *Id.* at 161, 193 S.E. at 231. Rather, it has "the effect only of continuing in force the original contract of insurance." *Id.* When, therefore, the instant policy was reinstated pursuant to the terms of the reinstatement clause, it is as if there had been no interruption in the policy's other provisions including the incontestability clause. The company, pursuant to this clause, may not now, after the lapse of two years, contest the policy on any grounds other than those excepted from the provisions of the incontestability clause.

For the reason given, the decision of the Court of Appeals is

Affirmed.

Justice MEYER dissenting.

I dissent.

By its holding today, the Court expressly declines to follow the rule adopted by the overwhelming majority of jurisdictions which hold that upon reinstatement of a life insurance policy, the contestability period contained in the original policy is renewed as to misrepresentations in the reinstatement application.

One commentator has restated the rule which the majority opinion declines to adopt:

> [T]he great weight of authority holds that upon reinstatement *the contestable period begins running anew.* Therefore, the company can contest the validity of the reinstatement for fraud or other reasons at any time within the new contestable period (same length of time as the original contestable period) which started running upon the day the policy was reinstated. As to fraud, the general rule is that reinstatement will be avoided if the insurer can prove the allegedly false representation of a material fact.

7 S. Williston, *A Treatise on the Law of Contracts* § 921 at 655 (3d ed. 1963) (emphasis in original) (footnotes omitted). *See also* 1A J. Appleman & J. Appleman, *Insurance Law and Practice* § 320 at

356 (1981); Annot. "Insurance: Incontestable Clause as Affected by Reinstatement of Policy," 23 A.L.R. 3d 743 (1969).

One of the leading authorities on insurance law has stated that the majority rule "seems . . . quite the best reasoned of the diverse results reached." 1A J. Appleman & J. Appleman, *Insurance Law and Practice* § 320 at 356 (1981). In approving the majority rule, commentators explain the application of an incontestability clause to a reinstated policy:

> In this policy, it is provided that in the event of lapse or forfeiture for nonpayment of premiums, the policy may be reinstated by complying with certain conditions. By reinstatement is meant that the policy is put back into force and effect; not that a new policy is issued containing different terms or provisions. It is only reasonable, reason these courts, that the old defenses which were barred by the running of the first incontestable clause remain barred—they are not automatically revived. But as to new representations made which may be false and fraudulent, the insurer is entitled to a reasonable time to investigate and to determine their truth.

1A J. Appleman & J. Appleman, *Insurance Law and Practice* § 320 at 356 (1981).

This view is supported not only by a majority of courts which have addressed the issue, but also by sound public policy. The rationale for the majority rule was set forth in *New York Life Ins. Co. v. Burris*, 174 Miss. 658, 165 So. 116 (1936):

> Any other view would open the door to the grossest deceit and fraud in securing the reinstatement of a policy that had become incontestable under its original provisions. The contrary view would permit the holder of a lapsed policy, wherein the original contestable period had expired, who was facing impending death from a known fatal malady, to secure reinstatement by false and fraudulent representations of his continued good health and insurability, and then rest securely behind the protection of the original incontestable clause.

Id. at 671-72, 165 So. at 120.

Ironically, in support of the position it adopts today, the majority opinion relies on cases decided under Arkansas and Utah

law no longer applicable in either state. In both jurisdictions, the legislature has long since recognized the wisdom of the view taken by a majority of jurisdictions which have addressed the question at issue in this case.

The Arkansas cases, *Munn v. Robinson*, 92 F. Supp. 60 (W.D. Ark. 1950) (diversity jurisdiction, Arkansas law applied), and *New York Life Ins. Co. v. Dandridge*, 202 Ark. 112, 149 S.W. 2d 45 (1941), would be decided differently under legislation enacted in 1959, some twenty-seven years ago. Current Arkansas law provides:

> The reinstatement of any policy of life insurance or annuity contract hereafter delivered or issued for delivery in this State *may be contested on account of fraud or misrepresentation of facts material to the reinstatement only for the same period following reinstatement* and with the same conditions and exceptions as the policy provides with respect to contestability after original issuance.

Ark. Stat. Ann. § 66-3324 (1980) (emphasis added).

Likewise, a different result would have obtained in *Burnham v. Bankers Life & Casualty Co.*, 24 Utah 2d 277, 470 P. 2d 261 (1970), cited in the majority opinion, if the insurance policy in that case had been written subsequent to the 1963 legislation, enacted some twenty-three years ago, which provided in pertinent part:

> (1) A reinstated policy of life insurance or annuity contract may be contested on account of fraud or misrepresentation of facts material to the reinstatement only for the same period following reinstatement and with the same conditions and exceptions as the policy provides with respect to contestability after original issuance.

1963 Utah Laws ch. 45, p. 236.[1]

1. The Utah law currently in force provides in pertinent part:

> "A reinstated life insurance policy or annuity contract may be contested for two years following reinstatement on the same basis as at original issuance, but only as to matters arising in connection with the reinstatement. Any grounds for contest available at original issuance continue to be available for contest until the policy has been in force for a total of two years during the lifetime of the insured."

Utah Code Ann. § 31A-22-403(3) (1986).

The majority opinion seeks to distinguish, but in effect overrules, *Petty v. Insurance Co.*, 212 N.C. 157, 193 S.E. 228 (1937). In *Petty*, the Court ruled that the "representation in the certificate of health was required as a condition precedent to reinstatement." *Id.* at 162, 193 S.E. at 231. The certificate of good health was "material as a matter of law," and thus a truthful answer was required in the certificate. Because the statements in the health certificate were false, the company was allowed to deny that coverage had been reinstated.

The majority acknowledges that "presentation of evidence of insurability satisfactory to the company" was a condition precedent to reinstatement of Mr. Chavis' life insurance policy. The majority reasons that because "[e]vidence was presented to the company concerning the defendant's health" and because Southern thereafter reinstated the lapsed policy, the company "obviously" found satisfactory Chavis' evidence of good health.

If the reasoning of the majority opinion were applied to the facts in the *Petty* case, no doubt the outcome would have been different; the insurer would have been estopped to deny coverage inasmuch as the company had *obviously* found the insured's representations to be satisfactory, because it "reinstated the policy and accepted from the insured annual premium payment." *Petty*, 212 N.C. at 158, 193 S.E. at 229.

I trust that by implicitly overruling *Petty*, the majority opinion will stir the legislative branch to enact legislation which will restore wisdom and fairness in the application of insurance incontestability provisions to reinstatement of lapsed policies.

U.S. HELICOPTERS, INC. v. DAVID C. BLACK

No. 796PA85

(Filed 29 August 1986)

1. Bailment § 3.3— defendant as bailee of helicopter—sufficiency of evidence

In an action to recover for damages to plaintiff's helicopter, plaintiff's evidence was sufficient to show that defendant was bailee of the aircraft where it tended to show that plaintiff contracted with defendant and with defendant alone to hire out to defendant a helicopter so that he could learn to fly; defend-

ant furnished his own instructor and paid plaintiff the sum charged; on the day of the crash, plaintiff gave defendant access to the helicopter, and defendant and his instructor took it out; and no agent of plaintiff accompanied them.

2. Principal and Agent § 1— helicopter crash during flying lesson—flight instructor as defendant student's agent

In an action to recover for damages to plaintiff's helicopter which occurred during a crash while defendant was taking flying lessons, plaintiff's evidence was sufficient to show that the flight instructor was defendant's agent where it tended to show that defendant contracted with plaintiff to furnish his own instructor; defendant selected a friend whose other contacts with plaintiff were infrequent and occurred largely after the agreement between plaintiff and defendant; the instructor did not make a practice of teaching students to fly helicopters; except for substituting for plaintiff's regular instructor on one occasion, defendant was the instructor's only pupil; and defendant furnished the helicopter in which the instructor taught him.

ON discretionary review of a decision of the North Carolina Court of Appeals, 77 N.C. App. 827, 336 S.E. 2d 449 (1985), affirming an order granting defendant's motion for a directed verdict entered by *Collier, J.*, at the 11 February 1985 Civil Session of Superior Court, UNION County. Heard in the Supreme Court 14 May 1986.

Dawkins & Lee, P.A., by Koy E. Dawkins, for plaintiff-appellant.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins III, for defendant-appellee.

FRYE, Justice.

Plaintiff initiated this suit on 10 January 1983 by filing a complaint that alleged, in substance, that defendant had negligently damaged one of its helicopters while in possession of the helicopter as bailee. The case was tried before a jury at the 11 February 1985 Civil Session of Superior Court, Union County. At the close of plaintiff's evidence, defendant moved for a directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, and the trial judge granted the motion. Plaintiff appealed, and the Court of Appeals affirmed the decision of the trial judge. Plaintiff petitioned this Court for discretionary review of the Court of Appeals' decision. The petition was allowed 18 February 1986. For the reasons outlined below, we find that defend-

ant's motion should not have been granted and accordingly reverse the decision of the Court of Appeals.

On defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and viewed in the light most favorable to the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). The plaintiff must also be given the benefit of every reasonable inference to be drawn therefrom. *Id.* The question for the trial judge to resolve is the sufficiency of the evidence, when viewed in this manner, to take the case to the jury and support a verdict for the plaintiff. *Id.* This question should not be resolved against the plaintiff unless it appears, as a matter of law, that the plaintiff cannot recover upon any view of the facts that the evidence reasonably tends to establish. *Id.* In the instant case, when taken as true and viewed in the light most favorable to the plaintiff, the evidence showed the following facts.

Plaintiff in 1982 was in the business of providing helicopters for a variety of charters, for rentals, and for instruction. Its usual practice with students was to charge the student a single hourly rate that included the use of a helicopter and the services of an instructor. It had its own regular instructor. Defendant approached plaintiff in April of 1982 about renting a helicopter to learn to fly. Defendant specifically rejected the services of plaintiff's regular instructor, however, preferring to receive instructions from a friend named Ron Manning. Manning was a qualified instructor. Plaintiff's acting president, Creswell Horne, Jr., accordingly agreed to defendant's use of Manning and arranged to rent a helicopter to defendant for $115 an hour, the difference between his usual hourly rate for students and the fee he paid his regular instructor. Defendant and Manning flew together on several occasions.

On 18 September 1982, defendant and Manning took the helicopter out to practice certain maneuvers which defendant needed to improve before he could obtain a helicopter pilot's license. The helicopter was in good condition when defendant and Manning took it out. According to defendant's testimony at a pretrial deposition introduced at trial, Manning told him to get on the controls with him and "follow through," which meant that defendant was to keep his hands and feet on the controls while the other man performed a particular maneuver so that defendant could

"feel" what he did. Manning then began a maneuver known as an autorotation. In this maneuver, according to the evidence, the pilot simulates a safe landing after an engine failure. The pilot lands the helicopter, or alternatively stops and hovers within a few feet of the ground, without using the engine. On this occasion, however, instead of either landing or coming to a halt and hovering just off the ground, the helicopter crashed. Defendant stated that Manning later told him that during the maneuver, he, Manning had told defendant to take over. Defendant testified that he did not hear Manning due to an unexplained failure of the intercom, which had been working well up to that point and was working after the crash. Manning told Horne after the accident that he had been unable to get hold of the controls in time to prevent the crash.

Both parties agreed that Manning, as the instructor, was the "pilot in command" as defined by F.A.A. regulations. The "pilot in command" is responsible for the operation and safety of an aircraft during flight. 14 C.F.S. § 91.3 (1986).

Plaintiff called an expert witness who testified in effect that Manning had been negligent in several respects, including, *inter alia*, his omission to verify that defendant had heard him before releasing control and his failure to recover the controls in time to prevent the crash.

Plaintiff also introduced testimony about the amount of its damages.

The Court of Appeals concluded that the trial court did not err in directing a verdict for defendant because the plaintiff's evidence tended to show that the helicopter was damaged as a result of the negligence of Manning, the instructor pilot, rather than defendant.

However, the rule in North Carolina is that a bailee is liable not only for the results of his own negligence but also for that of his agents. *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356 (1953). Therefore, if plaintiff's evidence, taken in the light most favorable to plaintiff, could reasonably establish that defendant was a bailee and that Manning was defendant's agent, a directed verdict for defendant would not be proper. *See Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678.

[1] Accordingly, the first question to consider is whether defendant was the bailee of the helicopter. To establish the existence of a bailment with defendant as bailee, plaintiff must show that it delivered the helicopter to defendant, that defendant accepted it, and that it was in defendant's sole custody. *See Freeman v. Service Co.*, 226 N.C. 736, 40 S.E. 2d 365 (1946); *Wells v. West*, 212 N.C. 656, 194 S.E. 313 (1937). Plaintiff's evidence, taken in the light most favorable to the plaintiff, established that plaintiff contracted with defendant and with defendant alone to hire out to defendant a helicopter so that defendant could learn to fly. Defendant furnished his own instructor, and defendant paid plaintiff the sum charged. On the day of the crash, plaintiff gave defendant access to the helicopter, and defendant and Manning took it out. No agent of plaintiff's accompanied them. Under the facts of this case, plaintiff has shown sufficient evidence, if believed, to establish that a bailment did exist and that defendant was the bailee.

Defendant, however, contends that he was not the bailee because plaintiff's evidence establishes that plaintiff surrendered control to Manning, not to defendant, and that Manning was in control at the time of the crash. To support this argument, defendant relies upon F.A.A. regulations placing responsibility for the safety of an aircraft upon the pilot in command, in this case, Manning, and upon the fact that according to defendant's testimony, he believed that Manning was in fact in control of the helicopter. While these points may establish that Manning had *actual* control, nevertheless, this fact would not alter defendant's status as bailee. Taken in the light most favorable to the plaintiff, plaintiff's evidence, as discussed previously, was sufficient to establish that plaintiff hired the helicopter out to defendant for defendant's own instructor to teach him how to fly, not to Manning to use in order to teach a selected student how to fly. Manning's control of the helicopter in this instance therefore came about only because defendant entrusted him with the task of teaching defendant to fly. Defendant as bailee remained in *legal* control of the helicopter.

[2] Having established that plaintiff introduced sufficient evidence to show that defendant was the bailee of the helicopter, we turn next to the question of whether Manning was his agent. " 'An agent is one who acts for or in the place of another by au-

thority from him.' " *Julian v. Lawton*, 240 N.C. 436, 440, 82 S.E. 2d 210, 213 (1954). On this record, viewed in the light most favorable to the plaintiff, Manning was defendant's agent. Defendant contracted with plaintiff to furnish his own instructor. He selected Ron Manning, whose other contacts with the plaintiff were infrequent and occurred largely after the agreement between plaintiff and defendant. As far as the evidence at trial discloses, Manning did not make a practice of teaching students to fly helicopters. Rather, except for substituting for plaintiff's regular instructor on one occasion, defendant appears to have been Manning's only pupil. Defendant furnished the helicopter in which Manning taught him. Taken as a whole, a jury could conclude from these facts that Manning was acting for defendant and with his authority in instructing defendant and operating the helicopter. Therefore, under the rule set forth in *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356, defendant would be liable for Manning's negligence.

Defendant argues that his case is distinguishable from *Vincent v. Woody*. Defendant would have this Court interpret *Vincent v. Woody* as holding that if the bailor consents to the bailee's entrustment of the bailed goods to a third person, then the bailee is not liable to the bailor for the negligence of that third person. Plaintiff assented to defendant's choice of Manning. Defendant argues that he cannot therefore be liable for Manning's negligence.

Defendant's argument is based upon a misreading of *Vincent v. Woody*. In that case, plaintiff Vincent delivered his automobile and certificate of title to defendant Woody for Woody to sell on his behalf. Woody in turn delivered the car to one Herndon for repairs, and Herndon drove the car and negligently damaged it. Plaintiff Vincent contended that defendant Woody delivered the car to Herndon without his knowledge or consent, and Woody contended that he and plaintiff together delivered the car to Herndon and that plaintiff gave Herndon the instructions to repair the car. The jury found for the plaintiff. On defendant Woody's appeal, the Court held that on the record before it, Herndon had been Woody's agent. Thus, in *Vincent v. Woody*, the question was not whether plaintiff consented to defendant's use of defendant's agent, but whose agent Herndon was.

Defendant in the instant case relies upon the following passage to support his interpretation:

> The excerpt from the charge of the court directed to the evidence on this phase of the case, . . . [instructs the jury that] [i]n the event 'the automobile was placed in possession of Herndon without the knowledge, consent, or permission of the plaintiff; and as a result of the automobile having been placed in his possession, Herndon's, without the knowledge, consent, or permission of the plaintiff, and it was then damaged by Herndon; then Woody would be liable for the damage done to said automobile while in the possession of Herndon . . . .'

Vincent, 238 N.C. at 120, 76 S.E. 2d at 358. Defendant notes that the Court went on to hold that the judge's charge was correct.

Taken out of context, the passage quoted above does appear to support defendant's contention. However, this passage appears as part of the following paragraph:

> The plaintiff contended that the vehicle was delivered to Herndon without his knowledge or consent. Woody contended it was delivered by him and plaintiff jointly and plaintiff gave instructions as to the repairs and replacements to be made by the mechanic. The excerpt from the charge of the court directed to the evidence on this phase of the case, to which defendant excepts, lifted out of context, would seem to make defendant an insurer of the safe return of the property bailed in an undamaged condition. In the event 'the automobile was placed in possession of Herndon without the knowledge, consent, or permission of the plaintiff; and as a result of the automobile having been placed in his possession, Herndon's, without the knowledge, consent, or permission of the plaintiff, and it was then damaged by Herndon; then Woody would be liable for the damage done to said automobile while in the possession of Herndon . . . .'

Id. The Court went on to say:

> But it is axiomatic that the charge must be read and construed contextually. Immediately preceding the instruction to which exception is entered the court had correctly instructed the jury as to defendants' liability. Immediately following,

the court emphasized the fact that defendants' liability in any event depended upon the presence or absence of negligence. It then applied the law specifically to the case on trial in the following language:

> 'So that in this case, if you find that the relationship of bailor and bailee existed between the plaintiff and defendant, the defendant had imposed upon him the responsibility of exercising due care to return the property in the same condition as it was when delivered to him, or to keep the same in good order and condition until bail was made. And if by his failure to exercise due care, the property was damaged in any amount, the plaintiff would have carried the burden of the fourth issue, entitling him to nominal damages at least. And this fact is so prominent (sic), that if the defendant placed the car in the hands of some other person; that is to say, if Woody placed the car in the hands of Herndon, and Herndon failed to use due care and subjected it to abuse; then Woody is answerable to any conduct on the part of Herndon that caused a decrease in value of the automobile; and he, Woody, delivering the car to Herndon, would and did make Herndon his agent.'

Id. at 120-21, 76 S.E. 2d at 358-59. The Court then concluded that taken as a whole, the judge's charge to the jury was essentially correct. *Id.* at 121, 76 S.E. 2d at 359.

To summarize, plaintiff has shown sufficient evidence, taken in the light most favorable to it, to establish the existence of a bailment with defendant as bailee, that Manning, the instructor pilot, was acting as defendant's agent, and that the crash was due to Manning's negligence. Accordingly, a directed verdict for defendant was not proper.

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

Reversed and remanded.

STATE OF NORTH CAROLINA v. JOHN DAVIDSON WOODWARD

No. 353PA86

(Filed 29 August 1986)

BEFORE *Battle, J.*, at the 24 June 1985 Session of Superior Court, WAKE County, the order of the District Court dismissing the citation charging defendant with Driving While Impaired was affirmed. Upon the State's appeal, the Court of Appeals reversed the judgment of the Superior Court in a decision reported at 80 N.C. App. 725, 343 S.E. 2d 291 (1986). The defendant's petition under N.C.G.S. 7A-31 for discretionary review of the decision of the Court of Appeals was allowed on 28 August 1986.

Bode, Call & Green, by Howard S. Kohn, for defendant appellant.

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

PER CURIAM.

In reversing the judgment of the superior court which affirmed the order of the district court judge dismissing the case against the defendant for failure of the State to prosecute, the Court of Appeals held that the district court judge abused his discretion.

The test of whether a trial court has abused its discretion has been stated as follows:

> A ruling committed to the trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 324 S.E. 2d 829 (1985).

Applying this test to the findings of fact entered by Judge Cashwell in entering his order of dismissal, we conclude that his ruling was not an abuse of discretion. We therefore reverse the Court of Appeals.

Reversed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; RUFUS L. EDMISTEN, ATTORNEY GENERAL; PUBLIC STAFF; HENRY J. TRUETT; TOWN OF BRYSON CITY; SWAIN COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE, GRAHAM AND JACKSON COUNTIES; THE TOWNS OF ANDREWS, DILLSBORO, ROBBINSVILLE, AND SYLVA; AND THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; MURIEL MANEY; AND DEROL CRISP, APPELLEES	)	
v.	)	ORDER
NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC., APPELLANTS	)	

No. 227A83

(Filed 19 August 1986)

UPON receipt and consideration of the mandate of the Supreme Court of the United States in this cause, issued _____ July 1986, the following order was entered and is hereby certified to the North Carolina Utilities Commission:

"This case is remanded to the North Carolina Utilities Commission for further proceedings consistent with this Court's opinion filed herein on 3 July 1985 but not inconsistent with the opinion of the United States Supreme Court in *Nantahala Power and Light Company, et al. v. Thornburg, et al.*, No. 85-568, decided 17 June 1986, 476 U.S. ---, 90 L.Ed. 2d 943 (1986).

The Bond filed herein on 9 February 1985 (and if the same is no longer in effect, a new bond in a like amount) to secure the payment of any refunds which might be ordered upon the final determination of this proceeding and any appeal therefrom shall continue in full force and effect until final determination of the case or until otherwise ordered by this Court.

By order of the Court in conference, this the 19th day of August 1986.

s/BILLINGS, J.
For the Court"

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; RUFUS L. EDMISTEN, ATTORNEY GENERAL; PUBLIC STAFF; HENRY J. TRUETT; SWAIN COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE, GRAHAM AND JACKSON COUNTIES; TOWNS OF ANDREWS, BRYSON CITY, DILLSBORO, ROBBINSVILLE, AND SYLVA; AND THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; DEROL CRISP	)	
v.	)	ORDER
NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC.	)	

No. 111A84

(Filed 19 August 1986)

UPON receipt and consideration of the order of the Supreme Court of the United States in this cause, issued 23 June 1986, the following order was entered and is hereby certified to the North Carolina Utilities Commission through the North Carolina Court of Appeals:

"This case is remanded to the North Carolina Utilities Commission for further proceedings consistent with this Court's opinion filed herein on 13 August 1985 but not inconsistent with the opinion of the United States Supreme Court in *Nantahala Power and Light Company, et al. v. Thornburg, et al.*, No. 85-568, decided 17 June 1986, 476 U.S. ---, 90 L.Ed. 2d 943 (1986).

The Bond filed herein with the North Carolina Utilities Commission on 7 October 1985 (and if the same is no longer

in effect, a new bond in a like amount) to secure the payment of any refunds which might be ordered upon the final determination of this proceeding and any appeal therefrom shall continue in full force and effect until final determination of the case or until otherwise ordered by this Court.

By order of the Court in conference, this the 19th day of August 1986.

s/BILLINGS, J.
For the Court"

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; NANTAHALA POWER & LIGHT COMPANY, APPLICANT; TAPOCO, INC. AND ALUMINUM COMPANY OF AMERICA, RESPONDENTS	)	
v.	)	ORDER
RUFUS L. EDMISTEN, ATTORNEY GENERAL; PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; COUNTIES OF CHEROKEE, GRAHAM, JACKSON, MACON AND SWAIN; TOWNS OF ANDREWS, BRYSON CITY, DILLSBORO, ROBBINSVILLE, AND SYLVA; TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; HENRY J. TRUETT, HOWARD PATTON, VERONICA NICHOLAS, O. W. HOOPER, JR., ALVIN E. SMITH, AND LARRY LYNN BAILEY, JACKSON PAPER MANUFACTURING COMPANY, INTERVENORS	)	

No. 549A84

(Filed 19 August 1986)

UPON receipt and consideration of the order of the Supreme Court of the United States in this cause, issued 23 June 1986, the following order was entered and is hereby certified to the North Carolina Utilities Commission:

"This case is remanded to the North Carolina Utilities Commission for further proceedings consistent with this Court's opinion filed herein on 13 August 1985 but not inconsistent with the opinion of the United States Supreme Court in *Nantahala Power and Light Company, et al. v. Thornburg, et al.*, No. 85-568, decided 17 June 1986, 476 U.S. ---, 90 L.Ed. 2d 943 (1986).

By order of the Court in conference, this the 19th day of August 1986.

s/BILLINGS, J.
For the Court"

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

ABE v. BOWEN

No. 237P86.

Case below: 79 N.C. App. 369.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

COLE v. DUKE POWER CO.

No. 417P86.

Case below: 81 N.C. App. 213.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

CRAIG v. BUNCOMBE COUNTY BD. OF EDUCATION

No. 392P86.

Case below: 80 N.C. App. 683.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 28 August 1986.

HAGLER v. HAGLER

No. 276PA86.

Case below: 80 N.C. App. 166.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 28 August 1986.

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

HANES v. SPENCER

No. 388P86.

Case below: 80 N.C. App. 724.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

HINSON v. BROWN

No. 394P86.

Case below: 80 N.C. App. 661.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986. Notice of appeal by defendants pursuant to G.S. 7A-30 dismissed 28 August 1986.

HOUSING AUTHORITY OF THE CITY OF WINSTON-SALEM v. HARDY

No. 310P86.

Case below: 80 N.C. App. 166.

Petition for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 28 August 1986.

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

IN RE JACKSON

No. 390P86.

Case below: 80 N.C. App. 724.

Petition by Benjamin Franklin Young for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

IN RE PROPOSED ASSESSMENT v. CAROLINA TELEPHONE

No. 431P86.

Case below: 81 N.C. App. 240.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

IN RE WHITE

No. 410P86.

Case below: 81 N.C. App. 1.

Petition by Vincent Bernard Grier for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

MAPP v. TOYOTA WORLD, INC.

No. 452P86.

Case below: 81 N.C. App. 421.

Petition by defendant (Toyota World, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

N. C. BAPTIST HOS., INC. v. HARRIS

No. 284PA86.

Case below: 80 N.C. App. 167.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 28 August 1986.

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

NORTHWESTERN BANK v. ROSEMAN

No. 439A86.

Case below: 81 N.C. App. 228.

Petition by plaintiff 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 denied 28 August 1986.

OPSAHL v. PINEHURST INC.

No. 432PA86.

Case below: 81 N.C. App. 153.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-32 allowed 28 August 1986.

SPROUSE v. NORTH RIVER INS. CO.

No. 487P86.

Case below: 81 N.C. App. 311.

Petition by defendant for writ of supersedeas and temporary stay allowed 21 August 1986. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied and temporary stay dissolved 28 August 1986.

STATE v. ALBERT

No. 429P86.

Case below: 81 N.C. App. 156.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

STATE v. BRYANT

No. 344P86.

Case below: 77 N.C. App. 459.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 28 August 1986.

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

STATE v. BULLOCK

No. 567P86.

Case below: 82 N.C. App. 301.

Petition by defendant for writ of supersedeas and temporary stay of the judgment of the Court of Appeals denied 22 September 1986.

STATE v. COLEMAN

No. 308P86.

Case below: 80 N.C. App. 271.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

STATE v. COLEY

No. 522P86.

Case below: 82 N.C. App. 301.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 26 August 1986. Petition by Attorney General for writ of supersedeas and temporary stay denied 26 August 1986.

STATE v. DANIEL

No. 537P86.

Case below: 82 N.C. App. 592.

Petition by the Attorney General for writ of supersedeas and temporary stay allowed 5 September 1986. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 17 September 1986.

STATE v. GALLOWAY

No. 396P86.

Case below: 80 N.C. App. 725.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

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

STATE v. HEIDMOUS

No. 419P86.

Case below: 81 N.C. App. 157.

Petition by defendant for discretionary review pursuant to G.S. 7A-32 denied 28 August 1986.

STATE v. HUMPHRIES

No. 613P86.

Case below: 82 N.C. App. 749.

Petition by the Attorney General for writ of supersedeas and temporary stay allowed 2 October 1986 pending consideration and decision of the Attorney General's petition for discretionary review.

STATE v. NEWTON

No. 545A86.

Case below: 82 N.C. App. 555.

Petition by Attorney General for writ of supersedeas and temporary stay dismissed 22 September 1986.

STATE v. THOMAS

No. 434P86.

Case below: 81 N.C. App. 157.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

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

STATE v. THOMAS

No. 437P86.

Case below: 81 N.C. App. 200.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

STATE v. TRUEBLOOD

No. 568P86.

Case below: 82 N.C. App. 763.

Petition by defendant for writ of supersedeas and temporary stay denied 16 September 1986.

STATE v. WOODWARD

No. 353PA86.

Case below: 80 N.C. App. 725.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 28 August 1986.

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

YADKIN VALLEY BANK AND TRUST CO.
v. NORTHWESTERN BANK

No. 381P86.

Case below: 80 N.C. App. 716.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 28 August 1986.

Alford v. Shaw

FRANK O. ALFORD, WILKIE P. BEATTY, AS EXECUTRIX OF THE ESTATE OF PAUL B. BEATTY, CARSON INSURANCE AGENCY, INC., PATRICIA A. EDLUND, STANLEY EDLUND, JAMES M. GILFILLIN, LARRY G. GOLDBERG, RAQUEL T. GOLDBERG, BETTY F. RHYNE, ROBERT R. RHYNE AND NORMAN V. SWENSON, DERIVATIVELY IN THE RIGHT OF ALL AMERICAN ASSURANCE COMPANY, PLAINTIFFS v. ROBERT T. SHAW, AMERICAN COMMONWEALTH FINANCIAL CORPORATION, GREAT COMMONWEALTH LIFE INSURANCE COMPANY, ICH CORPORATION, CHARLES E. BLACK, S. J. CAMPISI, ROY J. BROUSSARD, TRUMAN D. COX, FRED M. HURST, C. FRED RICE, AND PEGGY P. WILEY, DEFENDANTS, AND ALL AMERICAN ASSURANCE COMPANY, BENEFICIAL PARTY

No. 132PA85

(Filed 7 October 1986)

1. **Corporations §§ 4, 6— shareholders' derivative action—fraud and self-dealing alleged against majority of directors—litigation committee recommends settling or not pursuing claims—modified business judgment rule adopted**

In a shareholders' derivative action in which self-dealing and fraud were alleged against the majority of the board of directors, the Supreme Court adopted a version of the business judgment rule of *Auerbach v. Bennett*, 393 N.E. 2d 994, which limits judicial inquiry into a special litigation committee's judgment on pursuing litigation to whether the committee was composed of disinterested independent directors who acted in good faith and followed appropriate investigative procedures, modified to place the burden on defendants at a summary judgment hearing to show that the committee was composed of directors who were disinterested and independent and who conducted an appropriately thorough investigation. If the independence of the directors and the reasonableness of their investigation is established, the directors' good faith in carrying out their duties will be presumed in the absence of evidence to the contrary.

2. **Corporations §§ 4, 6— shareholders' derivative action—fraud and self-dealing alleged against directors—recommendation of special litigation committee against pursuing claims—summary judgment for defendants proper**

The trial judge properly granted defendants' motions for summary judgment in a shareholders' derivative action in which plaintiffs were minority shareholders; plaintiffs had alleged fraud and self-dealing by a majority of the board of directors; the board of directors established a special investigative committee to conduct an investigation and determine whether any legal action should be initiated; the committee recommended that all except two of the claims investigated not be asserted and that the remaining two claims be settled; the record discloses that the board of directors made every effort to insure that outside counsel and the two outside directors comprising the special litigation committee met the requisite qualifications of independence and disinterestedness; plaintiffs did not challenge the independence of the committee except through general, broad allegations of structural bias; the committee interviewed sixteen people, reviewed approximately 3,750 documents, submit-

ted interrogatories to each person who served as a director during the relevant period, and prepared a 409-page report in addition to an appendix which included twenty-five exhibits; the affidavit submitted by plaintiffs contained a challenge to the committee's judgment, not to its independence or good faith, and did not suggest any available information which the committee did not consider; plaintiffs' counsel was afforded every opportunity to provide the committee with information which might have been helpful in assessing the merits of the claims; and the report of the special committee left no doubt that the investigation was exhaustive and undertaken seriously and in good faith, following procedures sufficiently broad in scope and conscientious in execution to insure a thorough review of all allegations and related matters.

Justice FRYE concurring in part and dissenting in part.

Justice MARTIN dissenting.

ON discretionary review, pursuant to N.C.G.S. § 7A-31 from a decision of the Court of Appeals, 72 N.C. App. 537, 324 S.E. 2d 878 (1985), reversing judgment entered by *Snepp, J.*, on 12 December 1983 in Superior Court, MECKLENBURG County. Heard in the Supreme Court on 18 December 1985.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Ralph M. Stockton, Jr. and Daniel R. Taylor, Jr., for plaintiff All American Assurance Company.

Cansler & Lockhart, P.A., by Thomas Ashe Lockhart and Bruce M. Simpson, for plaintiff-appellees.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts and Bruce H. Conners, and Peter G. Pappas, for defendant-appellants Charles E. Black, S. J. Campisi, Roy J. Broussard, Fred M. Hurst, Peggy P. Wiley and Truman D. Cox.

BILLINGS, Chief Justice.

The sole issue on appeal is whether, in North Carolina, the business judgment rule may be applied to a special litigation committee's decision not to pursue derivative claims based upon charges of fraud and self-dealing by a majority of the members of the board of directors of the corporation asserted by minority shareholders. The Court of Appeals concluded that the business judgment rule, "traditionally used by our courts as a defense *on the merits* to allegations of fraud," could not be invoked as "a procedural device to dispose of derivative litigation," 72 N.C. App. at 548, 324 S.E. 2d at 886, and reversed the order of the trial judge

granting summary judgment on all but two claims and approving settlement of the remaining claims. We reverse.

I.

A.

As a result of certain demands made on behalf of a number of minority shareholders of All American Assurance Company ("AAA"), that company's board of directors adopted a resolution establishing a "Special Investigative Committee." The Committee was authorized, "in their independent discretion and judgment," to conduct an investigation into the matters about which complaint had been made and "to determine in their independent judgment based upon such investigation whether in the best interest of AAA and its shareholders any claim or demand shall be made or asserted . . . or whether any legal action shall be initiated against any person or other entity."

Prior to completion by the special litigation committee of its investigation, plaintiffs filed a shareholder's derivative suit in Superior Court, Mecklenburg County. The allegations in the complaint, for the most part, paralleled the claims made earlier which were then under investigation by the Committee. Included in the complaint were allegations of "wrongful, unlawful and fraudulent transactions" undertaken by defendants[1] "to the enormous loss and detriment of All American."

Within a year after the complaint was filed, the special litigation committee completed its investigation and filed its report. The Committee recommended that all except two of the claims investigated[2] not be asserted and that the two remaining claims be settled.

1. The individual defendants were at the time members of the board of directors of AAA and constituted a majority of the Board.

2. The Committee investigated the original claims and the allegations in the complaint. Also considered were allegations in a class action suit brought in the United States District Court for the Western District of North Carolina on behalf of certain minority shareholders seeking to recover damages from defendants Shaw, Great Commonwealth Life, and American Commonwealth Financial Corporation. The federal lawsuit was filed after the special litigation committee had begun its investigations but prior to the filing of the shareholder's derivative suit.

Based on the recommendations of the special litigation committee, defendant AAA moved for summary judgment on all claims except the two which were the subject of a settlement agreement and for approval of the settlement agreement. In addition, defendants Wiley, Campisi, Hurst, Broussard, Black and Cox moved for summary judgment.

Judge Snepp granted the motions, reasoning that:

> The Court is of the opinion that the business judgment rule controls the disposition of this case and, therefore, that the only issues before it are whether the Special Committee was composed of disinterested, independent directors who acted in good faith, and whether the scope of the investigation and the procedures adopted and followed were appropriate . . . [and] that there is no genuine issue of a material fact as to the disinterestedness, independence and good faith of the Special Committee, or as to the scope of the investigation or the appropriateness of the procedures adopted and followed by the Special Committee in investigating the claims asserted. . . .

The Court of Appeals reversed, holding that "directors of North Carolina corporations who are parties to a derivative action may not confer upon a special committee of the board of directors the power to bind the corporation as to its conduct of the litigation." 72 N.C. App. at 547, 324 S.E. 2d at 886. In reaching this conclusion, the Court of Appeals considered each of three prevailing views, rejected both the view first articulated in the landmark case of *Auerbach v. Bennett*, 47 N.Y. 2d 619, 393 N.E. 2d 994, 419 N.Y.S. 2d 920 (1979), and the view as represented by *Zapata Corp. v. Maldonado*, 430 A. 2d 779 (Del. 1981), both of which recognize the authority of the courts to rely, with different degrees of deference, upon litigation decisions made by special litigation committees of the corporation's board of directors, and adopted the rule enunciated in *Miller v. Register And Tribune Syndicate, Inc.*, 336 N.W. 2d 709 (Iowa 1983).[3]

3. As of this date, it appears that the courts of only four states, Alabama, Delaware, Iowa and New York, have addressed the question presented here. New York and Alabama have adopted the rule known as the *Auerbach* rule, *Auerbach v. Bennett*, 47 N.Y. 2d 619, 393 N.E. 2d 994, 419 N.Y.S. 2d 920; *Roberts v. Alabama Power Co.*, 404 So. 2d 629 (Ala. 1981), Delaware adopted the rule as stated in

The claims made on behalf of certain minority shareholders of AAA were first asserted by letter dated 28 October 1981 from Attorney Thomas A. Lockhart and directed to the board of directors of All American Assurance Company. The letter questioned the propriety of certain transactions undertaken by the officers and directors of AAA in conducting business for the corporation. These included failing to exercise an option to purchase shares of AAA stock from Great Commonwealth Life Insurance Company (GCL) and failing to exercise a "put" to sell shares of AAA stock to American Commonwealth Financial Corporation (ACFC); paying excessive amounts to affiliated companies for administrative expenses; entering into certain allegedly improper reinsurance and coinsurance agreements; redeeming certain 8% debentures held by affiliated companies; releasing American Bank and Trust Company (ABTC) of Baton Rouge, Louisiana, from an obligation to purchase an office building; and engaging in other allegedly improper transactions with affiliates, including unsecured loans and joint ownership of airplanes.[4]

Zapata Corp. v. Maldonado, 430 A. 2d 779, and Iowa adopted the rule of *Miller v. Register And Tribune Syndicate, Inc.*, 336 N.W. 2d 709. Most of the opinions which have considered application of the business judgment rule to decisions of special litigation committees have been by federal courts applying law which they predict would be applied by the state whose law governs the litigation. *Auerbach* has been applied as the law of California, *Gaines v. Haughton*, 645 F. 2d 761 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145, 71 L.Ed. 2d 297 (1982), relying on *Lewis v. Anderson*, 615 F. 2d 778 (9th Cir. 1979), *cert. denied*, 449 U.S. 869, 66 L.Ed. 2d 89 (1980), and of Michigan, *Genzer v. Cunningham*, 498 F. Supp. 682 (E.D. Mich. 1980). Federal courts have applied *Zapata* as the projected law of Maryland, *Rosengarten v. Buckley*, 613 F. Supp. 1493 (D.C. Md. 1985), Virginia, *Abella v. Universal Leaf Tobacco Co., Inc.*, 546 F. Supp. 795 (E.D. Va. 1982) and Connecticut, *Joy v. North*, 692 F. 2d 880 (2d Cir. 1982), *cert. denied sub nom. Citytrust v. Joy*, 460 U.S. 1051, 75 L.Ed. 2d 930 (1983).

In two additional cases, the federal courts found it unnecessary to choose between *Auerbach* and *Zapata: In re General Tire & Rubber Co. Sec. Litigation*, 726 F. 2d 1075 (6th Cir.) (concluding that under either *Auerbach* or *Zapata*, the settlement decision of the committee would be affirmed; thus, no need to decide which Ohio would apply), *modified on other grounds*, Fed. Sec. L. Rep. (CCH) ¶ 91, 468, *cert. denied sub nom. Schreiber v. Gencorp, Inc.*, 469 U.S. 858, 83 L.Ed. 2d 120 (1984); *Hasan v. CleveTrust Realty Investors*, 729 F. 2d 372 (6th Cir. 1984) (under either *Auerbach* or *Zapata*, the thoroughness of the one-man committee's investigation as well as his disinterestedness would prevent entry of summary judgment; thus no need to decide which rule Massachusetts would apply).

4. Underlying these claims and the allegations in the derivative action is the fact that defendants Shaw, Rice, ICH, ACFC and GCL (the "Shaw Group") repre-

By letter dated 11 May 1982, Mr. Lockhart, as attorney for the minority shareholders of AAA, made the following demands of the board of directors with regard to the earlier claims: recovery from GCL of 232,678 AAA shares purchased at $5.00 per share when AAA had a "put" option to sell 51,774 shares at $10.00 per share to ACFC; recovery of all loans and advances to affiliates; recovery of all investments, amounting to at least $4,259,149.00, in National American Life Insurance Company (NAL); and demand that the company refrain from coinsurance and reinsurance treaties and transactions with affiliates which had not been approved by the North Carolina Department of Insurance.

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sent the majority and controlling shareholders of AAA and that the transactions complained of allegedly amounted to a "pattern of self-dealing and negligent acquiescence" resulting in the "looting" of assets of AAA. The transactions for the most part can be traced to the corporate history of AAA:

AAA, a North Carolina corporation, was originally organized in 1929 as Pyramid Life Insurance Company, with offices in Charlotte, North Carolina. In 1972, control of the company was acquired by investors who changed the name to All American Assurance Company and moved the offices to Baton Rouge, Louisiana. In 1975, the company was placed in rehabilitation by the North Carolina Department of Insurance after encountering financial difficulties. Mr. Lockhart brought a derivative action on behalf of the company in 1976, charging improper handling of the company's operations. *See Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *disc. rev. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181-83 (1979). At that time, approximately 65% of the company's stock was owned by American Bank & Trust Company of Baton Rouge. On 5 January 1979, ABTC sold this stock to ACFC, a defendant in this action. ACFC was controlled by defendant ICH which in turn was controlled by defendants Shaw and Rice. ACFC then sold this stock to defendant GCL, its wholly-owned subsidiary. The offices of AAA were moved to Dallas, Texas where AAA shares common facilities and personnel with GCL and other affiliated companies under a cost sharing plan. AAA then formed NALICO in 1981. NALICO Insurance Company, a wholly-owned subsidiary of AAA, acquired all of the shares of National American Life Insurance Company (NAL). NAL, a Louisiana company, had been in both receivership and rehabilitation. NALICO was dissolved in December 1982. NAL is wholly-owned by AAA. In November 1982, the minority shareholders of all of the companies controlled by ICH, including AAA, were eliminated through a series of mergers and these companies became wholly-owned subsidiaries of ICH. The question of the merger was raised in the present lawsuit. Plaintiffs' motion for a preliminary injunction to stop the merger was denied on 17 November 1982 upon stipulation of defendants ICH, ACFC and GCL that they are subject to the jurisdiction of the court in this action; that plaintiffs would not lose their standing by virtue of the merger; that defendants would maintain the special litigation committee; and that the court would retain jurisdiction of the cause and the parties. The Committee concluded that the fraudulent merger claim involves individual shareholder rights rather than rights of AAA.

The complaint in the present action, filed on 4 November 1982, asserted liability on the part of the defendants based on the transactions described above and the failure of AAA's directors to take action.

B.

As one commentator recently noted, this case "clearly presents policy choices of major significance in the corporation law of North Carolina." R. Robinson, *North Carolina Corporation Law and Practice*, § 14-15 (3d ed. 1983 and Supp. 1985). We therefore deem it appropriate to approach the issue from a historical and economic as well as a legal perspective.

The shareholder derivative action, codified in N.C.G.S. § 55-55, traces its roots to English common law as first described in the case of *Foss v. Harbottle*, 2 Hare 461, 67 Eng. Rep. 189 (1843).

The Supreme Court of the United States, after a brief encounter with the propriety of derivative actions in *Dodge v. Woolsey*, 59 U.S. 331, 15 L.Ed. 401 (1855), fully recognized and set out the common law requirements for derivative actions in *Hawes v. Oakland*, 104 U.S. 450, 26 L.Ed. 827 (1882). With respect to the right of the shareholder to bring a derivative action, the Court observed:

> That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed.

Id. at 453, 26 L.Ed. at 829.

A derivative action brought by the shareholder against the corporation and others for wrongdoing, however, was subject to two requirements: (1) an exhaustion of intra-corporate remedies,

and (2) ownership of shares in the corporation at the time of the complained-of transaction. In this regard, Justice Miller relied on the decisions of the English courts, quoting with approval *MacDougall v. Gardiner*, 1 Ch. D. 13 (1875):

> "[N]othing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent; unless there is something *ultra vires* in the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it, but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company,—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done."

Id. at 456-57, 26 L.Ed. at 830-31.

Although citing to and adopting the requirements for maintaining a derivative action enunciated in *Hawes v. Oakland*, the North Carolina Supreme Court in *Moore v. Mining Company*, 104 N.C. 534, 10 S.E. 679 (1889) first approached the derivative action with caution, reasoning that:

> In the nature of the matter it would contravene every principle of intelligent procedure, be impractical and absurd to allow ordinarily one or more of the stockholders of a corporation to bring actions to recover property, or the value of it, that belongs to it, or to recover damages for injuries to it, or its property, or to collect debts due to it. Such actions imply corporate disorganization and the absence of corporate integrity and entity. . . . The right to bring and the occasion of bringing such actions arises only when and because the proper corporate officers will not, for some *improper* con-

> sideration, discharge their duties as they should do. But stockholders, as such, may not bring such actions at their pleasure . . . .

Id. at 542-43, 10 S.E. at 682. (Emphasis added.)

Since the decision in *Moore*, our courts have entertained shareholder derivative actions, subject to the requirements of exhaustion of intra-corporate remedies, including demand on directors, and contemporaneous ownership. *See Goodwin v. Whitener*, 262 N.C. 582, 138 S.E. 2d 232 (1964) (mismanagement); *Sales Corp. v. Townsend*, 248 N.C. 687, 104 S.E. 2d 826 (1958) (fraudulent withdrawal and appropriation of corporate assets); *Caldlaw, Inc. v. Caldwell*, 248 N.C. 235, 102 S.E. 2d 829 (1958) (preempting profit on sale of corporate property); *Jordan v. Hartness*, 230 N.C. 718, 55 S.E. 2d 484 (1949) (fraudulently dissipating assets).

C.

Of particular significance in the development of the law concerning the shareholder derivative action are the early and thereafter consistent statements requiring prior demand on the directors of a corporation and a recognition of the necessity and validity of business judgment in conducting corporate affairs.

The rationale for the prerequisite of demand speaks to the essence of corporate governance. "When a person becomes a stockholder in a corporation he assents to the execution of all the powers which the law confers upon the corporation and agrees to abide by the action of the governing body as to all matters properly under its control." *Murphy v. Greensboro*, 190 N.C. 268, 275, 129 S.E. 614, 617 (1925); *see Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 80 S.E. 2d 358 (1954). The directors are responsible for the total management of the corporation, including decisions to forego suits or pursue actions which in their judgment are in the best interests of the corporation. To require the shareholder to pursue and exhaust intra-corporate remedies through demand on directors assures corporate management the opportunity to pursue alternative remedies, thus avoiding unnecessary litigation. It is only in those cases where demand would be futile, as where corporate management is under control of the alleged guilty parties, that demand is excused. *See Gaines v. Manufacturing Co.*, 234 N.C. 331, 67 S.E. 2d 355 (1951) (a shareholder may show facts ex-

cusing demand); *Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 80 S.E. 2d 358 (where control of a corporation is in the directors whose actions are questioned, and a minority shareholder has exhausted all means available to him to obtain redress of grievances within the corporation itself, demand is not required); *Excelsior Pebble Phosphate Co. v. Brown*, 74 F. 321, 323 (4th Cir. 1896) ("to require the complainants to show that they had exhaused all effort in inducing the directors to convict themselves of fraud, is absurd").

Viewed in historical perspective, the evolving law of shareholder derivative actions also presaged what is now referred to as the business judgment rule. In *Hawes v. Oakland*, 104 U.S. 450, 458, 26 L.E. 827, 831, the Court noted the important distinction between the class of cases involving directors who were allegedly guilty of fraud, breach of trust, or were proceeding *ultra vires*, and those cases "in which there is no breach of trust, but only error and misapprehension or simple negligence on the part of the directors."

We find similar language in our early case of *Besseliew v. Brown*, 177 N.C. 65, 97 S.E. 743 (1918). In the context of a suit by the receivers of a corporation against its officers and directors to recover loss of the company's assets, our Court affirmed a judgment overruling a demurrer from which defendants had appealed. Plaintiff alleged that the directors had negligently entrusted the management of corporate affairs to its secretary who misappropriated the company's funds. In determining the extent of defendants' liability this Court observed that:

> It is fully established in this jurisdiction and elsewhere that the directors and managing officers of a corporation are to be properly considered and dealt with as trustees, or *quasi* trustees, in respect to their corporate management, and may, in proper instances, be held liable for loss or depletion of the company's assets due to their willful or negligent failure to perform their official duties. *They are not, as a rule, responsible for mere errors of judgment* (*Fisher v. Fisher*, 170 N.C. 378, and authorities cited), nor for slight omissions from which the loss complained of could not have reasonably been expected; but where they accept these positions of trust they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances

> and charged with a like duty, usually the care that he shows in the conduct of his own affairs of a similar kind; and if there is a breach of legal duty in this respect, causing a loss of the company's assets, the corporation may sue . . . .

Id. at 67, 97 S.E. at 744. (Emphasis added.) *See also Gordon v. Pendleton*, 202 N.C. 241, 162 S.E. 546 (1932) (nonsuit for defendants affirmed—no convincing or satisfactory evidence that alleged negligent acts of defendants in making loans resulted in pecuniary loss).

Thus, in North Carolina as elsewhere, the business judgment rule has provided the yardstick against which the duties and decisions of corporate officers and directors are measured in order to achieve a balance between the need to hold management accountable for legitimate wrongs committed against the corporation and the need to ensure that management is accorded necessary decision-making discretion[5] and concomitant protection from liability for injury to the corporation resulting from good faith decisions undertaken within the scope of authority and with loyalty and due care.

As a defensive mechanism, the rule has spawned the business judgment doctrine that courts will not normally review or interfere with corporate management decisions, given "the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments." *Auerbach v. Bennett*, 47 N.Y. 2d at 630, 393 N.E. 2d at

5. Numerous salutary policy reasons for the rule include the belief that "after-the-fact litigation is an imperfect device to evaluate corporate business decisions," particularly where "[t]he entrepreneur's function is to encounter risks and to confront uncertainty." *Joy v. North*, 692 F. 2d at 886. That is, there is a need to protect management "from unfair retrospective reviews of their mistakes," thus permitting "risk-taking, innovation and venturesome business activity." Russell M. Robinson, II, *Recent Developments in the Business Judgment Rule*, Commercial, Banking & Business Law Section Annual Meeting and CLE program, N.C. Bar Foundation Continuing Legal Education (1986). Other reasons advanced include the recognition that directors are managers, not insurers of the corporation's success; management decisions are more properly the province of directors selected by shareholders rather than of a judge; and as a matter of judicial economy, the rule relieves the courts from involvement in complicated business questions. *See* Dent, *The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit?*, 75 Nw. U.L. Rev. 96 (1980); Brown, *Shareholder Derivative Litigation and the Special Litigation Committee*, 43 U. Pitt. L. Rev. 601 (1982).

1000, 419 N.Y.S. 2d at 926. Thus, the decisions of directors are accorded a presumption of propriety which can be overcome only upon a showing of misconduct—lack of good faith, dishonesty, etc.

The applicability of the business judgment rule to a particular board decision, however, has not been limited to purely commercial business decisions; that is, as a substantive defense to shareholder attacks on the soundness of business decisions. Through an evolving line of judicial decisions, the rule has been applied to litigation decisions determining whether or not a corporation should pursue an available cause of action. *See United Copper Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 61 L.Ed. 1119 (1917); *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 47 L.Ed. 256 (1903); *Hawes v. Oakland*, 104 U.S. 450, 26 L.Ed. 827. To the extent that the good faith and honesty requirements are met, a litigation decision not to sue made by disinterested board members has been accorded by courts the same presumption of propriety and judicial deference under the business judgment doctrine as decisions made regarding the day-to-day operation of the company. Unless the minority shareholders who institute a derivative suit can provide a forecast of evidence that the disinterested board either did not make the decision not to pursue the litigation in good faith or failed to conduct an adequate investigation of the claim before making the decision, summary judgment dismissing the action is appropriate.

The recognition by American courts that the business judgment rule may serve as a procedural tool to terminate derivative action has not been without controversy.[6] It is, nevertheless, the critical starting point toward resolution of the issue presented in this case.

6. *See generally* Coffee and Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 Colum. L. Rev. 261 (1981). The authors question the relevance of the business judgment rule to decisions to terminate litigation given the policy of the rule to shield management from liability for decisions made in the context of the business environment. The pressures of time, the uncertainty of decisions where risk-taking is a factor, and the risk of liability inherent in business decisions do not accompany a decision not to sue.

II.

A.

We first note that "derivative claims . . . belong to the corporation itself," *Auerbach*, 47 N.Y. 2d at 631, 393 N.E. 2d at 1000, 419 N.Y.S. 2d at 927; that is, the rights to be vindicated are those of AAA, not those of plaintiffs suing derivatively on the corporation's behalf.[7] *See Gall v. Exxon Corp.*, 418 F. Supp. 508 (S.D.N.Y. 1976). With this in mind, courts have acknowledged that the decision whether to prosecute derivative claims generally lies within the judgment and control of management. In *United Copper Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263-64, 61 L.Ed. 1119, 1124, Justice Brandeis observed that:

> Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment.

In *United Copper*, the issue was whether a court should entertain a shareholder's derivative suit brought on behalf of a corporation to recover damages against a third party for conduct in violation of the Sherman Act following the corporation's refusal to institute the suit. The Court acknowledged that there was no allegation of misconduct on the part of the directors or that the directors were in control of the wrongdoers or stood in any relation to them. The district court had sustained a demurrer and dismissed the complaint. Its judgment was affirmed by the Circuit Court of Appeals, and the Supreme Court affirmed.

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7. N.C.G.S. § 55-55(d) provides that: "If the action on behalf of the corporation is successful, in whole or part, whether by means of a compromise and settlement or by a judgment, the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorneys' fees, and shall direct the plaintiff to account to the corporation for the remainder of any proceeds of the action."

The protective mantle of the business judgment rule to litigation decisions, while admittedly a barrier to shareholders seeking to assert a derivative action over board opposition, is not without rational basis. Indeed, assuming that a compensatory rationale underlies the derivative action, factors militating against even potentially successful litigation, such as the disruption of business, adverse impact on employee morale, and impact of adverse publicity, are considerations well within the expertise of corporate management. Frequently, derivative action is predicated on a multitude of complicated business transactions occurring over an extended period of time (as is the situation in the present case). The corporate cost of conducting such complex litigation is frequently formidable. *See, e.g., Gaines v. Haughton*, 645 F. 2d 761; *Cramer v. General Tel. & Electronics Corp.*, 582 F. 2d 259 (3d Cir. 1978), *cert. denied*, 439 U.S. 1129, 59 L.Ed. 2d 90 (1979); *Rosengarten v. Intern. Tel. & Tel. Corp.*, 466 F. Supp. 817 (S.D.N.Y. 1979); *Gall v. Exxon Corp.*, 418 F. Supp. 508. Thus, the decision whether and to what extent to prosecute is generally predicated on considerations which are ultimately calculated to protect and advance the economic best interest of the corporation, a responsibility which belongs to the management of the corporation.

In principle then we recognize that the decision of disinterested directors, made in good faith and in the exercise of honest judgment, not to pursue claims should be accorded judicial deference under the business judgment doctrine, thereby precluding judicial inquiry into the merits of such claims. *See Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279.

The business judgment rule, however, presupposes that management decisions have been made by disinterested and impartial board members acting honestly and in good faith, with loyalty and due care. Where shareholders' claims allege wrongdoing on the part of a majority of the officers or directors, as is the case in the present lawsuit, the practice has emerged of appointing a committee of directors, a special litigation committee not implicated in the wrongdoing, to assume responsibility for the litigation decision. Briefly, courts in other jurisdictions have adopted one of three approaches in according judicial deference to the decision of a special litigation committee. The so-called *Auerbach* view holds that the business judgment rule forecloses judicial in-

quiry into the merits of a shareholder derivative suit where the decision to terminate has been made by a committee of disinterested directors acting in good faith and following appropriate investigative procedures. *See Auerbach v. Bennett*, 47 N.Y. 2d 619, 393 N.E. 2d 994, 419 N.Y.S. 2d 920. The *Zapata* view essentially adopts the *Auerbach* position in cases where formal demand was made and acted upon by the special litigation committee; i.e., where a majority of the board of directors was not implicated in the charges of wrongdoing. A committee decision rejecting a derivative claim where demand was excused as being futile is subject to closer judicial scrutiny—a two-step test necessitating inquiry into the independence, good faith, and basis supporting the committee's conclusions as well as a determination by the court, applying its own independent judgment, whether the action should be dismissed. *See Zapata Corp. v. Maldonado*, 430 A. 2d 779. Finally, *Miller v. Register And Tribune Syndicate, Inc.*, 336 N.W. 2d 709 holds that directors who are parties to a derivative action may not confer upon a special litigation committee the power to bind the corporation as to its conduct of the litigation, a position taken only by the Iowa courts.[8]

B.

Inasmuch as we have recognized in principle that litigation decisions made by corporate management should be accorded judicial deference under the business judgment doctrine, the issue then becomes whether and to what extent the decisions of a special litigation committee should be recognized by our courts in North Carolina where the appointment of that committee is necessitated by allegations of misconduct on the part of a majority of the board of directors—misconduct which disqualifies the directors themselves from making an impartial litigation decision.

Clearly, there are fundamental differences between a litigation decision made by a board of directors free of implication in wrongdoing and by a special litigation committee appointed to make a litigation decision because charges of misconduct have been lodged against a majority of the board. In the former case, it

8. The same standard adopted by the Iowa Court was earlier adopted by a Delaware Chancery Court in 1980 and was later rejected by the Supreme Court of Delaware in the *Zapata* case. *See Maldonado v. Flynn*, 413 A. 2d 1251 (Del. Ch. 1980), *rev'd sub nom., Zapata Corp. v. Maldonado*, 430 A. 2d 779 (Del. 1981).

is only the interests of the corporation which are involved. The integrity of the board's decision-making process is intact. The decision of a special litigation committee, on the other hand, involves not only legitimate business judgments concerning the propriety of the suit as it pertains to the best interests of the corporation, but also exposure of board members to potential liability should the committee determine that derivative action is appropriate. As a result, a number of courts have questioned, with varying degrees of suspicion, the ability of special litigation committees to render dispassionate, unbiased decisions. *See Abramowitz v. Posner*, 513 F. Supp. 120 (S.D.N.Y. 1981), *aff'd*, 672 F. 2d 1025 (2d Cir. 1982); *Genzer v. Cunningham*, 498 F. Supp. 682; *Zapata Corp. v. Maldonado*, 430 A. 2d 779.

The assumption is that the taint of self-interest which disqualifies directors in the first instance from rendering an impartial litigation decision should act to disqualify the same defendant directors from participating in the selection of a committee authorized to make the decision. That is, personal, financial and moral influences—peer or "structural" bias—will permeate the committee's decision-making process and ultimately compromise its integrity.

This potential for "structural bias" was evidently of sufficient concern to the Court of Appeals in this case to justify the adoption of a prophylactic rule effectively prohibiting the power of a "tainted" board to delegate a litigation decision to a special litigation committee. *Alford v. Shaw*, 72 N.C. App. at 544-45, 324 S.E. 2d at 884. In so holding, the Court of Appeals has, as defendants point out, virtually emasculated the corporation's power to terminate derivative litigation where all or a majority of directors are named as defendants. We do not believe that the prophylactic rule adopted by the Court of Appeals, as enunciated in *Miller v. Register And Tribune Syndicate, Inc.*, 336 N.W. 2d 709, will serve the best interests of all segments of the corporate community in North Carolina, including minority stockholders, majority stockholders, officers, directors and the corporate entity.

In rejecting the *per se* rule prohibiting disqualified directors from delegating litigation decisions to a special litigation committee, we must determine the amount of judicial deference to be accorded to the decision of the committee.

The following observations, made by one commentator, offer perhaps the most thoughtful perspective on the dilemma of shareholder derivative litigation as evidence in this case:

> The quintessential characteristic of corporate governance is private decision-making by directors as the appointed delegates of shareholders. Shareholders commit themselves to having their commercial affairs controlled by a board of directors when they make the decision to put their investment capital at risk in a corporation. In instituting derivative actions, shareholders seek to be released from this commitment which they have made to rule by directors. Shareholders are attempting to substitute their litigation decisions for those of their directors. This is the dilemma which shareholders derivative litigation presents to the courts. By entertaining such litigation, courts are required to sanction a fundamental change in the most basic of intra-corporate relationships. Derivative litigation is predicated upon the willingness of the court to reverse the roles of the directors and shareholders in corporate decision-making. Many of the problems encountered by the courts in dealing with special litigation committees arise from the irreconcilability of this concept of shareholder derivative litigation and the traditional concept of autonomous corporate governance by the board of directors. The courts wish to accommodate meritorious derivative litigation while at the same time preserving, to the greatest extent possible, the traditional intra-corporate relationship between shareholders and directors.
>
> When the full board is disabled from acting because of majority member disqualification, the special litigation committee makes use of outside directors as the only viable group within the corporate entity potentially capable of performing the board's traditional role of corporate decision-maker. The very willingness of the courts to listen to a special committee is a judicial acknowledgment of the proven value of traditional corporate norms which recognize private decision-making by directors as the most effective method of corporate governance. The private corporation has been the primary instrument for this country's development of a business infrastructure which, at least in comparison with the

> systems of other countries, has been remarkably successful in producing an economy of abundance.

Brown, 43 U. Pitt. L. Rev. at 644.

With this in mind, we also take judicial notice of the fact that North Carolina has grown in recent years to become one of the most populous states in the nation. Commerce and industry have enjoyed a concomitant growth in the state and depend for their strength and vitality on laws designed to encourage and protect that growth. *See, e.g., A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983); North Carolina Economic Development Report, North Carolina Department of Commerce (1985). A favorable business climate can be fostered in part by recognizing the importance of traditional intra-corporate relationships, and by providing a measure of protection against "strike suits" (nuisance suits brought to extort settlement).[9]

We are not unmindful of the criticisms advanced by commentators and courts respecting the full breadth of judicial deference accorded special litigation committee decisions under the business judgment doctrine. *See* Cox, *Searching for the Corporation's Voice in Derivative Suit Litigation: A Critique of Zapata and the ALI Project*, 1982 Duke L.J. 959; Coffee and Schwartz, *The Survival of the Derivative Suit: An Evaluation and Proposal for Legislative Reform*, 81 Colum. L. Rev. 261; Brown, *Shareholder Derivative Litigation and the Special Litigation Committee*, 43 U. Pitt. L. Rev. 601; Dent, *The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit*, 75 Nw. U.L. Rev. 96.

Of particular interest to us is the view expressed in *Zapata Corp. v. Maldonado*, 430 A. 2d 779, which purports to represent a compromise position between the judicial deference advocates and the prophylactic rule advocates. We find, however, that the

9. In this regard it should be noted that N.C.G.S. § 55-55(c) provides that the derivative action, once brought, may not be dismissed, discontinued, compromised or settled without approval of the court, thereby substantially reducing the potential for extortion of settlement. N.C.G.S. § 55-55(c) provides that in the event the court determines that the derivative action was brought without reasonable cause, the court may require the plaintiff to pay defendant directors or officers the reasonable expenses of defending the action, including attorneys' fees. The provision offers additional protection against the bringing of nuisance suits.

Zapata court, in advancing the two-tiered analysis, provides only "an illusory improvement," Cox, 1982 Duke L.J. 975; potentially raises more problems than it offers solutions, *see Joy v. North*, 692 F. 2d 880 (Cardamone, J. dissenting); and in the absence of standards or guidelines for the rendering of a court's own independent judgment, offers no assurance that decisions will be consistent. *See* Brown, 43 U. Pitt. L. Rev. at 642-43. Thus "[i]n the absence of well-articulated standards, any power to decide may quickly degenerate into the power to decide arbitrarily." *Id.* at 643-44. More important, however, is our rejection of the predisposed prejudice on the part of some courts that a special litigation committee is, due to the potential of some inherent structural bias, incapable of acting independently. Finally, we fail to find authority in our Rules of Civil Procedure or elsewhere for a trial judge in North Carolina to substitute his own judgment for that of the factfinder in determining whether the decision to terminate litigation is appropriate if the circumstances do not justify deference to the decision of duly elected corporate directors.

C.

[1] We have chosen to adopt the business judgment rule position enunciated in *Auerbach v. Bennett*, 47 N.Y. 2d 619, 393 N.E. 2d 994, 419 N.Y.S. 2d 920, which limits judicial inquiry into a special litigation committee's judgment regarding whether it is in the best interests of a corporation to pursue litigation to whether the committee was composed of disinterested, independent directors who acted in good faith, following appropriate investigative procedures, but we modify the traditional *Auerbach* approach regarding the allocation of the burden of proof. We believe that careful application of this modified *Auerbach* rule to determine the disinterested independence and good faith of the committee members and the appropriateness and sufficiency of the investigative procedures provides sufficient judicial safeguards. With that inquiry satisfied, our courts should recognize that the substantive decision of the committee not to pursue the claims advanced in the shareholder's derivative action "falls squarely within the embrace of the business judgment doctrine, involving as it [does] the weighing and balancing of legal, ethical, commercial, promotional, public relations, fiscal and other factors familiar to the resolution

of many if not most corporate problems."[10] *Auerbach*, 47 N.Y. 2d at 633, 393 N.E. 2d at 1002, 419 N.Y.S. 2d at 928.

In adopting the *Auerbach* rule, we first note, as did the Court of Appeals, that it is within the power of boards of directors of North Carolina corporations to appoint committees from among their members to exercise full board authority. The committee must be approved by a majority of the board of directors then in office and must consist of two or more directors. N.C.G.S. § 55-31. The fact that the appointing members of a board of directors are acting under the "disability" of potential liability as a result of shareholder allegations does not *per se* extend to disable them from delegating managerial authority over the litigation to a special litigation committee.

Although rejecting a rule that the mere potential for structural bias conclusively prevents the application of the business judgment doctrine to a litigation decision made by a special litigation committee when a majority of the members of the board of directors of the corporation are accused in a derivative action of misconduct, we nevertheless recognize the legitimate concern regarding the true independence of such a committee. Under these circumstances we believe that at a hearing on a motion for summary judgment, the burden of establishing that the committee was composed of directors who were disinterested and independent and who conducted an appropriately thorough investigation should be upon the defendants to the derivative action.[11] The de-

10. A decision not to pursue litigation is not necessarily a decision that the claim lacks merit. The costs to the corporation, both direct and indirect, of litigation may outweigh the benefit to the corporation of even successful litigation. *See Rosengarten v. Intern. Tel. & Tel. Corp.*, 466 F. Supp. 817, 824 ("If the directors legitimately determine that such an action will not benefit the corporation, then, regardless of the illegality of the underlying transaction, the business judgment rule permits termination of the suit."); *see also Gall v. Exxon Corp.*, 418 F. Supp. 508.

11. It is also generally agreed that the burden of proof should be accorded to the party having better access to the relevant facts. *See McCormick on Evidence* § 337 (3d ed. 1984); 9 *J. Wigmore, Evidence* § 2486 (Chadbourn rev. 1981). In the present case, matters concerning the independence and investigative procedures of the special litigation committee clearly fall within the knowledge of the committee members and defendant directors who, additionally, possess the greater resources and are essentially contending that "the more unusual event has occurred." *McCormick* § 337 at 950.

fendants may not rely on the absence of evidence of a lack of independence and reasonable investigation; they must come forward with positive, uncontradicted and credible evidence that those prerequisites to reliance on the committee's decision are met. If the defendants fail to satisfy the trial judge that there is no genuine issue of material fact as to the satisfaction of those prerequisites, summary judgment may not be entered for the defendants. As we said in *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976) regarding the authority of the courts to enter summary judgment in favor of the party with the burden of proof:

> To be entitled to summary judgment the movant must still succeed on the basis of his own materials. He must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury. Further, if the affidavits seem inherently incredible; if the circumstances themselves are suspect; or if the need for cross-examination appears, the court is free to deny the summary judgment motion.

If, however, the independence of the directors and the reasonableness of their investigation is established, the directors' good faith in carrying out their duties will be presumed in the absence of evidence to the contrary.[12]

D.

[2] With this standard in mind, we hold that the trial court properly granted defendants' motions for summary judgment.

The record discloses that the Board of Directors of AAA made every effort to insure that outside counsel and the two outside directors comprising the Committee met the requisite qualifications of independence and disinterestedness. The selection procedures and qualifications of the special litigation committee

12. Although this presumption places upon the plaintiffs in the derivative action the burden of producing evidence or going forward on the question of good faith, it does not shift to them the burden of persuasion. *See* 2 *Brandis on North Carolina Evidence* § 218 (1982). Therefore, if credible evidence of a lack of good faith by members of the Committee is produced at the hearing on the summary judgment motion, ordinarily summary judgment would be inappropriate.

members shown by the evidence presented in the present case are typical of an emerging pattern of common criteria designed to ensure independence and good faith and to engender confidence in the committee's ability to render sophisticated and impartial decisions in matters of legal and corporate business complexity. In this case, the Board began with its 10 June 1982 resolution to appoint Mr. Walter F. Brinkley as special counsel. Mr. Brinkley has served as President of the North Carolina Bar Association; is a member of the American College of Trial Lawyers; has experience in corporate, insurance and litigation matters; had previous experience as special counsel; and had never represented AAA or any of its affiliates. None of these facts is contested.

Mr. Brinkley was requested to contact and recommend two persons of "unquestioned reputation, experience, independence, ability and who [had] never been associated in any way with the Company or any of its affiliates" to serve as members of the board of directors and to act as a special litigation committee.

On 9 July 1982, Mr. Brinkley advised the Board by letter that he recommended Marion G. Follin, who was experienced as an executive in the operation of a life insurance company, and Frank M. Parker, who had judicial experience, to serve as the special litigation committee. Mr. Follin retired in 1970 from Pilot Life Insurance Company as Vice Chairman of the Board of Directors and Senior Vice President, as well as Vice President of three subsidiaries. Mr. Follin had been involved in the life insurance business for 40 years and had served with the U.S. Bankruptcy Court as an advisor and trustee. Judge Parker was a practicing attorney in North Carolina for thirty-two years during which time he also served as a member of the Board of Trustees for the University of North Carolina and was a member of the North Carolina Senate. Judge Parker served as an Associate Judge on the North Carolina Court of Appeals for twelve years and at the time of his appointment to the special litigation committee was serving of counsel to the law firm in which he was a partner prior to his judicial appointment. Again, none of these facts is contested. Plaintiffs have not challenged the independence of the committee except through general, broad allegations of structural bias.

At the 21 July 1982 meeting of the board of directors of AAA, Mr. Follin and Judge Parker were duly elected to the

Board. At that meeting, Judge Parker made the following statement which he requested be incorporated into the minutes:

> Speaking for Mr. Follin and myself, should you decide to elect us to the Board of Directors and to name us as the members of a Special Investigative Committee, we will accept the appointment provided that it is clearly understood that in undertaking our duties:
>
> (1) We have no preconceived ideas concerning the merits of any claims which may have been asserted or may in the future be asserted against All American Assurance Company or any of its present or former officers or directors;
>
> (2) We will conduct as thorough investigation [sic] as we possibly can make of all matters pertinent to such claims;
>
> (3) Based on the information developed as a result of our investigation and the facts as we find them to be, we will make our own independent determination as to what actions, if any, should be undertaken with respect to these claims in the best interest of all shareholders of All American Assurance Company; and
>
> (4) If after our investigation we determine, in our independent judgment, that some legal action or actions should, to protect the best interest of all shareholders, be undertaken against any person or entity, we will see that such actions are initiated and prosecuted vigorously to a conclusion.
>
> In short, we want it clearly understood that in carrying out our duties as members of the Board of Directors and as members of the Special Investigative Committee, we intend to exercise our own independent judgments and to let the chips fall where they may.

Neither the federal class action suit nor the derivative suit had been filed at the time of the appointments.

With respect to the investigative procedures, the committee interviewed sixteen people,[13] reviewed approximately 3,750 documents,[14] submitted interrogatories to each person who served as a director of AAA during the relevant period, and prepared a 409 page report in addition to an appendix which included twenty-five exhibits.

We note that in plaintiffs' Objection to AAA's Motion for Partial Summary Judgment and Approval of Proposed Settlement, plaintiffs' counsel alleges that the findings and conclusions of the Committee report were based on "many misrepresentations of facts and law made by defendants." In support of this allegation, plaintiffs included the affidavit of Buist M. Anderson, an attorney and fifty-year veteran in the life insurance industry. Mr. Anderson states that he examined the Committee report. Based only upon his review of the report, he concluded that "it appears that the Committee did not fully examine and evaluate all available information pertinent to plaintiffs' claims and that the Committee relied in large part upon misleading and false information provided by defendants." However, Mr. Anderson does not identify any information that was available and not examined or any lead that was not followed. Nowhere in the affidavit does Mr. Anderson specify any facts which he identifies as false; instead he states that the Committee relied upon certain "contentions" or "representations" made by the defendants which were erroneous or questionable.[15] In short, Mr. Anderson challenges, on their

13. Interviewed were members of the board of directors, three individuals from the North Carolina Department of Insurance, including the Insurance Commissioner; the Deputy Commissioner and Chief Examiner of the Louisiana Insurance Department; a representative from Coopers & Lybrand (auditors); a representative from Shearson/American Express; and attorneys representing the minority shareholders.

14. Documents included organizational documents and all minutes of AAA; annual statements filed with insurance departments; SEC reports; proxy and financial statements; copies of correspondence, notes and memoranda; and minutes of affiliated companies.

15. In his affidavit Mr. Anderson states:

"Defendants' contention relied upon by AAA's Board and the Special Committee that AAA was not damaged in connection with the release of ABTC because AAA would have incurred a substantial capital gains tax upon sale of the building is erroneous . . . .

". . . .

merits, the propriety of the business transactions claimed by plaintiffs to be wrongful, unlawful and fraudulent, and questions the analysis of the special litigation committee which concluded that the transactions were based on legitimate business and tax consequences. Because Mr. Anderson's affidavit contains a challenge to the Committee's judgment, not to its independence or good faith, and does not suggest any available information which the Committee did not consider, it raises no question regarding issues which we have said are appropriate for determination of the ruling on the motion for summary judgment. It is also evident that plaintiffs' counsel, Mr. Lockhart, was afforded every opportunity to provide the Committee with information which might have been helpful in assessing the merits of the claims. This Mr. Lockhart declined to do.[16] The facts concerning what the Committee did in the process of its investigation are not in dispute. We hold that, when there is no factual dispute, the question of whether those facts establish that the investigation has been sufficiently thorough is a question to be determined as a matter of law by the courts. The Report of the Special Committee of All American Assurance Company, July 1983, leaves no doubt that the investigation was exhaustive and undertaken seriously and in good faith, following procedures sufficiently broad in scope and conscientious in execution to insure a thorough review of all allegations

"Defendants' representation that National American qualified as a 'dividend-paying' stock is clearly ludicrous . . . .

". . . .

"The representation by the Shaw group, relied on by AAA's Board and the Committee, that National American is a profitable investment for AAA is questionable . . . ."

16. It was counsel's position that the Committee should "share" information concerning its activities or investigation, rather than act as "judge and jury" and only receive information. In response, the Committee informed counsel that they did not feel that it was appropriate for him to interrogate members of the Committee as to their findings "since it was felt that the committee's function [was] to develop evidence and make its conclusions based upon the evidence which is discovered and considered."

By approving the entry of summary judgment in this case, we do not suggest that a plaintiff is not entitled to discover information relevant to the determination of the appropriateness of summary judgment. However, civil discovery procedures are available for that purpose and, of course, are limited to and afford the usual protections relating to relevancy and protection of work product.

and related matters. The Report supports a conclusion that the members were fully apprised of the facts which could support their decision to terminate the derivative action with respect to the majority of the claims.

In the present case we agree with the trial judge that the *Auerbach* test has been met with regard to the disinterested independence and good faith of the special litigation committee's membership and the nature and scope of its investigations and that the entry of partial summary judgment and approval of settlement[17] on behalf of AAA, and entry of summary judgment on behalf of defendants Wiley, Campisi, Hurst, Broussard, Black and Cox was proper.

Reversed and remanded.

Justice FRYE concurring in part and dissenting in part.

I concur in that portion of the majority opinion which holds that a special litigation committee is an appropriate device under the facts of this case. I dissent from that portion which adopts a modified version of the *Auerbach* rule. I believe that adopting a version of the *Zapata* rule would be more consistent with existing North Carolina statutory and case law.

This case raises serious questions concerning the continued vitality of shareholders derivative actions in North Carolina where the essence of the claim is alleged fraud and self-dealing by a majority of the members of the Board of Directors. Since the use of the special litigation committee under these circumstances presents a question of first impression before this Court, I believe that a good starting point for analysis is N.C.G.S. § 55-55, enacted by our General Assembly in 1973. This statute authorizes the initiation of shareholders derivative actions and provides for certain

17. Inasmuch as we have held that the decision of the special litigation committee with respect to plaintiffs' claims is governed by the business judgment rule, the proposed settlement of two claims, like the decision not to pursue litigation on the remaining claims, must be judged by the business judgment standard. Indeed, the fact that the Committee found sufficient merit in these two claims to recommend action speaks to its independence and the thoroughness of its investigation. Having determined that defendants met their burden under the *Auerbach* test, the judgment of the court extends to all recommendations made by the Committee, including recommendations to pursue or discontinue litigation or to settle claims.

control by the court and the award of reasonable expenses, including attorneys' fees to the plaintiffs or the defendants under certain circumstances. Subsection (c) is of special significance. It provides:

> (c) *Such action shall not be discontinued, dismissed, compromised or settled without the approval of the court.* If the court shall determine that the interest of the shareholders or any class or classes thereof, or of the creditors of the corporation, will be substantially affected by such discontinuance, dismissal, compromise or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to such shareholders or creditors whose interests it determines will be so affected. If notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as costs of the action. (Emphasis added.)

The statute does not specifically say what test the court will apply in determining whether it will approve a discontinuance, dismissal, compromise or settlement of the action. However, it would be difficult for the court to make a determination as to whether the interests of the shareholders or the creditors would be substantially affected by such discontinuance, dismissal, compromise or settlement without at least looking at the proposed action substantively. One way would be to look at the plaintiff's claim to see if there is some forecast of evidence that would make it likely that the plaintiff could prevail on the merits. Even if there is a likelihood that the plaintiff could prevail but that the amount of the recovery would not be sufficient to outweigh the detriment to the corporation, the court could still allow discontinuance, dismissal, compromise or settlement. In making this determination, the court could rely heavily on the recommendation of the special litigation committee but without that recommendation being mandatory on the court.

Even in cases where the directors are not charged with fraud or self-dealing, and even if the plaintiff and the board agree to discontinue, dismiss, compromise or settle the lawsuit, they must

still get court approval. Thus, if we allow a special litigation committee's recommendation to be binding upon the court where the majority of the board which appointed the committee has been charged with fraud and self-dealing, we are giving to the special committee's recommendation a higher degree of sanctity than that which would be given to the combined recommendation of the plaintiffs and a board not charged with fraud or self-dealing. I do not believe that this was the intent of the legislature in enacting N.C.G.S. § 55-55.

Another expression of legislative intent may be found in N.C.G.S. § 55-30 relating to a director's adverse interest. It provides, *inter alia*,

> (b) No corporate transaction in which a director has an adverse interest is either void or voidable, if:
>
> . . . .
>
> (3) The adversely interested party proves that the transaction was just and reasonable to the corporation at the time when entered into or approved. In the case of compensation paid or voted for services of a director as director or as officer or employee the standard of what is 'just and reasonable' is what would be paid for such services at arm's length under competitive conditions.

In *Smith v. Robinson*, 343 F. 2d 793 (4th Cir. 1965), it was stated that a corporate officer acts in a fiduciary capacity and cannot profit at the expense of the corporation; and that while it is true that the North Carolina law and the general law do not prohibit corporate officers from dealing with the corporation, the adversely interested party must prove that the transaction was fair, just and reasonable when entered into.

In 1927, this Court decided that a transaction between a corporation and its directors or officers is presumed to be invalid unless those seeking to sustain it prove that it was just and reasonable. *Highland Cotton Mills v. Ragan Knitting Co.*, 194 N.C. 80, 138 S.E. 428 (1927).

In *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E. 2d 551 (1983), this Court held that the common law rule as stated in *Highland Cotton Mills* is the same standard codified by the legis-

lature in N.C.G.S. § 55-30(b)(3). We said that under both standards the adversely interested party must demonstrate that the transaction at issue was "just and reasonable."

When N.C.G.S. §§ 55-55 and 55-30(b)(3) are read *in pari materia*, it would seem that when a stockholder in a derivative action seeks to establish self-dealing on the part of a majority of the board, the burden should be upon those directors to establish that the transactions complained of were just and reasonable to the corporation at the time when entered into or approved. The fact that a special litigation committee appointed by those directors charged with self-dealing recommends that the action should not proceed, while carrying weight, should not be binding upon the trial court. Rather, the court must make a fair assessment of the report of the special committee at least to determine whether there is some reasonable probability that the defendants will be able to show that the transaction was just and reasonable to the corporation at the time. If this appears evident from the report, then summary judgment may be allowed in favor of the defendants. If not, the court could still examine the report further to determine whether, notwithstanding the ability of the defendants to prove that the transaction was just and reasonable, it would still not be in the best interest of the corporation to pursue the derivative action.

In the instant case, the trial court was

> of the opinion that the business judgment rule controls the disposition of this case and, therefore, that *the only issues before it are whether the Special Committee was composed of disinterested, independent directors who acted in good faith, and whether the scope of the investigation and the procedures adopted and followed were appropriate.* (Emphasis added.)

Under *Zapata*, an additional requirement must be satisfied. The trial court must also exercise its independent discretion in determining whether it "will be persuaded by the exercise of a committee power resulting in a summary motion for dismissal . . . ." *Zapata Corp. v. Maldonado*, 430 A. 2d 779, 788 (Del. 1981). This the trial court clearly did not do. Thus, I would remand the case for the trial court to exercise its discretion in accordance with the *Zapata* rule.

Justice MARTIN dissenting.

The Court today has placed the corporate fox in charge of the shareholders' henhouse. As stated by the Supreme Court of Delaware:

> At the risk of stating the obvious, the problem is relatively simple. If, on the one hand, corporations can consistently wrest bona fide derivative actions away from well-meaning derivative plaintiffs through the use of the committee mechanism, the derivative suit will lose much, if not all, of its generally-recognized effectiveness as an intra-corporate means of policing boards of directors. See Dent, [*The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit?*], 75 Nw. U.L. Rev. at 96 & n. 3, 144 & n. 241. If, on the other hand, corporations are unable to rid themselves of meritless or harmful litigation and strike suits, the derivative action, created to benefit the corporation, will produce the opposite, unintended result. For a discussion of strike suits, see Dent, *supra*, 75 Nw. U.L. Rev. at 137. See also *Cramer v. General Telephone & Electronics Corp.*, 3d Cir., 582 F. 2d 259, 275 (1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1048, 59 L.Ed. 2d 90 (1979). It thus appears desirable to us to find a balancing point where bona fide stockholder power to bring corporate causes of action cannot be unfairly trampled on by the board of directors, but the corporation can rid itself of detrimental litigation.

Zapata Corp. v. Maldonado, 430 A. 2d 779, 786-87 (1981). *Accord, e.g., Lewis v. Fuqua*, 502 A. 2d 962 (Del. Ch. 1985), *appeal refused*, 504 A. 2d 571 (Del. 1986). *See Abella v. Universal Leaf Tobacco Co.*, 546 F. Supp. 795 (E.D. Va. 1982). In my opinion, the majority's rejection of a standard acknowledging the existence of structural bias because of its concern to "serve the best interests of all segments of the corporate community in North Carolina" (slip op. at 24) does so at the expense of the bona fide rights of well-meaning stockholder-plaintiffs. What is needed instead is a fair procedure which will protect the interests of both the corporation and of shareholders who seek to protect their own economic interests by bringing suit on behalf of the corporation. It is not for this Court to "serve the best interests of all segments of the corporate community in North Carolina"—a function perhaps proper-

ly performed by the governor and General Assembly—but to ensure that conflicts among litigants are fairly adjudicated in a way favoring neither "the corporate community" nor any other association or person bringing suits before this Court.

The majority's adoption of the *Auerbach* standard mirrors those opinions

> characterized both by insufficient attention to the commercial considerations which justify the business judgment rule's application in general business transactions and by a marked insensitivity to the threat of structural bias. Courts persuaded by *Auerbach's* articulation of the limited judicial review necessary in special litigation committee cases have in effect announced a substantial presumption that the committee has acted properly, so that its recommendation can be overturned only in extreme situations.

Cox & Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 Law and Contemporary Problems, Summer 1985, at 83, 115-16, 126 (1985) (footnotes omitted) [hereinafter *Bias in the Boardroom*]. *Cf., e.g., Hasan v. CleveTrust Realty Investors*, 729 F. 2d 372, 376 (6th Cir. 1984). Enlightened courts do not need blindly to defer to the "business judgment rule." *See, e.g., Smith v. Van Gorkom*, 488 A. 2d 858 (Del. 1985); Note, *Directors Who Approve Sale of Corporation Without Sufficient Deliberation Not Entitled to Protection Afforded by Business Judgment Rule*, 16 Seton Hall L. Rev. 242 (1986).

As at least one commentator has acknowledged, North Carolina accords even minority shareholders unusually strong protection. *See* R. Robinson, *North Carolina Corporation Law* § 14-1 (1983). It is therefore appropriate to begin by observing that our legislature has mandated that a shareholder's derivative action

> shall not be discontinued, dismissed, compromised or settled without the approval of the court. If the court shall determine that the interest of the shareholders or any class or classes thereof, or of the creditors of the corporation, will be substantially affected by such discontinuance, dismissal, compromise or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to

> such shareholders or creditors whose interests it determines will be so affected. If notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as costs of the action.

N.C.G.S. § 55-55(c) (1982).[1] This statute is a clear instantiation of the public policy of our state requiring thorough judicial review of suits initiated by shareholders on behalf of a corporation: under its plain language the court is directed to determine whether the interest of any shareholder will be substantially affected by the discontinuance, dismissal, compromise, or settlement of a derivative suit. This is also in accord with Rule 23(c) of the North Carolina Rules of Civil Procedure. In order to make such an assessment the court must of necessity evaluate the adequacy of materials prepared by the corporation which support the corporation's desire to dismiss or settle a derivative suit. To rely blindly on the report of a corporation-appointed committee which assembled such materials on behalf of the corporation—as the majority of this Court would do by adopting an *Auerbach*-type rule—is to abdicate the judicial duty to consider the interests of shareholders imposed by N.C.G.S. § 55-55(c). This abdication is particularly inappropriate in a case such as this one, where shareholders allege serious breaches of fiduciary duties owed to them by the directors controlling the corporation.

Since *Zapata Corp. v. Maldonado*, 430 A. 2d 779, was handed down in May 1981 the trend among courts which have been faced with the choice of applying an *Auerbach*-type rule or a *Zapata*-type rule clearly has been to require judicial scrutiny of the merits of the report of a special litigation committee. *Compare In re General Tire & Rubber Co. Sec. Litigation*, 726 F. 2d 1075 (6th Cir.), *modified on other grounds*, Fed. Sec. L. Rep. ¶ 91,468, *cert. denied*, 469 U.S. 858, 83 L.Ed. 2d 120 (1984); *Abramowitz v. Posner*, 672 F. 2d 1025 (2d Cir. 1982) (Delaware law); *Joy v. North*, 692 F. 2d 880, 889 (2d Cir. 1982) (Connecticut law; rejecting *Auer-*

1. Although the majority recognizes this statute in a footnote, no attempt is made to reconcile the duties imposed upon the trial court by the statute with the majority's analysis.

bach rule because it "effectively eliminate[s] the fiduciary obligations of directors and officers"), *cert. denied*, 460 U.S. 1051, 75 L.Ed. 2d 930 (1983); *Rosengarten v. Buckley*, 613 F. Supp. 1493, 1500 (D.C. Md. 1985) (applying Maryland law, the court stated that it "agrees with [the] commentators [who] have found fault with the *Auerbach* approach because it does not acknowledge the structural bias inherent in a system which allows directors to judge the actions of their fellow directors"); *Abella v. Universal Leaf Tobacco Co.*, 546 F. Supp. 795 (Virginia law); *Zilker v. Klein*, 540 F. Supp. 1196 (N.D. Ill. 1982) (indicating in dictum that court would have followed *Zapata* rule had parties not settled); *Miller v. Register and Tribune Syndicate, Inc.*, 336 N.W. 2d 709 (Iowa 1983), *with Gaines v. Haughton*, 645 F. 2d 761 (9th Cir. 1981) *cert. denied*, 454 U.S. 1145, 71 L.Ed. 2d 297 (1982) (relying on *Lewis v. Anderson*, 615 F. 2d 778 (9th Cir. 1979), *cert. denied*, 449 U.S. 869, 66 L.Ed. 2d 89 (1980), a case which, interpreting California law, noted similarity between Delaware and California statutes and followed *Auerbach*-type rule enunciated in pre-*Zapata* federal case construing Delaware law); *Roberts v. Alabama Power Co.*, 404 So. 2d 629 (Ala. 1981). I interpret this trend away from *Auerbach* as indicating growing concern with the deficiencies inherent in a rule giving great deference to the decisions of a corporate committee whose institutional symbiosis with the corporation necessarily affects its ability to render a decision that fairly considers the interest of plaintiffs forced to bring suit on behalf of the corporation.

The majority's shift of the burden of proving on summary judgment[2] that an executive "committee was composed of directors who were disinterested and independent and who conducted an appropriately thorough investigation" to the defendants to a derivative action is a step in the right direction. However, the majority's shift of this burden only when a *majority* of the members of the board of directors of the corporation are accused of misconduct hardly goes far enough. It would be a rare occasion that a majority of a board would be so accused. Moreover, what the majority concedes with one hand it takes away by the other by adding to this *Auerbach* test an unwarranted presumption. Until today, no court has ever gone so far as to add a presumption of

2. The majority's opinion does not make clear whether this burden would also shift at trial on the merits.

good faith to the *Auerbach* test "[i]f . . . the independence of the directors and the reasonableness of their investigation is established." As the United States Court of Appeals for the Sixth Circuit stated when overruling a district court order which applied such a presumption:

> Neither the *Auerbach* approach nor the *Zapata* approach allows a reviewing court to extend to the members of a special litigation committee the presumption of good faith and disinterestedness. As the *Auerbach* court recognized, the policies of the business judgment rule do not protect from judicial scrutiny the complexion and procedures of a special litigation committee. . . . The courts . . . are particularly well-equipped to evaluate the fairness of a committee's make-up and procedures. In *Auerbach*, the court concluded:
>
> > As to the methodologies and procedures best suited to the conduct of an investigation of facts and the determination of legal liability, the courts are well equipped by long and continuing experience and practice to make determinations. In fact they are better qualified in this regard than are corporate directors in general.
>
> 419 N.Y.S. 2d at 929, 393 N.E. 2d at 1003. Thus although the policies of the business judgment rule may accord to the substantive business conclusions of a special litigation committee a presumption of soundness, those policies do not accord to the committee's members a presumption of good faith.

The delegation of corporate power to a special committee, the members of which are hand-picked by defendant-directors, in fact, carries with it inherent structural biases. In their seminal article on the status of shareholder derivative actions, Coffee and Schwartz found in the members of a special litigation committee a strong potential for bias:

> A derivative action invokes a response of group loyalty, so that even a 'maverick' director may feel compelled to close ranks and protect his fellows from the attack of the 'strike suiter.' As a result, an outside director independent enough to oppose a chief executive officer with re-

> spect to a proposed transaction he thinks is unfair or unwise may still be unable to tell the same officer that he thinks the suit against him has sufficient merit to proceed . . . a refusal to protect one's peers once events have transpired is seen as disloyal treachery.

Coffee & Schwartz, *The Survival of The Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 Columbia L.Rev. 261, 283 (1981).

> The problems of peer pressure and group loyalty exist *a fortiori* where the members of a special litigation committee are not antagonistic, minority directors, but are carefully selected by the majority directors for their advice. Far from supporting a presumption of good faith, the pressures placed upon such a committee may be so great as to justify a presumption against independence. *See* Dent, *The Power of Directors to Terminate Shareholder Litigations: The Death of The Derivative Suit*, 75 Northwestern L.Rev. 96 (1981).

Hasan v. CleveTrust Realty Investors, 729 F. 2d 372, 376-77.

The threshold guarantee of the integrity of an independent litigation committee is the requirement of its independence and freedom from influence of the defendants named in the derivative suit. Permitting defendants to choose committee members would ignore the fact that colleagues of the defendants cannot be impartial in evaluating the merits of claims against those who appointed them to the committee. *E.g.*, *Joy v. North*, 692 F. 2d 880, 888; *Bias in the Boardroom* at 91-108, 132 (analyzing factors which lead individuals selected by board of directors to conform their decision-making behavior to the board's normative view, which view usually disfavors derivative suits). Even permitting nondefendant directors to choose members of or to participate in an allegedly independent executive committee established to evaluate a derivative suit does not purge the committee of bias. Nondefendant board members continue to be part of the cohesive, loyal, conforming ingroup which favors outcomes that will not damage their colleagues' esteem or judgment:

> The directors called upon to evaluate a derivative suit against their colleagues are not, and generally have not been, isolated from the suit's defendants. As members of the board

> of directors they continue to interact with the defendants, who usually remain directors or officers of the corporation. Even members of a special litigation committee who were appointed *after* the derivative suit was initiated are legally bound under the organic requirements for committee membership to serve as directors on the full board. The new special litigation committee members and the defendant directors therefore serve as colleagues on the same corporate board in addressing an array of nonderivative suit issues. Consequently, the judges and those to be judged associate on a regular basis in discharging their many tasks as corporate directors during the preliminary derivative suit skirmishes. In doing so, they share a mutual duty to serve the corporate interest, and they often adopt a common view of that corporate interest. Analogous studies suggest that the effect of these shared experiences is not only to bond the directors and the defendants together but also to form a basis upon which the [independent] directors can be expected to give greater weight to the defendant's values, attitudes, and perceptions than to those of outgroup members like the plaintiff. . . .
>
> More is involved in the dynamics of intergroup discrimination in the demand or special litigation committee context than the seemingly simple categorization of the nondefendant directors as "directors," a category which also includes the defendants. As seen earlier, individuals place great value on their selection to and membership on a corporation's board: They are attracted to their colleagues and value greatly the associations they reap from the directorship. The relative attractiveness and rewards of board membership to the nondefendant director are important considerations in the director's ability to be an impartial arbitrator of a colleague's behavior.

Bias in the Boardroom at 103-04 (footnotes omitted). *See also, e.g.*, Brudney, *The Independent Director: Heavenly City or Potemkin Village?*, 95 Harv. L. Rev. 597 (1982).

Because of the potential for such structural bias, it is my opinion that a rule which permits a trial court to determine that a litigation committee chosen even by nondefendant directors is in-

dependent provides less than an empty prayer for the impartiality needed to ensure the integrity of a litigation committee. *Cf. Miller v. Register and Tribune Syndicate, Inc.*, 336 N.W. 2d 709; *Zapata Corp. v. Maldonado*, 430 A. 2d 779, 787 (when independent directors are called upon to participate in executive committee established to evaluate litigation, "[t]he question naturally arises whether a 'there but for the grace of God go I' empathy might not play a role"); *Bias in the Boardroom* at 117. A judicial inquiry into the alleged independence, good faith, and reasonable investigation of a committee established under such circumstances is fatuous at best. *Cf.* ALI Principles of Corporate Governance and Structure: Restatement and Recommendations § 7.03(e) (Tent. Draft No. 1, 1982).

If the use of a special committee is to be the means for corporate evaluation of whether to go forward with a derivative suit when plaintiffs have alleged malfeasance of corporate directors, the only balanced way to proceed is for parties to the suit to petition the trial court to appoint a committee whose members have no connection with either the parties to the suit or the suit itself.[3] This committee, rid of the structural bias inherent in the *Auerbach* approach, would review the allegations of the derivative suit with input from all litigants concerning, e.g., the legal merits of the suit and its practical impact on the corporation's business and internal management, before submitting the committee report to the court for judicial review. Because such a report will have been prepared by a committee not sharing defendants' biases, the court would then be able to focus on the legal and factual merits of the complaint, as well as the costs and/or benefits to the corporation resulting from a decision to prosecute or not to prose-

3. As one court stated when discussing plaintiff's allegations that corporate directors diverted a corporate opportunity to themselves:

> "If [plaintiff's allegation] is true, it is difficult to imagine a more egregious breach of fiduciary duty. In the present corporate litigation climate, a stockholder's welfare rests almost solely on the judgment and independence of his directors. Any reasonably valid claim that the directors acted because of a conflict of interest involving their own selfish economic interest should bear close scrutiny by an impartial tribunal—not a one-man committee appointed by the alleged wrong doers."

Lewis v. Fuqua, 502 A. 2d 962, 972 (Del. ch. 1985), *appeal refused*, 504 A. 2d 571 (Del. 1986).

cute the suit, instead of focusing on potentially inherent biases of the committee which would otherwise frame the court's analysis. *See Bias in the Boardroom* at 132-35. Such prophylactic rules are required to prevent the potential for structural bias inherent in the use of a litigation committee whose members are chosen by corporate officials who may share the majority of this Court's evident, but unwarranted, presumption that many if not most derivative suits are merely strike suits. *Bias in the Boardroom* at 89 ("directors perceive the typical derivative suit [as being an] unscrupulous strike suit. Such a view of the derivative suit can only introduce a very solid source of decision bias to the choice between the suit's continuance and its dismissal."). *See Miller v. Register and Tribune Syndicate, Inc.*, 336 N.W. 2d 709.

The majority's assessment of the adequacy of the trial court's evaluation of the evidence before it also exposes jurisprudential weakness in the standard of analysis applied.[4] After noting that the special investigative committee interviewed sixteen people, reviewed numerous documents, and submitted interrogatories to some relevant persons before preparing its report, the majority then dismissively rejects plaintiffs' objection to defendants' motions for partial summary judgment because instead of identifying "false" items of information relied upon by the special committee, one of plaintiffs' affiants identified only "erroneous or questionable" information which defendants provided to the committee. The majority goes on to state:

> Because Mr. Anderson's affidavit contains a challenge to the Committee's judgment, not to its independence or good faith, and does not suggest any available information which the Committee did not consider, it raises no question regarding issues which we have said are appropriate for determination of the ruling on the motion for summary judgment.

4. The majority first determines that the trial court properly found that the members of the special investigative committee were sufficiently uninvolved with the affairs of defendants so as to be genuinely disinterested in and independent of defendants and their corporate affairs. Although concerns regarding structural bias would normally require careful scrutiny of the independence and disinterestedness of the committee, plaintiffs in this case do not contest the disinterested independence of the committee members and therefore neither the trial court nor, a fortiori, the appellate division, is required to address this issue.

In addition to drawing an opaque epistemological distinction between "false" information and "erroneous" information, the majority's approach omits consideration of those parts of plaintiffs' objection which clearly expose the need for neutral judicial review of the adequacy, scope, and conclusions of the special committee's investigation.[5] Besides alleging that defendants supplied the committee with critical false pieces of information, plaintiffs objected, inter alia, that:

> 2. The business judgment defense sought to be raised by AAA through the Special Committee does not apply because the claims alleged in the Complaint involve multiple conflicts of interest between the defendants, particularly the Shaw Group, and AAA, and the conflicts of interest alleged in the Complaint and confirmed by the Committee Report have not been resolved.
>
> . . . .
>
> 4. The business judgment defense sought to be raised by AAA through the Special Committee does not apply because the claims alleged in the Complaint result from the obvious and prolonged failure of the defendants to exercise oversight and supervision of AAA to the egregious detriment of AAA, and this failure to exercise the oversight and supervision required by the laws of North Carolina has not been corrected.
>
> 5. The business judgment defense sought to be raised by AAA through the Special Committee does not apply because the claims alleged involved no business purpose for AAA, and the defendants who caused AAA to engage in the wrongful and unlawful acts alleged in the Complaint and confirmed by the Committee Report are still in control of the business affairs of AAA.
>
> . . . .
>
> 7. The Committee Report is not sufficiently thorough to warrant the Court's dismissal of plaintiff's [sic] claims and approval of the proposed $250,000 settlement.

5. Similarly the majority excerpts only a few general phrases from the detailed and lengthy affidavit of plaintiffs' affiant.

8. The Committee Report is not thorough because it is based upon incomplete, insufficient and misleading information, a large part of which was gathered by counsel, not the Special Committee.

9. The Committee Report is not thorough because the information is unsworn and there was no opportunity for cross-examination by the Special Committee or counsel for the plaintiffs.

10. The Committee Report could not be sustained upon a trial of plaintiffs' claims.

11. The Shaw Group supervised or participated in the organization and structure of the Special Committee.

12. Approval of the Committee Report and the proposed $250,000 settlement would be inequitable, unfair, unreasonable, prejudicial and contrary to the best interests of AAA, AAA's shareholders (now or formerly), AAA's policyholders and the public of North Carolina.

By rejecting a test that would require the trial court to examine and resolve these issues, the majority's *Auerbach*-type approach permits defendants to seal from judicial review serious issues affecting plaintiffs' rights as minority shareholders under North Carolina law. *Cf. Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E. 2d 551 (1983). At the very least plaintiffs should be permitted to develop and present evidence in the neutral forum of superior court: (1) that the committee, though perhaps disinterested and independent, may not have been *qualified* to assess intricate and allegedly false tax and accounting information supplied to it by those in the corporate culture who would benefit from decisions not to proceed with litigation,[6] (2) that, in fact, false and/or incomplete information was supplied to the committee because of the nonadversarial way in which it gathered and evaluated information, and therefore (3) in light of these and other problems which arise from the structural bias inherent in the procedures approved by today's majority opinion, that the

6. Such is suggested by plaintiffs' affiant in this case. Under the majority's "disinterested and independent" standard, a professor of philosophy who knew nothing about accounting or corporate law would be acceptable as a committee member.

committee's decisions with respect to litigation eviscerate plaintiffs' opportunities as minority shareholders to vindicate their rights under North Carolina law. *Cf.* Dent, *The Power of Directors to Terminate Shareholder Litigations: The Death of The Derivative Suit*, 75 Nw. U.L. Rev. 96 (1981). Such is especially true in cases, like this one, where serious and complex allegations of breaches of fiduciary duty by defendant-directors caused minority shareholders to have to file a derivative suit on behalf of the corporation. The courts of this state should not participate in shielding from justice the possible wrongdoing of those against whom grievances have been lodged.

It is clear from the materials submitted by plaintiffs in support of their objections to defendants' motions for summary judgment that material issues of fact exist surrounding the adequacy of the investigation conducted by and the conclusions reached by defendants' litigation committee. Those accused of breach of fiduciary duties owed to a corporation and its shareholders should not be permitted to close the courthouse doors to plaintiffs merely by appointing a special committee which allows them to avoid the burden of proving challenged transactions to be fair and reasonable to those to whom the fiduciary duties are owed. The public policy of this state favoring derivative actions compels the conclusion that the approach espoused by the majority of this Court and the entry by the trial court of summary judgment in favor of defendants are inappropriate. N.C.G.S. § 55-55(c).

Moreover, I note that the majority's capitulation to the decisions of an executive committee hand chosen by the corporation whose very refusal to sue caused the plaintiff-shareholder to bring suit constitutes an unconstitutional delegation of judicial power under our state constitution. *Cf. State v. Matthews*, 270 N.C. 35, 153 S.E. 2d 791 (1967). Although article IV, section 1 of the North Carolina Constitution is an express limitation of legislative power, it is clear that this Court cannot by its opinions establish a court. By adopting *Auerbach* and establishing a presumption of good faith, the majority has in effect created a court whose decisions affecting the substantive rights of the parties are unreviewable. Such procedure also violates article I, section 18 of the North Carolina Constitution. This section guarantees access to the courts for redress of injuries. *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904). The majority's *Auerbach* procedure im-

pairs the right of persons to have their complaints resolved by the courts of this state. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983). Simply put, redress by an *Auerbach*-type committee is not redress within the meaning of article I, section 18 of our constitution. Presumably, the legislature had this in mind when it adopted N.C.G.S. § 55-55 (c).

By this dissent I paint no stains upon the character and integrity of the Honorable Francis Marion Parker, my valued friend of long standing, nor upon Mr. Follin. It is not the actions of Judge Parker and Mr. Follin that trouble me, but the adoption of the rule itself, which will be applied in all future cases.

STATE OF NORTH CAROLINA v. EMMETT W. HOSEY

No. 154PA86

(Filed 7 October 1986)

1. **Criminal Law § 88.1— leading questions—cross-examination in form only**

The purpose of the qualification "ordinarily" used in N.C.G.S. § 8C-1, Rule 611(c) is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact. Further, the authority to sustain objections to leading questions directed to friendly witnesses in such situations is inherent in the discretion granted the trial court in Rule 611(a) to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth."

2. **Criminal Law § 88.1— limiting leading questions on cross-examination—failure to make findings and conclusions**

While the better practice would have been for the trial court to make findings and conclusions and declare formally that the witness was friendly to the party cross-examining her or adverse to the party calling her as a witness before limiting the use of leading questions on cross-examination of the witness, it was not reversible error for the court to limit leading questions on cross-examination without conducting a *voir dire* hearing or making any formal declaration when the record on appeal manifestly shows that the witness was only ostensibly the witness of the party calling her and was entirely friendly to the party cross-examining her.

3. **Criminal Law § 88.1— limiting leading questions on cross-examination—friendly witness**

Defendant's right to cross-examine the State's witnesses was not denied when the trial court sustained the State's objections to leading questions dur-

ing defendant's cross-examination of his wife, a witness called by the State, where the witness sought whenever possible to make her testimony helpful to defendant and adverse to the State's case against him, and defendant was thus engaged in cross-examination in form only and not in fact. Further, any possible error in this regard was rendered harmless because defendant had the opportunity to establish any material fact he sought to elicit by simply rephrasing his questions to the witness.

ON writ of certiorari to review the decision of the Court of Appeals, 79 N.C. App. 196, 339 S.E. 2d 414 (1986), finding no error in the judgment entered by *Long, J.*, at the 3 December 1984 Criminal Session of Superior Court, SURRY County. The defendant was indicted for one count of rape and one count of incest. He entered pleas of not guilty. The jury found the defendant guilty of second degree rape and incest. The defendant received consecutive sentences of twelve years imprisonment for the rape conviction and four and one-half years imprisonment for the incest conviction.

The defendant appealed to the Court of Appeals which found no error. The Supreme Court allowed the defendant's petition for writ of certiorari on 7 April 1986. Heard in the Supreme Court on 8 September 1986.

Lacy H. Thornburg, Attorney General, by Cathy J. Rosenthal, Associate Attorney, for the State.

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

MITCHELL, Justice.

The defendant makes four assignments of error on appeal. He first contends the trial court erred in sustaining the State's objections to leading questions during the defendant's cross-examination of a witness called by the State. Next, the defendant contends he was denied a fair trial because the State improperly insinuated that he had engaged in criminal acts additional to those charged against him. Third, the defendant contends the trial court wrongly denied his motion to dismiss the rape charge for lack of substantial evidence. Finally, the defendant contends the trial court plainly erred by including a statement which was not supported by the evidence in its summation to the jury. These contentions are without merit.

The State's evidence tended to show that the defendant, Emmett Hosey, was married to Martha Hosey. He was the stepfather to her three children from her former marriage, including the victim,[1] a female who was thirteen years old at the time of the crimes charged. Mrs. Hosey and her children began living with the defendant in 1976. On numerous occasions since the victim was about nine years old, the defendant would enter her bedroom at night and feel her breasts and genitals.

From 26 September to 6 October 1981, Mrs. Hosey was hospitalized for a possible heart condition. She arranged for her children to stay with their natural father until she came home. At that time the Hoseys and the children lived in a mobile home near another mobile home where the victim's natural father, Mrs. Hosey's ex-husband, lived.

On or about 1 October 1981, the victim was preparing to visit her mother in the hospital. The hot water heater in her father's mobile home was broken, so she went home to shower. The defendant was visiting in the victim's father's mobile home.

The victim had just stepped out of the shower when the defendant entered the bathroom and told her to get up against the sink. He started rubbing against her and touching her breasts and genitals. The defendant told the victim to go into the bedroom and lie down on his bed. She did so. Her stepfather followed, pulled down his pants, and began rubbing his penis against her genitals.

A noise startled the defendant. He ordered the victim to go to her room, lie down on the bed, and not come out. She did go to her room, but dried off and began dressing. There was no door in the doorway entering her room.

The victim heard her stepfather lock the outside door of the mobile home. He entered her room naked, pushed her down onto the bed and began rubbing against her and kissing her. He pulled

1. Use of the victim's name in this opinion is not necessary to distinguish her from other individuals involved in the case and would add nothing of value. Therefore, in keeping with the practice established by this Court in numerous recent cases, her name has been deleted throughout this opinion to avoid further embarrassment. *See, e.g., State v. Acklin*, 317 N.C. 677, 346 S.E. 2d 481 (1986); *State v. Artis*, 316 N.C. 507, 342 S.E. 2d 847 (1986); *State v. Price*, 313 N.C. 297, 327 S.E. 2d 863 (1985); *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984).

her legs apart, keeping them open with his knees. The defendant held her arms at the wrists and penetrated her vagina. The victim said he "went up and down" on her "three or four times" and it hurt. She screamed, "Please stop, just stop!" Lifting her leg from under the defendant, she kicked him in the stomach. She was crying.

The defendant left, but returned to tell the victim that if she said anything to her mother he would beat her up or kill her. These threats scared her. Moreover, the victim was afraid of her stepfather because he had shown her a penitentiary where he said he had served time for shooting a man.

Several witnesses at trial described the victim as shy. Her mother said that if "you fuss in front of her, you do anything in front of her, she is nervous and she will cry, and it scares her."

The defendant also told the victim that if she "ever wanted to do it again" to tell him, and they would tell her mother they were going to ride around and they would park somewhere. About six months after the attack, the defendant began entering the victim's room at night and touching her breasts and genitals.

On 8 May 1984, the victim told her mother of these incidents. Her mother said the victim should yell for her and hit Mr. Hosey with the vacuum cleaner if he touched her again. That very night, the victim yelled for her mother. Mrs. Hosey saw the defendant as he left the victim's room but did not confront him.

The defendant first contends his right to cross-examine the State's witnesses was denied when the trial court sustained the State's objections to leading questions during the defendant's cross-examination of his wife, a witness called by the State. We disagree.

"[T]he North Carolina Rules of Evidence follow the traditional view that the use of leading questions is a matter of right during cross-examination." *State v. Mitchell*, 317 N.C. 661, 668, 346 S.E. 2d 458, 462 (1986). On the other hand, during direct examination the use of leading questions generally is not approved but may be allowed in the sound discretion of the trial court. N.C.G.S. § 8C-1, Rule 611(a) and (c) (Cum. Supp. 1985). *See State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 235 (1974).

Rule 611 of the North Carolina Rules of Evidence provides in pertinent part:

> RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION
>
> (a) Control by the Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth. . . .
>
> . . . .
>
> (c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination.

N.C.G.S. § 8C-1, Rule 611 (Cum. Supp. 1985).

Leading questions usually are not permitted on direct examination because of the danger that they will suggest the desired reply to an eager and friendly witness. In effect, lawyers could testify, their testimony punctuated only by an occasional "yes" or "no" answer. "The rule prohibiting leading questions is not based on a technical distinction between direct examination or cross-examination, but on the alleged friendliness existing between counsel and his witness." *State v. Greene*, 285 N.C. at 492, 206 S.E. 2d at 235 (decided before the enactment of the North Carolina Rules of Evidence, N.C.G.S. 8C-1). Therefore, the trial court should consider the true relationship between the interrogator and witness in ruling on the propriety of leading questions during either direct examination or cross-examination of the witness.

Cross-examination of an adverse witness is a matter of right, but the scope of cross-examination is subject to appropriate control by the court. *See Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed. 2d 297 (1973). The right of a cross-examiner to employ leading questions is not absolute. *See, e.g., Ardoin v. J. Ray McDermott and Co., Inc.*, 684 F. 2d 335 (5th Cir., 1982); *Morvant v. Construction Aggregates Corporation*, 570 F. 2d 626 (6th Cir.), *cert. dismissed*, 439 U.S. 801, 58 L.Ed. 2d 94 (1978); *Mitchell v. U.S.*, 213 F. 2d 951 (9th Cir.) *cert. denied*, 348 U.S. 912, 99 L.Ed.

715 (1955) (not error to limit defendant's questioning of friendly prosecution witness to non-leading questions).

In this case, the State called Martha Hosey who is the victim's mother and the defendant's wife. A review of the entire transcript of her testimony clearly shows that she sought wherever possible to make her testimony helpful to the defendant and adverse to the State's case against him. Her unwillingness to give testimony favorable to the State was revealed *inter alia* by her contentiousness during her examination by the prosecutor. For example:

> Q. Did you hear Emmitt make any response to the effect that's a lie or hear him say anything like that?
>
> A. You're getting ahead of yourself.
>
> Q. Well, I'm just—if you would, answer the question.
>
> . . . .
>
> Q. Where was it you'd asked him [Emmett Hosey] that at?
>
> A. You just asked me that awhile ago.
>
> . . . .
>
> A. [Y]ou know why that was an awful night?
>
> Q. Yes, ma'am, I do.
>
> A. You wasn't even there, so how could you know?
>
> Q. The fact is, Mrs. Hosey, you weren't in the room when Emmitt went in there, were you, yourself?
>
> . . . .
>
> Q. I'll ask you, Mrs. Hosey, on the night you went over to Mr. Martin's right here, if you didn't make a statement in their presence that you believed everything [the victim] had said that day and that you were mighty upset about it. Didn't you tell them that?
>
> A. I believed it at the time.
>
> . . . .

Q. Mrs. Hosey, when did you stop believing it?

A. Right after [the victim] didn't know what come was, when I got to thinking about she didn't know, and she does know. She knows a lot more than she lets on like she does.

Q. Mrs. Hosey, I believe you said—correct me if I'm wrong. I want to be sure I'm straight about this—that right after she accused Emmitt is when you asked her what come was and she said she didn't know. Isn't that right?

A. I didn't ask her what come was.

Q. Well, didn't you testify that you asked her that right after . . .

A. No, I did not.

Q. When did you ask her that?

A. I didn't tell you that.

Q. You asked her did he come on you.

A. I said did he come on you.

Q. And right after she accused him of that. Is that right?

A. Yes, uh huh.

The State was frequently forced, in effect, to cross-examine its own witness in order to elicit complete and accurate answers. Mrs. Hosey's failure to be candid and forthcoming when initially answering many of the prosecutor's questions is further demonstrated by the following:

Q. Who did you find to be in the bedroom?

A. He [Emmett Hosey] wasn't in there.

Q. Had he been in there, to your knowledge?

A. Not to my knowledge but, well, I said, I didn't see him, and I . . .

A. [The victim] hollered, Mama. That's when I went up the hall, and Emmitt was standing there; and I said, Emmitt, did you go in there, and he said, well, yes, I went in there and covered them up.

Q. So, that's my question—yes, you know he went in there.

. . . .

Q. Mrs. Hosey, did I understand you to say just before this that [the victim] only came to see you [in the hospital] two times? Is that right?

A. Two times with Emmitt.

Q. I'll ask you if you didn't say she just came two times.

A. She came four times.

Q. And when did you decide it was four times, Mrs. Hosey?

. . . .

Q. I'll ask you whether or not when you went over there you begged and pleaded with [the victim] to drop all this.

A. No, buddy, I did not beg and plead.

Q. Did you ask her to drop it?

A. . . . I said . . . ain't you got what you wanted, and she said yes. I said why in the world don't you stop this mess.

Q. So you did ask her to stop it.

A. Yeah. I said why in the world don't you stop this mess.

Mrs. Hosey's cooperation with the State during direct examination was, at best, minimal. The record on appeal makes it obvious that Mrs. Hosey was only ostensibly a State's witness.

The Commentary[2] to Rule 611 is helpful in determining when an objection to a leading question by a party cross-examining a friendly witness should be sustained. It reads in relevant part:

2. The commentaries printed with the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, in the General Statutes were not enacted into law by the General Assembly. Instead, the General Assembly intended that the commentaries be used to "clarify legislative intent or reflect amendments to the rules . . ." and instructed the Revisor of Statutes to "cause the Commentary to each rule to be printed with

> Subdivision (c) continues the traditional view that the suggestive powers of the leading question are as general propositions undesirable. Within this tradition numerous exceptions have achieved recognition: . . . . As the Advisory Committee's Note points out: "The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command."
>
> The Note states that:
>
> "The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of redirect) or of an insured defendant who proves to be friendly to the plaintiff."

N.C.G.S. § 8C-1, Rule 611, Commentary (Cum. Supp. 1985).

While the use of leading questions ordinarily is a matter of right during cross-examination, the defendant here clearly was cross-examining a friendly witness. Therefore, the defendant was engaged in cross-examination in form only and not in fact. Justifiable concern has been expressed that to allow a party to ask leading questions of a friendly witness "would allow the examiner to provide a false memory to the witness by suggesting the desired reply to his question." *State v. Greene,* 285 N.C. at 492, 206 S.E. 2d at 235.

[1] Like the authors of the Commentary, we conclude that the qualification "ordinarily" used in subsection (c) of Rule 611 "is to furnish a basis for denying the use of leading questions when the

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the rule in the General Statutes." 1983 N.C. Sess. Laws ch. 701, § 2. This approach by the General Assembly was prudent, since the commentaries contain references to case law of other states and other matters subject to change without the consent or knowledge of the General Assembly. In accord with what we perceive to be the intent of the General Assembly, we will not treat the commentaries printed with the North Carolina Rules of Evidence in the General Statutes as binding authority but, instead, will give them substantial weight in our efforts to comprehend legislative intent.

cross-examination is cross-examination in form only and not in fact . . . ." N.C.G.S. § 8C-1, Rule 611(c), Commentary (Cum. Supp. 1985). Further, the authority to sustain objections to leading questions directed to friendly witnesses in such situations is inherent in the discretion granted the trial court in Rule 611 to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation *effective for the ascertainment of the truth.*" N.C.G.S. § 8C-1, Rule 611(a) (Cum. Supp. 1985) (emphasis added). The exercise of this discretionary power by the trial court at appropriate times will prevent the party examining a friendly witness from providing "a false memory to the witness by suggesting the desired reply to his question" inadvertently or otherwise. *State v. Greene*, 285 N.C. at 492, 206 S.E. 2d at 235. When a party is "cross-examining" a friendly witness, it is within the discretion of the trial court to sustain objections to leading questions.

[2] The defendant also contends that it was improper for the trial court to limit or prevent him from asking leading questions on cross-examination without first making formal findings and conclusions and declaring the witness hostile to the State or friendly to the defendant. No such declaration was made by the trial court in this case.

By his argument in this regard, the defendant has sought to have us require formal findings analogous to those we previously required under our former anti-impeachment rule. Under that rule, the State was prohibited from impeaching its own witness by prior inconsistent statements or any evidence of the witness's bad character. *See, e.g., State v. Cope*, 309 N.C. 47, 305 S.E. 2d 676 (1983). An exception to the general rule applied when the prosecutor had been misled as to the witness's expected testimony on a material fact and was "surprised by the actual testimony given." Before the trial court could apply the "surprise exception," however, it was required to resolve in a *voir dire* hearing the preliminary questions of whether the prosecutor had been misled and surprised by the testimony of the witness. *Id.* at 51, 305 S.E. 2d at 679.

The anti-impeachment rule and exceptions thereto were abolished with the adoption of our new North Carolina Rules of

Evidence. *State v. McDonald*, 312 N.C. 264, 269 n.1, 321 S.E. 2d 849, 852 n.1 (1984). Rule 607 now expressly provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C.G.S. § 8C-1, Rule 607 (Cum. Supp. 1985).

We see no reason to engraft the technical requirements for exceptions to the now abolished anti-impeachment rule to issues arising under Rule 611 of the North Carolina Rules of Evidence. The better practice in cases such as this would be for the trial court to make findings and conclusions and declare formally that the witness is friendly to the party cross-examining him or adverse to the party calling him as a witness. *Cf. State v. Tate*, 307 N.C. 242, 297 S.E. 2d 581 (1982) (decided prior to the effective date of the North Carolina Rules of Evidence). But when, as here, the record on appeal manifestly shows that the witness was only ostensibly the witness of the party calling her and was entirely friendly to the party cross-examining her, the trial court does not commit reversible error by failing to make such a formal declaration. A trial court may properly limit leading questions of a witness in such situations without conducting a *voir dire* hearing or making any formal declaration.

[3] The defendant was not denied his right to cross-examine adverse witnesses or his right to present a full and effective defense. The trial court did not err in the present case by sustaining the State's objections to leading questions asked of a witness only nominally adverse to the defendant.

Further, any possible error in this regard was rendered harmless, because the defendant had the opportunity to establish any material fact he sought to elicit by simply rephrasing his questions to Mrs. Hosey. That he in fact did so is amply illustrated by the following:

> Q. Was [the victim] very upset and mad about it [a disagreement with Emmett Hosey] at the time?
>
> A. Yes.
>
> Q. All right, now, let me ask you this. Do you recall some time after that, more particularly on May 4, 1984, did [the victim] leave the trailer on that day where y'all were living?

A. Yes.

Q. And did she leave some time around the hour of 12:30 A.M.?

MR. YEATTS: OBJECTION.

MR. BOWMAN: To leading, Your Honor.

MR. YEATTS: OBJECTION to leading and OBJECTION to relevancy.

COURT: Well, SUSTAINED to the leading and without further foundation, I will SUSTAIN it as to relevancy.

Q. What time did [the victim] leave at that time?

A. 12:30.

. . . .

Q. Has she [the victim] ever told you at any time that – let me ask you this. Did you ask her about telling stories on . . .

MR. BOWMAN: OBJECTION to leading, Your Honor.

COURT: SUSTAINED.

Q. What if anything, did you ask her in regards to telling you the truth about things?

MR. BOWMAN: OBJECTION.

COURT: On what gounds [sic]?

MR. YEATTS: On the grounds of leading, Your Honor.

COURT: OVERRULED.

Q. What did you ask her?

A. [The victim] told me not to tell nobody that April's boyfriend had bought her a house.

. . . .

Q. Did he [Emmett Hosey] get up during the night and go do something with the furnace?

A. Yes, he did.

Q. Now, was it cool . . .

MR. BOWMAN: OBJECTION to leading.

COURT: SUSTAINED.

Q. Tell the ladies and gentlemen of the jury whether or not it was cool or warm that night.

A. Yes, it was cool and he got up to light our furnace.

Q. Did the heat come on?

MR. YEATTS: OBJECTION to leading, Your Honor.

COURT: SUSTAINED.

Q. State whether or not the heat came in or not.

A. Yes.

. . . .

Q. Now, Mrs. Hosey, let me ask you this. Did you say that the first time [the victim] told you something about this incident back in September of 1981 was during Autumn Leaves Festival?

A. Yes.

Q. Did she tell you then that it had been, that it happened two or three days after you'd gone into the hospital?

A. She said he [Emmett Hosey] touched her.

Q. I know, but did she tell you that it happened two or three days after you had gone in the hospital?

MR. BOWMAN: OBJECTION to the leading, Your Honor.

COURT: SUSTAINED.

Q. Did she tell you anything about when it happened?

A. No.

Thus, it is readily apparent that the action of the trial court in sustaining objections to leading questions during the defendant's cross-examination of his wife did not significantly interfere with the defendant's exercise of his right to cross-examine her. We reject the defendant's first contention as being without merit.

We have reached the same result as the Court of Appeals with regard to this contention. However, the opinion of the Court of Appeals may be read as expressing the view that, in all situations:

> it is within the sound discretion of the trial judge to determine whether the use of leading questions will be permitted and absent an abuse of such discretion the ruling by the trial judge will not be disturbed on appeal. *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 235 (1974).

State v. Hosey, 79 N.C. App. 196, 202, 339 S.E. 2d 414, 417 (1986). The rule quoted from *Greene* and relied upon by the Court of Appeals in this case is not universally valid. The trial court's discretion in this regard is limited to some extent by Rule 611. Nevertheless, for reasons fully discussed in this opinion, the Court of Appeals was correct in concluding that the trial court did not err by sustaining objections to the defendant's leading questions of Mrs. Hosey.

The defendant brought forward several additional assignments of error and supporting contentions. He contends he was denied a fair trial because the State asked questions insinuating he had engaged in criminal acts when his character was not at issue. He also contends that the trial court erred by denying his motion to dismiss the rape charge for lack of substantial evidence of each of the elements of the offense. Finally, he contends the trial court committed plain error by including a statement not supported by the evidence during its review of the evidence for the jury. Each of these contentions was addressed and disposed of in the opinion of the Court of Appeals in this case. For the reasons fully articulated in the opinion of the Court of Appeals, these assignments and contentions are without merit.

The decision of the Court of Appeals as modified herein is affirmed.

Modified and affirmed.

CHARLES L. ROWE v. FRANKLIN COUNTY, BOARD OF COMMISSIONERS OF FRANKLIN COUNTY, FRANKLIN MEMORIAL HOSPITAL, BOARD OF TRUSTEES OF FRANKLIN MEMORIAL HOSPITAL, JAMES S. HUNT, INDIVIDUALLY AND AS CHAIRMAN OF BOARD OF COMMISSIONERS OF FRANKLIN COUNTY AND BOARD OF TRUSTEES OF FRANKLIN MEMORIAL HOSPITAL, JAMES S. WEATHERS, RONALD W. GOSWICK, J. THURMAN GRIFFIN, BENNIE R. GUPTON, AND JAMES W. MILLS, INDIVIDUALLY AND AS COUNTY MANAGER OF FRANKLIN COUNTY

No. 164A86

(Filed 7 October 1986)

1. **Hospitals § 2.1— authority of trustees—divested by county commissioners—employment contract by trustees—unauthorized—not ultra vires**

An employment contract with plaintiff entered into by the board of trustees of the Franklin Memorial Hospital was not *ultra vires*, but was unauthorized, where the board of trustees was created by the Franklin County Board of Commissioners on 5 January 1948 with full authority to employ personnel for the proper operation of the hospital; the commissioners voted on 6 June 1983 for the management of the hospital by the Hospital Corporation of America; and the trustees, after learning of the commissioners' resolution and letter agreement with HCA, voted on 15 June 1983 to contract with Carolinas Hospital and Health Services, Inc. for management services for the hospital and with plaintiff as the hospital administrator. The June 6 resolution manifested the commissioners' intent to divest the trustees of the delegated authority to make long-term management decisions on behalf of the hospital, and the trustees as agents of the commissioners thus had no authority to enter into a long-term employment contract with plaintiff. N.C.G.S. § 131-126.21(b) (1981).

2. **Principal and Agent § 5.1— employment contract—beyond hospital trustees' apparent authority**

Summary judgment was properly entered for defendants in an action for damages for breach of plaintiffs' employment contract as a hospital administrator where a reasonably prudent person in plaintiff's position would not have been justified in believing that the trustees had authority to enter into long-term employment contracts on behalf of the hospital.

APPEAL by plaintiff pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 79 N.C. App. 392, 339 S.E. 2d 428 (1986), affirming judgment entered by *Barnette, J.*, at the 29 April 1985 session of Superior Court, FRANKLIN County. Heard in the Supreme Court 9 September 1986.

Plaintiff filed this action for damages alleging, inter alia, breach of a written contract of employment with defendant Franklin Memorial Hospital. The trial court entered summary

judgment on all issues in favor of defendants, and the Court of Appeals affirmed, with Wells, J., dissenting on grounds that plaintiff should have been granted summary judgment on the issue of breach of the employment contract.

Hollowell & Silverstein, P.A., by Thaddeus B. Hodgdon, for plaintiff-appellant.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by J. Ruffin Bailey and Gary S. Parsons, and Jolly, Williamson & Williamson, by Wilbur M. Jolly, for defendant-appellees.

MARTIN, Justice.

Having carefully examined the materials before the trial court on the parties' respective motions for summary judgment, we have determined that summary judgment was properly entered for defendants. Except as modified herein, we affirm the decision of the Court of Appeals.

[1] The undisputed evidence establishes that in accordance with Chapter 131, Article 13B of the 1947 Session Laws of North Carolina, the Franklin County Board of Commissioners created by resolution the Franklin Memorial Hospital and the Board of Trustees of Franklin Memorial Hospital on 5 January 1948. This resolution vested the board of trustees "with full authority to employ an architect, select a site and for the planning, establishment, construction, maintenance, and to employ such other personnel as are necessary for the proper operation of said Hospital . . . ." *See generally* N.C.G.S. §§ 131-126.20, .21(a) (1981). The board of trustees operated the hospital under this authority for many years, and on 22 October 1981 hired plaintiff under an oral contract to be administrator of the hospital for an undetermined period of time. On 21 December 1982 the Franklin County Board of Commissioners adopted a resolution stating its intent to transfer management, operation, and control of the hospital to a nonprofit, tax-exempt corporation to be formed in 1983. The terms of eight of the nine trustees had expired or were about to expire when this resolution was adopted, and so the commissioners notified the outgoing trustees of the commissioners' intention to reorganize the hospital's management. The outgoing trustees' terms were extended during this transitional period.

On 21 March 1983, the commissioners adopted a resolution inviting Carolinas Hospital and Health Services, Inc. (CHHS) and Hospital Corporation of America (HCA) to submit proposals for management of the hospital to the commissioners. This resolution provided that such proposals were to be submitted at a specially called meeting of the commissioners to which the trustees, medical staff of the hospital, and plaintiff were invited. On 23 May 1983 the commissioners, trustees, and plaintiff met with representatives of CHHS and HCA to receive the proposals submitted. Both proposals provided that the administrator of the hospital would be an employee of the management company selected.

On 6 June 1983 the commissioners unanimously voted to contract with HCA for the management of the hospital. In a letter agreement dated 10 June 1983, the commissioners and HCA agreed that HCA would supply an interim administrator, if requested, to assist in the provision of management services to the hospital pending negotiation and signing of a final, long-term contract between the commissioners and HCA. At a specially called meeting at 7:30 p.m. on 15 June 1983, after learning of the commissioners' resolution and letter agreement with HCA, and in the presence of plaintiff, the trustees adopted a resolution stating their intent to contract with CHHS for management services for the hospital. At this 15 June 1983 meeting the trustees also purported to enter into a written three-year employment contract with plaintiff under which plaintiff was to act as hospital administrator. In a specially called meeting at 9:00 p.m. on 15 June 1983, the commissioners voted to revoke the purported contract that the trustees had entered into with CHHS. On 27 June 1983 the board of commissioners entered a resolution expressly repealing, inter alia, those sections of the 1948 resolution which had vested authority to operate and manage the hospital in the trustees, and stating that all authority to plan, establish, construct, maintain and operate the hospital would now be vested in the commissioners, who would also serve as the trustees of the hospital. On 1 July 1983 this new board of trustees of the hospital voted to fire plaintiff as administrator of the hospital; the trustees also requested HCA to provide immediately an interim administrator for the hospital. By letter dated 11 July 1983, plaintiff was notified in writing by the chairman of the board of trustees that his employment as administrator of the hospital was terminated.

Plaintiff contends that the hospital, through the trustees then in power, entered into an enforceable written contract of employment with him on 15 June 1983 and that the hospital, through the commissioners (and later, as new trustees), breached this contract by firing him before the end of the term specified in the contract. In affirming summary judgment for defendants the Court of Appeals reasoned that by their 6 June 1983 resolution to contract with HCA, the commissioners revoked by implication the power of the trustees to enter into a long-term contract with any party concerning the management of the hospital. The Court of Appeals stated that because the trustees therefore had no authority to enter into a long-term employment contract with plaintiff on 15 June 1983, the purported contract "is thus *ultra vires* and void." We agree that the trustees had no authority to enter into the written contract with plaintiff on 15 June 1983, but, as explained below, we reject the incorrect statement of the Court of Appeals that the contract was ultra vires.

The Court of Appeals correctly stated that under N.C.G.S. § 131-126.21(a) the board of commissioners had authority to delegate its management authority over the hospital to the trustees and properly did so pursuant to the resolution entered in 1948. *See Simmons v. Elizabeth City*, 197 N.C. 404, 149 S.E. 375 (1929). N.C.G.S. § 131-126.21(a) also authorized the commissioners to set and limit the scope of authority delegated to the trustees. This authority to delegate power includes the authority to amend and revoke any power delegated. *City of Salisbury v. Arey*, 224 N.C. 260, 29 S.E. 2d 894 (1944). *See Swain County v. Sheppard*, 35 N.C. App. 391, 241 S.E. 2d 525 (1978). We hold that in the instant case the resolution of the commissioners dated 6 June 1983 revoked the authority of the trustees, effective that date, to enter into long-term contracts concerning the management of Franklin County Hospital.

Although the 6 June resolution does not state expressly that it revokes authority granted to the trustees in 1948, the clear implication of its language demonstrates the commissioners' intent to revoke the trustees' authority to enter into long-term management contracts on behalf of the hospital. In determining whether an ordinance or resolution has been repealed by implication, we look to the intent of the commissioners, bearing in mind that a presumption against intent to repeal exists "where express terms

are not used, and where both statutes [or resolutions or ordinances] by any reasonable construction can be declared to be operative without obvious or necessary repugnancy." *State v. Lance*, 244 N.C. 455, 457, 94 S.E. 2d 335, 337 (1956). *Cf. Clark v. City of Charlotte*, 66 N.C. App. 437, 311 S.E. 2d 71 (1984) (rules of construction applicable to statutes generally apply to county and municipal ordinances). "However, if two statutes are truly irreconcilably in conflict it is logical that the later statute should control, resulting in a repeal of the earlier statute." *State v. Greer*, 308 N.C. 515, 518, 302 S.E. 2d 774, 777 (1983). "A portion of an act may . . . be repealed by implication." *State v. Lance*, 244 N.C. at 457, 94 S.E. 2d at 337.

We agree with the Court of Appeals that the language of the 6 June resolution declaring that HCA will be the new manager of the hospital logically conflicts with the 1948 resolution insofar as the latter conferred authority on the trustees to enter into long-term employment contracts with respect to the management of the hospital. Under the circumstances, the 6 June resolution choosing HCA over CHHS clearly showed the commissioners' intent to exercise their authority to decide how the hospital would be managed in the future. By so resolving, the commissioners manifested their intent to divest the trustees of the delegated authority to make long-term management decisions on behalf of the hospital. Therefore, the resolution of 6 June 1983 impliedly repealed that part of the resolution of 1948 which had delegated authority to the trustees to enter into long-term contracts regarding management of Franklin Memorial Hospital. Thus, on 15 June 1983 the trustees had no authority to enter into a long-term contract of employment with plaintiff. *Cf.* N.C.G.S. § 131-126.21(b) (1981) (body to which county commissioners delegate authority to maintain and operate hospital "shall exercise only such powers and duties as are prescribed in the resolution of the board of county commissioners granting and vesting such authority and powers in said [body]"). However, the fact that the trustees had no authority to enter into an enforceable long-term employment contract on behalf of the hospital does not mean that the contract was ultra vires.

An act by a private or municipal corporation is ultra vires if it is beyond the purposes or powers expressly or impliedly conferred upon the corporation by its charter and relevant statutes

and ordinances. *See Moody v. Transylvania County*, 271 N.C. 384, 156 S.E. 2d 716 (1967); *Madry v. Scotland Neck*, 214 N.C. 461, 199 S.E. 618 (1938). If a corporation has authority under statute and charter to enter into a particular kind of contract, the fact that an agent of the corporation purports to bind the corporation without permission of the corporation does not make this act ultra vires. It merely makes this particular act one that the corporation has not authorized, even though other such acts by proper corporate agents would be binding on the corporation. In the instant case it is indisputable that the commissioners had statutory authority to enter into employment contracts on behalf of the hospital with managers and administrators of the hospital. *See* N.C.G.S. §§ 131-98(a)(8), -126.18(1), .20(c), .29 (1981). There is also no question that this authority had been properly delegated to and exercised by the trustees when they hired plaintiff under an oral employment contract in 1981. Hiring management employees is not an ultra vires act under the facts of this case. *Compare Moody v. Transylvania County*, 271 N.C. 384, 156 S.E. 2d 716 (provision of ambulance service was ultra vires the lawful authority granted to county commissioners); *Madry v. Scotland Neck*, 214 N.C. 461, 199 S.E. 618 (municipality's offer of reward was ultra vires authority granted by statute); *Burgin v. Smith*, 151 N.C. 561, 66 S.E. 607 (1909) (contract by county commissioners for building and repair of courthouse for $6500 was ultra vires statutory authority of commissioners to contract debt only up to $5000). Of course, if it had been ultra vires, the purported contract between the hospital and plaintiff would have been void and could not have been ratified by the corporation or enforced by plaintiff on grounds of estoppel. *Id.*[1] *See Central Transp. Co. v. Pullman's Car Co.*, 139 U.S. 24, 59-60, 35 L.Ed. 55, 68 (1890).

1. The harshness of the defense of ultra vires is predicated on the rule that those dealing with a municipal corporation are held to know the extent of the corporation's authority because the scope of such authority is a matter of public record. *See generally, e.g.*, 18B Am. Jur. 2d *Corporations* § 2002 (1985) ("Obligation of Member of Public to Take Notice of Extent of Corporation's Powers"); 10 E. McQuillin, *Municipal Corporations* § 29.04 (1981 & Supp. 1985) ("Notice Imputed to One Contracting With Municipality"); Comment, *Chemical Bank v. Washington Public Power Supply System: An Aberration in Washington's Application of the Ultra Vires Doctrine*, 8 U. Puget Sound L. Rev. 59, 62-65 (1984). Although ultra vires is permitted only to a limited extent as a defense by private corporations to actions based on contract brought by third parties, *see* N.C.G.S. § 55-18 (1982); *Piedmont Aviation v. Motor Lines*, 262 N.C. 135, 136 S.E. 2d 658 (1964); *Everette v.*

[2] Under the facts of the present case, because of the commissioners' 6 June resolution, the trustees' attempt to enter into an employment contract which would be binding upon the hospital was, under the law of agency, without actual authority. *See generally, e.g., Research Corp. v. Hardware Co.*, 263 N.C. 718, 140 S.E. 2d 416 (1965). However, the issue remains whether, despite the trustees' lack of actual authority, the contract is enforceable on grounds that in signing the contract on behalf of the hospital, the trustees held out to plaintiff apparent authority to act on behalf of the hospital.[2] *See Colyer v. Hotel Co.*, 216 N.C. 228, 4 S.E. 2d 436 (1939) (applying doctrine of apparent authority to facts concerning alleged breach of employment contract). "When a corporate agent acts within the scope of his apparent authority, and the third party has no notice of the limitation on such authority, the corporation will be bound by the acts of the agent . . . ." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 30, 209 S.E. 2d 795, 799 (1974). *Accord, e.g., Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976). *Cf.* 10 E. McQuillin, *Municipal Corporations* § 29.10 (1981 & Supp. 1985) (discussing cases where recovery by third parties allowed against public entity that was authorized to contract for the services provided but had improperly executed its authority); Comment, *Chemical Bank v. Washington Public Power Supply System: An Aberration in Washington's Application of the Ultra Vires Doctrine*, 7 U. Puget Sound L. Rev. 59, 65-72 (1984) (same). "[T]he determination of a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent." *Zimmerman v. Hogg & Allen*, 286 N.C. at 31, 209 S.E. 2d at 799.

> "If the facts and circumstances of the particular case reveal that an ordinarily prudent [person] would have been put on notice that one with whom he was dealing was not acting within the apparent scope of his authority, the principal is not bound under well-settled principles of agency law."

Lumber Co., 250 N.C. 688, 110 S.E. 2d 288 (1959); R. Robinson, *North Carolina Corporation Law* § 3-14 (3d ed. 1983), in many jurisdictions it is permitted much more freely when raised as a defense by a municipal corporation. *See* 10 E. McQuillin, *Municipal Corporations* § 29.104c (1981 & Supp. 1985).

2. Under our analysis of the appeal, we find it necessary to address this issue although it was not argued by the parties.

Id. (quoting 2 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 434, at 307 (perm. ed. 1931)). Therefore we turn to the question whether there is any material issue of fact whether an ordinarily prudent person exercising reasonable care in plaintiff's position would have been justified in believing that on 15 June 1983 the trustees continued to have authority to enter into long-term employment contracts on behalf of the hospital. We conclude that such a belief by an ordinarily prudent person would not have been justified and therefore the contract is not enforceable under principles of apparent authority.[3]

Although the trustees had hired plaintiff in 1981 under an oral contract of employment, plaintiff was undeniably aware of the friction between the commissioners and trustees during 1983 concerning the future management of the hospital: he was present at the 23 May 1983 meeting of the commissioners and trustees when proposals were received from CHHS and HCA and was aware of the commissioners' resolution of 6 June to contract with HCA shortly after it was entered. Eleven copies of the interim agreement of 10 June 1983 between the commissioners and HCA were hand delivered to plaintiff on 14 June 1983 by the County Manager of Franklin County. We hold that a reasonably prudent person in plaintiff's shoes would not have been justified in believing that on 15 June 1983 the trustees continued to have authority to enter into long-term employment contracts on behalf of the hospital. Therefore, there is no merit to the theory that any of the defendants were contractually bound to plaintiff under the doctrine of apparent authority.

Under the facts of this case plaintiff was merely an employee at will of the hospital when his employment was terminated. *See, e.g., Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E. 2d 282, 288 (1976). Summary judgment was properly entered for defendants.

The decision of the Court of Appeals is

Modified and affirmed.

3. In passing, we note that in an action to enforce a contract it may be appropriate to reply to a defense of lack of authority with an allegation of estoppel. *See* N.C.R. Civ. P. 8(c) (estoppel is an affirmative defense). Plaintiff did not do so in the instant case.

DIANNE HOLLEY, INDIVIDUALLY, GREG L. HINSHAW, GUARDIAN OF THE ESTATE OF ERVIN LEE HOLLEY AND DIANNE HOLLEY, GUARDIAN OF THE PERSON OF ERVIN LEE HOLLEY v. BURROUGHS WELLCOME CO., A NORTH CAROLINA CORPORATION, AND AYERST LABORATORIES: A DIVISION OF AMERICAN HOME PRODUCTS CORPORATION

No. 361A85

(Filed 7 October 1986)

Sales § 24; Negligence § 29.3— action against drug manufacturers—inadequate warnings—summary judgment improper

Summary judgment for defendants was improper in an action in which plaintiff alleged that his severe irreversible brain damage was caused by inadequate warnings by defendants of the dangers of certain anesthetic drugs manufactured and marketed by defendants and given to plaintiff where there was a genuine issue of material fact as to the extent to which plaintiff's doctor relied either directly or indirectly upon information contained in the package inserts and promotional information supplied by defendants, and an affidavit from plaintiff's expert pharmacologist constituted a forecast of competent evidence which, if believed by the jury, would establish the essential element of proximate cause.

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

APPEAL of right by defendants pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, reported at 74 N.C. App. 736, 330 S.E. 2d 228 (1985), reversing summary judgment for defendants entered on 17 November 1983 by *Johnson, J.*, in Superior Court, DURHAM County.

McCain & Essen, by Grover C. McCain, Jr., and Jeff Erick Essen for plaintiff-appellees.

Richard B. Conely, for defendant-appellant, Burroughs Wellcome Co.

Newsom, Graham, Hedrick, Bryson & Kennon, by E. C. Bryson, Jr., Joel M. Craig and Ann Windon Craver, for defendant-appellant, American Home Products Corporation.

FRYE, Justice.

Ervin Lee Holley was admitted to the Duke University Medical Center on 5 April 1976 for elective knee surgery. He was twenty-one years old and generally of good physical and mental

health. The surgical procedure performed on 6 April 1976, however, resulted in severe irreversible brain damage to Mr. Holley.

On 31 December 1980, the guardians of the person and estate of Ervin Lee Holley filed a complaint against defendant pharmaceutical companies, seeking compensatory and punitive damages for the severe and permanent personal injuries to Mr. Holley. According to plaintiffs, defendants overpromoted the benefits and inadequately warned of the dangers of certain anesthetic drugs manufactured and marketed by defendants and administered to Mr. Holley. Plaintiffs contend that defendants had a duty to warn potential users of the dangers, symptoms and suggested methods of treatment thereof, and that the failure to adequately include such warnings in promotional information and package inserts proximately caused the injuries to Mr. Holley. In support of their complaint, plaintiffs offered the affidavit of Dr. Claude T. Moorman.

According to Dr. Moorman, Mr. Holley's injuries were due to hypoxia, or oxygen deprivation, resulting from malignant hyperthermia. Malignant hyperthermia is a condition in which the body's temperature is elevated, causing an increase in the level of blood acidity and a corresponding decrease in the body's ability to supply oxygen to vital organs, including the heart and brain. The condition is associated with anesthesia, and can be caused by use of the general anesthetic known as halothane, manufactured by defendant Ayerst Laboratories and marketed by defendant American Home Products under the name of Fluothane. Succinylcholine Chloride, a muscle relaxant manufactured and marketed by defendant Burroughs Wellcome under the trade name Anectine, can also cause malignant hyperthermia and may aggravate an existing condition. According to Dr. Moorman, the malignant hyperthermia suffered by Mr. Holley was triggered by Fluothane and Anectine prescribed by the anesthesiologist, Dr. Hooper, and administered to Mr. Holley by Elizabeth Evans, a certified registered nurse anesthetist. One of the keys to successfully treating malignant hyperthermia, according to Dr. Moorman, is early awareness that the condition exists. Attending medical personnel must therefore recognize the symptoms of the condition for what they are.

Although Mr. Holley's anesthesia chart shows "a typical picture of increasing hypoxia," in Dr. Moorman's opinion, these in-

dications apparently were not recognized as symptoms of malignant hyperthermia, either by Dr. Hooper or Nurse Evans, and thus not properly treated in time to prevent injury. According to plaintiffs and Dr. Moorman, primary sources of awareness of the adverse effects of using pharmaceuticals are the package inserts that accompany the products, entries in the *Physicians' Desk Reference*, a standard reference text in the medical profession, and promotional information found in advertisements and provided by product salesmen. None of these sources, in Dr. Moorman's opinion, contained sufficient information or warnings to put an anesthesiologist or nurse anesthetist on notice of the possibility that the use of Fluothane or Anectine might induce or aggravate malignant hyperthermia in a patient.

Defendants, in June 1983, moved for summary judgment and supported their motions with the affidavit and deposition of Dr. Hooper and with several other affidavits. In his affidavit and deposition testimony, Dr. Hooper denied relying on any of the information made available by defendants through advertisements, representations by sales people, the *Physicians' Desk Reference*, or package inserts regarding the use and possible dangers of their products. Dr. Hooper also denied that Mr. Holley's injuries had been caused by malignant hyperthermia.

Plaintiffs responded with the affidavit of pharmacologist Dr. James O'Donnell which supported the claims made in their complaint. Based on his stated knowledge of the information concerning malignant hyperthermia, the various sources of information provided by defendants concerning Fluothane and Anectine, and the reliance of physicians on such information, Dr. O'Donnell opined that assuming Holley's injuries in fact resulted from malignant hyperthermia, medical personnel responsible for his care failed to timely recognize the condition, due in part to defendants' overpromotion of Fluothane and Anectine and inadequate warning of the dangers attending its use. On 17 November 1983, the trial court granted summary judgment for defendants. Plaintiff excepted to entry of judgment in favor of defendants and gave timely notice of appeal.

The Court of Appeals reversed the trial court's order allowing defendants' motion for summary judgment and remanded the cause for trial, holding that there existed genuine issues of fact

that must be submitted to the jury. The Court of Appeals reasoned that the testimony of Dr. Hooper, relied upon by defendants in support of their motion for summary judgment, was "inherently suspect," therefore raising a question of fact as to his credibility. The majority also held that defendants' duty to warn of risks associated with the use of their drugs extended to the nurse anesthetist working under Dr. Hooper's supervision, thus raising a question of fact as to the adequacy of warning to the nurse anesthetist. Judge Arnold dissented, disagreeing with the majority holding that Dr. Hooper's testimony was "inherently suspect." From this decision, defendants appeal as a matter of right to this Court. N.C.G.S. § 7A-30(2).

The issue in this case is whether the Court of Appeals properly reversed the trial court's order of summary judgment entered against the plaintiffs. We agree with the Court of Appeals' decision, on grounds stated below.

Plaintiffs, in their complaint and supporting affidavit, set forth a theory of recovery sounding in negligence. As noted in the Court of Appeals' opinion, in order to establish a *prima facie* case of negligence in a products liability action, a party must show, "(1) evidence of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach, and (4) loss because of the injury." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E. 2d 190, 194 (1980).

Plaintiffs allege that defendants' breach of duty owed to Mr. Holley to adequately warn medical personnel responsible for his care of the risks, symptoms and treatment of malignant hyperthermia, a condition associated with the use of their products, was the proximate cause of Mr. Holley's injuries. Defendants, on motion for summary judgment, offered an affidavit and the deposition testimony of Dr. Hooper, the anesthesiologist responsible for the prescription of anesthesia and care administered to Mr. Holley. Dr. Hooper testified that he did not rely on any information supplied by the defendants concerning the use of their respective products, Fluothane or Anectine.

The party moving for summary judgment has the burden of showing that there is no genuine issue as to any material fact. *Pembee Mfg. Corp. v. Cape Fear Construction Co.*, 313 N.C. 488,

329 S.E. 2d 350 (1985). In determining whether this burden is met, the moving party's "papers are scrutinized and all inferences are resolved against him." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E. 2d 392, 399 (1976). In addition, "[f]acts asserted by the party answering summary judgment motion must be accepted as true." *Norfolk and Western Railway Company v. Werner Industries, Inc.*, 286 N.C. 89, 98, 209 S.E. 2d 734, 739 (1974).

Keeping in mind these rules of construction, the precise question before this Court is whether there exists a genuine issue of fact as to the proximate cause of injuries suffered by Ervin Lee Holley.

Defendants contend that the facts about which there is no genuine issue demonstrate that the alleged negligence was not the proximate cause of the injury to Ervin Holley. In support of this contention, defendants rely on the deposition and affidavit of Mr. Holley's anesthesiologist, Dr. Hooper. Essentially, Dr. Hooper testified that he did not rely on information supplied by the defendants and further, that even if the package insert and promotional information supplied by the defenants had been exactly as plaintiffs claim they ought to have been, such compliance would have had no effect on the patient care rendered Mr. Holley, since Dr. Hooper was already quite aware of the possible effects of the drugs in triggering malignant hyperthermia, as well as the symptoms and treatment regime for this condition. Dr. Hooper admitted however that he had not had any personal experience with malignant hyperthermia. Defendants nevertheless contend that even if the warnings were inadequate and the products overpromoted, Dr. Hooper's testimony that he did not rely on such information demonstrates that there was no proximate causal relation between the alleged breach of duty and the injury to Holley.

Plaintiffs, on the other hand, contend that the forecast of evidence presented in this case is sufficient to raise a permissible inference that Dr. Hooper relied, directly or indirectly, on information from defendants' package inserts and from their promotional literature, thereby establishing a genuine issue of triable fact as to the element of proximate cause.[1] Plaintiffs argue essen-

1. Plaintiffs cite an Ohio Supreme Court case providing an excellent rationale for allowing the jury to decide if an adequate warning would have altered the doc-

tially that the testimony presented in this case establishes a forecast of evidence that the product information disseminated by drug manufacturers so permeates the entire medical profession that it constitutes a source of knowledge upon which Dr. Hooper relied in prescribing these products, and in providing the attending medical care.

At the deposition hearing Dr. Hooper testified on direct examination as follows:

> Q. Doctor, what is your source of knowledge of these anesthetic products and muscle relaxants that we have been talking about, or what sources of knowledge do you have?
>
> A. Any—Any practicing anesthesiologist has many sources of knowledge. I guess the basic source of knowledge is the education and training you get during your residency program, and then you build on that with reading textbooks, reading current medical literature, reading of the articles, listening to audio-digest tapes, attending meetings, hearing speakers on various topics.

Plaintiffs argue that the information published by the drug manufacturer is read and relied upon by writers and educators in the medical field and therefore such information permeates the sources of knowledge concerning Fluothane and Anectine. Plaintiffs further contend that the medical literature upon which Dr. Hooper admitted he relied is replete with promotional information supplied by the drug manufacturers. In support of this contention, plaintiffs rely in part on the affidavit submitted by defendant, Ayerst Laboratories Division of American Home Prod-

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tor's conduct. *Seley v. G. D. Searle Company*, 67 Ohio St. 2d 192, 423 N.E. 2d 831 (1982). In that case plaintiff suffered a stroke and numbness in her left side as a result of defendant's failing to warn of the side effects of the contraceptive Ovulen. The prescribing doctor testified that "he had acquired full knowledge from other sources of the increased risk of hypertension and stroke in women with a history of toxemia." *Id.* at 839. The court rejected the contention that the doctor's independent knowledge broke the causal link. Instead the court stated:

> "A warning may serve purposes other than merely filling gaps in the intended recipient's knowledge—one may benefit from being warned or reminded of what he already knows. Similarly, only speculation can support the assumption that an adequate warning, properly communicated, would not have influenced the course of conduct adopted by a physician, even where the physician had previously received the information contained therein." *Id.*

ucts. John B. Jewell, the Director of Medical Affairs of Ayerst Laboratories stated the following:

> During the course of marketing Fluothane, Ayerst has kept the medical profession fully informed concerning the use of the anesthetic by means of professional literature distributions, medical journals, professional association meetings, package inserts, 'dear doctor' letters and detailmen. The Fluothane package insert has always been the key to the information disseminated by Ayerst to the medical profession. Each package insert contains the prescribing information for the drug, including Indications, Contraindications, Warnings, Precautions and Adverse Reactions. Copies of a new package insert, as changed from time to time with the advent of new knowledge, have been sent out by Ayerst, with 'dear doctor' letters, to the medical profession. Every package insert for Fluothane has always been submitted to and approved by the FDA before it is used.
>
> The prescribing information contained in the Fluothane package insert has always been produced and included in every advertisement of the drug . . . . The same information has also appeared in the Physician's Desk Reference (P.D.R.) since 1976.
>
> In addition to the package inserts, 'dear doctor' letters and journal advertising, Ayerst has disseminated information to the medical profession by means of detailmen. The instructions to the detailmen, who are sales personnel, have always been to conform their discussion of Fluothane to the information contained in the package insert . . . .

Plaintiffs also rely on the following affidavit of pharmacologist Dr. James T. O'Donnell as evidence of the extent to which medical professionals responsible for Holley's care relied on drug information supplied by the manufacturers:

> I am acquainted with the syndrome known as malignant hyperthermia and I am further familiar with the state of the knowledge in the professional literature concerning malignant hyperthermia at the time of the operation of Ervin Holley at Duke Hospital in 1976. I have also acquainted myself with the advertising of these two defendants of these

respective products as of the time of the operation in 1976 and before.

. . . .

I am also acquainted with the degree of reliance by medical and pharmacy personnel, including physicians, on information about drugs provided by the manufacturers from various sources including package inserts, mailings and oral information supplied by detailmen. In my opinion, I possess expert knowledge concerning the degree that the information supplied by drug manufacturers are [sic] relied upon by individuals in medical and health fields.

For reasons that I can elaborate upon in more detail in actual testimony, it is my opinion that the information supplied by these defendants for their respective drugs of Fluothane and Anectine were completely inadequate to warn users of these drugs of the dangers of the development of the syndrome of malignant hyperthermia and of any recommended treatment of it if it, in fact, developed . . . . [S]hould it be determined that Mr. Holley developed malignant hyperthermia during his operation in April, 1976, then I do hold the opinion that the failure of the health personnel responsible for his care at that time to recognize the malignant hyperthermia syndrome was, at least, due in part to the failure of the manufacturers of Fluothane and Anectine to warn of the propensities of their drugs to cause or trigger this syndrome and due in part to their over-promotion of these drugs without giving fair balance to the dangers of the drugs.

In *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981), this Court held that:

> Summary judgment is . . . a device by which a defending party may force the claimant to produce a forecast of claimant's evidence demonstrating that claimant will, at trial, be able to make out at least a *prima facie* case or that he will be able to surmount an affirmative defense. Under such circumstances claimant need not present all the evidence available in his favor but only that necessary to rebut the defendant's showing that an essential element of his claim is non-existent or that he cannot surmount an affirmative de-

fense. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419, 421 (1979); *see generally* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745 (1974).

Drawing, as we must, all inferences of fact in favor of the plaintiffs, the affidavits and deposition testimony, taken together, are sufficient to defeat defendants' motion for summary judgment based on lack of proximate causal relationship between the alleged breach of duty and the injuries suffered by Holley.

First, plaintiffs' contention that Dr. Hooper relied directly or indirectly on defendants' overpromotion and inadequate warnings in package inserts finds support in defendant Ayerst's affidavit. The affidavit plainly indicates that during the course of marketing drugs the manufacturers seek to keep the medical profession fully informed through a variety of means including medical journals, professional literature distributions and package inserts. The information contained in the package inserts according to Ayerst was the key to information which they as manufacturers presented to the medical profession through various sources. Furthermore, Dr. Hooper in deposition testimony specifically stated that one of his sources of knowledge concerning Fluothane and Anectine was the medical literature. The testimonies of Ayerst and Dr. Hooper, therefore, when read together in a light most favorable to plaintiffs, raise a genuine issue of triable fact as to the extent to which Dr. Hooper relied either directly or indirectly upon information contained in the package inserts and promotional information supplied by the drug manufacturers.

Secondly, Dr. O'Donnell's affidavit, based on his asserted knowledge of professional literature concerning malignant hyperthermia, the information supplied by defendants concerning Fluothane and Anectine and the degree of reliance accorded such information by medical personnel in general, directly addresses the issue of proximate cause. His testimony that assuming Holley suffered from malignant hyperthermia, the failure of medical personnel to timely recognize and treat such condition was in part due to defendants' inadequate warnings and overpromotion, constitutes a forecast of competent evidence which, if believed by a jury, would establish the essential element of proximate cause in plaintiffs' negligence action.

For the foregoing reasons we find that there exists a genuine issue of fact as to whether the alleged negligence of defendants was the proximate cause of Ervin Lee Holley's injuries. Accordingly, we agree with the Court of Appeals that the trial court erred in allowing defendant's motion for summary judgment. Therefore, for the reasons stated in this opinion, the decision of the Court of Appeals is affirmed.

Affirmed.

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

TOM TOGS, INC. v. BEN ELIAS INDUSTRIES CORP.

No. 649PA85

(Filed 7 October 1986)

1. **Process § 14.4— foreign corporation—contract made in and to be performed in North Carolina—subject to jurisdiction**

A contract was made in North Carolina and was to be performed in North Carolina, so that defendant was subject to jurisdiction in North Carolina under N.C.G.S. § 55-145(a)(1), where one of defendant's buyers visited the New York showroom of an independent manufacturer's representative and placed an order for plaintiff's clothes; a purchase order was forwarded to plaintiff in North Carolina for acceptance or rejection; plaintiff's name and address were on the order; the independent agent had no authority to accept any offer made to plaintiff; and plaintiff accepted the order by sending the shirts to defendant within the specified time, as was customary in the industry.

2. **Process § 14.3— contract made within North Carolina—jurisdiction not automatic—due process inquiry required**

Jurisdiction over a foreign corporation does not automatically follow from a determination that a transaction falls within the language of N.C.G.S. § 55-145; the requirements of due process are the ultimate test of jurisdiction over a nonresident defendant. N.C.G.S. § 1-75.4.

3. **Process § 14.3; Constitutional Law § 24.7— foreign corporation—minimum contacts—evidence sufficient**

There were sufficient minimum contacts to justify the exercise of personal jurisdiction over the defendant without violating due process where defendant made an offer to plaintiff, whom defendant knew to be located in North Carolina; plaintiff accepted the offer in North Carolina; the contract was for special-

ly manufactured shirts and defendant was told that the shirts would be cut in North Carolina; defendant agreed to send its personal labels to plaintiff in North Carolina for plaintiff to attach to the shirts; the shirts were manufactured and shipped from North Carolina; and defendant returned them to North Carolina. N.C.G.S. § 25-1-105 (1965).

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

ON appeal by plaintiff pursuant to N.C.G.S. § 7A-30(1) and, as an alternative basis, grant of discretionary review to plaintiff pursuant to N.C.G.S. § 7A-31 of a decision of the North Carolina Court of Appeals, 76 N.C. App. 663, 334 S.E. 2d 105 (1985), reversing an order entered at the 19 October 1984 Session of Superior Court, WAKE County, by *Lee, J.*, denying defendant's motion to dismiss plaintiff's breach of contract action. Heard in the Supreme Court 14 April 1986.

Johnson, Gamble, Hearn & Vinegar, by Samuel H. Johnson and Richard J. Vinegar, for plaintiff-appellant.

Smith, Debnam, Hibbert & Pahl, by Bettie K. Sousa, for defendant-appellee.

FRYE, Justice.

The sole issue in this case is whether the Court of Appeals erred in holding that the trial court lacked personal jurisdiction over defendant for lack of sufficient minimum contacts between defendant and this State. We conclude that such contacts do exist and accordingly reverse the decision of the Court of Appeals.

The record in this case discloses the following information.

Plaintiff is a North Carolina clothing manufacturer. Defendant is a clothing distributor who buys from manufacturers and resells to retail stores. Defendant is incorporated in the State of New Jersey but has its principal place of business in New York City.

In November of 1983, one of defendant's buyers visited the New York City showroom of one Neal Schulman. According to Schulman's own affidavit, he was at that time an independent clothing manufacturer's sales representative for a number of manufacturers, including plaintiff. Defendant's buyer examined

samples of clothing manufactured by plaintiff Tom Togs and discussed ordering similar merchandise from plaintiff with Schulman. Schulman informed the buyer that the clothes would have to be specially cut and shipped from the Tom Togs factory in North Carolina.

The following day, defendant gave Schulman a purchase order to forward to plaintiff in North Carolina for over $44,000 worth of shirts. Plaintiff's name and address, showing it to be located in North Carolina, appear on the purchase order in the space labelled "Vendor." Defendant also both wrote on the purchase order and told Schulman that it would send plaintiff its own labels to be sewn into the shirts. Schulman accordingly forwarded the purchase order to plaintiff in North Carolina to accept or reject it. Schulman said in his affidavit, and plaintiff confirmed, that he had no authority to accept any offer made to plaintiff. He specifically denied accepting this offer.

Upon receipt of the purchase order, plaintiff accepted by sending the shirts to defendant within the time specified. This method of acceptance was a customary method in the industry at that time.[1]

Plaintiff shipped the shirts to defendant in early January 1984. About two weeks after receipt, defendant complained to the plaintiff that the shirts did not conform to the samples. Plaintiff agreed that defendant could return the shirts on the express condition that the entire order was returned in its original condition. However, when the shirts arrived back in North Carolina, a substantial number were missing, and the rest had been damaged. Plaintiff notified defendant that it was rejecting the returned shirts, and intended to resell them pursuant to N.C.G.S. § 25-2-706(3), which it proceeded to do.

Plaintiff then sued defendant for damages in Superior Court, Wake County. Defendant moved for dismissal for lack of both subject matter and personal jurisdiction and for failure to state a claim upon which relief could be granted. The trial judge denied

1. We note that this method is also acceptable under the Uniform Commercial Code. *See* N.C.G.S. § 25-2-206 (1965).

the motion,[2] and defendant appealed to the Court of Appeals solely on the issue of jurisdiction. The Court of Appeals reversed. Plaintiff appealed to this Court on the grounds that a substantial constitutional question was involved, *see* N.C.G.S. § 7A-30(1), and alternatively petitioned for discretionary review on the basis that the case involved extraordinary issues of public interest and jurisprudential significance, *see* N.C.G.S. § 7A-31. This Court denied defendant's motion to dismiss the appeal and granted plaintiff's motion for discretionary review on 7 January 1986.

This Court has previously held that a two-step analysis must be employed to determine whether a non-resident defendant is subject to the *in personam* jurisdiction of our courts. *Miller v. Kite*, 313 N.C. 474, 329 S.E. 2d 663 (1985). First, the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution. *Id.*

[1] Our long-arm statute, N.C.G.S. § 1-75.4 (1983), allows the courts of this State to exercise *in personam* jurisdiction over a properly notified defendant[3] when, *inter alia*, a special jurisdiction statute applies. Plaintiff contends that such a statute, N.C.G.S. § 55-145(a)(1), does apply in this case. N.C.G.S. § 55-145(a)(1) (1982) provides:

> (a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> (1) Out of any contract made in this State or to be performed in this State . . . .

2. In his order, the trial judge also resolved in plaintiff's favor a conflict in the evidence over the place where defendant's offer was accepted. Plaintiff has averred that it accepted the offer in North Carolina as described herein. Defendant's Assistant-Secretary, who does not appear from the information in the record to have been the representative who dealt with Schulman, had stated in an affidavit that plaintiff solicited the purchase order from offices it maintained in New York and had executed the contract there.

3. Defendant stipulated to receipt of notice.

We agree with plaintiff that the instant case falls within the language of N.C.G.S. § 55-145(a)(1). The cause of action arose out of a breach of contract. Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred. *Goldman v. Parkland*, 277 N.C. 223, 176 S.E. 2d 784 (1970). In the instant case, this act was the acceptance by the plaintiff of defendant's offer. Therefore, the contract was "made in this State." Additionally, it was also "to be performed in this State."

[2] Plaintiff argues that our inquiry should end here, that where a transaction falls within the language of N.C.G.S. § 55-145, jurisdiction automatically follows. This Court, however, has previously held that *in personam* jurisdiction pursuant to N.C.G.S. § 55-145 must not be exercised in a way that violates the due process clause. *See Goldman v. Parkland*, 277 N.C. 223, 176 S.E. 2d 784; *Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965). We have also held in considering N.C.G.S. § 1-75.4 that the requirements of due process, not the words of the long-arm statute, are the ultimate test of jurisdiction over a non-resident defendant, *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974), and, following the mandate of the United States Supreme Court, we have rejected any *per se* rule of long-arm jurisdiction, *see Buying Group v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979). Accordingly, we reject plaintiff's contention and proceed to the second step of our analysis.

[3] To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945) (quoting from *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 283 (1940)). In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298 (1958). This relationship between the defendant and the forum must be "such that he should reasonably anticipate being haled into court there."

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 62 L.Ed. 2d 490, 501 (1980).

The United States Supreme Court has noted two types of long-arm jurisdiction. Where the controversy arises out of the defendant's contacts with the forum state, the state is said to be exercising "specific" jurisdiction. In this situation, the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction. Where the controversy is unrelated to the defendant's activities within the forum, due process may nevertheless be satisfied if there are "sufficient contacts" between the forum and the defendant. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414, 80 L.Ed. 2d 404, 411 (1984). The Supreme Court has also said that for purposes of asserting "specific" jurisdiction, a defendant has "fair warning" that he may be sued in a state for injuries arising from activities that he "purposefully directed" toward that state's residents. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 85 L.Ed. 2d 528, 540-41 (1985). Because the controversy in this case arises out of defendant's contacts with this State, specific jurisdiction is the type sought here. Our focus should therefore be upon the relationship among the defendant, this State, and the cause of action.

Our Court of Appeals concluded that defendant had insufficient contacts with North Carolina to satisfy the requirements of due process. In reaching its conclusion, the court apparently relied upon the facts that only one contract was involved, defendant was never physically present in this jurisdiction in connection with this transaction, and defendant's other contacts with this State appear to be insubstantial.[4]

4. Plaintiff's president stated in an affidavit that defendant:

1) sold merchandise to Family Dollar and Super Dollar Stores located in North Carolina,

2) sold to other retailers with stores in North Carolina, and

3) sold to a national chain with stores in North Carolina.

Even the first averment fails to state clearly that defendant was dealing directly with North Carolina entities.

Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this State. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 85 L.Ed. 2d 528, 545; *McGee v. International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed. 2d 223 (1957); *Goldman v. Parkland*, 277 N.C. 223, 176 S.E. 2d 784. In the instant case, the defendant made an offer to plaintiff whom defendant knew to be located in North Carolina. Plaintiff accepted the offer in North Carolina. The contract was therefore made in North Carolina, as we discussed earlier. The contract was for specially manufactured goods, shirts in this case, for which plaintiff was to be paid over $44,000. Defendant was told that the shirts would be cut in North Carolina, and defendant also agreed to send its personal labels to plaintiff in North Carolina for plaintiff to attach to the shirts. Defendant was thus aware that the contract was going to be substantially performed in this State. The shirts were in fact manufactured in and shipped from this State. After defendant contacted the plaintiff to complain about the shirts, defendant then returned them to this State. We therefore conclude that the contract between defendant and plaintiff had a "substantial connection" with this State. *See Goldman v. Parkland*, 277 N.C. 223, 176 S.E. 2d 784. We further conclude that by making an offer to the North Carolina plaintiff to enter a contract made in this State and having a substantial connection with it, defendant purposefully availed itself of the protection and benefits of our laws.

Other factors involved in this litigation also support a conclusion that jurisdiction is permissible in this case. It is generally conceded that a state has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 85 L.Ed. 2d 528, 541. We take judicial notice of the fact that textile manufacturing is an important industry in North Carolina, giving North Carolina a special interest in this litigation. We also note that in actions governed by the Uniform Commercial Code, N.C.G.S. § 25-1-105 (1965) provides that Chapter 25 applies to all transactions "bearing an appropriate relation to this State." *See Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405

(1982). Therefore, in the instant case, North Carolina law would be the law to be applied. We note further that defendant has failed to show any other reason why the exercise of such jurisdiction would be unfair. North Carolina is certainly a convenient forum for this litigation in terms of witnesses and location of events. Nor has defendant pointed to any disparity between plaintiff and itself which might render the exercise of personal jurisdiction over it unfair.

In conclusion, after examining the relationship among the defendant, the forum, and the cause of action, we find sufficient minimum contacts to justify the exercise of personal jurisdiction over the defendant in this case without violating the due process clause.

Defendant, however, argues strongly that personal jurisdiction is improper because it took no action *in* North Carolina. Lack of action by defendant *in* a jurisdiction is not now fatal to the exercise of long-arm jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L.Ed. 2d 528; *McGee v. International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed. 2d 223. As the Supreme Court explained in *McGee* almost thirty years ago,

> Looking back over [the] long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

McGee, 355 U.S. at 222-23, 2 L.Ed. 2d at 226. More recently, the Court commented, "The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293, 62 L.Ed. 2d 490, 498-99.

Defendant also contends that its case is indistinguishable from *Sola Basic Industries v. Electric Membership Corp.*, 70 N.C. App. 737, 321 S.E. 2d 28 (1984), wherein our Court of Appeals held that personal jurisdiction was not proper. In *Sola*, plaintiff, a Wisconsin corporation with a plant in Goldsboro, North Carolina, sold defendant, a rural electric corporation operating only in Indiana, a transformer. The contract of sale was negotiated in Indiana. Three years later, the transformer broke down. Defendant, believing the necessary repairs were covered under warranties in the original contract, arranged with the plaintiff for the transformer to be taken to plaintiff's plant in North Carolina. Only after the transformer was in North Carolina did the plaintiff notify defendant that the original warranty had expired and defendant would need to pay for any repairs. The parties then entered into a contract covering the repairs. When defendant later refused to pay for the repairs, plaintiff sued in North Carolina. Defendant had no other contacts with this State. The Court of Appeals held that under these circumstances, there were insufficient minimum contacts between defendant and North Carolina to justify the exercise of personal jurisdiction over the defendant.

We find that the facts in *Sola* are distinguishable from the facts in the instant case. In *Sola*, defendant's connection with North Carolina was incidental to the earlier contract negotiated in Indiana with plaintiff Wisconsin corporation. From the facts disclosed in the Court of Appeals' opinion, apparently no essential part of this original contract took place in North Carolina. When defendant agreed to plaintiff's taking the transformer to this State for repairs, defendant believed that the repairs were covered under the original contract. Defendant's subsequent act in agreeing to pay for repairs performed here only took place after the transformer had been taken to plaintiff's plant and plaintiff was refusing to repair it unless defendant agreed to pay. Under these circumstances, defendant's act could not fairly be characterized as voluntarily availing itself of the benefits and protections of our State's laws. *Cf. Chung v. NANA Development Corp.*, 783 F. 2d 1124 (4th Cir. 1986). In the instant case, however, the record is clear that defendant voluntarily entered into a contract with a substantial connection with this State. We believe the facts in this case more nearly parallel those in *Time Corp. v. Encounter, Inc.*, 50 N.C. App. 467, 274 S.E. 2d 391 (1981), and *Equity Associ-*

ates v. Society for Savings, 31 N.C. App. 182, 228 S.E. 2d 761 (1976), *cert. denied*, 291 N.C. 711, 232 S.E. 2d 203 (1977), where our Court of Appeals found the exercise of personal jurisdiction over out-of-state defendants to be proper.

For all of the reasons discussed herein, we reverse the decision of the Court of Appeals and remand this case to that court in order that the decision of the Superior Court, Wake County, may be reinstated.

Reversed and remanded.

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. MACK DONALD OLLIS

No. 408A85

(Filed 7 October 1986)

1. **Rape and Allied Offenses § 3— first degree rape—short form indictment—age of victim**

A rape indictment alleging that the victim was "a female child eight (8) years old" sufficiently alleged that she was "a child under twelve" as required by N.C.G.S. § 15-144.1(b) (Cum. Supp. 1981) as it existed on 6 June 1983, the date of the alleged rape, and the additional allegation in the language of the 1 October 1983 amendment to the statute that the child was "thus of the age of under thirteen (13) years" was surplusage.

2. **Rape and Allied Offenses § 4.2— rape by another—admissibility to explain victim's physical condition**

In a prosecution for first degree rape and first degree sexual offense, the trial court committed prejudicial error in refusing to allow defendant to question the child victim about instances of rape committed by defendant's adult son against the victim on the same day as the alleged rape by defendant in order to show that physical findings described by the physician who examined the victim were the result of those acts by defendant's son. N.C.G.S. § 8C-1, Rule 412(b)(2).

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

BEFORE *Owens, J.*, at the 20 August 1984 Criminal Session of Superior Court, BURKE County, the defendant was convicted of

first-degree rape and first-degree sexual offense for which he received two concurrent life sentences. The defendant appeals pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 15 May 1986.

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

Sam J. Ervin, IV, for defendant-appellant.

BILLINGS, Chief Justice.

The defendant brings forward in his brief six assignments of error relating to corroborating evidence, evidence of sexual activity of the victim, evidence of an attempt to commit a similar crime, portions of the prosecutor's argument to the jury, and jury instructions and proof concerning the dates of the alleged offenses. Subsequent to oral argument he filed in this Court a motion in arrest of judgment questioning the sufficiency of the indictment. We find no fatal defect in the indictment, but for the reason stated below we reverse the defendant's convictions.

In March of 1984, the victim, a child of ten years at the time of the trial, underwent a medical examination as the result of a beating inflicted upon her by her father. The victim had disclosed to a friend at school that she had been beaten. The friend reported the incident to a teacher who in turn contacted school officials. The Burke County Department of Social Services was called in to investigate and arranged for the child to be examined by a physician. During the course of the examination, the victim told the physician that she had been raped and sexually assaulted by the defendant, who was a friend of the victim's family. During the weeks following the medical examination, the victim informed social services, law enforcement, and court personnel that she had been sexually abused by the defendant. The victim testified at trial that sometime in the late spring of 1983 the defendant had visited the mobile home where she was living with her mother, stepfather and stepbrother. The defendant entered the victim's bedroom, removed her clothes, undressed himself, and engaged in sexual intercourse with her. The defendant warned her not to tell anyone what had occurred or he would hurt her. The victim also described an incident which took place in the fall of 1983. On this occasion, the defendant attended an evening poker and drinking

party at the victim's home. After the victim was sent to bed, the defendant entered the bedroom which the victim shared with her younger stepbrother. The defendant pulled the victim's nightgown above her head and performed a sexual act (cunnilingus) on her.

I.

[1] On 8 September 1986 the defendant filed a motion in arrest of judgment. He contends that the superseding indictment returned 29 October 1984 charging him with rape is fatally defective in that:

(1) it attempts to state the offense as provided in N.C.G.S. § 15-144.1(b), short form indictment for rape, but in so doing charges an offense that was not a crime on the date of the offense charged, and

(2) it fails to satisfy criminal pleading requirements specified in N.C.G.S. §15A-924 because it does not allege facts supporting all of the elements of the offense.

The indictment for first-degree rape states that the date of the offense as June 6, 1983 and alleges that

> on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did carnally know and abuse [the victim], a female child eight (8) years old and thus of the age of under thirteen (13) years.

The defendant correctly points out that the allegations of the indictment fail to charge that the defendant at the time of the offense was 12 years of age or more and 4 or more years older than the victim, elements required for non-forcible first-degree rape of "a child of the age of 12 years or less." N.C.G.S. § 14-27.2(a)(1) (1981). Therefore, the indictment does not "assert[ ] facts supporting every element of [the] criminal offense," N.C.G.S. § 15A-924 (a)(5) (1983), and must be sustained, if at all, under the authority of N.C.G.S. § 15-144.1(b).

On 6 June 1983, the date of the alleged offense, N.C.G.S. § 14-27.2(a) (1981) provided in part as follows:

> 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 . . . .

The corresponding portion of N.C.G.S. § 15-144.1 (Cum. Supp. 1981), "Essentials of bill for rape," provided:

> (b) If the victim is a female child under the age of 12 years it is sufficient to allege that the accused unlawfully, willfully, and feloniously did carnally know and abuse a child under 12, naming her, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for the rape of a female child under the age of 12 years and all lesser included offenses.

Effective 1 October 1983, N.C.G.S. § 14-27.2(a)(1) was amended by substituting "a child under the age of 13 years" for "a child of the age of 12 years or less," and N.C.G.S. § 15-144.1(b) was amended by changing "12" to "13."

This Court held in *State v. Howard*, 317 N.C. 140, 343 S.E. 2d 538 (1986) that a bill of indictment charging that on 15 February 1983 the defendant "feloniously did carnally know and abuse [the victim], a child under the age of 13 years," failed to allege a criminal offense for a rape allegedly occurring before the 1 October 1983 amendment to the statute. The indictment in the *Howard* case did not allege the actual age of the victim; it merely alleged carnal knowledge of "a child under the age of 13 years" which stated neither the statutory elements of the offense nor the averments deemed sufficient by N.C.G.S. § 15-144.1(b) as it existed on the day of the offense. In the case *sub judice*, however, the indictment not only charges that the victim was under the age of 13 years, it specifically alleges that she was 8 years of age, satisfying the statutory age requirement existing prior to 1 October 1983.

The defendant's contention seems to be, however, that despite the allegation of the victim's actual age, the indictment is fatally defective because of the State's attempt to use the short form indictment, since the statutory authorization for a short form indictment for an offense occurring before the date of the

amendment to N.C.G.S. § 15-144.1(b) required that the indictment allege that the victim was "a child under 12."

We reject the defendant's argument and hold that the indictment is sufficient. An allegation that the victim is "a female child eight (8) years old" sufficiently alleges that she is "a child under 12" and satisfies the requirement of N.C.G.S. § 15-144.1(b) as it existed on 6 June 1983; the additional allegation that the child was "thus of the age of under thirteen (13) years" is surplusage.

II.

[2] The defendant contends that the trial court erred by denying his request to be allowed to cross-examine the victim concerning other sexual activity. Assuming *arguendo* that rape or sexual offenses committed against a child victim constitute "sexual activity of the complainant" and come within the shield of N.C.G.S. § 8C-1, Rule 412 (Cum. Supp. 1985), section (b) of Rule 412 contains the following:

> Notwithstanding any other provision of law, the sexual behavior of the complainant [in a rape or sexual offense case] is irrelevant to any issue in the prosecution unless such behavior:
>
> . . . .
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant.

The defendant contends that he should have been allowed to question the victim about instances of rape committed by the defendant's adult son, Ray Mikie Ollis, against the victim in order to show that the physical findings described by the physician who examined the victim were the result of those acts by Mikie Ollis. We agree.

The victim testified about two occasions when the defendant had engaged in sexual activity with her. The acts on one of the occasions as described by the victim constituted cunnilingus and the other constituted rape.

Following the victim's testimony, Dr. Whalley testified that he had examined the victim regarding the bruises she sustained

as the result of her father's beating. He stated that during the course of the examination the victim told him that "[t]wo men had —trying to think of the correct way to say this—had laid on top of her with their clothes off, and banged on top of her, hurting where she passes urine." The victim had not mentioned in her testimony that anyone other than the defendant had sexually abused her. Barbara Wheeler, a social worker, was permitted to testify that Dr. Whalley had told her that the victim had said that two men had raped her. The trial judge limited consideration of Dr. Whalley's and Ms. Wheeler's statements to use as corroboration.

Therefore, because there was no reference to two men in the victim's testimony, the statements of the two witnesses, although admissible as corroborative evidence to enhance the victim's credibility, did not provide substantive evidence that a man other than the defendant had raped the victim. *See State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384 (1982).

Dr. Whalley further testified that as a result of the victim's statements he examined her genitalia and found that her urovaginal opening measured approximately three centimeters. He further stated that "I would expect a normal ten year old girl to have a urovaginal opening of approximately half that size. So I felt that this was larger than expected." In response to the District Attorney's question whether the larger urovaginal opening was consistent with the history given by the victim, the physician responded in part:

> There was evidence that this area inside the labia, right exactly in front of which the area where the urine and the urine opening is and the entrance to the vaginia [sic] is, it's together, and this tissue seemed to be stretched to a larger opening than I would expect in a ten year old girl.

He further stated: "It's my opinion that the evidence on physical examination show [sic] that [the victim] did receive or has been the object of inappropriate physical and sexual abuse."

The physician's additional testimony regarding his examination of the victim's genitalia, including his description of the appearance of the hymen ring, can be summarized as that it was not inconsistent with that which exists in most young girls.

The victim was the only witness to the alleged sexual acts, which the defendant denied. The physician's testimony was thus the only independent evidence corroborating the victim's testimony that she had been raped. In his closing argument the District Attorney relied heavily on the physician's physical findings as corroborative of the victim's testimony that the defendant had on one occasion put his penis inside her "pee-pee."

Following the physician's testimony, upon request of the defendant the Court conducted an in-camera hearing pursuant to N.C.G.S. § 8C-1, Rule 412, and the victim was examined out of the presence of the jury. At that time she testified that on the same day that she was raped by the defendant and immediately after the defendant left the room, Mikie Ollis came into her bedroom and "done the samething [sic] that Mack Donald [the defendant] did . . . . He stuck his penis in my pee-pee." She further testified in the in-camera hearing that the same thing had happened before between her and Mikie Ollis, the first time being five days before Christmas in 1982. She further testified about an occasion when he took her in a car to a place under a bridge and got on top of her, put his penis on but not in her "pee-pee" and moved up and down. She said that on Mikie's daughter's birthday, she went to a pajama party at Mikie's house and he twice "took off his clothes and got on me and moved up-and-down with his penis in my pee-pee."

Following the in-camera hearing, the defendant requested that he be allowed to examine the victim before the jury regarding the sexual acts of Mikie Ollis on the basis that it was admissible under N.C.G.S. § 8C-1, Rule 412(b)(2). The trial judge ruled that the evidence was not relevant and excluded it.

We agree with the defendant that the evidence should have been admitted, as it would have provided an alternative explanation for the medical evidence presented by Dr. Whalley and falls within exception (b)(2) of Rule 412.

The State concedes that the evidence would be admissible as to the first-degree rape charge but contends that it was not relevant to the charge of first-degree sexual assault and that its exclusion in the rape case was harmless, since through the testimony of Dr. Whalley and Ms. Wheeler, evidence that two

men had sexually assaulted the victim was before the jury. We disagree.

As was pointed out earlier, the jury was specifically instructed that the physician's and the social worker's testimony could only be considered as corroborative evidence. That testimony was not an adequate substitute for the defendant's right to present substantive evidence relevant to his defense.

Also, although objection to the testimony was sustained and a motion to strike allowed, Ms. Wheeler made reference in her testimony on at least two occasions to multiple rapes of the victim, which in the absence of evidence that they were committed by some other male, the jury clearly would infer were acts committed by the defendant.

We do note that the victim was consistent and very specific regarding details of the assaults against her. She appeared to present independent, credible testimony, at times clarifying apparent misunderstandings by the questioning attorneys about her testimony or her previous statements. There is no suggestion in her answers that she confused the two men. However, we are not able to say that the jury would not have had a reasonable doubt about the defendant's guilt if they had known that the only physical evidence corroborating the victim's testimony of rape was possibly attributable to the acts of a man other than the defendant. N.C.G.S. § 15A-1443. We find that exclusion of that evidence was prejudicial to the defendant in presenting his defense to the charge of rape.

Although the evidence of an alternative source of the physical condition possibly resulting from rape was irrelevant to the sexual offense charge, we also are not convinced that under the circumstances its exclusion was harmless. If the sexual offense charge had been tried separately, the physician's testimony would not have been relevant, and the evidence regarding rape of the victim by another man as an alternative explanation for the victim's physical condition also would have been irrelevant. Because the two offenses were tried together, however, the enhancing character of the doctor's evidence, appearing as it did to corroborate the victim's testimony that she was penetrated, in turn enhanced the credibility of the witness regarding a second sexual offense by the defendant. For that reason we also find that the er-

ror was prejudicial to the defendant's defense against the charge of first-degree sexual offense.

We have examined the defendant's remaining assignments of error and conclude that either no prejudicial error has been demonstrated or the alleged error is not likely to recur on retrial.

For the reasons stated above, we reverse both convictions and remand to the Superior Court of Burke County for a new trial.

New trial.

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

FIDELITY BANKERS LIFE INSURANCE COMPANY v. PATRICIA DORTCH, ANN C. DORTCH, ANN HUNTER DORTCH, ELIZABETH D. BESWICK AND CENTRAL BANK OF THE SOUTH, TRUSTEE FOR JOHN J. DORTCH RETIREMENT PLAN AND TRUST

No. 132PA86

(Filed 7 October 1986)

Insurance § 29.1— life insurance—ownership transferred to Keogh trustee—subsequent change of beneficiary not valid

The trial court properly granted summary judgment for Patricia Dortch where John Dortch purchased a life insurance policy in 1972 and designated Patricia Dortch, then his wife, as beneficiary; Mr. Dortch assigned the policy in 1975 to a Keogh retirement plan and transferred ownership of the policy to the Central Bank of the South, the trustee of the plan; John and Patricia Dortch executed a separation agreement in 1979; Mr. Dortch remarried in 1980 and completed a change of beneficiary form for the Keogh plan designating his new wife and two daughters as beneficiaries; the plan administrator submitted the form to the bank; and the bank took no action to change the beneficiary before Mr. Dortch's death in 1984. The express language of the policy created a distinction between the policy owner and the person whose life was to be insured, the power to change beneficiaries falls squarely into the category of rights and privileges which the owner has the authority to exercise, Mr. Dortch unequivocally conveyed ownership to the bank, only the bank could effectively change beneficiaries after the transfer, and the bank could not do so after Mr. Dortch died and Patricia Dortch acquired vested rights to policy benefits.

ON defendant Patricia Dortch's petition for discretionary review of the decision of the Court of Appeals, 79 N.C. App. 148, 339 S.E. 2d 38 (1986), which reversed the summary judgment entered in her favor by *DeRamus, J.*, at the 18 March 1985 session of Superior Court, GUILFORD County, and remanded the case for entry of judgment consistent with the opinion of the Court of Appeals. Heard in the Supreme Court 11 September 1986.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Charles T. Hagan III, for defendant-appellant, Patricia Dortch.

Nichols, Caffrey, Hill, Evans & Murrelle, by Thomas C. Duncan and Douglas E. Wright, for defendant-appellees.

MARTIN, Justice.

Plaintiff filed this interpleader action requesting that the trial court determine which of the defendant claimants is entitled to the proceeds of a life insurance policy issued by plaintiff to John J. Dortch. The trial court granted summary judgment in favor of defendant Patricia Dortch, former wife of the insured. The Court of Appeals reversed and remanded for judgment consistent with the expressed intent of the insured to provide defendants Ann C. Dortch, Elizabeth D. Beswick, and Ann Hunter Dortch (his second wife and two daughters) with the benefits of the insurance. For reasons explained below, we believe the trial judge properly granted summary judgment for Patricia Dortch and, accordingly, we reverse the Court of Appeals.

The record establishes that John J. Dortch purchased a life insurance policy from Fidelity Bankers Life Insurance Company (Fidelity) in 1972 and designated Patricia Dortch, his wife at that time, as primary beneficiary. In 1975 Mr. Dortch assigned the policy to a Keogh retirement plan set up by the law firm where he was employed. Mr. Dortch also transferred ownership of the policy to Central Bank of the South (Central Bank), trustee of the Keogh Plan. He accomplished this transfer by submitting the appropriate forms to Fidelity, and Central Bank paid all premiums on the policy thereafter.

In April 1979 John and Patricia Dortch executed a separation agreement under which Patricia Dortch would remain the beneficiary of the Keogh Plan until Mr. Dortch remarried, left the law

firm, or fulfilled his alimony obligation. Subsequently, John and Patricia Dortch divorced. In August 1980 Mr. Dortch married Ann Campbell. Mr. Dortch completed a change of beneficiary form for the Keogh Plan on 3 September 1980, designating his new wife, Ann C. Dortch, and his daughters, Elizabeth D. Beswick and Ann Hunter Dortch, as beneficiaries under the plan. The plan administrator submitted the form to trustee Central Bank. Though the bank received the form on 8 September 1980, it took no action then to change the beneficiary of the insurance policy.

Mr. Dortch died on 9 April 1984. Patricia Dortch filed a claim for benefits as designated beneficiary under the insurance policy. Ann C. Dortch, Elizabeth D. Beswick, and Ann Hunter Dortch filed claims as designated beneficiaries under the Keogh Plan. Central Bank filed a claim as trustee of the Keogh Plan. On 14 June 1984 Fidelity instituted this interpleader action asking the court to determine which of the claimants would be entitled to the policy proceeds. On 15 June 1984 Central Bank submitted to Fidelity the Keogh Plan change of beneficiary form that Mr. Dortch had completed. On 4 September 1984 Central Bank submitted to Fidelity an insurance policy change of beneficiary form completed by the bank, purporting to name the Keogh Plan as beneficiary of the policy.

We first note the well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto. *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968); *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967); *McNeal v. Insurance Co.*, 192 N.C. 450, 135 S.E. 300 (1926). It follows from this rule that those persons entitled to the proceeds of a life insurance policy must be determined in accordance with the contract. *Bullock v. Insurance Co.*, 234 N.C. 254, 67 S.E. 2d 71 (1951); *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68 (1931).

In making such a determination, the intention of the parties controls any interpretation or construction of the contract, and intention must be derived from the language employed. *Lineberry v. Trust Co.*, 238 N.C. 264, 77 S.E. 2d 652 (1953). This Court has long recognized its duty to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used. *Industrial Center v. Liability Co.*, 271

N.C. 158, 155 S.E. 2d 501 (1967). The duty is a solemn one, for it seeks to preserve the fundamental right of freedom of contract. *See Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960); U.S. Const. art. I, § 10. Only when the contract is ambiguous does strict construction become inappropriate. *Duke v. Insurance Co.*, 286 N.C. 244, 210 S.E. 2d 187 (1974), *reh'g denied*, 286 N.C. 547 (1975); *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967).

Having reviewed the applicable maxims, we turn to the contract underlying this dispute. The policy contains these pertinent general provisions:

> OWNERSHIP. The owner shall be as designated in the application for this policy unless ownership is changed in accordance with the provision "CHANGE OF OWNERSHIP OR BENEFICIARY." During the lifetime of the Insured, the Owner shall be entitled exclusively to all rights and privileges of this policy unless otherwise provided by written request.
>
> . . . .
>
> CHANGE OF OWNERSHIP OR BENEFICIARY. Any change in the designation of the Owner or Beneficiary, other than an irrevocable beneficiary, may be made during the lifetime of the Insured while this policy is in force by written notice satisfactory to the Company. Upon receipt of the notice, the change shall be effective as of the date on which the notice was signed whether or not the Insured is living on the day of receipt, subject to any payment made or action taken by the Company before receipt of the notice.

Clearly, the express language of the policy creates a distinction between the policy owner and the person whose life is to be insured, apparently contemplating situations in which ownership is transferred by the insured to a third party. The distinction is a crucial one, for the owner of an insurance policy acquires the authority to exercise any rights or privileges granted therein, even though another party originally contracted for the policy. *See* 2 J. Appleman & J. Appleman, *Insurance Law and Practice* § 771 (rev. ed. 1966). The power to change beneficiaries falls squarely into the category of rights and privileges under the contract. Consequently, it must be recognized that the owner is the

only person who can exercise this power, even though the owner is not the insured. 5 Couch on Insurance 2d § 28:37 (rev. ed. 1984); *see Barden v. Insurance Co.*, 41 N.C. App. 135, 254 S.E. 2d 271, *disc. rev. denied*, 297 N.C. 608, 257 S.E. 2d 216 (1979).

The Dortch policy does not alter these rules but merely makes them explicit. We find the policy language patently unambiguous: *all* rights and privileges are to vest *exclusively* in the owner. Nowhere does the policy imply that the insured himself holds any contractual rights. Indeed the insured plays a limited role under the contract, functioning primarily as the measuring life for determining the duration of the policy owner's rights.

Mr. Dortch, in full compliance with the provision allowing such a transfer, unequivocally conveyed ownership to Central Bank. The record does not indicate that Mr. Dortch attempted to reserve any rights to himself at that time. Thus, once transfer of ownership was executed, all rights and privileges vested in Central Bank. While the Keogh Plan form filled out by Mr. Dortch in 1980 may have demonstrated his intent to change policy beneficiaries, it nonetheless failed to achieve that result, as any attempt by Mr. Dortch to exercise the power to change beneficiaries was entirely ineffectual after the 1975 transfer. Only Central Bank, in its capacity as owner, could effectively make a change. Uncontroverted evidence shows that the bank's sole effort in this regard occurred some months after Mr. Dortch died, when the bank executed the appropriate policy change of beneficiary form and submitted it to Fidelity. This action, however, came too late.

Under a contract granting the power to change beneficiaries, the rights of the designated beneficiary do not vest until the death of the insured. *Harrison v. Winstead*, 251 N.C. 113, 110 S.E. 2d 903 (1959); *Russell v. Owen*, 203 N.C. 262, 165 S.E. 687 (1932). Because no change of beneficiary was attempted by Central Bank during Mr. Dortch's lifetime, Patricia Dortch remained the designated beneficiary when he died and she acquired vested rights to policy benefits at that time. Central Bank's post-mortem change of beneficiary necessarily failed as against a prior vested right. Again, the policy itself, which requires that changes occur during the lifetime of the insured, is consistent with the rule of law. As no genuine issue of material fact exists on the question of entitlement to the proceeds, the trial judge properly granted Patricia Dortch's motion for summary judgment.

The Court of Appeals, in reaching the opposite conclusion, adopted the rule that an insurer waives any formalities required for a change of beneficiary under its policy when it chooses to interplead the claimants. This rule rests upon the notion that such formalities function primarily to protect the insurer from double liability and, because the interpleader action serves the same protective purpose, strict construction of the contract becomes unnecessary. The Court of Appeals held that application of the rule to this case would rightfully allow the intent of Mr. Dortch to control.

We believe that the interpleader rule is inapplicable to the facts at hand and cannot be relied upon in this case. A careful reading of this Court's concise analysis of the rule in *Sudan Temple v. Umphlett*, 246 N.C. 555, 99 S.E. 2d 791 (1957), proves illuminating. This Court pointedly remarked that an insurance company's waiver of formalities "does not impair any *vested* right which the original beneficiary had. It is but a recognition that the insurer had, *in the lifetime of the insured*, consented to a change in its contract between them." *Id.* at 560, 99 S.E. 2d at 794-95 (emphases added). We stress, as before, that the interest of Patricia Dortch under the policy ripened upon the death of Mr. Dortch. Because the interpleader rule was not designed to defeat vested rights, the facts of this case permit a decision without determining the effect of the interplea.

Similarly, we need not reach appellees' contention that application of the doctrine of substantial compliance mandates an award in their favor. Under that doctrine, affirmative acts demonstrating an intent to change beneficiaries which are not in strict compliance with policy formalities nevertheless may guide the court in distributing insurance proceeds. *Teague v. Insurance Co.*, 200 N.C. 450, 157 S.E. 421 (1931). Like the interpleader rule, though, substantial compliance can be successfully applied only to those changes attempted during the lifetime of the insured, before the interest of the designated beneficiary vests. We observe in passing that the cases cited by appellees all involve some affirmative act performed by the insured before his death. In each case the insured was also the owner of the policy and could legitimately exercise the rights thereunder. *Woodell v. Insurance Co.*, 214 N.C. 496, 199 S.E. 719 (1938); *Fertilizer Co. v. Godley*, 204 N.C. 243, 167 S.E. 816 (1933); *Teague v. Insurance Co.*, 200 N.C. 450,

157 S.E. 421; *Light v. Equitable Life Assurance Society*, 56 N.C. App. 26, 286 S.E. 2d 868 (1982). Because Central Bank, as the party with power to change beneficiaries, performed no affirmative acts prior to Mr. Dortch's death, the doctrine of substantial compliance is irrelevant to this case.

We conclude that the policy language requiring the owner to make any changes in the policy beneficiary during the lifetime of the insured is unambiguous and that Central Bank did not act in a timely manner to supplant Patricia Dortch as beneficiary. The trial judge correctly entered summary judgment for Patricia Dortch.

The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the trial court for reinstatement of the judgment.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DARRELL LEE DUNLAP

No. 145A86

(Filed 7 October 1986)

Constitutional Law § 45— trial without counsel—waiver of counsel—voluntariness—failure to make statutory inquiry

Defendant is entitled to a new trial because the trial judge failed to conduct the mandatory inquiry under N.C.G.S. § 15A-1242 before allowing defendant's request to remove his appointed counsel and represent himself. Neither the statutory responsibilities of standby counsel, N.C.G.S. § 15A-1243, nor the actual participation of standby counsel in the case is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.

ON appeal by defendant as a matter of right pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Collier, J.*, at the 28 October 1985 Criminal Session of Superior Court, GUILFORD County.

The defendant was indicted on 3 June 1985 by the Guilford County Grand Jury on charges of first-degree rape and first-degree kidnapping. At a trial in which the defendant appeared *pro se*, with some assistance from appointed standby counsel, the

jury found him guilty of first-degree rape and first-degree kidnapping. He received a sentence of life imprisonment for the rape and a consecutive twelve-year term for the kidnapping. On 19 March 1986 we allowed defendant's motion to bypass the Court of Appeals on the kidnapping conviction. Heard in the Supreme Court 9 September 1986.

Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant-appellant.

BILLINGS, Chief Justice.

The defendant brings forward four assignments of error. He contends that he is entitled to a new trial because the trial judge failed to conduct the mandatory inquiry under N.C.G.S. § 15A-1242 before allowing his request to remove his appointed counsel and represent himself; that the trial judge committed reversible error in admitting testimony about an inculpatory statement by defendant without first conducting a *voir dire* hearing to determine admissibility; that the admission of incompetent evidence about the weapon used in the crime prejudiced his case; and that he was improperly convicted of both first-degree kidnapping and first-degree rape, under the authority of *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986).

We agree with the defendant that he is entitled to a new trial because the trial judge did not comply with N.C.G.S. § 15A-1242 before allowing him to be tried without counsel. Since the other three issues are not likely to recur at the new trial, we will not address them.

Because the issue dispositive of this appeal does not relate to the facts surrounding the alleged crimes, a detailed recitation of the facts is unnecessary. Briefly, the State's evidence tended to show that the victim and a friend were sitting in a parked car in the parking lot of a school in High Point when the defendant approached the car, threatened the two with a gun and made the victim get out and walk with him into a nearby neighborhood where he raped her.

Following the defendant's arrest and execution of an affidavit of indigency, on 13 May 1985 the public defender was appointed to represent him. Because of a conflict of interest the public defender was replaced the next day, 14 May 1985, by private attorney Jack Green. On 27 June 1985, James Snow was named to replace Jack Green. On 10 September 1985 the defendant wrote Mr. Snow a letter in which he expressed dissatisfaction with Mr. Snow's services, and on 20 September 1985 Mr. Snow filed a motion to withdraw "in the best interests of the defendant and the ends of justice."

When the case was called for trial on 28 October 1985, the prosecutor said the defendant "had something he wanted to address to the Court." The following dialogue resulted in the defendant's *pro se* representation:

THE COURT: All right, sir. Do you have some matter you want to bring up to me?

MR. DUNLAP: Yes, sir. I've been locked up in jail six months. I had him for my lawyer for four months. He hasn't put forth any effort to help me, you know, in my trial. You know, he comes down and tells me to lie about something then tell my parents something else and get everybody crossed up. And he just don't want to help me. So I want to represent myself. It'd be just like if he'd be with me.

THE COURT: All right, sir. You want just to represent yourself?

MR. DUNLAP: You know, I've been in jail six months. I know I can't get another lawyer to file for a speedy trial. I want another lawyer, but I don't want to stay in jail. I want to get tried tomorrow since my court day is tomorrow. So I'll just come up here tomorrow.

THE COURT: Yes. Well, you're on the calendar for the first case for trial in the morning. The jury will be here at 9:30 to start selecting.

MR. DUNLAP: Okay.

THE COURT: I'll have him stand by in case you want to ask him any legal questions about procedures which you probably are not too familiar with. And you have the right to repre-

sent yourself if that's your desire, and that's what you tell me you want to do; is that correct?

MR. DUNLAP: Yes, sir. Can I get another lawyer and get tried tomorrow?

THE COURT: There is no way that anybody else who is totally unfamiliar with the case could help you at all. I think you need to have somebody that has some knowledge of the background of the case to sit by you, anyway, that you can ask questions about.

MR. DUNLAP: Okay.

THE COURT: Okay. I'll allow your motion to represent yourself. We'll start picking the jury as soon after 9:30 as we can get to it. We may have a few pleas to take first. All right.

The trial began the next day. The defendant made no objections during the direct examination of the victim, and his attempt at cross-examination was probably more harmful than helpful to his case. Against the advice of his standby counsel, defendant elected to testify and tried to offer into evidence a letter he had received while he was in jail awaiting trial. When the prosecutor objected and the trial judge ruled the letter inadmissible, the defendant said he did not want to tell the jury anything further. The judge ruled that the defendant had not testified and therefore did not permit the prosecutor to cross-examine him. Mr. Snow made a closing argument for the defendant.

On appeal the defendant contends that the trial judge committed reversible error by not complying with the statutory mandate of N.C.G.S. § 15A-1242 before allowing the defendant to proceed *pro se*, citing *State v. Bullock*, 316 N.C. 180, 340 S.E. 2d 106 (1986) and *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775 (1984).

The State attempts to distinguish *Bullock* on the bases that the defendant freely chose a speedy trial over a delay in order to have representation by counsel other than Mr. Snow and that "standby counsel did actively assist the defendant in his defense." However, neither of these facts excuses compliance with N.C.G.S. § 15A-1242, which is required in order to insure that the defend-

ant voluntarily made a knowing and intelligent waiver of his constitutional right to counsel, *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530 (1972), in order to exercise his constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562 (1975).

As the United States Supreme Court said in *Faretta*:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. [Citations omitted.] Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. at 279.

Id. at 835, 45 L.Ed. 2d at 581-82.

Compliance with N.C.G.S. § 15A-1242 serves to establish the record for appellate review.

N.C.G.S. § 15A-1242 (1983), provides as follows:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

If this inquiry is undertaken and the trial judge is satisfied that the defendant knowingly and voluntarily chooses to waive counsel and represent himself, the trial judge must allow the defendant's

pro se representation and may appoint standby counsel in accordance with the terms of N.C.G.S. § 15A-1243. *State v. Kuplen*, 316 N.C. 387, 399, 343 S.E. 2d 793, 800 (1986).

In the case *sub judice*, the trial judge did not make the required inquiry under N.C.G.S. § 15A-1242. The record clearly indicates that the defendant had been advised of his right to assigned counsel, as he had exercised the right and counsel had been appointed to represent him. His right to assigned counsel did not include the right to counsel of his choice, *Morris v. Slappy*, 461 U.S. 1, 75 L.Ed. 2d 610 (1983); *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980), and in the absence of justification for dismissal of assigned counsel, the defendant had the choice of accepting the services of his assigned counsel or proceeding *pro se*. *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976); *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965).

However, nothing in the record before this Court shows that the trial judge made any inquiry to satisfy himself that the defendant understood and appreciated the consequence of his decision or comprehended "the nature of the charges and proceedings and the range of permissible punishments." N.C.G.S. § 15A-1242. Had an appropriate inquiry been made, the defendant might well have concluded that despite his differences with court appointed counsel, it would be in his best interest to continue to accept Mr. Snow's active representation, as he did at the end of the trial after being totally frustrated in his efforts to present a defense.

We further note that neither the statutory responsibilities of standby counsel, N.C.G.S. § 15A-1243, nor the actual participation of standby counsel in the case *sub judice* is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.

For failure of the trial judge to make the inquiry mandated by N.C.G.S. § 15A-1242 before permitting the defendant to proceed to trial without counsel, the defendant is entitled to a new trial. *State v. Bullock*, 316 N.C. 180, 340 S.E. 2d 106; *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775.

New trial.

STATE OF NORTH CAROLINA v. JAMES CLIFFORD LILLEY

No. 22A86

(Filed 7 October 1986)

Assault and Battery § 15.7— felonious assault—self-defense—no duty to retreat in own home—failure to instruct—no plain error

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial court should have instructed the jury on the right of one attacked in his own home to act in self-defense without first retreating, but the court's failure to give such an instruction did not constitute "plain error" under the circumstances of this case.

APPEAL of right under N.C.G.S. § 7A-30(2) from the decision of a divided panel of the North Carolina Court of Appeals, 78 N.C. App. 100, 337 S.E. 2d 89 (1985) (*Parker, J.*, with *Hedrick, C.J.*, concurring and *Becton, J.*, dissenting), finding no error in defendant's trial before *Preston, J.*, at the 11 October 1984 session of ORANGE County Superior Court. Heard in the Supreme Court on 9 September 1986.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., Special Deputy Attorney General, and G. Patrick Murphy, Assistant Attorney General, for the State.

Epting & Hackney, by Robert Epting, for defendant-appellant.

BROWNING, Justice.

The question presented is whether, notwithstanding defendant's failure to request an instruction or object to its omission, the trial judge committed "plain error" in failing to instruct the jury on the right of one attacked in his own home to act in self-defense without first retreating. We hold that under the circumstances of this case it is not "plain error" and affirm the Court of Appeals.

I.

The State's evidence tended to show that, at the time of the incident, defendant was living with the victim's sister, Lisa Wilson, in the same apartment complex in Chapel Hill where the victim, Michael Wilson, lived. On 24 June 1984, defendant went to

the victim's apartment and asked Wilson if he would take his sister to the hospital.

Wilson asked what was wrong with Lisa and defendant admitted that they had been quarreling and that he had hit her. Wilson replied, "You hit my sister. I'll kill you." Upon hearing this, defendant raised the pistol he had in his hand, pointed it at Wilson and said, "You ain't going to do a goddamn thing." Wilson ignored defendant, who then left and returned to his own apartment.

Wilson went to defendant's apartment a few minutes later, entered the open front door without knocking, and heard his sister and defendant fighting. He walked back to the bedroom. Defendant was in the bedroom, standing between the door and the bed, with the gun still in his hand. Wilson pushed defendant aside to place himself between the defendant and his sister at which point defendant shot him.

Defendant's evidence was in conflict with the State's evidence and tended to show that defendant did not have a gun when he went to the victim's apartment; that while in the victim's apartment the victim threatened to kill defendant; that defendant returned to his apartment and then got his gun because of the victim's threat and the fact that defendant knew the victim had several guns; that defendant was afraid the victim was going to try to kill him; that the victim entered defendant's apartment, came into the bedroom, shoved his sister aside and came at defendant; that the victim reached down toward his waistband; that defendant thought the victim was going after his gun when defendant shot the victim.

At trial, the trial court failed to instruct the jury on the right of one to use force in self-defense without retreating when one is in his own home. Defendant acknowledges that he neither requested this instruction nor did he object to its omission. The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury, and the trial judge sentenced defendant to the presumptive sentence of three years imprisonment.

In his appeal to the Court of Appeals, defendant contended that the trial court erred in failing to instruct that defendant had no duty to retreat if he were attacked in his own home. A majori-

ty of the Court of Appeals' panel rejected defendant's argument, holding that the trial court should have included such an instruction, but that the failure to give it was not "plain error."

Judge Becton, believing that the trial judge committed "plain error" by failing to instruct the jury on the right of defendant to use force in self-defense without retreating because he was in his own home, dissented. Defendant appeals the decision of the Court of Appeals on this issue as a matter of right. N.C.R. App. P. 16(b). Defendant's Petition for Discretionary Review as to the other issues raised in his brief was denied. *State v. Lilley*, 78 N.C. App. 100, 337 S.E. 2d 89 (1985), *disc. rev. denied*, 316 N.C. 199, 341 S.E. 2d 582 (1986).

II.

Defendant complains that the trial judge committed prejudicial error by failing to instruct the jury on the right of one to use force in self-defense without retreating when he is in his own home. Although defendant did not request such an instruction at trial, nor did he object to its omission, he asks us to consider it on appeal under the "plain error" rule, adopted in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), as an exception to North Carolina Rule of Appellate Procedure 10(b)(2). The exception provides that "plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Id.* at 660, 300 S.E. 2d at 378, *citing* Fed. R. Crim. P. 52(b). In adopting the "plain error" rule, this Court said, " '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Id.* at 661, 300 S.E. 2d at 378 (*quoting Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed. 2d 203, 212 (1977)).

For the reasons set forth below, we conclude that the trial court should have included an instruction that defendant had no duty to retreat, but in the case before us, the failure to give such an instruction does not constitute "plain error."

First, the rule allowing a person to stand his ground and not retreat when attacked in his home applies only when the defendant is free from fault in bringing on the confrontation leading to the assault. *State v. Pearson*, 288 N.C. 34, 215 S.E. 2d 598 (1975). As the Court of Appeals' majority opinion concluded:

> In this case, a reasonable juror could conclude that the defendant was not free from fault where there was evidence showing that defendant had hit the victim's sister; that defendant had earlier pointed a gun at the victim; that defendant had asked the victim to come over; that the victim heard the defendant and his sister quarreling when he entered their apartment; and that defendant still had the gun in his hand when the victim entered the bedroom. This evidence is sufficient to support a conclusion that the defendant was not free from fault and, thus, could not avail himself of the general rule that one has no duty to retreat when attacked at home.

State v. Lilley, 78 N.C. App. at 106, 337 S.E. 2d at 93.

Second, there is conflicting evidence as to whether the victim attacked defendant. Defendant's evidence tended to show that the victim "jumped on" defendant. The victim testified that he merely pushed defendant aside to step between defendant and his sister. Here, the jury, apparently finding the victim to be more credible, reached the conclusion that there had been no violent attack by the victim; that defendant used excessive force in responding to any assault by the victim; or even that there had been no assault by the victim. An instruction on the right to stand ground and not retreat when attacked in one's home would not likely have changed the result in this case.

Third, in the recent case of *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986), this Court discussed the "plain error" rule in a "self-defense" case where the homicide took place in the defendant's residence and business. As in the present case, the defendant in *Morgan* submitted no request for special jury instructions to the effect that he had the right to stand his ground and repel force with force in his own home or place of business, if he were found not to be the aggressor, nor did he object to the trial court's failure to so charge the jury. This Court held that although it was error for the trial court not to instruct the jury as to one's right to stand his ground when attacked in his own home or business, this error was not properly preserved for review by reason of the defendant's failure to comply with Rule 10(b)(2) of the Rules of Appellate Procedure. This Court further found upon review of the record pursuant to *State v. Odom*, 307

N.C. 655, 300 S.E. 2d 375 (1983), and *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986), that such error did not constitute "plain error." Quoting from *Walker*, this Court said in *Morgan*:

> "The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. *State v. Odom*, 307 N.C. at 661, 300 S.E. 2d at 378-79. In other words, the appellate court must determine that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant. *State v. Black*, 308 N.C. at 741, 303 S.E. 2d at 806-07. Therefore, the test for 'plain error' places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection. *Cf.* N.C.G.S. § 15A-1443(c) (defendant not prejudiced by error resulting from his own conduct)."

Morgan, 315 N.C. at 645, 340 S.E. 2d at 96 (quoting *Walker*, 316 N.C. at 39, 340 S.E. 2d at 83-84).

In the present case, a review of the whole record does not convince us that absent the error the jury probably would have reached a different verdict. Defendant, therefore, has not met his burden of showing "plain error."

The decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. WILLIAM E. THOMPSON

No. 142A86

(Filed 7 October 1986)

1. **Criminal Law § 138.24— aggravating factor—age of victim—not required that victim be targeted because of age**

The trial court did not err when sentencing defendant for first degree burglary, felony breaking or entering and felony larceny by finding that the crimes were aggravated because the victim was very old where the victim was seventy-nine years old. A defendant may take advantage of the age of his victim by targeting the victim because of the victim's age, or in the actual commission of a crime against the person of the victim or in the victim's presence, knowing that the victim by reason of age was unlikely to effectively intervene or defend himself. N.C.G.S. § 15A-1340.4(a)(1)(j) (1983).

2. **Criminal Law § 138.24— aggravating factor—physically infirm victim—no error**

The trial court did not err when sentencing defendant for burglary, felony breaking or entering, and felony larceny by finding as an aggravating factor that the victim was physically infirm where evidence stipulated to by defense counsel was that the victim had been under the care of a physician for both arthritis and angina. It is not necessary that the victim be targeted because of her infirmity; only that her condition be taken advantage of by the defendant, and the crimes here were committed in the victim's presence where her weakened condition was or should have been apparent.

3. **Criminal Law §§ 161, 138.11— resentencing—greater sentence—no exception or assignment of error**

Whether a resentencing was improper in that it resulted in a longer sentence than that imposed during the first sentencing hearing was not properly before the Court where there was no assignment of error or exception in the record. N. C. Rules of Appellate Procedure, Rule 10(a).

BEFORE *Johnson, J.*, at the 7 February 1986 Criminal Session of Superior Court, CUMBERLAND County, defendant was resentenced for first-degree burglary, felony breaking or entering, and felony larceny.

Lacy H. Thornburg, Attorney General, by Eugene A. Smith, Senior Deputy Attorney General, for the State.

James R. Parish for defendant-appellant.

MEYER, Justice.

At the 26 June 1984 Criminal Session of Superior Court, Cumberland County, defendant pled guilty to first-degree burglary, felony breaking or entering, and felony larceny. He was sentenced by Bailey, J., to life imprisonment for burglary and two ten-year terms, one each for the breaking or entering and the larceny, these to run concurrently with the life sentence. On appeal to this Court, the defendant argued that there was insufficient evidence of three aggravating factors. We agreed as to two factors and remanded the case for resentencing. *State v. Thompson*, 314 N.C. 618, 336 S.E. 2d 78 (1985). The resentencing hearing was held at the 7 February 1986 Criminal Session of the Superior Court for Cumberland County, E. Lynn Johnson, judge presiding. After hearing evidence and arguments, Judge Johnson found three aggravating factors and imposed a life sentence for the burglary count, consolidated with the breaking or entering count, and a consecutive eight-year term for the larceny. Defendant appeals the life sentence to this Court as a matter of right pursuant to Rule 4(d) of the North Carolina Rules of Appellate Procedure, as authorized by N.C.G.S. § 15A-1444(a1) and (d) (1983). Leave was granted to bypass the Court of Appeals on the larceny count on 19 March 1986.

The charges against defendant resulted from events occurring at the home of Ms. Mary McQueen on the evening of 28 December 1983. On that evening, the defendant, together with Benny Jackson, broke into Ms. McQueen's house, tied her up, and took money and several items of personal property. As the defendant was loading the car with these items, Jackson raped Ms. McQueen. At the original sentencing hearing, Judge Bailey found that the crimes to which defendant pled guilty were aggravated by three factors: the victim was very old, the victim was physically infirm, and the property taken was of great monetary value. Judge Bailey found that these aggravating factors outweighed the mitigating factors found and sentenced defendant to terms beyond the presumptive sentences. On his first appeal to this Court, the defendant successfully argued that there was insufficient evidence of the victim's old age or infirmity. Accordingly, we remanded the case for resentencing.

At the second sentencing hearing, the State presented additional evidence of Ms. McQueen's age and physical infirmity in the form of written statements from Ms. McQueen. These statements, stipulated to by the defendant, described not only the events of the evening of 28 December but also Ms. McQueen's physical problems, including angina and arthritis. The statement also indicated that, at the time of the crimes, Ms. McQueen was seventy-nine years old. The defendant presented several witnesses and testified in his own behalf. On cross-examination, the defendant conceded that he was aware that Ms. McQueen was an "old lady," although he contended that he and Jackson had selected her as a victim because they believed she would be away from the house. After hearing the evidence and arguments of counsel, Judge Johnson found that the victim was "very old," that she was physically infirm, and that the property taken was of great monetary value.

It is well established that the State bears the burden of proof to establish the existence of aggravating factors if it seeks a term of imprisonment greater than the presumptive sentence. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). The existence of such factors must be proved by a preponderance of the evidence. N.C.G.S. § 15A-1340.4(a) (1983). We find that the evidence presented by the State at the defendant's resentencing hearing met this standard with regard to the aggravating circumstances of age and infirmity.

[1] The defendant first assigns as error Judge Johnson's finding that the crimes were aggravated because Ms. McQueen was seventy-nine years old at the time of the crimes. N.C.G.S. § 15A-1340.4(a)(1)(j) (1983). On his appeal from the first sentencing hearing, the defendant contended that there was no competent evidence of Ms. McQueen's age. We agreed and ordered the case remanded for resentencing. On this appeal, the defendant apparently concedes that there was sufficient evidence that Ms. McQueen was seventy-nine years old when the crimes were committed and that seventy-nine years is "very old" for the purposes of this aggravating factor. We agree and so hold. It is now his contention, however, that, in order for this aggravating factor to apply, age must have been a reason for the selection of the victim.

The purpose of applying the aggravating factors is to punish more severely those defendants who have acted with culpability

beyond that necessary to commit the crimes of which they stand convicted. It is for this reason that no element of the crime itself may be used in aggravation. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). In order to be appropriately considered, the "very old" factor must relate to the purposes of sentencing.

Defendant cites *State v. Eason*, 67 N.C. App. 460, 313 S.E. 2d 221 (1984), for the proposition that " 'the underlying policy of . . . [N.C.G.S. § 15A-1340.4(a)(1)(j)] is to discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity.' " *Id.* at 463, 313 S.E. 2d at 223 (quoting *State v. Mitchell*, 62 N.C. App. 21, 29, 302 S.E. 2d 265, 270 (1983)). We agree. *See State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986). However, defendant goes on to argue that, in order to comport with this policy, aggravation must be reserved for those crimes where the victim is "targeted" because of age. With this latter argument, we do not agree.

There are at least two ways in which a defendant may take advantage of the age of his victim. First, he may "target" the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself. In either case, the defendant's culpability is increased.

In *State v. Hines*, 314 N.C. 522, 335 S.E. 2d 6 (1985), the crime involved a sixty-two-year-old male victim. The trial court had found that the victim was in good health and physical condition. Nonetheless, the judge found that the crime was aggravated because of the victim's age. This Court disagreed and held that the crime was not properly aggravated unless the victim was particularly vulnerable. In *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828, we held that a seventy-four-year-old victim was "very old" for the purposes of this statute, in spite of the fact that he was of good physical health. It was clear in that case that the victim had been targeted because of his age.

Neither *Hines* nor *Barts* was meant to restrict the aggravation of crimes to those where the victim was targeted because of age. Where the age of the victim is taken advantage of by the de-

fendant during the commission of the crime—by whatever means —the defendant's culpability is increased. It is this increased culpability that leads to a more severe punishment.

It is clear in this case that the defendant took advantage of Ms. McQueen's age. There is evidence that the defendant was aware that Ms. McQueen was an "old lady," as he described her, before he broke into her house. Moreover, there was ample evidence that the defendant was aware of the advanced age of his victim after the crimes charged were undertaken. He saw, spoke to, and helped restrain Ms. McQueen. Clearly, he took advantage of the fact that Ms. McQueen was old and unable to defend herself or her property to the extent that a younger person could have. We hold, therefore, that the trial court did not err in finding that the crimes charged were aggravated because the victim was very old.

[2] Defendant next argues that it was error for the trial court to find as an aggravating factor that the victim was physically infirm. At the sentencing hearing, the prosecutor offered a summary of evidence of Ms. McQueen's physical condition. According to this summary, Ms. McQueen had been under the care of a physician, Dr. Jordan, for both arthritis and angina. Defendant's argument, however, is that this evidence is insufficient to establish Ms. McQueen's infirmity. We disagree. This proposed evidence was stipulated to by defense counsel. Such stipulations may be considered for the purposes of aggravation. *State v. Swimm*, 316 N.C. 24, 340 S.E. 2d 65 (1986). The trial judge's finding that Ms. McQueen was physically infirm is thus supported by competent evidence.

Defendant argues that, even if Ms. McQueen was physically infirm, this fact should not be used in aggravation of the crimes because the defendant did not know of her condition before he committed the crimes. What we have said regarding the aggravating factor that the victim was very old applies here. It is not necessary that the victim be targeted because of her infirmity; only that this condition be taken advantage of by the defendant. Here, the crimes were committed in the victim's presence. Her weakened condition was or should have been apparent to him during the commission of the crimes, if not before. We hold that it was not error for the trial court to have found this aggravating factor.

[3] Although not denominated as a separate issue, the defendant argues that the resentencing was improper in that it resulted in a longer sentence than that imposed during the first sentencing hearing. However, no exception or assignment of error relating to this matter appears in the record. Thus, this question is not properly before us. N.C. R. App. P. 10(a).

No error.

STATE OF NORTH CAROLINA v. ALVIN C. WEAVER

No. 110A86

(Filed 7 October 1986)

Criminal Law § 34.5— other offenses—admissible to show identity

The trial court did not err in a prosecution for felonious larceny by admitting evidence that defendant had sold stolen property to the State's witness in the past where defendant's evidence was that he was a mere bystander as the sale was negotiated by a third party. Evidence of prior dealings between the witness and defendant was relevant to the question of the witness's certainty in identifying defendant as the one with whom he dealt and as evidence that defendant was involved in a scheme or plan to steal tools and sell them to the informant; evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused. N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1985).

APPEAL of right by the State pursuant to N.C.G.S. § 7A-30(2) from the decision by a divided panel of the Court of Appeals, 79 N.C. App. 244, 339 S.E. 2d 40 (1986) reversing the defendant's conviction and ordering a new trial.

The defendant was charged with felonious breaking or entering and with felonious larceny of a chain saw and a socket set which were removed between 11:00 p.m. on 3 November 1984 and 12:00 Noon on 4 November 1984 from a storage building in Gaston County belonging to Buddy Edison. The defendant was acquitted of the breaking or entering charge and found guilty of felonious larceny at the 11 March 1985 Criminal Session of Superior Court, GASTON County, before *Lamm, J.* From judgment entered 14 March 1985 imposing a sentence of ten years, defendant appealed to the Court of Appeals. The Court of Appeals held that evidence

that the defendant had sold tools in the past to one of the State's witnesses was erroneously admitted at trial to the defendant's prejudice. Judge Arnold dissented, finding the evidence admissible as tending to show a plan or scheme to steal tools and sell them to the witness. The case is before this Court on the basis of the dissent. Heard in the Supreme Court on 10 September 1986.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State-appellant.

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

BILLINGS, Chief Justice.

The State called Carl Rutledge as a witness. Prior to Mr. Rutledge's testimony before the jury, the Court conducted a *voir dire* hearing to determine the admissibility of certain evidence which the State indicated that it would offer and to which the defendant objected.

The *voir dire* testimony of Mr. Rutledge established that he was stopped by a Gaston County police detective on 29 October 1984 while transporting a quantity of tools that he had purchased from the defendant. The detective informed him that some of the tools were stolen property and threatened to charge him with larceny or possession of stolen property unless he revealed where he got the tools. As a result, Mr. Rutledge agreed to cooperate with the police department. He said that he had known the defendant for about eight years and had bought items from him over the eight-year period. On 4 November 1984 he called the police department to report that the defendant had called and asked him to purchase certain items. Mr. Rutledge met with the police who searched him and his car and wired him for sound. He then met the defendant and another man, Roger Morris, at a trailer where he purchased two chain saws and a drill for $250.00 with marked bills which had been supplied to him by the police. One of the chain saws was the one taken from Mr. Edison's storage building.

The trial judge overruled the defendant's objection to introduction of evidence regarding the witness's purchase of tools on 29 October and the history of purchases by the witness from the defendant over an eight-year period.

The witness was permitted to testify before the jury that on 29 October 1984 at the defendant's request, he went to a trailer where the defendant introduced him to another man, Roger Morris, whom the defendant identified as his brother, and showed him "boxes of tools. The living room was full of them." He further testified that he gave $425.00 to the defendant for the tools after the defendant took him to a bank for the witness to cash a check to obtain cash for the purchase. He also stated that he had dealt with the defendant for about eight years and that it would be hard to say on how many occasions he had given the defendant money for tools. "You couldn't put them [the tools] in this courtroom."

The events occurring on the day of the alleged offense were detailed by Mr. Rutledge and by members of the police department.

The defendant's defense consisted of testimony by Roger Morris that he alone had broken into the storage building on Mr. Edison's property and stolen the items which *he* sold to Mr. Rutledge. He said that he had committed the larceny, had called Mr. Rutledge, and had sold Mr. Rutledge the chain saws and the drill, although the defendant was present at the time of the sale.

The only question presented by this appeal is whether under N.C.G.S. § 8C-1, Rule 404, evidence of the dealings between the defendant and Mr. Rutledge was properly admitted into evidence over the defendant's objection.

N.C.G.S. § 8C-1, Rule 404(b) (Supp. 1985) provides:

> *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.

As mentioned in the commentary to the Rule and as we have noted in previous cases either construing Rule 404(b) or in applying the rule of *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), the purposes for which evidence of other crimes, wrongs or acts is admissible is not limited to those enumerated either in the

Rule or in *McClain. State v. Young*, 317 N.C. 396, 412 n. 2, 346 S.E. 2d 626, 635 n. 2 (1986); *State v. Morgan*, 315 N.C. 626, 637 n. 2, 340 S.E. 2d 84, 91 n. 2 (1986). In fact, as a careful reading of Rule 404(b) clearly shows, evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused. 1 *Brandis on North Carolina Evidence* § 91 (1982).

The State contends that Rule 404(b) is totally inapplicable to the contested evidence in the case *sub judice* because the witness did not testify that the tools that he bought from the defendant on 29 October 1984 and over the previous eight-year period had been stolen. Thus, according to the State, the evidence was not evidence of other crimes or wrongs. However, we believe that Mr. Rutledge's testimony clearly implied that he had purchased stolen tools from the defendant. The evidence was that the purchases were made at a private residence, not at a place of business, and consisted of quantities of tools that it would be highly unusual for a person other than a merchant to possess for legitimate purposes. Further, the witness testified that he was stopped by the police while transporting the tools that he purchased from the defendant on 29 October 1984 and the police said they were "going to put about ten or twelve breaking and entering charges against [him]." (We note also that the defendant's witness, Roger Morris, stated that Mr. Rutledge was "a dealer in hot goods—stolen merchandise.") Therefore, the clear implication of the evidence was that on previous occasions the defendant had sold stolen property to Mr. Rutledge, and the evidence of the quantity of items and number of sales certainly suggested that the defendant knew they were stolen.

The question thus presented is whether the evidence of previous dealings between the witness and the defendant was relevant to some fact or issue other than the character of the defendant. We hold that it was and reverse the Court of Appeals.

The defendant's evidence tended to show that although the defendant was present in the trailer when the 4 November 1984 sale was made, he was a mere bystander as the sale was negotiated and completed by Roger Morris. Roger Morris testified that he made the phone call to Mr. Rutledge that caused Mr. Rutledge to come to the trailer where the sale was made. To explain why, when arrested, the defendant had half of the marked bills used by

Mr. Rutledge to purchase the chain saws, Mr. Morris said that he had paid the defendant for babysitting. The testimony of Roger Morris was in sharp conflict with the testimony of Mr. Rutledge regarding who called Mr. Rutledge and who negotiated the sale. Therefore, the evidence of prior dealings between Mr. Rutledge and the defendant was relevant to the question of Mr. Rutledge's certainty in identification of the defendant as the one with whom he dealt on 4 November and to establish a course of dealing between the two to enhance the witness's testimony that on the occasion in question he dealt with the defendant rather than with Roger Morris. As pointed out by Judge Arnold in his dissenting opinion, it also "tended to show that defendant was involved in a scheme or plan to steal tools and sell them to the informant Rutledge." 79 N.C. App. at 249, 339 S.E. 2d at 44; *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364. We therefore reverse the Court of Appeals.

Reversed.

SHIRLEY PATTON v. DAVID E. PATTON

No. 50A86

(Filed 7 October 1986)

Divorce and Alimony § 30— equitable distribution—closely-held corporation—finding as to value—not sufficient

The trial court's finding in an equitable distribution action of the value of a closely-held corporation was not sufficient where the finding was merely an enumeration of the factors considered by the court in determining the value of defendant's interest in the corporation without any indication of the value the court may have attributed to each of the enumerated factors. N.C.G.S. § 50-20, N.C.G.S. § 50-21.

DEFENDANT appeals as a matter of right pursuant to N.C.G.S. § 7A-30(2), from a decision of a divided panel of the Court of Appeals, 78 N.C. App. 247, 337 S.E. 2d 607 (1985), affirming in part the judgment of *LaBarre, J.*, entered 28 August 1984 in the District Court, DURHAM County, and remanding the cause for proper findings of fact and entry of judgment on the issue of attorneys fees. Heard in the Supreme Court 9 September 1986.

James B. Maxwell for plaintiff appellee.

Clayton, Myrick & McClanahan, by Robert D. McClanahan, and Robert W. Myrick for defendant appellant.

PARKER, Justice.

In this appeal from a judgment in equitable distribution of marital property under N.C.G.S. §§ 50-20, 50-21, ordering division of the marital property, defendant challenges the trial court's finding of fact concerning the value of defendant's interest in a closely-held corporation. The majority of the panel of the Court of Appeals held that the trial court's finding of fact was sufficient to support its conclusion as to the value of defendant's interest. For the reasons hereinafter stated, we hold that the trial court's judgment in this respect is not supported by sufficient findings of fact; consequently, we reverse in part the decision of the Court of Appeals and remand the cause for further proceedings.

Plaintiff and defendant were married in 1959 and separated in 1981. A judgment of absolute divorce based on a one-year separation was entered on 1 December 1983. By judgment entered 28 August 1984, defendant was awarded his interest in Patco, Inc. (Patco), a closely-held corporation.

In its judgment of 28 August 1984, the trial court made the following finding of fact:

> 34. That in evaluating the defendant's/husband's share of Patco, Inc., the Court has considered the estimate of the defendant himself as given in an insurance application approximately six months prior to the separation of the parties (plaintiff's exhibit 10), the book value of the business in 1980 through November, 1984, the relative ownerships of the stock in the company in 1980 through 1984 (it being noted that defendant is the sole (or 96%) stockholder of the company having purchased the interest of his brother with the company redeeming his stock by treasury stock), has considered the capitalization of earnings of the company, has considered the earning capacity of the company as demonstrated in the last four-to-five year period of time, the present economic outlook for the business and industry, the good will that has accumulated to the business through the hard work and com-

petent efforts of the defendant, and the financial position of Patco, Inc., as demonstrated by its unaudited statements for 1980 through April 30, 1984. The value of the defendant's interest in Patco, after consideration of all these factors, at the relevant time for evaluation for equitable distribution in this matter was at least $85,000.

In providing for distribution of marital property, N.C.G.S. § 50-20(j) states, "[T]he court shall make written findings of fact that support the determination that marital property has been equitably divided." In the recent case of *Poore v. Poore*, the Court of Appeals stated that in its order of distribution of marital property, the trial court "should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied." 75 N.C. App. 414, 422, 331 S.E. 2d 266, 272, *disc. rev. denied*, 314 N.C. 543, 335 S.E. 2d 316 (1985). *See also, Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985) (valuation of a professional partnership interest). Certainly the requirement of specific findings is no less applicable in an equitable distribution order involving a spouse's interest in a closely-held corporation.

The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review "to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). Furthermore, this requirement "is not designed to encourage ritualistic recitations by the trial court," but "is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E. 2d 26, 29 (1977).

We do not intend to imply, however, that the trial court should recite in detail the evidence presented at the hearing; rather the trial court should be guided by the same rules applicable to actions for alimony *pendente lite*, *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971), and to actions for child support, *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985), thus

limiting the findings of fact to ultimate, rather than evidentiary, facts.

Applying these principles to the case before us, finding of fact No. 34 appears to be merely an enumeration of the factors considered by the trial court in determining the value of defendant's interest in Patco, lacking any indication of what value, if any, the trial court may have attributed to each of the enumerated factors. The trial court's conclusion that the value of defendant's interest in Patco "was at least $85,000" is nebulous, if not meaningless. The finding of fact is not clear as to how much more than $85,000 the interest may be worth. Distributions of this nature require more precise findings and determinations of ultimate facts. Therefore, in our view, finding of fact No. 34 is too vague and conclusory to permit appellate review.

Since the order appealed from does not contain findings of fact sufficient to support the judgment, the decision of the Court of Appeals is reversed as to the sufficiency of finding of fact No. 34 and the cause is remanded to the Court of Appeals for further remand to the District Court, Durham County, for proceedings consistent with this decision.

Reversed in part and remanded.

JEAN S. TATUM v. FRANK TATUM

No. 161A86

(Filed 7 October 1986)

Rules of Civil Procedure § 50.4— motion for judgment n.o.v.—failure to preserve right

Plaintiff failed to preserve her right to move for judgment notwithstanding the verdict where she failed to move for a directed verdict at the close of all the evidence.

APPEAL of right by plaintiff 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. 605, 339 S.E. 2d 817 (1986), finding no error in a judgment entered by *Lee, J.*, at the 25 March 1985 session of Superior

Court, DURHAM County. Heard in the Supreme Court 11 September 1986.

Arthur Vann for plaintiff-appellant.

Bryant, Drew & Patterson, P.A., by Victor S. Bryant, Jr., for defendant-appellee.

PER CURIAM.

Plaintiff assigns as error the denial by the trial judge of her motion to set aside the verdict of the jury on the issue of contributory negligence. This motion was in effect a motion for judgment notwithstanding the verdict pursuant to Rule 50(b)(1) of the North Carolina Rules of Civil Procedure. Plaintiff failed to move for a directed verdict at the close of all the evidence. Therefore, plaintiff failed to preserve her right to move for judgment notwithstanding the verdict. *Graves v. Walston*, 302 N.C. 332, 275 S.E. 2d 485 (1981).

Modified and affirmed.

STATE OF NORTH CAROLINA v. GARY RAYMOND HENRY

No. 782PA85

(Filed 7 October 1986)

Criminal Law § 150— interlocutory superior court order—no right of appeal

Defendant may appeal an interlocutory superior court order reversing dismissal of criminal charges against him and remanding the cause to the district court only after a final judgment has been entered in the superior court. N.C.G.S. §§ 7A-27(b) (1981); 15A-1432(d) (1983); 15A-1444 (1983).

ON discretionary review of the decision of the Court of Appeals, reported without published opinion at 78 N.C. App. 635, 338 S.E. 2d 629 (1985), dismissing defendant's appeal from order entered by *Hobgood, J.*, at the 12 February 1985 session of the Superior Court, WAKE County, which reversed a dismissal by the WAKE County District Court of a charge of driving while impaired and remanded the cause for trial on the merits. Heard in the Supreme Court 10 September 1986.

Lacy H. Thornburg, Attorney General, by Linda Ann Morris, Associate Attorney, for the State.

Crumpler & Scherer, by William B. Crumpler and Sally H. Scherer, for defendant appellant.

PER CURIAM.

There is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case, *State v. Thompson*, 56 N.C. App. 439, 289 S.E. 2d 132 (1982); *State v. Black*, 7 N.C. App. 324, 172 S.E. 2d 217 (1970). Defendant may appeal the superior court order reversing dismissal of criminal charges against him and remanding the cause to the district court, "as in the case of other orders of the superior court," after a final judgment has been entered in the superior court. N.C.G.S. 7A-27(b) (1981); 15A-1432(d) (1983); 15A-1444 (1983).

Affirmed.

CATHY SURLS O'BRIEN v. MICHAEL G. PLUMIDES

No. 152PA86

(Filed 7 October 1986)

ON review upon defendant-appellant's petition for writ of certiorari allowed by this Court on 7 April 1986 to review a unanimous decision of the Court of Appeals reported at 79 N.C. App. 159, 339 S.E. 2d 54 (1986), reversing the judgment of *Snepp, J.*, entered 5 March 1986 in Superior Court, MECKLENBURG County, granting summary judgment for the defendant-appellant.

Bender & Lawson, by Jean B. Lawson, for plaintiff-appellee.

Michael G. Plumides, pro se, for defendant-appellant.

PER CURIAM.

We conclude that defendant-appellant's petition for writ of certiorari was improvidently allowed.

Petition for writ of certiorari improvidently allowed.

JOHN CAIN, EMPLOYEE-PLAINTIFF v. R. W. GUYTON, D/B/A G. S. AUTO PARTS & GUYTON BATTERY SERVICE, EMPLOYER-DEFENDANT, NON-INSURED

No. 248A86

(Filed 7 October 1986)

APPEAL of right by the defendant under N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 79 N.C. App. 696, 340 S.E. 2d 501 (1986), affirming an award of the Industrial Commission filed on 19 December 1984. Heard in the Supreme Court on 8 September 1986.

Charles R. Hassell, Jr., for plaintiff appellee.

Williamson & Walton, by Benton H. Walton, III, for defendant appellant.

PER CURIAM.

Affirmed.

CLYDE C. BAILEY, JR. v. THOMAS LEBEAU AND PIONEER COACH MANUFACTURING COMPANY

No. 191A86

(Filed 7 October 1986)

APPEAL by plaintiff from a divided panel of the Court of Appeals, 79 N.C. App. 345, 339 S.E. 2d 460 (1986), reversing in part and remanding to the trial court for new trial on the issue of breach of express warranty.

Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto and B. Danforth Morton, for plaintiff-appellant.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for defendant-appellees.

Lacy H. Thornburg, Attorney General, by James C. Gulick, Special Deputy Attorney General, amicus curiae.

PER CURIAM.

The decision of the Court of Appeals reversing in part and remanding to the trial court for new trial on the issue of breach of express warranty is affirmed as herein modified. The case is remanded for new trial on the issues of breach of express warranty and unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1.1, as well as damages.

Modified and affirmed.

STATE OF NORTH CAROLINA v. JOHN TERRY ABNEY

No. 187A86

(Filed 7 October 1986)

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, 79 N.C. App. 649, 339 S.E. 2d 841 (1986), vacating an order entered by *Snepp, J.*, on 12 March 1985 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 8 September 1986.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Gordon Widenhouse, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion. The case is remanded to the Court of Appeals for consideration of the substantive issues properly raised by the appeal.

Reversed and remanded.

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

BENSON v. GREENMAN CORPORATE CONSULTANTS, INC.

No. 484P86.

Case below: 81 N.C. App. 678.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

BRUMMER v. BD. OF ADJUSTMENT OF CITY OF ASHEVILLE

No. 426P86.

Case below: 81 N.C. App. 307.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

CLARK v. AMERICAN & EFIRD MILLS

No. 561P86.

Case below: 82 N.C. App. 192.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

CONRAD INDUSTRIES, INC. v. SONDEREGGER

No. 409P86.

Case below: 81 N.C. App. 156.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

COX v. STATE ex rel. SUMMERS

No. 478P86.

Case below: 81 N.C. App. 612.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

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

DANIELS v. MONTGOMERY MUT. INS. CO.

No. 498PA86.

Case below: 81 N.C. App. 600.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1986.

DAVIS v. TAYLOR

No. 477P86.

Case below: 81 N.C. App. 42.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

DURHAM v. NATIONWIDE MUTUAL INS. CO.

No. 455P86.

Case below: 81 N.C. App. 528.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

ENSLEY v. NATIONWIDE MUT. INS. CO.

No. 480P86.

Case below: 80 N.C. App. 512.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 October 1986.

FOARD v. FOARD

No. 491P86.

Case below: 81 N.C. App. 678.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

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

FORSYTH COUNTY HOSPITAL AUTHORITY, INC. v. SALES

No. 551P86.

Case below: 82 N.C. App. 265.

Petition by defendant (Jessie Lynch) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

HAGER v. HARRIS

No. 483P86.

Case below: 81 N.C. App. 678.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

HARMON v. PUBLIC SERVICE OF N.C., INC.

No. 461P86.

Case below: 81 N.C. App. 482.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

IN RE BABY BOY SCEARCE

No. 495P86.

Case below: 81 N.C. App. 531.

Petition by Durham County Department of Social Services for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

IN RE BABY BOY SCEARCE

No. 496P86.

Case below: 81 N.C. App. 662.

Petition by Durham County Department of Social Services for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

IN RE POTEAT v. EMPLOYMENT SECURITY COMM.

No. 514PA86.

Case below: 82 N.C. App. 138.

Petition by Employment Security Commission for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1986.

JONES v. CANNON

No. 453P86.

Case below: 81 N.C. App. 679.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 7 October 1986.

KEITH v. DAY

No. 474PA86.

Case below: 81 N.C. App. 185.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1986.

KINNEY v. BAKER

No. 556P86.

Case below: 82 N.C. App. 126.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 October 1986.

McMILLAN v. DAVIS

No. 464P86.

Case below: 81 N.C. App. 433.

Petition by defendant (Bettie A. Davis, divorced) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

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

PRITCHARD v. ELIZABETH CITY

No. 450P86.

Case below: 81 N.C. App. 543.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

RATCLIFF v. COUNTY OF BUNCOMBE

No. 415A86.

Case below: 81 N.C. App. 153.

Notice of appeal by plaintiff pursuant to G.S. 7A-30 dismissed 7 October 1986.

RICE v. WOOD

No. 550P86.

Case below: 82 N.C. App. 318.

Petition by plaintiff (Patricia Baker Rice) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

SCHMOYER v. CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS

No. 435P86.

Case below: 81 N.C. App. 140.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

SHERRILL v. TOWN OF WRIGHTSVILLE BEACH

No. 463P86.

Case below: 81 N.C. App. 369.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 7 October 1986.

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

SMITH v. JONES

No. 424P86.

Case below: 81 N.C. App. 129.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

STANCIL v. BRUCE STANCIL REFRIGERATION, INC.

No. 489P86.

Case below: 81 N.C. App. 567.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

STATE v. COLLINS

No. 460A86.

Case below: 81 N.C. App. 346.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 October 1986.

STATE v. HASKINS

No. 517P86.

Case below: 81 N.C. App. 680.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 October 1986.

STATE v. McEACHERN

No. 494P86.

Case below: 81 N.C. App. 680.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

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

STATE v. ROWE (Now Porietis)

No. 472P86.

Case below: 81 N.C. App. 469.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 October 1986. Petition by defendant for discretionary review as to first degree murder case only allowed 7 October 1986 for the purpose of entering the following order: In case No. 79CRS711, the judgment is vacated and the case is remanded to the North Carolina Court of Appeals for further remand to the trial court for further proceedings consistent with G.S. 14-17 and 15A-2000, *et seq.*

STATE v. SANDERS

No. 471P86.

Case below: 81 N.C. App. 438.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

STATE v. SLADE

No. 436P86.

Case below: 81 N.C. App. 303.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 October 1986.

STATE v. TAPP

No. 473P86.

Case below: 81 N.C. App. 529.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

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

STATE v. WATSON

No. 547P86.

Case below: 77 N.C. App. 666.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 October 1986.

STATE ex rel. CREWS v. PARKER

No. 549PA86.

Case below: 82 N.C. App. 419.

Petition by intervenor-appellant for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1986.

SWISHER v. AMERICAN HOME ASSURANCE CO.

No. 395P86.

Case below: 80 N.C. App. 718.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986. Notice of appeal by plaintiff pursuant to G.S. 7A-30 dismissed 7 October 1986.

TYNDALL v. TYNDALL

No. 391P86.

Case below: 80 N.C. App. 722.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

WAYNESVILLE MOUNTAINEER, INC. v. MANEY

No. 393P86.

Case below: 80 N.C. App. 725.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1986.

THOMAS M. McINNIS & ASSOCIATES, INC. v. JANET H. HALL

No. 601A85

(Filed 4 November 1986)

1. **Rules of Civil Procedure § 60.2— failure to respond to complaint—reliance on husband's assurances—excusable neglect**

Defendant's failure to respond to plaintiff's complaint was the result of excusable neglect where defendant did not respond upon the assurance by her husband that the matter had been resolved by payment of a judgment in a prior action against the husband and there was therefore no necessity to respond; defendant was aware that the prior action against her husband was based upon the very auction contract on which she was being sued and that her husband paid $7,964.29 to satisfy the judgment entered against him in that action; defendant was also aware that this payment by her husband was not made until three days after the filing of the complaint in the second action and three days prior to service upon her of the summons; and it was therefore quite reasonable for defendant to have concluded that in suing her plaintiff was only trying to get payment of the judgment in the first action, that payment of this judgment by her husband resolved all controversy, and that there was no need to respond to the complaint.

2. **Judgments § 35.1— action on contract against husband—action on same contract against wife not barred by res judicata**

Res judicata did not apply to bar plaintiff's action to recover on an auction contract where defendant alleged that a prior action by plaintiff against her husband on the same contract resulted in judgment in plaintiff's favor, since contracts joint in form are several in legal effect, and the same cause of action was therefore not involved.

3. **Judgments § 37— collateral estoppel—determination of issue in prior trial**

The issue of plaintiff's entitlement to recover prejudgment interest under its auction contract was actually determined in plaintiff's prior action against defendant's husband for collateral estoppel purposes where plaintiff requested an award of interest from the date of sale after the jury rendered its verdict, and the trial judge made a determination that plaintiff was not entitled to interest from the date of sale as a matter of law.

4. **Interest § 2; Judgments § 55— breach of contract—interest from date of breach—question of law**

Where a jury verdict confirmed the existence of an auction contract, established that it was breached by one seller, and awarded plaintiff the commission fixed by the contract, plaintiff's entitlement to interest from the date of sale was a question of law properly within the province of the trial judge, not a question of fact for the jury, and plaintiff did not waive this question by failing to request a jury instruction on this issue.

5. **Judgments § 36— collateral estoppel—prior erroneous judgment**

The fact that a prior judgment was based on an erroneous determination of law or fact does not as a general rule prevent its use for purposes of collateral estoppel.

6. **Judgments § 36— defensive use of collateral estoppel—mutuality of estoppel no longer necessary**

Mutuality of estoppel is no longer required for the defensive use of collateral estoppel when the party to be collaterally estopped had a full and fair opportunity to litigate the issue in question in the earlier action. Therefore, despite the absence of mutuality of estoppel, defendant wife, who was a party to an auction contract but not a party to a prior action on the contract against her husband, could assert collateral estoppel in an action against her to recover prejudgment interest under the contract.

7. **Rules of Civil Procedure § 60.2— collateral estoppel as meritorious defense**

Collateral estoppel constituted a meritorious defense for the purpose of setting aside a default judgment under Rule 60(b) on the ground of excusable neglect.

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

Chief Justice BILLINGS concurring in result.

Justice MEYER joins in the concurring opinion.

APPEAL of right by defendant, and cross-appeal by plaintiff, from a decision of a divided panel of the Court of Appeals, 76 N.C. App. 486, 333 S.E. 2d 544 (1985), affirming an order entered 28 February 1984 by *Beale, J.*, in the District Court, RICHMOND County, denying defendant's Rule 60(b)(1) motion to set aside a default judgment.

Sharpe & Buckner, by Richard G. Buckner, for plaintiff-appellee.

Manning, Fulton & Skinner, by Charles B. Morris, Jr., and Barry D. Mann, for defendant-appellant.

FRYE, Justice.

The parties to this action bring two questions before this Court: 1) whether the trial court erred in finding that defendant's failure to respond to the complaint in this action was the result of excusable neglect; and 2) whether the doctrine of collateral estoppel may constitute a meritorious defense in this case. We answer the first question in the negative and affirm the Court of Appeals

on that issue. We answer the second question yes and reverse the courts below on this issue.

This action stems from the breach of a contract between the sellers (defendant Hall and her husband) and plaintiff auctioneer, Thomas M. McInnis & Associates, Inc. (McInnis). On 21 July 1980, Janet Hall and her husband, Bobby Hall, entered into an auction contract with Thomas M. McInnis & Associates, Inc., which provided that McInnis would sell the Hall's 70-acre poultry farm in exchange for commissions based on a percentage of the sale price. After the highest bidder had been determined at the 22 July 1980 auction, a dispute arose between the highest bidder and the Halls. As a result of the dispute, the sale was never completed.

In December 1980, Bobby Hall filed suit against McInnis seeking $9,750, the amount of earnest money paid in escrow by the highest bidder at the auction sale. In January 1981, without joining Mrs. Hall as a party to the action, McInnis filed a counterclaim asking the court to award it damages for breach of the auction contract, consisting of $7,800 in commissions, together with interest at the legal rate from the date of sale. Judgment was entered in favor of McInnis on 11 March 1983 for $7,800 with interest to run thereon from the date of judgment, not the date of sale.

McInnis did not request that the issue of interest be submitted to the jury, and the jury was not instructed on this issue. Rather, McInnis contended that interest was payable from the date of breach of the contract as a matter of law. The judge expressed the opinion that the question of interest on the breach of contract was a jury question and had been waived in the absence of a timely request that the issue of interest be submitted to the jury. He therefore declined, as a matter of law, to award interest payable from the date of breach and instead awarded interest only from the date of the judgment. McInnis did not appeal this decision.

McInnis thereafter commenced execution proceedings on the judgment against Bobby Hall. On 27 May 1983, it filed a complaint against Janet H. Hall (defendant herein), seeking damages for breach of the auction contract, again seeking $7,800 in commissions together with interest at the legal rate from the date of sale. On 3 June 1983, Bobby Hall paid the judgment against him,

including interest figured from the date of judgment. Three days later, Janet Hall was served with summons and a copy of the complaint that had been filed on 27 May 1983. Under the assurance from her husband that this matter had been resolved and that there was no necessity to respond to plaintiff's complaint, Janet Hall did not file an answer or otherwise respond to the complaint. As a result of this failure, default judgment was eventually entered on 25 July 1983 against her in the amount of $1,678.56, the difference between the interest calculated from the date of sale and the interest awarded from the date of judgment in the earlier action against Bobby Hall.

On 28 February 1984, the trial court denied Janet Hall's Rule 60(b)(1) motion to set aside the default judgment against her, finding that her failure to respond to the complaint constituted excusable neglect but that she had failed to demonstrate a meritorious defense to the plaintiff's claim. The Court of Appeals in a divided opinion affirmed the lower court's decision.

To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense. *Cayton v. Clark*, 212 N.C. 374, 193 S.E. 404 (1937); *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E. 2d 787 (1975); *Bank v. Finance Company*, 25 N.C. App. 211, 212 S.E. 2d 552 (1975). Defendant asserts on appeal before this Court that the doctrine of collateral estoppel is applicable to the plaintiff's claim and constitutes a meritorious defense to this breach of contract action. Plaintiff, in whose favor we granted a writ of certiorari on 28 January 1986, seeks reversal of that portion of the Court of Appeals' opinion which affirmed the trial court's finding of excusable neglect. We will address plaintiff's contention first.

I.

[1] Plaintiff contends that the trial court erred in finding that defendant's failure to respond to the complaint in this action was the result of excusable neglect. This Court finds no merit in plaintiff's argument.

Rule 60(b) of the North Carolina Rules of Civil Procedure provides that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect
>
> . . . .

N.C.R. Civ. P. 60(b). Although a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and will not be disturbed unless the trial court has abused its discretion, *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E. 2d 532, 541 (1975), whether excusable neglect has been shown is a question of law—not of fact. *Land Co. v. Wooten*, 177 N.C. 248, 98 S.E. 706 (1919); *Equipment, Inc. v. Lipscomb*, 15 N.C. App. 120, 189 S.E. 2d 498 (1972). Based on the facts found by the trial court, an appellate court must determine, as a matter of law, whether defendant's actions constitute excusable neglect.

While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case. *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E. 2d 819 (1978). Excusable neglect must have occurred at or before entry of judgment and must be the cause of the default judgment being entered. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *cert. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976).

A close examination of the facts herein discloses that defendant's actions were reasonable under the surrounding circumstances. Defendant did not respond to the complaint upon the assurance by her husband that the matter had been resolved by payment of the judgment in the first action and that there was no necessity to respond. Defendant was aware that the prior action against her husband was based upon the very auction contract on which she was being sued and that her husband paid $7,964.29 to satisfy the judgment entered against him in that action. Defendant was also aware that this payment by her husband was not made until three days after the filing of the complaint in the second action and three days prior to service upon her of the summons. Under these circumstances, it seems quite reasonable for defendant to have concluded that in suing her, plaintiff was only

trying to get payment of the judgment in the first action, that payment of this judgment by her husband resolved all controversy, and that there was no need to respond to the complaint.

Defendant cites *Trucks, Inc. v. Greene*, 34 N.C. App. 279, 237 S.E. 2d 862 (1977), and *Gregg v. Steele*, 24 N.C. App. 310, 210 S.E. 2d 434 (1974), as authority in support of the trial court's finding of excusable neglect. Both cases rely upon an opinion of this Court, *Abernathy v. Nichols*, 249 N.C. 70, 105 S.E. 2d 211 (1958), in which it is said that:

> [T]his Court has held that under G.S. 1-220 [since repealed; now N.C.G.S. § 1A-1, Rule 60(b)(1)] a wife's failure or neglect to file answer in a suit against her and her husband, upon assurances by her husband that he will be responsible for and assume the defense of the action, is excusable neglect.

Abernathy, 249 N.C. at 72, 105 S.E. 2d at 213.

Plaintiff contends that there is a difference between a husband's assurance to his wife that he will take care of the matter and take action and a husband's assurance to his wife that he has already taken care of the matter so that no action need be taken. However, this Court agrees with the unanimous panel of the Court of Appeals which declined to make such a fine distinction. Instead, we hold that the principle above stated is applicable to the present case.

Plaintiff further contends that to hold that Mrs. Hall's actions constitute excusable neglect is to hold as a general proposition that if a defendant wife seeks the legal advice of her husband and the legal advice proves to be erroneous, the wife can raise the erroneous legal advice given to her by her husband as excusable neglect on her part. Our decision should not be so broadly construed. Instead, we narrowly interpret the trial court's ruling, upheld by the Court of Appeals, to mean that under the circumstances surrounding this case it was not unreasonable for Mrs. Hall to rely on her husband's assurance that the matter had been taken care of and thus that her actions constitute excusable neglect.

II.

Turning now to defendant's appeal, we must next determine whether the trial court erred in concluding that defendant does

not have a meritorious defense. Defendant contends that plaintiff should not be permitted to recover in a second action interest from the date of breach which was denied to it in a previous action. As a legal basis for her contention, defendant rests her argument on the principles of collateral estoppel.

The companion doctrines of *res judicata* and collateral estoppel have been developed by the courts of our legal system during their march down the corridors of time to serve the present-day dual purpose of protecting litigants from the burden of relitigating previously decided matters and of promoting judicial economy by preventing needless litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 58 L.Ed. 2d 552, 559 (1979). The "classic" American case, 1B Moore's Federal Practice § 0.441[1] at 718-19 (2d ed. 1984), defining these two doctrines and illustrating the differences between them is the United States Supreme Court's decision in *Cromwell v. County of Sac*, 94 U.S. 351, 24 L.Ed. 195 (1877). Justice Field, writing for the Court, described the two as follows:

> In considering the operation of [a prior] judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . .
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be

> as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

Id. at 352-53, 24 L.Ed. at 197-98. Although the names used by courts when referring to Justice Fields' two "effects" have varied over time, the term "*res judicata*" is frequently applied to the former and the term "collateral estoppel," to the latter. *See* 1B Moore's Federal Practice § 0.405[1] at 180 (2d ed. 1984); J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* 606-09 (1985).[1] We shall use these terms in this sense in this opinion.

Thus, under *res judicata* as traditionally applied, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. When the plaintiff prevails, his cause of action is said to have "merged" with the judgment; where defendant prevails, the judgment "bars" the plaintiff from further litigation. In either situation, all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded. *See* Restatement (Second) of Judgments § 18, 19 (1982); 1B Moore's Federal Practice § 405[1] at 181-85 (2d ed. 1984). Under collateral estoppel as traditionally applied, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies. *See* Restatement (Second) of Judgments § 27

1. While scholars believe that the two doctrines have different origins, they are regarded as now related. *See, e.g.*, Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 Ill. L. Rev. 41 (1940). We note that some courts, including our own, have accordingly used the term "res judicata," in the broad sense of the preclusive effects of former adjudication, to refer to either. *See* 1B Moore's Federal Practice § 0.405[1] at 178-79 (2d ed. 1984); *see, e.g., Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909 (1955). The United States Supreme Court uses the terms "*res judicata*" and "collateral estoppel" in the manner described in the text above. *See Allen v. McCurry*, 449 U.S. 90, 94, 66 L.Ed. 2d 308, 313 (1980). We note that the Restatement (Second) of Judgments, however, has preferred to substitute the terms "claim preclusion" (rather than *res judicata*) and "issue preclusion" (rather than collateral estoppel) because of changes that have taken place in the Rules of Civil Procedure. Restatement (Second) of Judgments at 5-11 (1982).

(1982);[2] 1B Moore's Federal Practice § 0.441[1] at 718 (2d ed. 1984). Traditionally, courts limited the application of both doctrines to parties or those in privity with them by requiring so-called "mutuality of estoppel": both parties had to be bound by the prior judgment. *See Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (1942).

[2] North Carolina currently recognizes both doctrines in their traditional guise. *See King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973). Therefore, for *res judicata* to apply, Mrs. Hall would need to show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both she and McInnis were either parties or stand in privity with parties. However, because in this State contracts joint in form are several in legal effect, the same cause of action is not involved. *See Rufty v. Claywell*, 93 N.C. 306 (1885); N.C.G.S. § 1-72 (1983). Accordingly, *res judicata* cannot apply in the present action.

For Mrs. Hall to assert a plea of collateral estoppel under North Carolina law as traditionally applied, she would need to show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both she and McInnis were either parties to the earlier suit or were in privity with parties. *See King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799. Defendant argues that she meets all of these requirements; plaintiff contests defendant's claim only as to the last requirement. We find that Mrs. Hall meets every requirement but the last.

First, the prior suit resulted in a judgment on the merits.

Second, identical issues are involved. In its suit against Mr. Hall, plaintiff sought and failed to obtain interest on its commission from the date of sale. In the instant suit, plaintiff seeks again

2. The Restatement employs the following wording:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 (1982).

to recover interest on its commission (the same commission) from the date of sale.

Third, the issue was actually litigated. Plaintiff initially requested interest from the date of sale in its pleading. The issue was later raised before the trial judge; plaintiff specifically requested an award of interest from the date of sale. Plaintiff argued before the judge that it was entitled to this interest as a matter of law.

[3] Fourth, the issue was actually determined. The trial court in the instant case found as a fact that:

> i. No issue was submitted to the jury, and nor was any such issue requested, and nor was the jury charged concerning interest on the McInnis and Hall contract and *the Presiding Judge declined to grant interest from the day of breach of the contract as a matter of law*, he expressing the opinion that the question of interest on the breach of contract was a jury question and had consequently been waived in the absence of a timely request that an issue concerning interest be submitted to the jury; McInnis contended that interest was payable from the day of breach as a matter of law.

(Emphasis added.) Essentially, then, after the jury rendered its verdict, McInnis requested an award of interest from the date of sale. In making this request, McInnis claimed to be entitled to interest from that date as a matter of law. The trial judge, however, "declined to grant interest from the day of breach of the contract as a matter of law." The judge thereby made a determination that McInnis was not entitled to interest from the date of sale (the date of the breach) as a matter of law. His basis for making this determination was his opinion that prejudgment interest is a question of fact and had therefore been waived, but his determination, made in response to McInnis' claim, was that McInnis was not entitled to the requested interest as a matter of law.

Lastly, this determination was necessary to the resulting judgment. The trial court in the instant case also found as a fact that:

> h. *Judgment was entered by the Judge Presiding* in favor of McInnis and against Hall for the $7,800.00, *with interest to run thereon from the day of Judgment.*

(Emphasis added.) McInnis raised and argued the issue of interest on the jury's award from the date of sale in the prior action, but the judge awarded interest only from the date of judgment.

[4] In fact, the judge in the earlier action erred. Where the amount of damages for a breach of contract is ascertainable from the contract itself, the prevailing party is entitled as a matter of law to interest from the date of the breach. *See Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972), *rev'd on other grounds*, 283 N.C. 277, 196 S.E. 2d 262 (1973); *Thomas v. Realty Co.*, 195 N.C. 591, 143 S.E. 144 (1928); *see also T. C. Allen Construction Co. v. Stratford Corp.*, 384 F. 2d 653 (4th Cir. 1967) (applying North Carolina law). *Cf. Noland Co. v. Poovey*, 54 N.C. App. 695, 282 S.E. 2d 813 (1981), *cert. denied*, 304 N.C. 728, 288 S.E. 2d 808 (1982).[3] The jury verdict in the prior action confirmed the existence of the auction contract, established that it was breached by Mr. Hall, and awarded McInnis the commission fixed by the contract. Once these facts were established, McInnis' entitlement to interest from the date of sale was a question of law properly within the province of the trial judge, not a question of fact for the jury, and the auctioneering company did not waive this question by failing to request a jury instruction on the issue.

[5] Nevertheless, the fact that a prior judgment was based on an erroneous determination of law or fact does not as a general rule prevent its use for purposes of collateral estoppel. As this Court held several years ago in *King v. Grindstaff*, 284 N.C. 348, 360, 200 S.E. 2d 799, 808,

> To be valid a judgment need not be free from error. Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding *res judicata* and collateral estoppel effect in all courts, Federal and State . . . .

3. Interest is awarded for a breach of contract pursuant to N.C.G.S. § 24-5. That portion of the statute that applied to this case has since been slightly reworded. The cases cited herein were decided under the wording that existed at the time of the decision in the instant case.

Because the trial judge did make a determination that McInnis was not entitled to interest from the date of sale as a matter of law, and because that determination was necessary to support the award actually made, McInnis may be bound by this determination despite the fact that it was erroneous. The normal method for obtaining relief from judgments flawed by error of law is through appeal to our appellate courts. Plaintiff McInnis had the opportunity to have the trial judge's erroneous determination corrected in this manner. It failed to do so. Therefore, it may properly be bound by the earlier judge's determination that it was not entitled to prejudgment interest on this particular commission.

[6] However, the final traditional requirement of mutuality of estoppel is unsatisfied. Although McInnis was a party to the earlier action, our Court of Appeals has correctly ruled that Mrs. Hall was not in privity with her husband, the other party in that action. Under North Carolina law as heretofore applied, collateral estoppel would not be available to her for failure to meet the mutuality requirement.

The modern trend in both federal and state courts is to abandon the requirement of mutuality for collateral estoppel,[4] subject to certain exceptions, as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the earlier action. 1B *Moore's Federal Practice* § 0.441[3.2] at 731-36 (2d ed. 1984 and Supp. 1985-86); *see also Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 28 L.Ed. 2d 788 (1971) (discussion) and Restatement (Second) of Judgments § 29 (1982 and Supp. 1985-86). The requirement of mutuality has long been under attack. In the 1800's, Jeremy Bentham denounced it as " 'a maxim which one would suppose to have found its way from the gaming-table to the bench,' " *Zdanok v. Glidden Co.*, 327 F. 2d 944, 954 (2d Cir.), *cert. denied*, 377 U.S. 934, 12 L.Ed. 2d 298 (1964) (quoting Bentham, Rationale of Judicial

4. There seems to be no parallel move to abandon the traditional requirement of mutuality for *res judicata*. Abandoning mutuality for *res judicata* as defined herein would accomplish little in a practical sense. Because a plaintiff is generally regarded as having a separate cause of action against each obligor even when the subject matter of the claims is identical, the requirement of identity of cause of action would render *res judicata* unavailable to one not a party or privy in any case. *See* 1B Moore's Federal Practice § 0.412 at 503 (2d ed. 1984); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 Colum. L. Rev. 1457, 1458 (1968); Cleary, *Developments in the Law*, 65 Harv. L. Rev. 818, 861-62 (1952).

Evidence, in 7 Works of Jeremy Bentham 171 (J. Bowing ed. 1843)) (meaning that the maxim displays an attitude of "lose against one, play again against another"). After a series of judicial erosions, it was finally first abandoned, at least for "defensive" uses of collateral estoppel, in the landmark case of *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (1942).

Other states followed *Bernhard*'s lead until in 1967 the New York Court of Appeals felt itself able to say, "[T]he 'doctrine of mutuality' is a dead letter." *B. R. DeWitt, Inc. v. Hale*, 19 N.Y. 2d 141, 147, 225 N.E. 2d 195, 198, 278 N.Y.S. 2d 596, 601 (1967). In 1971, the United States Supreme Court joined the trend and held in *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 28 L.E. 2d 788, that mutuality would no longer be required for defensive uses of collateral estoppel in Federal courts. Later, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 58 L.E. 2d 552, the Court extended its earlier holding to permit carefully controlled "nonmutual offensive" use as well. *But see United States v. Mendoza*, 464 U.S. 154, 78 L.Ed. 2d 379 (1984) (where the Court refused to allow nonmutual offensive collateral estoppel against the Federal Government). Commentators appear to be in agreement that most jurisdictions have abandoned the mutuality requirement at least in part. *See* Restatement (Second) of Judgments § 29, Reporter's Note (1982 and Supp. 1985-86); Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 Ariz. St. L.J. 45; Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 Iowa L. Rev. 917 (1982); Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After Parklane Hosiery Co. v. Shore*, 31 Hastings L.J. 755 (1980); Note, *Collateral Estoppel Without Mutuality: Accepting the Bernhard Doctrine*, 35 Vand. L. Rev. 1423 (1982).

The basic rationale behind this abandonment was succinctly expressed by Traynor, J., writing for the Supreme Court of California in *Bernhard*. Judge Traynor first noted that the criteria for determining who might assert a plea of collateral estoppel differed fundamentally from the criteria for determining against whom the plea might be asserted. The requirements of due process forbade the assertion of a plea of collateral estoppel against a litigant unless he was a party or in privity with a party to the earlier suit, but no comparable reason existed for requiring

that the litigant asserting the plea be bound by the former adjudication. *Bernhard*, 19 Cal. 2d at 811-13, 122 P. 2d at 894-95. Traynor therefore concluded that there was no satisfactory rationalization for permitting "one who has had his day in court to reopen identical issues by merely switching adversaries." *Bernhard*, 19 Cal. 2d at 813, 122 P. 2d at 895. More recently, the United States Supreme Court in *Blonder-Tongue* explained, "the question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issues." *Blonder-Tongue*, 402 U.S. at 328, 28 L.Ed. 2d at 799. *See also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 58 L.Ed. 2d 552.

We are presented in the instant case with a proposed defensive use of the doctrine of collateral estoppel, and we see no good reason for continuing to require mutuality of estoppel in cases like this case. Plaintiff McInnis has already had its day in court on the issue it now seeks to relitigate against Mrs. Hall. Plaintiff seeks now to augment the award rendered by the prior court. The issue here is identical to the one decided in the prior case. Both actions are based on the same breach of contract, under which Mrs. Hall's obligations were exactly the same as her husband's. On the record before this Court, plaintiff clearly had a full and fair opportunity to litigate this issue in the first action. Plaintiff did not appeal the adverse determination and the judgment became final.

We have said before that collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805. *See also Crossland-Cullen Co. v. Crossland*, 249 N.C. 167, 170, 105 S.E. 2d 655, 657 (1958) ("It is elementary and fundamental that every person is entitled to his day in court to assert his own rights or to defend against their infringement . . . . But public policy is equally as adamant in its demand for an end to litigation when complainant has exercised his right . . . ."). We believe that, at least in cases like the instant case, the better view is to allow defendants like Mrs. Hall to assert collateral estoppel as a defense against a party who has previously had a full and fair opportunity to litigate a matter and now seeks to reopen the identical issues with a new adversary. Allowing a defensive use of

collateral estoppel in such cases will relieve parties from the cost and vexation of multiple lawsuits, encourage joinder, promote judicial economy, and, as the United States Supreme Court has said, "by preventing inconsistent decisions, encourage reliance on adjudication," *Allen v. McCurry*, 449 U.S. 90, 94, 66 L.Ed. 2d 308, 313 (1980).

Although defendant argued before this Court that she was in privity with her husband, she concluded her argument by requesting in essence that this Court adopt an expansive application of collateral estoppel. She said,

> It would be unjust and a waste of courts' time to permit one who has had its day in court (McInnis) to reopen identical issues by merely switching adversaries. Under the doctrine of collateral estoppel, the plaintiff should be unable to augment an award which was rendered by a prior court in a case in which it was a party by institution of a second action on the very question decided by the prior court. The doctrine of collateral estoppel was intended with this very result in mind, and inapplicability of this doctrine to circumstances such as the ones presently before us considerably limits this doctrine.

[7] We therefore hold that defendant may assert the prior judgment as a defense to the present action and that, in this case, collateral estoppel constitutes a meritorious defense. That portion of the decision of the Court of Appeals which affirmed the trial court's denial of defendant's motion to set aside the default judgment for lack of a meritorious defense is reversed and the cause remanded to the Court of Appeals for further remand to the District Court, Richmond County, for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

Chief Justice BILLINGS concurring in result.

I am unable to join in the majority opinion because, regardless of whether the time has come to abandon mutuality in the

defensive use of the doctrine of collateral estoppel, an abandonment that was not requested by the defendant and a question that was briefed by neither party, the doctrine of collateral estoppel does not prevent litigation of the issue of the plaintiff's entitlement under its contract to prejudgment interest because that issue was not "determined" in the earlier action. Nevertheless, the result reached by the majority is supported by the application of another doctrine specifically applicable to joint and several obligations, such as the one involved in this litigation, and I therefore concur in the result.

In regard to their obligations to the plaintiff under the auction contract, Mr. and Mrs. Hall were jointly and severally liable. N.C.G.S. § 1-72 (1983) permits suit "against all or any number" of persons obligated on a joint contract; therefore, the plaintiff herein was not required to join Mrs. Hall in its counterclaim against Mr. Hall in the prior lawsuit. Because persons who are jointly and severally liable on a contract are not in privity, as the majority correctly concludes, the judgment against Mr. Hall did not operate as *res judicata* as to the plaintiff's claim against Mrs. Hall.

Res judicata and *collateral estoppel* are two similar doctrines with significantly different application. *Res judicata* is called a doctrine of "claim preclusion" because it prevents relitigation of a claim or cause of action between the same parties or those in privity with the parties. *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973). It precludes not only the issues actually determined but all issues which could or should have been raised in support or defense of the claim litigated. Unquestionably, *res judicata* would prevent the plaintiff from seeking in a second lawsuit to recover prejudgment interest from Mr. Hall.

Collateral estoppel, on the other hand, works to preclude relitigation by parties or their privies of facts or issues *actually determined* in a previous action based upon a different claim or cause of action. *Id.*

> In determining whether collateral estoppel is applicable to specific issues, certain requirements must be met: (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have

been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Id. at 358, 200 S.E. 2d at 806.

Here the claims in the two actions are different because, although they are based upon one contract, the first was a claim to establish Mr. Hall's liability under that contract; the action *sub judice* is a claim to establish Mrs. Hall's liability, which is joint and several with but independent of Mr. Hall's liability.

Historically in North Carolina, our courts have applied the doctrine of mutuality to both *res judicata* and collateral estoppel. Under the doctrine of mutuality, if the prior action did not bind one of the parties to the second action because he or she had not been a party or in privity with a party to the first action, the other party also was not bound, even though he or she had been a party to the earlier action. *Kayler v. Gallimore*, 269 N.C. 405, 152 S.E. 2d 518 (1967). Because Mrs. Hall was not a party to the earlier action and was not in privity with a party, she in no way was bound by any issues determined therein. If the judgment in the prior action had not been satisfied by Mr. Hall, there is no question that the plaintiff herein could have prosecuted this action against Mrs. Hall and that she was not bound by the determination in the prior action that the debt was owed or the amount of the outstanding balance due on the debt. She also would have been free to interpose any defenses or set-offs that she had to the debt, whether or not they had been raised by Mr. Hall in the counterclaim against him. Because Mrs. Hall was not precluded by any determination in the first action, application of the doctrine of mutuality would mean that the plaintiff, although a party to the first action, would not be precluded in an action against Mrs. Hall by any determination in the first action. By abandoning the doctrine of mutuality in application of the doctrine of collateral estoppel, the majority concludes that the plaintiff is precluded by the prior judgment from seeking to recover prejudgment interest in this action against Mrs. Hall.

The problem with the majority's analysis is not with abandonment of the doctrine of mutuality but with application of collateral estoppel to the issue of the plaintiff's entitlement to

prejudgment interest, because the issue of the entitlement of the plaintiff to recover prejudgment interest on its contract was not actually determined on the merits in the first action.

Among the trial judge's findings of fact, to which no exception was taken, was the following:

> 1.i. No issue was submitted to the jury, and nor was any such issue requested, and nor was the jury charged concerning interest on the McInnis and Hall contract and the Presiding Judge declined to grant interest from the day of breach of the contract as a matter of law, he expressing the opinion that the question of interest on the breach of contract was a jury question and had consequently been waived in the absence of a timely request that an issue concerning interest be submitted to the jury; McInnis contended that interest was payable from the day of breach as a matter of law.

The finding contained in paragraph 1.i. establishes that the trial judge determined that entitlement to prejudgment interest was a jury question, not a question of law. Neither he nor the jury *determined* that McInnis was not entitled under its contract to prejudgment interest; the judge determined that as against Mr. Hall in the action McInnis had waived its right to recover the interest by not requesting that an issue regarding prejudgment interest be submitted to the jury. Waiver is conduct by which a party relinquishes a right, Black's Law Dictionary 1417 (5th Ed. 1979), giving up in the action the right to rely upon the claim or defense which he otherwise could rely upon. Because the waiver applied only to the conduct of the action against Mr. Hall, it was not a determination that McInnis could not recover the interest against other obligors on the contract. The right of McInnis to recover prejudgment interest *under the contract* was not "actually litigated and determined in the original action" although it "might have been thus litigated and determined," *Cromwell v. County of Sac*, 94 U.S. 351, 353, 24 L.Ed. 195, 198 (1877) (majority opinion, 318 N.C. 421, 427-28, 349 S.E. 2d 552, 556), had McInnis not, under the trial judge's view of the law, waived his right to

have it determined.[1] As stated in Restatement (Second) of Judgments § 27 comment e (1982):

> A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

Whether an issue raised in the pleading was actually litigated and determined must be determined by a review of the entire record, *Reid v. Holden*, 242 N.C. 408, 88 S.E. 2d 125 (1955). In this case the trial judge expressly held that the issue of prejudgment interest was waived and therefore not determined. *See Solarana v. Industrial Electronics, Inc.*, 50 Haw. 22, 28, 428 P. 2d 411, 416 (1967) (" 'A judgment is not res judicata as to issues raised in a previous case which were . . . matters which a court expressly refused to determine.' "); *Harvey v. Getchell*, 190 Or. 205, 225 P. 2d 391 (1950). Careful attention to the question of whether the issue raised in the second action was determined in the first action becomes especially necessary when we abandon the doctrine of mutuality in the defensive use of collateral estoppel.

Therefore, because the issue was not actually litigated and determined, collateral estoppel does not bar litigation of McInnis' entitlement to prejudgment interest even if the doctrine of mutuality is abandoned in the circumstances presented here.

1. It might be that if Mrs. Hall is entitled to rely on collateral estoppel in the action *sub judice*, McInnis is bound by the trial judge's "determination" that the question of prejudgment interest is a factual, rather than a legal, question.

The trial judge found as fact no. 7 that "[t]he only alleged meritorious defense raised by the defendant in her affidavits or in argument of counsel is that of collateral estoppel." No exception was taken to finding of fact no. 7, nor was any question raised in either the Court of Appeals or in this Court about the possible existence of another meritorious defense.

However, the motion of the defendant to set aside the judgment, the affidavits of Mr. and Mrs. Hall, the findings of the trial judge and the statement of facts in the Court of Appeals' opinion and in this Court's majority opinion all state that prior to entry of the default judgment against Mrs. Hall in the case *sub judice*, McInnis had obtained a judgment against Mr. Hall for breach of the contract which also was the basis for the action against Mrs. Hall and that the judgment had been satisfied.

As this Court noted in *Sherwood v. Collier*, 14 N.C. 380, 381 (1832)[2]:

> A payment by any one of two or more, jointly, or jointly and severally bound for the same debt, is payment by all, and any of the parties may take advantage of it and plead it to an action brought by a satisfied creditor, or in his name by the sureties.

The general rule in this country is that, although *res judicata* does not prevent the prosecution of separate actions and the obtaining of separate judgments against persons jointly and severally liable on the same obligation, the *satisfaction* of a judgment against one such obligor satisfies all debts or judgments based upon the joint and several obligation, even if the judgments are for different amounts. 47 Am. Jur. 2d, *Judgments* § 993 (1969), Restatement (Second) of Judgments § 50; *Leo Jay Rosen Associates, Inc. v. Schultz*, 148 So. 2d 293 (Fla. Dist. Ct. App.) (1963). Therefore, the satisfaction by Mr. Hall of the judgment which McInnis had obtained against him for the joint and several contractual obligation would constitute a defense to an action against Mrs. Hall upon the same obligation.

2. The rule of the *Sherwood* case was not changed by the subsequent enactment of N.C.G.S. § 1-72 which permits action against "all or any number of the persons making [joint contracts]."

If we are going to reach out and decide this case on the basis of legal principles not raised or briefed by the parties, I would prefer to decide it on the basis of the theory which is tailor-made for the situation present and which calls for the application of a long-accepted rule of law rather than to use this case as a vehicle to change the law of mutuality in collateral estoppel without the benefit of briefs or arguments.

Justice MEYER joins in this concurring opinion.

HENRY L. WILLIAMS v. BURLINGTON INDUSTRIES, INC., AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 436PA85

(Filed 4 November 1986)

1. **Master and Servant § 111— Employment Security Commission—decision by deputy commissioner—review by Court of Appeals proper**

The Court of Appeals had authority pursuant to N.C.G.S. § 96-15(h) to review a decision by a deputy commissioner of the Employment Security Commission to remand to the referee who originally heard the case.

2. **Master and Servant § 110— unemployment compensation—remand by deputy commissioner to referee for further fact finding—propriety**

In a proceeding for unemployment compensation where the deputy commissioner who heard the case remanded for further fact finding, the Court of Appeals erred in concluding that the deputy commissioner had abused his discretion, since the referee found that petitioner was discharged for leaving work early and falsifying time records; the referee also found that petitioner left early because he had finished his work but did not ask permission because he did not want to disturb his supervisor; the referee found that petitioner entered his time before the start of each work day and did not think about correcting the entries; and such findings did not indicate that petitioner's action in leaving early violated any employment rule or whether petitioner's actions with regard to his time records were the result of forgetfulness or intentional wrongdoing.

3. **Master and Servant § 110— unemployment compensation—findings of fact by referee—sufficiency—employee leaving work early—falsifying time records**

Findings by a referee in a proceeding for unemployment compensation were supported by the evidence under either the "any competent evidence" or the "substantial evidence on the whole record" test, and such findings were sufficient to support the referee's conclusion that petitioner was discharged for misconduct where the findings indicated that petitioner failed to notify his

supervisor that he was leaving before his scheduled quitting time despite his knowledge that he was supposed to do so; petitioner did not have good cause for this failure; petitioner falsified his time records and he was paid by the hour; and these two actions constituted willful or wanton disregard of his employer's interest.

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

ON discretionary review of a decision of the Court of Appeals, 75 N.C. App. 273, 330 S.E. 2d 657 (1985), reversing a judgment of the Superior Court, SAMPSON County, which affirmed a decision of the Employment Security Commission that claimant was disqualified for unemployment compensation. Heard in the Supreme Court 13 February 1986.

East Central Community Legal Services, by Reynauld M. Williams, for petitioner-appellee.

T. S. Whitaker, Chief Counsel, and Thelma M. Hill, for respondent-appellant Employment Security Commission.

Robert H. Stevens, Jr., Assistant General Counsel and Ben Tennille, Associate General Counsel, for respondent-appellant Burlington Industries.

Ogletree, Deakins, Nash, Smoak & Stewart, by Stuart M. Vaughan, Jr., and A. Bruce Clarke, for Amicus Curiae North Carolina Associated Industries.

Broughton, Wilkins, Webb & Gammon, P.A. by J. Melville Broughton, Jr., for Amicus Curiae North Carolina Textile Manufacturers Association.

FRYE, Justice.

The parties to this dispute raise several questions on review, all related to the larger question of whether the Court of Appeals erred in vacating the judgment of the Superior Court, Sampson County, which affirmed the decision of the Employment Security Commission to deny petitioner unemployment compensation, and remanding the case to that court for entry of an award of benefits. For the reasons set forth in this opinion, we hold that the Court of Appeals did err.

Petitioner was discharged from his job as a frequency checker with respondent Burlington Industries (hereinafter Bur-

lington) on 13 June 1983. The reasons given him at the time of discharge were that he had left the plant without permission from his supervisor and had also falsified time records. He applied for unemployment compensation. When this was denied, he requested a hearing before an appeals referee. The referee heard testimony from petitioner and from his former supervisor and another representative of Burlington on 25 July 1983. Following the hearing, the referee made findings of fact and concluded that petitioner had been discharged for misconduct as defined by N.C.G.S. § 96-14(2) and accordingly did not qualify for benefits.

Petitioner then appealed to the Commission. After reviewing the evidence, Deputy Commissioner V. Henry Gransee, Jr., vacated the referee's decision and remanded the cause for a new hearing before the same referee. Following this second hearing, the referee concluded anew that petitioner had been discharged for misconduct as defined by N.C.G.S. § 96-14(2). Petitioner again appealed. The deputy commissioner affirmed the referee's decision and adopted it as the Commission's own.

Petitioner then sought judicial review by the Superior Court, Sampson County. The case came on for hearing at the 9 July 1984 Civil Session before Lewis, J., who affirmed the Commission's decision. Petitioner appealed to the Court of Appeals, which reversed on the grounds that the deputy commissioner erred in remanding for a second hearing before the appeals referee. Respondents petitioned this Court for discretionary review of the Court of Appeals' decision. The petition was allowed on 19 September 1985.

I.

[1] Respondents initially contend that the Court of Appeals had no authority to review the deputy commissioner's decision to remand. This contention is clearly incorrect. N.C.G.S. § 96-15(h) (1985) ("Judicial Review") provides:

> Judicial review shall be permitted only after a party claiming to be aggrieved by the decision [of the Employment Security Commission or deputy commissioner] has exhausted his remedies before the Commission . . . and has filed a petition for review . . . . The petition . . . shall explicitly state what exceptions are taken to the decision *or procedure* of the Commission and what relief the petitioner seeks.

(Emphasis added.) Petitioner properly listed the deputy commissioner's remand as an exception in his petition for review by the superior court and further raised it as an assignment of error before the Court of Appeals. The Court of Appeals accordingly did not err in reviewing this decision. N.C. R. App. P. 10.

[2] Respondents further contend that the Court of Appeals applied an incorrect standard in reviewing the deputy commissioner's decision to remand.

N.C.G.S. § 96-15(e) (1985) ("Review by the Commission") provides:

> The Commission or Deputy Commissioner may on its own motion affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence . . . .

The statute thus allows the deputy commissioner in his discretion to remand a case for further fact finding. The Court of Appeals concluded that the deputy commissioner in this instance had abused his discretion.

The appeals referee initially found the following facts:

> 1. Claimant last worked for Burlington Industries, Incorporated on June 10, 1983. From June 12, 1983 until June 18, 1983, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination.
>
> 2. Claimant was discharged from this job for leaving work early and without permission and falsifying time records.
>
> 3. On June 7, 1983, June 8, 1983, and June 9, 1983, claimant was scheduled to work from 7:00 p.m. to 7:00 a.m. On each of those days claimant left prior to 7:00 a.m. and did so without permission. Claimant left early on those dates because he had completed his work and was tired. Claimant did not request permission because he would have to call his supervisor at his home and claimant did not want to disturb the supervisor.

4. On claimant's time record, claimant entered that he had worked twelve hours on each day, June 7, June 8, June 9, 1983. Claimant had not worked 12 hours. Claimant entered his time before the start of each work day and just didn't think about correcting the entries on the subsequent days.

Based on these facts, the referee concluded that petitioner had been discharged for misconduct as defined by N.C.G.S. § 96-14(2). This statute defines misconduct as

> conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer.

N.C.G.S. § 96-14(2) (1985).

The deputy commissioner in his order of remand said:

> It is now, therefore, ordered that the undersigned, having reviewed the evidence in the record, does hereby vacate the decision of the Appeals Referee and remand the cause for a new hearing and decision.
>
> It is unclear under which rule the claimant was discharged and exactly what the rule provided. Further, it appears that the three warnings and discharge all occurred on June 11, 1983. For a warning to serve any purpose as to future conduct, it would seem that it would have to be prospective. The Appeals Referee shall make a specific finding whether the claimant forgot to correct his time entries or falsified them.

The burden is upon respondent Burlington Industries to show that petitioner is disqualified from receiving unemployment compensation. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E. 2d 357, 359 (1982). The Court of Appeals reasoned that principles applicable to review by the courts should also be applicable to review by the Employment Security Commission. Accordingly, when all "sufficient and necessary findings of ma-

terial fact essential to resolving the issue have been made" and there is thus no need to remand, "any remand would be an abuse of discretion." 75 N.C. App. 273, 277, 330 S.E. 2d 657, 660.[1] The Court of Appeals so concluded because it believed that any other conclusion would unfairly give employers repeated opportunities to meet their burden. *Id.* The court went on to hold that the facts as initially found were sufficient to resolve the issue of whether petitioner was disqualified in petitioner's favor. It accordingly found that the deputy commissioner's remand was improper and an abuse of discretion.

Courts may review the discretionary decisions of administrative agencies for clear or manifest abuse of discretion. *See Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E. 2d 18 (1960). While we do not mean to imply that remands by the Employment Security Commission can never be an abuse of discretion, we find no such abuse in the instant case. We disagree with the opinion of the Court of Appeals that the referee's initial findings were sufficient to resolve the issue.

As previously stated by this Court,

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system . . . .'
>
> In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence . . . . It is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine

1. Although not cited in its decision in the instant case, our Court of Appeals has held that a superior court judge erred in sending a case back to the Employment Security Commission for further findings when all material facts necessary to resolve the issue had been found. *See Tastee Freeze Cafeteria v. Watson*, 64 N.C. App. 562, 307 S.E. 2d 800 (1983).

> what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.

Coble v. Coble, 300 N.C. 708, 712-13, 268 S.E. 2d 185, 189 (1980) (citations omitted) (emphasis in original).

The referee's initial findings omitted certain material facts.

The referee found on the one hand that petitioner was fired for leaving work early and without permission, and also that petitioner's job was finished and he did not wish to disturb his supervisor at home at an early hour. The referee did not find on this initial occasion that petitioner's action violated any employment rule, although there was some evidence in the record indicating that such was the case, or any other reason why petitioner's action was unacceptable behavior. Because petitioner's action would be perfectly acceptable in certain employments, these facts *as initially found* do not, *per se*, suggest "misconduct" as contemplated by the statute.

However, the referee found additionally that petitioner was also discharged for falsifying time records. The use of the word "falsify" suggests intentional deception, but this suggestion is neither confirmed nor rebutted by the referee's further finding that petitioner "just didn't think about correcting the entries on the subsequent days." The deputy commissioner could hardly have determined from a review of these findings whether petitioner merely forgot to correct his time entries or whether his omission was intentional. The record as it existed at the time was not sufficiently clear for the deputy commissioner himself to resolve this discrepancy. Petitioner's testimony at the first hearing contained internal inconsistencies and could be interpreted as supporting either conclusion. Because the findings and the record together were thus insufficient to resolve this issue in either party's favor, the deputy commissioner did not abuse his discretion in remanding for a new hearing.

We note that petitioner also argued before the Court of Appeals that the deputy commissioner abused his discretion in remanding for a new hearing before the same appeals referee. Petitioner made no such argument before this Court. This issue is accordingly deemed abandoned.

II.

[3] Having concluded that the Court of Appeals erred in finding that the deputy commissioner abused his discretion in remanding for a second hearing, we turn now to a review of the deputy commissioner's final decision in order to determine whether the superior court erred in affirming it.

N.C.G.S. § 96-15(i) (1985) provides that when judicial review is sought of decisions of the Commission on unemployment benefits, "the findings of fact by the Commission, if there is evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." After petitioner's second hearing, the appeals referee made new findings of fact and again concluded that petitioner was disqualified from receiving benefits because he had been discharged for misconduct. The deputy commissioner adopted this decision as the Commission's own. Petitioner contends both that certain material findings therein are unsupported by the evidence and that the findings do not support the conclusion reached. Petitioner further urges this Court to adopt the so-called "whole record test" for reviewing decisions of the Employment Security Commission.

Judicial review of the sufficiency of evidence to support findings of fact by an administrative agency is generally under one of three standards in North Carolina: *de novo* review where specifically authorized by statute, "substantial evidence on the whole record," or "any competent evidence." *In re Rogers*, 297 N.C. 48, 61, 253 S.E. 2d 912, 920 (1979). N.C.G.S. § 96-15 does not specify which test should be employed; it merely provides that the Commission's findings shall be conclusive "if there is evidence to support them . . . ." N.C.G.S. § 95-15(i) (1985). Where the word "evidence" appears, and its meaning is not otherwise qualified, "evidence" has been read to mean "substantial evidence." *Id.* at 61, 253 S.E. 2d at 920-21. Moreover we note that the "whole record" test is the test normally preferred. *See N.C. State Bar v. DuMont*, 304 N.C. 627, 286 S.E. 2d 89 (1982).

However, N.C.G.S. § 96-4(m) (1985), which deals primarily with hearings concerning employers' liability for unemployment tax, contains the following provision:

> When an exception is made to the facts as found by the Commission, the appeal shall be to the superior court . . . but the

> decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by *any competent evidence.*

(Emphasis added.) This Court applied this section to judicial review of disqualification of claimants in *Employment Security Commission v. Smith*, 235 N.C. 104, 69 S.E. 2d 32 (1952). Petitioner argues that this Court erred in so doing because this section has no relation to the section governing reviews of decisions on claimants' benefits. He accordingly urges the Court to adopt the "whole record" test for reviewing decisions on claimants' benefits and reserve the "any competent evidence" test for cases arising under N.C.G.S. § 96-4(m).

We need not decide this issue in the instant case, however, because we find that the disputed findings of the referee are supported by the evidence under either the "any competent evidence" or the "substantial evidence on the whole record" test. Furthermore, the principal underlying facts in this case are not seriously in dispute.

The appeals referee's second decision (adopted by the deputy commissioner as the decision of the Commission) included the following findings pertinent to this review:

> 3. Claimant was discharged from this job for leaving work early on three consecutive days without the permission of his supervisor and falsification of company records.
>
> EXCEPTION NO. 18
>
> 4. Claimant was employed as a frequency checker on the 11:00 p.m. to 7:00 a.m. shift. On shifts beginning June 6, 7, and 8, 1983, claimant was scheduled to work from 7:00 p.m. to 7:00 a.m. Claimant was scheduled to work his regular 11:00 p.m. to 7:00 a.m. shift on June 9 and 10, 1983.
>
> 5. Claimant's supervisor, Lee Shearin, works an 8:00 a.m. to 5:00 p.m. shift and is not normally at the work site during claimant's shift. [Claimant, however, had been instructed to call Mr. Shearin at his home if there were any problems.] Claimant had called Mr. Shearin at his home in the past to report such things as sickness necessitating claimant's early departure and claimant's inability to report for work.

EXCEPTION NO. 19

6. As a routine part of claimant's job, he entered the number of hours worked each day on a frequency check sheet. Based upon claimant's entries on the frequency check sheet, Mr. Shearin reported claimant's hours to payroll so that claimant might be paid. Claimant was paid according to the number of hours worked.

7. On June 7, 8, and 9, 1983, claimant left work, prior to the end of his shift. On each of the three days, claimant left without first receiving or attempting to receive, permission from his supervisor. Claimant left work early because he was tired. [Claimant chose not to call his supervisor, despite his knowledge that he was to do so, because he did not wish to 'bother' his supervisor at that time of day.] [It is found as a fact that claimant did not have good cause for failing to obtain permission to leave early from his supervisor on June 7, 8, and 9, 1983.]

EXCEPTION NO. 20

EXCEPTION NO. 21

8. On the frequency check sheet for the same three-day period, claimant recorded that he worked 12 hours on each of the three days. [Claimant made these entries prior to leaving his job.] [Claimant, however, had several opportunities to correct the false entries, but failed to do so.] Claimant failed to correct the entries because he was in a rush. [It is therefore found as a fact that claimant has failed to show good cause for falsifying company records.] [In view of the fact that claimant had several opportunities to correct the false entries yet failed to do so, it is further found that claimant's falsification of company records was intentional.]

EXCEPTION NO. 22

EXCEPTION NO. 23

EXCEPTION NO. 24

EXCEPTION NO. 25

Finding #3 is clearly supported by the evidence. At the first hearing, there was testimony that where an employee "walked off" of a job, Burlington normally adopted the position that the

employee had quit. However, both of Burlington's representatives at that hearing agreed that the company had not adopted this attitude but had instead discharged petitioner. There was also testimony at both hearings that petitioner could have been discharged for receiving four warnings within a prescribed period. Petitioner had previously received one warning (for a different infraction). He was given three warnings at once on the day he was fired for leaving early without permission on the three days in question (7, 8 and 9 June 1983). Nevertheless, respondent's representative testified repeatedly that petitioner was discharged for the reasons found by the referee, these reasons appear on petitioner's termination record at Burlington, and petitioner stated at his first hearing for unemployment benefits that he was given these reasons upon discharge. Thus, a fair reading of the record indicates that while petitioner could have been discharged for receiving four warnings, he was in fact discharged for his conduct, i.e., leaving work early without permission and falsification of time records.

There was also ample evidence to support the disputed portion of finding #5, that petitioner had been instructed to call his supervisor at home if there were any problems. Both Burlington's representatives and petitioner himself consistently testified to the fact that petitioner was supposed to call his supervisor in that event.

Petitioner took exception to two portions of finding #7. First, that "[c]laimant chose not to call his supervisor, despite his knowledge that he was to do so, because he did not wish to 'bother' his supervisor at that time of day," may be further subdivided into two separate parts, one, that "claimant chose not to call his supervisor . . . because he did not wish to 'bother' his supervisor at that time of day," and, two, that claimant knew he was supposed to call. There is substantial evidence to support both parts.

As to the first, petitioner agreed throughout both hearings that he had not telephoned his supervisor. At the first hearing, in response to the question "Why didn't you call [your supervisor]?" petitioner replied, "Well, it was close to 7 o'clock, and it wouldn't be long before it was time for him to get up . . . ." At the second hearing, petitioner testified in addition that two previous supervisors had reacted negatively to early morning calls. While peti-

tioner did not use the word "bother," the referee's finding well expresses the sense of his testimony.[2]

It is true that petitioner did offer somewhat conflicting testimony at his second hearing, saying that he had left notes for his supervisor to tell him of petitioner's early departure. Nevertheless, in view of the fact that petitioner failed to mention these notes at any previous stage of the claims process, that his supervisor denied receiving even one of them, and that accidental loss of all three would appear unlikely, we cannot say that under either standard of review this portion of the referee's finding was erroneous.

As to the second subdivision, that petitioner knew he was supposed to call his supervisor, Burlington introduced at the second hearing a copy of various posted rules, including the following:

> VISITING OTHER AREAS—LEAVING PLANT PREMISES—Employees, unless on Company business or in the course of their regular work, are not to visit departments other than those in which they are employed, nor to leave the plant premises during scheduled hours of work, without expressed authorization of the immediate supervisor.

Furthermore, at one point during his second hearing, petitioner agreed that he knew he should have communicated with his supervisor.[3]

2. Petitioner's attorney contends on appeal that had petitioner called the supervisor, he would have violated another work rule prohibiting employees from making phone calls except in cases of emergency. While the record shows that such a rule exists, petitioner himself never gave this rule as a reason for failing to telephone.

3. Although Burlington has strenuously argued at various levels that this fact is clearly proven, much of its evidence on this point is flawed. At the first hearing, it introduced evidence that petitioner's action was against its rules, that this information is dispensed at an orientation session for new employees, and that various portions of its rules are reviewed at "personalized contact sessions." However, Burlington failed to show that its orientation program was in effect when petitioner was hired thirteen years before, or that this particular rule was reviewed at any personalized contact session where petitioner was present. Petitioner contended at his first hearing that he knew he was supposed to call if there was any *difficulty*, and there was none. At the second hearing, Burlington introduced evidence that petitioner was discharged from Burlington in 1973 for leaving without permission but without any information about the circumstances, and that in 1976 a former

In the second portion of finding #7 to which petitioner excepted, the referee found that petitioner did not have good cause for failing to obtain permission to leave early. Violation of a work rule is not misconduct if the employee's actions were reasonable and were taken with good cause. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357. Petitioner contends that "good cause" is a conclusion of law and thus fully reviewable on appeal. This contention is contrary to this Court's recent statement in *Intercraft* that good cause is "a matter for the factfinder, here the Commission, to decide." *Id.* at 377, 289 S.E. 2d at 360.

In the instant case, the facts as found by the referee are essentially that petitioner knew that he was supposed to call his supervisor before leaving early, despite the fact that his task had been completed.[4] His reason was that he did not want to bother the supervisor. The record also shows that according to petitioner, this particular supervisor had never become upset on other occasions when petitioner called to report problems. This evidence tends to support the referee's conclusion.

The only evidence that would suggest a different result is that at the end of the preceding week, on Saturday, 4 June 1983, petitioner's supervisor had told petitioner he could leave when he finished his tasks and he would be paid for the entire eight-hour shift. According to the testimony, petitioner's supervisor was acting under the mistaken belief that workers who were present for more than half of their shift were to be paid for the entire shift. The evidence shows that petitioner's next working day was 6-7 June, and petitioner also left when he had completed his tasks on that and the two succeeding days. Petitioner repeatedly indicated that he could see no difference between the events of Saturday, 4 June, and those of 7, 8, and 9 June. However, we note that on Saturday, 4 June, petitioner left before his scheduled time *with his*

supervisor told him to get permission to go to a different area while on a break. Thus the only real evidence that petitioner knew that it was against company rules for him to leave without his supervisor's permission *when all of his work for that day was already completed* was the posted rule and petitioner's own statement at the second hearing.

4. Although the referee did not find as a fact in her second findings that petitioner had completed his tasks, both parties agree that he had done so on the three days in question, and the documentary evidence introduced by Burlington supports this fact.

supervisor's express permission. Nothing in the record suggests that the supervisor was giving petitioner implied permission to leave before the appointed hour on future occasions. Therefore, we find that there is substantial evidence to support the referee's finding that petitioner did not have good cause for failing to obtain permission on the days in question.

Petitioner similarly takes exception to four portions of finding #8. First is the referee's finding that "[c]laimant made these entries prior to leaving his job." Petitioner testified that he entered twelve hours on each of the three days in question when he first come on the job. The entries were thus clearly made prior to leaving. Second, the referee found that claimant had several opportunities to correct the incorrect entries. The evidence is uncontroverted that petitioner entered incorrect time figures for each day for three days in succession, that he came again to work that week on a fourth day, and that he finished early on each of these days. Therefore, he clearly had repeated opportunities to correct all three of his incorrect entries. Fourth, the referee found that "[i]n view of the fact that claimant had several opportunities to correct the false entries yet failed to do so, it is further found that claimant's falsification of company records was intentional." Intent may be inferred from the surrounding circumstances. We therefore find that there was substantial evidence to support the first, second and fourth portions of finding #8.

The third portion, that petitioner failed to show good cause for falsifying company records, is also supported by the evidence.[5] Petitioner's own testimony is that on each successive day he did not correct the entries from the previous days because he was in a rush, and the referee so found. In view of the undisputed facts that petitioner had extra time at the end of each succeeding shift, and that the mistake was repeated for three successive days, we believe that the evidence supports this finding.[6]

5. We note that the burden of showing that a claimant is disqualified for misconduct as defined by the statute remains on the employer. *See Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E. 2d 357, 359.

6. Another relevant factor should be mentioned at this point. The uncontroverted testimony of both petitioner and his supervisor, a witness for Burlington, about petitioner's leaving early yet being paid for his full shift on Saturday, 4 June, described previously, plus petitioner's apparent feeling that there was no difference between the happenings of that Saturday and those of his next three working days

We must next consider whether the findings as made support the conclusion that petitioner was discharged for misconduct as defined by N.C.G.S. § 96-14(2).

Petitioner contends that the findings are deficient for failure to state what rule petitioner violated. The Court of Appeals held that petitioner was not guilty of misconduct because he had "good faith" cause for his actions, and respondents and amici curiae contend that the Court of Appeals is improperly requiring employers to show intent before an employee may be found to have been discharged for misconduct whereas a finding of negligence is sufficient. Neither party is entirely correct.

Misconduct is defined as "conduct evincing such willful or wanton disregard of an employer's interest" as is found in:

1) *deliberate* violations or disregard of standards of behavior which the employer has the right to expect, or

2) carelessness or negligence *of such degree or recurrence* as:

   a. to manifest equal culpability, wrongful *intent*, or evil *design*, or

   b. to show an *intentional* and substantial disregard of the employer's interests or of the employee's duties.

N.C.G.S. § 96-14(2) (1985) (emphases added). Petitioner's contention is erroneous in that while violation of a specific work rule may amount to such misconduct, *see Intercraft Industries Corp. v.*

(ending 7, 8, and 9 June), plus the testimony of Burlington's witness that Burlington had had no problems with petitioner posting incorrect time records before 7 June 1983, plus the fact that petitioner's normal shift was only eight hours instead of twelve, could support a finding that petitioner was genuinely confused about the propriety of his actions and the proper interpretation of Burlington's rules. In such case, his actions might not constitute misconduct. There is, however, evidence that tends to negate a finding that he was confused on this matter. Petitioner's supervisor testified that *he* mistakenly believed that petitioner was entitled to be paid for his entire shift despite leaving early, but neither he nor petitioner ever testified that he told petitioner so. Petitioner never made any claim of entitlement to be paid for the unworked hours, even mistakenly. Furthermore, at his first hearing, he said of the preceding Saturday, "He paid me for eight hours. I only worked six. Now, that's falsification of time, but there's no difference there. He said, 'When you finish, go.' " Petitioner's testimony could be interpreted to mean that he was fully aware that he was not entitled to compensation for his unworked hours.

Morrison, 305 N.C. 373, 289 S.E. 2d 357, the statute does not require such a showing. Our Court of Appeals has found misconduct based on conduct alone, without reference to a specific rule. *See, e.g., Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 291 S.E. 2d 308 (1982) (gross insolence). Likewise, respondent errs in that while one of the examples of willful or wanton disregard of an employer's interest is negligence, the statute requires that more be shown than simple negligence. An employee's intent is clearly a relevant consideration.

The Court of Appeals did err in one respect, however. This Court has said that violation of a work rule is not misconduct if the evidence shows that the employee's actions were reasonable and were taken with good cause, which is further defined as a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. *See Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 375-76, 289 S.E. 2d 357, 359. Accordingly, when the Court of Appeals held that petitioner had a "good faith" cause for violating a work rule, it was technically applying an incorrect standard. Although an employee's intentions are certainly relevant in either event, the correct standard is the objective "good cause" rather than the subjective "good faith cause."

Finally, we believe that the facts as found will support the referee's conclusion that petitioner was discharged for misconduct. The findings show two bases for such a conclusion. First, petitioner failed to notify his supervisor that he was leaving before his scheduled quitting time despite his knowledge that he was supposed to do so. The referee found that petitioner did not have good cause for this failure. Second, he repeatedly falsified his time records, and he was paid by the hour. We agree that the two, taken together, constitute "willful or wanton disregard" of his employer's interest. *Cf. In re Butler*, 60 N.C. App. 563, 299 S.E. 2d 672, *cert. denied*, 308 N.C. 191, 302 S.E. 2d 242 (1983) (failure without good cause to notify employer of an excusable absence, such as illness, negates any good cause for the absence itself), and *In re Williams*, 60 N.C. App. 572, 299 S.E. 2d 668, *cert. denied*, 308 N.C. 544, 304 S.E. 2d 243 (1983) (employee's alteration of production records, resulting in overpayment to her, was sufficient to support a conclusion of misconduct).

In summation, we hold that the Court of Appeals erred in its decision that the deputy commissioner abused his discretion in remanding for further findings, and we find no error in the decision of the Superior Court, Sampson County. For all the reasons discussed in this opinion, we reverse the decision of the Court of Appeals.

Reversed.

Justices PARKER and BROWNING did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. J. B. RAMEY

No. 105A86

(Filed 4 November 1986)

1. **Rape § 4.1— first degree sexual offense—defendant's prior sexual acts—similar evidence not objected to—objection waived**

In a prosecution for first degree sexual offense, defendant could not complain about the admission of the testimony of the victim regarding prior sexual acts committed against him by defendant, since evidence regarding the same prior acts of defendant was later admitted without objection through the testimony of a detective and in a statement written by the victim, and defendant therefore waived his objection to the prior testimony.

2. **Criminal Law § 163; Rape § 6— first degree sexual offense—prior sexual acts—limiting instruction not requested or given—no plain error**

Defendant failed to show plain error in the trial court's failure to instruct the jury, without request from defendant, that the evidence of prior sexual acts by defendant against the victim could be considered only for the purpose of showing intent and not character where defendant did not show that the jury probably would have reached a different verdict had the instruction in question been given.

3. **Criminal Law § 99.8— first degree sexual offense—questioning of eight-year-old victim by court—no expression of opinion**

In a prosecution for first degree sexual offense, the trial court's questions asked of the eight-year-old victim as to how many times he had been touched between the legs by the defendant and how old the victim was when the first incident occurred were for the purpose of clarification and did not amount to an improper expression of opinion. N.C.G.S. § 15A-1222.

4. **Criminal Law § 89.1— first degree sexual offense—evidence as to victim's truthfulness—no plain error**

In a prosecution for first degree sexual offense, the trial court did not commit plain error in allowing the victim's mother and sister to testify that the victim told the truth. N.C.G.S. § 8C-1, Rule 608(a).

5. **Criminal Law § 89.3— first degree sexual offense—evidence of victim's prior consistent statements—no plain error**

Though the trial court in a prosecution for first degree sexual offense erred in allowing a detective to testify that statements of the victim had at all times been consistent, such error did not constitute plain error requiring a new trial, since the bulk of the detective's testimony related to prior statements of the victim and was corroborative of the victim's testimony; very little of the evidence presented through the witness had not already been heard by the jury; and the jury had the victim's prior statements before it and could compare them.

6. **Criminal Law § 89.3— corroboration of witness—prior statement of witness—"new" information**

In order to be corroborative and therefore properly admissible, a prior statement of a witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. Prior statements of the Supreme Court are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, are not admissible as corroborative evidence.

7. **Criminal Law § 89.3— victim's prior statements—inclusion of "new" material—admissibility for corroboration**

In a prosecution for first degree sexual offense, the trial court did not err in admitting into evidence certain oral and written out-of-court statements made by the victim to a detective, though the statements included additional facts not referred to in the victim's testimony, since the statements tended to strengthen and add credibility to his trial testimony.

8. **Criminal Law § 73.1— first degree sexual offense—testimony by victim's mother as to victim's behavior—no error**

In a prosecution for first degree sexual offense, the trial court did not err in allowing the victim's mother to testify as to what a counselor told her concerning the victim's behavior where the testimony merely related to the existence of the victim's resentment and anger and not to their cause, and even if the testimony did imply that defendant's actions caused the victim's resentment and anger, there was other testimony by the victim's mother to the same effect and explaining further his behavioral problems.

9. **Criminal Law § 98— number of character witnesses limited—no error**

The trial court did not err in limiting defendant to six character witnesses and in allowing his remaining witnesses to stand up and give their names and addresses to the jury without first being sworn since defendant did not object to this procedure; the jury was informed by comments of the court and counsel

that these witnesses were present to attest to defendant's good character and reputation in the community; and it was within the court's discretion to limit the number of character witnesses a party may call. N.C.G.S. § 8C-1, Rule 603.

10. Indictment and Warrant § 17.2— date of offense—no variance between indictment and proof

In a prosecution for first degree sexual offense, there was no merit to defendant's contention that there was a fatal variance between the indictment and proof with regard to the date of the offense, and defendant was not misled thereby and deprived of the opportunity to present an adequate defense, since the warrant and bill of indictment showed the date of the offense as 13 March 1985; although the victim was unable to state the exact date of the offense and could only state that it occurred sometime in March, defendant was put on notice as to the boy's uncertainty during a probable cause hearing; at the hearing defendant was given the opportunity to cross-examine the victim with regard to the date of the offense; defendant had notice that the State was not relying on the exact date alleged in the warrant and indictment; and defendant did not in fact rely on the date stated in the indictment.

APPEAL by the defendant from judgment entered by *Mills, J.*, at the 10 October 1985 Criminal Session of Superior Court, FORSYTH County.

The defendant was indicted for first degree sexual offense. He was found guilty by a jury on 10 October 1985 and was sentenced to life imprisonment. The defendant appealed his conviction for first degree sexual offense and the resulting life sentence to the Supreme Court as a matter of right. Heard in the Supreme Court 8 September 1986.

Lacy H. Thornburg, Attorney General, by Charles H. Hobgood, Assistant Attorney General, for the State.

West, Crawford & James, by David R. Crawford, for the defendant appellant.

MITCHELL, Justice.

The defendant has brought forth numerous assignments of error on appeal. He contends: (1) the trial court erred by allowing the victim to testify regarding prior sexual acts of the defendant; (2) the trial court committed plain error by failing to instruct the jury, without request from the defendant, as to the limited purpose for which the jury could consider testimony of prior sexual acts; (3) the trial court committed error by expressing an opinion as to facts in controversy; (4) the trial court committed plain error

by permitting certain witnesses to testify that the victim tells the truth and that he made no prior inconsistent statements; (5) the trial court committed plain error in allowing into evidence, for the purpose of corroboration, out-of-court statements made by the victim that went beyond the scope of his trial testimony; (6) the trial court erred by allowing a witness to testify to what a counselor told her regarding the victim's behavior; (7) the trial court abused its discretion in instructing the defendant to present his remaining character witnesses by having them stand and give their names and addresses to the jury; (8) the trial court erred by denying the defendant's motion to dismiss at the close of all the evidence for variance between allegations in the indictment and the evidence presented by the State at trial. We find no prejudicial error.

The State offered evidence tending to show that the victim,[1] a boy eight years old, was in the second grade in March 1985. The defendant, a family friend, went to the victim's home at four or five o'clock in the afternoon sometime in March. The defendant told the victim's mother that he needed to have the boy crawl through a window in a mobile home because he was locked out. The victim went with the defendant. They stopped on the way and the defendant bought the victim ice cream and a drink. After arriving at the mobile home, the defendant worked outside and the victim played. Later, instead of having the victim crawl through a window, the defendant opened the door and called the victim inside and into the bedroom. When the victim entered the bedroom, the defendant told him to pull his pants down and lie on the bed. When the boy did so, the defendant touched the boy's penis with his hand and with his mouth. The victim testified that defendant's mouth was on his penis about twenty minutes. They then left the mobile home and the defendant took the victim home. The defendant told him not to tell anyone about what happened.

1. Use of the victim's name is not necessary to distinguish him from other individuals involved in the case and would add nothing of value to this opinion. Therefore, "in keeping with the practice established by this Court in numerous recent cases," the victim's name has been deleted throughout the opinion in order to avoid further humiliation and embarrassment for him. *State v. Hosey*, 318 N.C. 330, 332 n. 1, 348 S.E. 2d 805, 807 n. 1 (1986).

Several days later the victim told his thirteen-year-old sister that the defendant "felt" him. She told him to tell their mother, but he did not do so then. The day before school was out in June, the victim told his sister again. She told their mother to make him repeat what he had said. At that time, the victim told his mother that the defendant "touched" him. She asked him "Where?", and the victim pointed to his penis. She asked him if the defendant did anything else, and he said, "He put his mouth on me." She called the Sheriff's Department that night and was told to talk with Detective Linda Sturgill.

The first time Detective Sturgill talked with the victim on 12 June 1985, his mother was not in the room. During questioning by Detective Sturgill, the victim pointed to the penis on an anatomically correct doll to explain his use of the word "ding-dong" in his description of what the defendant had done to him.

The victim testified that this was not the first time this type of thing had happened with the defendant. The victim said he was five years old the first time, and it had happened more than five times.

The victim's mother testified that she remembered the defendant coming and getting the victim for the purpose of having him go through the window. She said that the incident occurred approximately in the middle of March. The victim remembered that it occurred in March, and his mother remembered that it was at approximately the time her oldest daughter rented the mobile home from the defendant. Her daughter had put some of her property in the mobile home on 7 March 1985, but did not move in until a week or two later.

There had been other occasions when the victim and the defendant were alone together. The victim's family lived in one of the defendant's mobile homes from 1979 until May 1984. After they moved into a house about three miles away, there were two incidents in which the defendant came and got the victim.

The defendant presented evidence tending to show only that on 15 March 1985, the victim crawled through the mobile home window and was then driven home by a neighbor, Shirley Stoltz.

[1] The defendant first assigns as error the action of the trial court in admitting over objection the testimony of the victim re-

garding prior sexual acts committed against him by the defendant. The defendant contends that the testimony by the victim that "this" had happened on other occasions was inadmissible under N.C.G.S. § 8C-1, Rule 404(b) because it was evidence of other crimes, wrongs, or acts to prove character and to show that the defendant acted in conformity therewith. The defendant argues that the testimony was too ambiguous as to the nature of such offenses and too remote as to the dates thereof to be admissible under Rule 404(b).

Even if it is assumed *arguendo* that the testimony was not admissible, this assignment of error is not properly before this Court. Evidence regarding the same prior acts of the defendant was later admitted without objection through the testimony of Detective Sturgill and in a statement written by the victim. Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence. *State v. Gordon*, 316 N.C. 497, 342 S.E. 2d 509 (1986); *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). We overrule this assignment of error.

[2] The defendant also assigns as error the trial court's failure to instruct the jury, without request from the defendant, that the evidence of prior sexual acts by the defendant against the victim could be considered only for the purpose of showing intent. Since defendant failed to object to the trial court's instructions, review on appeal is limited to consideration of whether the omission constituted plain error. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). We hold that it did not.

We have stated that:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done' . . . .

State v. Odom, 307 N.C. at 660, 300 S.E. 2d at 378, *quoting with approval, United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed. 2d 513

(1982). Rarely will an improper jury instruction justify reversal of a criminal conviction when no objection was made at trial. *State v. Odom*, 307 N.C. at 660-61, 300 S.E. 2d at 378. To bear the burden of showing the existence of plain error, the appellant must establish that absent the error the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986). "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." *Id.*

Even assuming *arguendo* that failure to give the limiting instruction the defendant now argues for was error, the defendant has failed to show that the verdict would have been different had the trial court given the instruction. The defendant essentially argues that, although it was proper for the jury to consider such evidence, had the jury been instructed to consider it only as to his intent but not his character, the defendant would have been found not guilty. This is highly unlikely. Certainly, the defendant has failed to show that this is so probable as to make the trial court's action plain error. We conclude that the omission from the jury instructions complained of was not plain error.

[3] By his next assignment of error, the defendant contends that the trial court committed reversible error by expressing an opinion as to facts in controversy when asking a question of the eight-year-old boy victim during his testimony. After the victim had testified that the defendant had touched the victim's penis with his mouth and hand, the following exchange occurred:

Q. [I]s this the first time this has ever happened?

A. Hum?

Q. Is this the first time this has ever happened to you?

A. No.

MR. RAY: Objection.

THE COURT: Overruled.

Q. How old were you the first time this ever happened to you with Mr. Ramey?

A. Five.

MR. RAY: Your Honor, I object.

THE COURT: Overruled.

Q. How many times would you say it's ever happened?

MR. RAY: Objection.

THE COURT: Just the two of you together and he touched you between your legs.

It is well established by both statute and case law that it is improper during any stage of the trial for a trial judge in the presence of the jury to express his opinion on any question of fact to be decided by the jury. *See State v. Blackstock*, 314 N.C. 232, 333 S.E. 2d 245 (1985); N.C.G.S. § 15A-1222. However, the mere asking of a question by the court is not in itself erroneous. *See* N.C.G.S. § 8C-1, Rule 614(b) (1986). In fulfilling the duties of a trial judge to supervise and control the course of a trial so as to insure justice to all parties, the judge may question a witness in order to clarify confusing or contradictory testimony. *State v. Blackstock*, 314 N.C. 232, 333 S.E. 2d 245; *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974).[2] We have also held that asking leading questions of a youthful witness is proper, particularly when, as here, the inquiry is directed to matters of a sexual nature. *State v. Cobb*, 295 N.C. 1, 8, 243 S.E. 2d 759, 763 (1978).

A trial judge's question propounded for the purpose of clarification is an expression of opinion only if a jury reasonably could

2. *Greene* was decided before the repeal of N.C.G.S. § 1-180 (repealed 1977) which provided:

> § 1-180. Judge to explain law, but give no opinion on facts.—No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the State and defendant in a criminal action.

Case law provided that the provisions of N.C.G.S. § 1-180 were also violated at any stage of the trial "by comments of the testimony of a witness, by remarks which tend[ed] to discredit a witness, . . . or by any other means which intimate[d] an opinion of the trial judge in a manner which would deprive an accused of a fair and impartial trial before the jury." *State v. Greene*, 285 N.C. at 489, 206 S.E. 2d at 233-34; *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966).

infer that the question intimated an opinion as to a factual issue, the witness's credibility or the defendant's guilt. *State v. Blackstock*, 314 N.C. at 236, 333 S.E. 2d at 248; *State v. Yellorday*, 297 N.C. 574, 581, 256 S.E. 2d 205, 210 (1979). This is not such a case. In the present case, the defendant relies on *State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973), in urging this Court to grant a new trial. In *McEachern*, before there was any testimony from the victim that she had been raped, the trial judge asked the victim on the stand, "Let me ask you a question of clarification before you go further, you were in the car when you were raped?" *Id.* at 59, 194 S.E. 2d at 789. This Court found that the question by the trial judge was an improper expression of opinion that might have affected the verdict in that it assumed that the victim had been raped.

The present case is distinguishable from *McEachern* because here the trial judge did not assume facts not in evidence. The victim had testified that the defendant had touched his penis. The eight-year-old victim was asked rather ambiguous questions concerning whether he had been touched by the defendant in that manner on previous occasions. A jury could not reasonably infer that the question expressed the judge's opinion that the witness had been touched between the legs. The question was clearly for the purpose of clarification of answers to somewhat ambiguous questions asked of a youthful witness concerning a delicate matter. This assignment of error is without merit.

[4] By his next assignment of error, the defendant complains that it was plain error for the trial court to allow certain witnesses to testify that the victim tells the truth and that his out-of-court statements were consistent with his trial testimony. The defendant submits that the trial court committed prejudicial error during the State's direct examination of the victim's mother by admitting the following question and answer:

> Q. Do you think he [the victim] tells the truth?
>
> A. Yes, I do.

The defendant argues that this testimony violated N.C.G.S. § 8C-1, Rule 608(a) which provides that evidence of the character for truthfulness of a witness is admissible only after it has been attacked. He argues that this rule was violated because the vic-

tim's character for truthfulness had not been attacked. Further, the defendant submits that the witness's answer was an improper lay opinion.

The defendant did not object or otherwise indicate at trial that he was dissatisfied with the foregoing exchange. Therefore, this issue must be analyzed according to the plain error doctrine. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). Even assuming *arguendo* that the exchange did constitute error, our required review of the entire record leads us to conclude it was not plain error. The appellant has not shown that absent the error the jury probably would have reached a different result. *See State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80. It is unlikely that the jury gave great weight to the fact that a mother believed that her son was truthful. We believe this evidence had little, if any, impact on the jury's decision and did not "tilt the scales" causing the jury to convict the defendant. *See id.* We find no plain error.

Next, the defendant argues that it was plain error for the trial court to allow the victim's mother to testify without objection as follows:

> Q. During all the time that you have talked to [the victim] has he ever told you anything different than what he told here today?
>
> A. No.

This question taken in context did not require the witness to characterize the victim's testimony as truthful or untruthful, but merely asked whether he had recanted his story at any time. She was asked to testify only from her own knowledge and was not required to draw any conclusions. This was a question of fact within the knowledge of the witness. The trial court did not commit plain error by allowing introduction of this testimony.

Similarly, the defendant complains that the following exchange during the testimony of the victim's sister constituted plain error.

> Question: Have you and [the victim] ever talked about it since then?
>
> Answer: Well, not alone, like. We—

Question: Just with the rest of the family?

Answer: Yes, sir.

Question: Have you ever heard him say anything else, Tracy, that it wasn't true, that he made it up or anything like that?

Answer: About this?

Question: Yes?

Answer: No, sir.

For the same reasons discussed above, we conclude that admission of this testimony was not plain error.

[5] The defendant's final argument under this assignment of error concerns the testimony of Detective Linda Sturgill, as follows:

Question: A number of times, you have had a number of occasions to speak to [the victim] other than that first time?

Answer: I have talked with [the victim] on two occasions.

Question: Has he ever told you anything inconsistent with what he told you that first time?

Answer: No, sir.

The defendant contends that the admission of that testimony, even without objection, was plain error. We agree that the testimony about which the defendant belatedly complains was improper. Inconsistencies in a witness's testimony or pretrial statements are for the jury to determine as fact finders. *State v. Corbett*, 309 N.C. 382, 401-02, 307 S.E. 2d 139, 151 (1983). The opinion and inferences of the witness as to whether the statements of the victim had been at all times consistent were not sufficiently "helpful to a clear understanding of [the witness's] . . . testimony or the determination of a fact in issue" to be admissible in the present case. N.C.G.S. § 8C-1, Rule 701 (1986). It would have been proper, however, for Detective Sturgill to testify as to the statements made to her by the victim and let the jury determine whether they were inconsistent.

We turn, then, to decide whether the defendant, having failed to object or except at trial, is entitled to any relief on appeal as a

result of the error. We again must apply the plain error doctrine. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804.

It appears from our required review of the entire record that the bulk of Detective Sturgill's testimony related to prior statements of the victim and was corroborative of the victim's testimony. Very little of the evidence presented through this witness had not already been heard by the jury. The jury had the victim's prior statements before it and could compare them. Therefore, the defendant has not met his burden of showing that the witness's testimony prejudiced the jury and caused it to reach a different verdict than it otherwise would have reached. *See State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80. We conclude that the error was not plain error.

[7] By his next assignment of error, the defendant contends that the trial court committed plain error by admitting into evidence certain oral and written out-of-court statements made by the victim to Detective Sturgill. The defendant argues that this testimony by Sturgill was not admissible as corroborative evidence because it went beyond the earlier testimony of the victim. This assignment of error is without merit.

In the recent case of *State v. Riddle*, 316 N.C. 152, 340 S.E. 2d 75 (1986), we again defined "corroboration" by stating that:

> Corroboration is "the process of persuading the trier of the facts that a witness is credible." 1 Brandis on North Carolina Evidence § 49 (2d rev. ed. 1982). We have defined "corroborate" as "to strengthen; to add weight or credibility to a thing by *additional and confirming* acts or evidence." *State v. Higgenbottom*, 312 N.C. 760, 769, 324 S.E. 2d 834, 840 (1985). Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983); *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979); *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972). However, the prior statement must in fact corroborate the witness' testimony. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277; *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976).

Id. at 156-57, 340 S.E. 2d at 77-78 (emphasis added).

[6] In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. *State v. Riddle*, 316 N.C. 152, 156-57, 340 S.E. 2d 75, 77-78 (1986); *State v. Higgenbottom*, 312 N.C. 760, 768-69, 324 S.E. 2d 834, 840 (1985); *State v. Burns*, 307 N.C. 224, 231, 297 S.E. 2d 384, 388 (1982). *See State v. Ollis*, 318 N.C. 370, 348 S.E. 2d 777 (1986). Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. *E.g., State v. Moore*, 301 N.C. 262, 274, 271 S.E. 2d 242, 249-50 (1980); *State v. Brooks*, 260 N.C. 186, 189, 132 S.E. 2d 354, 357 (1963). However, the witness's prior statements as to facts not referred to in his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative evidence. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.[3]

[7] In the present case, the corroborative evidence about which the defendant complains includes the following exchange during the testimony of Detective Sturgill:

> Q. All right. Did you ask [the victim] if this had ever happened before?
>
> A. Yes, I did.
>
> Q. What did he say?
>
> A. He said yes it had. And he told me he was five years old, that he could remember when he was five years old and they lived in a trailer and that Mr. Ramey would come by and get him and go to work on other trailers and that he would do these same things tomorrow and he would always tell him not to tell anyone and he would buy him ice cream and drinks and candy.

3. But contradictory evidence contained in any statement by the witness may be introduced by any party, including the party calling the witness, for purposes of attacking his credibility. *See, e.g.*, N.C.G.S. § 8C-1, Rules 607 and 806 (1986).

The defendant also complains of the court's admission into evidence of a pretrial written statement by the victim wherein he stated that the defendant "put his mouth on my ding dong. he [sic] used his hands on my ding dong. Mr. Ramey started doing this when I was 5 yers [sic] old."

The victim had previously testified that "this" had happened to him before, that the first time "this" ever happened was when he was five years old, and that it had happened to him more than five times. His testimony clearly indicated a course of continuing sexual abuse by the defendant. The victim's prior oral and written statements to Detective Sturgill, although including additional facts not referred to in his testimony, tended to strengthen and add credibility to his trial testimony. They were, therefore, admissible as corroborative evidence. *See State v. Higgenbottom*, 312 N.C. 760, 324 S.E. 2d 834; *State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384. The jury could not be allowed to consider this evidence for any other purpose, however, and whether it in fact corroborated the victim's testimony was, of course, a jury question. We find no error in the admission of Detective Sturgill's testimony in this regard for corroborative purposes.

[8] The defendant next contends that the trial court committed error in allowing the victim's mother to testify as to what a counselor told her concerning the victim's behavior. During the defendant's cross-examination of the victim's mother, he questioned her as to whether she had noticed anything unusual about the victim. Over the defendant's objection, she was allowed to answer that a counselor told her that the victim felt much resentment and anger. The defendant now contends that such testimony was hearsay highly prejudicial to the defendant in that it inferred that the resentment and anger was caused by the defendant's misconduct.

It is well established that the erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial. *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984); *State v. Powell*, 306 N.C. 718, 295 S.E. 2d 413 (1982); *State v. White*, 298 N.C. 430, 259 S.E. 2d 281 (1979). N.C.G.S. § 15A-1443(a) provides:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United

> States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subjection is upon the defendant.

Assuming *arguendo* that the testimony was inadmissible hearsay, we are not convinced that the defendant was prejudiced by its admission. The testimony merely related to the existence of the victim's resentment and anger and not to their cause. Even if the defendant is correct in stating that the testimony provided an inference that his actions caused the victim's resentment and anger, there was other testimony by the victim's mother to the same effect and explaining further the victim's behavioral problems. In fact, the additional testimony was elicited from the victim's mother by the defendant after she gave the answer to which the defendant objected. The defendant has not shown that there is a reasonable possibility that the jury would have found him not guilty but for this testimony. We therefore overrule this assignment of error.

[9] By his next assignment of error, the defendant argues that the trial court erred in limiting him to six character witnesses and in allowing his remaining witnesses to stand up and give their names and addresses to the jury without first being sworn. The defendant argues that the trial court violated his constitutional rights to call witnesses in his behalf and to a fair trial and violated N.C.G.S. § 8C-1, Rule 603, which requires witnesses to testify under oath or affirmation. We find no merit in this argument.

The record shows that the defendant had called and examined six character witnesses when the trial judge asked him to list the remaining character witnesses and have them stand and state their names and addresses. The defendant did so without objection. The jury was informed by comments of the court and counsel that these witnesses were present to attest to the defendant's good character and reputation in the community. Seven witnesses stood up and gave their names and addresses to the jury. One witness was allowed to tell the jury that he was a minister of Rural Hall Church of God.

The trial court, as a matter of discretion, may limit the number of character witnesses a party may call. *State v. McCray*, 312 N.C. 519, 324 S.E. 2d 606 (1985); *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968). *See* N.C.G.S. § 8C-1, Rules 403 and 611(a) (1986). The trial court did not err in limiting the defendant here to introducing the testimony of six character witnesses.

As to the defendant's complaint that his remaining character witnesses were not sworn when they gave their names and addresses, and when the minister stated his profession and church, we find no error. Even assuming *arguendo* that this was error under Rule 603, however, it could not have been prejudicial to the defendant's case. Therefore, this assignment of error is overruled.

[10] Finally, the defendant assigns as error the trial court's denial of his motion to dismiss at the close of all the evidence. The defendant maintains that there was a fatal variance between the allegations contained in the indictment and the actual proof presented by the State with regard to the date of the offense. The defendant suggests that he was misled thereby and deprived of the opportunity to present an adequate defense. We find no merit in this argument.

This Court has stated on a number of occasions that the State may prove that the crime charged was in fact committed on some date other than that alleged in the indictment. *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379; *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). *See also* N.C.G.S. § 15-155. However, this rule cannot be used to "ensnare" a defendant and deprive him of the opportunity to adequately defend himself. *State v. Whittemore*, 255 N.C. at 592, 122 S.E. 2d at 403.

The defendant in this case was not misled and deprived of the opportunity to present his defense. The warrant and bill of indictment showed the date of the offense as 13 March 1985. Although the victim was unable to state the exact date of the offense and could only state that it occurred sometime in March, the defendant was put on notice as to the boy's uncertainty during a probable cause hearing. At the probable cause hearing, the defendant was given the opportunity to cross-examine the victim with regard to the date of the offense. The defendant had notice that the State was not relying on the exact date alleged in the warrant and indictment.

Additionally, the defendant did not in fact rely on the date stated in the indictment. He presented alibi evidence as to 15 March 1985, not 13 March 1985. His defense was based on the underlying occurrences from which the date of the offense had been approximated, the date on which the defendant picked up the victim and had him crawl through a window, and not the date stated in the indictment. Thus, the defendant has not shown any prejudice due to the variance, and we overrule this assignment of error.

For the reasons stated herein, we hold that the defendant received a fair trial free from prejudicial error.

No error.

FORBES HOMES, INC., A NORTH CAROLINA CORPORATION v. JOHN G. TRIMPI AND TRIMPI, THOMPSON & NASH

No. 326A86

(Filed 4 November 1986)

Attorneys at Law § 3.1— attorney's agreement to pay on behalf of client—client's refusal to consent—attorney not responsible for payment

Where plaintiff sold a mobile home to defendant's client, the client suffered an injury, could not work, and became delinquent in his payments on the mobile home, plaintiff agreed to make payments on the mobile home in return for reimbursement from defendant out of any settlement or recovery on the client's personal injury claim, but the client refused to authorize defendant to pay any creditors, plaintiff's action against defendant to recover sums paid on the mobile home should have been dismissed, since defendant's letter indicating that he would pay plaintiff for his expenditures did not constitute a guaranty by defendant of his client's debt, nor did defendant make a personal promise to pay which he breached; rather, defendant acted as agent for his client in establishing a contract between the client and the plaintiff which the client breached when he subsequently revoked authorization for defendant to reimburse plaintiff out of the settlement proceeds.

APPEAL by the defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 80 N.C. App. 418, 342 S.E. 2d 526 (1986), reversing judgment for the defendant entered 10 September 1985 in the District Court of PASQUOTANK County following a non-jury trial.

In an earlier appeal, *Forbes Homes, Inc. v. Trimpi*, 70 N.C. App. 614, 320 S.E. 2d 328 (1984), the Court of Appeals reversed the trial court's order dismissing the plaintiff's claim pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). The decision of the Court of Appeals was affirmed by this Court by an equally divided vote. *Forbes Homes, Inc. v. Trimpi*, 313 N.C. 168, 326 S.E. 2d 30 (1985). Heard in the Supreme Court 10 September 1986.

Frank B. Aycock, Jr., for plaintiff-appellee.

Trimpi, Thompson & Nash, by John G. Trimpi and Thomas P. Nash, IV, for defendant-appellants.

BILLINGS, Chief Justice.

The plaintiff seeks to recover from the defendants the sum of $4,192.92 plus interest which it allegedly paid to Midland-Guardian Company on a debt owed by the defendants' client, Milford Simpson, and secured by a mobile home which the plaintiff had sold to Mr. Simpson.

The facts, which essentially are not disputed, are that in 1979 Mr. Simpson became delinquent in his payments on the mobile home because he had been injured in an automobile accident and was unable to work. The plaintiff's president and general manager, Mr. Cole, had a conversation with defendant John G. Trimpi, who was representing Mr. Simpson in pursuing a personal injury action. Following the conversation, Mr. Trimpi wrote Mr. Cole a letter on 8 June 1979 which contained the following:

> Confirming our telephone conversation on June 7, 1979, it is our understanding that you will continue to make payments on the mobile home obligation of Milford Simpson in return for Mr. Simpson's assurance that you will be reimbursed in full for the payments you have made or will make to satisfy the creditor.
>
> Subject to Mr. Simpson's approval, which I feel certain he will give, this firm will make restitution to you out of the net proceeds from any settlement or court recovery we make with regard to Mr. Simpson's personal injury claim arising out of an accident occurring on March 17, 1979. If you do not hear from us within ten days from receipt of this letter, you

may assume that Mr. Simpson has given us the authority to make such payment to you.

In early 1981 Mr. Simpson received $3,328.03 in back Social Security disability payments and began receiving monthly Social Security disability payments effective 1 January 1981. In June 1982 Mr. Trimpi obtained $8,500.00 in settlement of Mr. Simpson's personal injury claim and, acting upon instructions from Mr. Simpson, gave Mr. Simpson a check for $5,039.76, having deducted his fee and costs from the settlement amount. Neither Mr. Trimpi nor Mr. Simpson notified the plaintiff of the settlement, and the plaintiff was not reimbursed for the payments it had made on behalf of Mr. Simpson.

When the plaintiff learned that the settlement had been made, Mr. Cole demanded that Mr. Trimpi reimburse the plaintiff, which Mr. Trimpi refused to do. The plaintiff paid off the remaining debt on the mobile home and, acting pursuant to its recourse rights under the financing arrangement with Midland-Guardian and Mr. Simpson, initiated claim and delivery proceedings against Mr. Simpson to repossess the mobile home. Upon discovering that Mr. Simpson was facing hospitalization and was in extremely poor health, the plaintiff elected not to repossess the mobile home. Instead, it allowed Mr. Simpson to retain the mobile home upon his execution of a new note in the principal amount of $5,521.00. The original note was marked paid.

The plaintiff instituted this action seeking to recover from the defendants the sum of $4,783.67, representing payments of $4,192.92 made on Mr. Simpson's behalf plus $564.85 in interest.

The defendants' motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) was allowed, and in an appeal from the dismissal, the Court of Appeals reversed. 70 N.C. App. 614, 320 S.E. 2d 328. The defendants appealed to this Court and the reversal was affirmed per curiam by an equally divided Court. 313 N.C. 168, 326 S.E. 2d 30. Because the Court of Appeals' decision was affirmed per curiam without opinion by this Court, the opinion of the majority of the Court of Appeals became the law of the case. That opinion contained the following:

> The plaintiff has alleged facts which if offered in evidence would allow a jury to find the defendants promised the plain-

> tiff that if the plaintiff would make certain payments for a third party, the defendants would retain from the proceeds of a claim they were handling for the third party funds with which they would reimburse the plaintiff. The plaintiff accepted this offer by making the payments and the defendants have refused to reimburse the plaintiff from the proceeds of the settlement for the third party. If a jury should find these facts, the defendant would be liable to the plaintiff for breach of contract.

70 N.C. App. at 615, 320 S.E. 2d at 328-29.

On remand to the District Court of Pasquotank County, the parties waived jury trial and evidence was presented to the trial judge, who entered judgment for the defendants. The judgment contained the following pertinent findings of fact which were supported by the evidence:

> 5. That defendant Trimpi communicated with plaintiff concerning Mr. Simpson's financial inability to keep current with the payments due plaintiff, and defendant Trimpi requested plaintiff to continue making payments on Simpson's mobile home obligation *in return for Simpson's assurance* that plaintiff would be reimbursed in full out of the net proceeds from any settlement or court recovery. [Emphasis added.]
>
> . . . .
>
> 7. . . . That defendant Trimpi's representation of Simpson was solely in a representative capacity as attorney for Simpson.
>
> 8. That based upon the totality of the circumstances the Court finds that there was no meeting of the minds of plaintiff and defendant Trimpi that defendant Trimpi would be personally responsible for Simpson's debt, nor did defendant Trimpi receive any benefit or good and sufficient consideration to support his or his firm's personal obligation and responsibility to stand for the debt of Simpson.
>
> 9. That the attorney-client relationship existing between defendant Trimpi and Simpson was known to plaintiff, and plaintiff knew that defendant Trimpi and his firm were act-

ing on behalf of Simpson in promising to make reimbursement to plaintiff out of the net recovery. However, that Simpson instructed defendant Trimpi not to pay any of his creditors out of the settlement proceeds when settlement was effected on June 1, 1982. That defendant Trimpi was told by Simpson to disburse the net proceeds to Simpson so that he, Simpson, could deposit same in an Elizabeth City bank and pay creditors himself.

. . . .

11. That the Court deems it unnecessary to make any findings of fact or conclusions of law concerning the uncontroverted facts that subsequently plaintiff repossessed the mobile home and sold it back to Simpson under a bill of sale in the amount of $5,000.00, nor does the Court determine the extent of any credit which should be given to defendants inasmuch as the Court finds there to be no valid, enforceable contract between the parties affixing personal liability to defendants.

From the judgment for the defendants, the plaintiff appealed again to the Court of Appeals. In an opinion by Wells, J., the Court of Appeals reversed, saying:

> The trial court's findings, supported by the evidence, reflect an agreement between plaintiff and Trimpi that if plaintiff would make Simpson's payments, Trimpi would reimburse plaintiff for those payments out of the recovery obtained for Simpson.

80 N.C. App. at 422, 342 S.E. 2d at 528.

Hedrick, C. J. concurred, saying that "[a]ny other result would ignore the previous decision of this Court . . . ." *Id.* at 423, 342 S.E. 2d at 528-29.

Martin, J. dissented, and the defendant appealed to this Court. We reverse.

We begin our analysis by noting that the letter from Mr. Trimpi to Mr. Cole does not constitute a guaranty by Mr. Trimpi of Mr. Simpson's debt. Although Mr. Trimpi's agreement was in writing, satisfying the requirement of the statute of frauds, N.C.G.S. § 22-1, that a promise to answer for the debt or default

of another be in writing, the letter does not promise that Mr. Trimpi will assume personal liability for Mr. Simpson's debt; rather it is a promise to make restitution out of Mr. Simpson's money "[s]ubject to Mr. Simpson's approval."

As this Court said in *Jenkins v. Henderson*, 214 N.C. 244, 247, 199 S.E. 37, 39 (1938):

> If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone, unless credit has been given expressly and exclusively to the agent, and it appears that it was clearly his intention to assume the obligation as a personal liability and that he has been informed that credit has been extended to him alone.

The findings of the trial judge clearly establish that Mr. Trimpi was not promising to be personally liable for the payment of Mr. Simpson's debt.

The plaintiff in its brief concedes that it does not contend that Mr. Trimpi assumed the obligation to pay the plaintiff from his own funds; it says that it is seeking damages for Trimpi's failure to comply with his personal promise to reimburse the plaintiff out of Mr. Simpson's settlement.

We therefore must determine whether Mr. Trimpi in fact made a personal promise which he breached, or whether he merely acted as agent for his client, Mr. Simpson, establishing a contract between Mr. Simpson and the plaintiff which Mr. Simpson breached when he subsequently revoked authorization for Mr. Trimpi to reimburse the plaintiff out of the settlement proceeds.

In the previous appeal the Court of Appeals held that the defendant would be liable to the plaintiff for breach of contract if the jury (or the judge) should find that

> the defendants promised the plaintiff that if the plaintiff would make certain payments for a third party, the defendants would retain from the proceeds of a claim they were handling for the third party funds with which they would reimburse the plaintiff.

70 N.C. App. at 615, 320 S.E. 2d at 329, and that the defendants refused to reimburse the plaintiff from the proceeds although the plaintiff had accepted the offer by making the payments.

A careful review of the evidence and of the trial judge's findings reveals that the trial judge did not find facts which under the Court of Appeals' previous decision would necessitate judgment for the plaintiff. The finding was not that the defendants would retain the proceeds and reimburse the plaintiff subject only to the plaintiff making certain payments; it was essentially that in the absence of notice to the contrary, the plaintiff could assume that Mr. Simpson had authorized Mr. Trimpi to apply funds from Mr. Simpson's settlement to reimburse the plaintiff if the plaintiff made payments on Mr. Simpson's behalf. Regardless of what might have been the ethical or moral obligation[1] of Mr. Trimpi to the plaintiff to notify it when Mr. Simpson later revoked his authorization for Mr. Trimpi to pay Mr. Simpson's creditors, it is clear from Mr. Trimpi's letter and from the trial judge's findings of fact that Mr. Trimpi's role was that of agent for Mr. Simpson, whose assurance was given through Mr. Trimpi and whose authorization for payment was necessary before Mr. Trimpi could apply the settlement funds to reimburse the plaintiff.

We are not unmindful that an agent may be personally liable for damages caused to third persons by his fraud or false representations "even though he is acting in behalf of his employer, and even though he receives no benefit from the transaction." 37 Am. Jur. 2d, *Fraud and Deceit* § 320 (1968). *See also Norburn v. Mackie*, 262 N.C. 16, 136 S.E. 2d 279 (1964); *Mills v. Mills*, 230 N.C. 286, 52 S.E. 2d 915 (1949). However, in the case *sub judice* there is no allegation that, at the time Mr. Trimpi represented to the plaintiff that Mr. Simpson had authorized payment from the settlement,[2] the representation was false. An agent does not become liable because of his principal's breach of a contract negotiated by

1. We do not address any obligations of the defendant Trimpi under the Rules of Professional Conduct which might have arisen under these circumstances.

2. The representation was made when no contrary notice was given to the plaintiff within ten days of the plaintiff's receipt of the 8 June 1979 letter from Mr. Trimpi.

the agent for the principal. *Walston v. Whitley & Co.*, 226 N.C. 537, 39 S.E. 2d 375 (1946).

The letter and the trial judge's findings of fact establish only that Mr. Trimpi, acting as agent for Mr. Simpson, bound Mr. Simpson to an agreement to authorize payment by Mr. Trimpi out of anticipated settlement funds in exchange for the plaintiff's payment of money owed by Mr. Simpson to Midland-Guardian Company. Mr. Simpson's revocation of his authorization constituted a breach by him of that contract; Mr. Trimpi at no time agreed to act contrary to the authorization of his principal.

For the reasons given, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the District Court of Pasquotank County for reinstatement of the order dismissing the plaintiff's action.

Reversed.

STATE OF NORTH CAROLINA v. EVELYN GRACE HENSLEY VAUGHT

No. 351PA86

(Filed 4 November 1986)

1. Criminal Law § 138.21— assault with deadly weapon with intent to kill inflicting serious injury—especially heinous, atrocious, or cruel offense—sufficiency of evidence

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, evidence was sufficient to support the trial court's finding that the offense was heinous, atrocious, or cruel, where it tended to show that defendant approached the victim's back door with a plant in her hand; when the victim opened the door and took the plant, defendant shot her in the chest; the victim suffered a wound to her heart, and this injury was sufficient to support a conviction for the crime charged; the second, third, and fourth shots were not necessary to the conviction and resulted in a severed jugular vein and permanent nerve injury to the victim's arm; there was ample evidence of physical pain and psychological suffering sufficient to support the judge's finding that the offense was heinous, atrocious, or cruel in that the victim pled with defendant to stop firing; after all shots were fired, the victim was on the ground, drifting in and out of consciousness; and the victim felt pain and trauma, yet was unable to get help because she could not move. N.C.G.S. § 15A-1340.4(a)(1)(f).

2. Criminal Law § 138.24— severity of sentence—physical infirmity of victim as aggravating factor—sufficiency of evidence

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in finding as an aggravating factor that the victim was physically infirm where the evidence tended to show that the victim was wearing a leg cast and, as a result, her mobility was greatly impaired; after being shot, the victim went down; once down, she had difficulty getting up; two hours later she finally managed to get back to her bedroom to call for assistance; and this evidence left little doubt that the victim's physical infirmity impeded her ability to recover from the effects of the attack and to call for assistance. N.C.G.S. § 15A-1340.4(a)(1)(j).

3. Criminal Law § 138.29— severity of sentence—aggravating factor—insufficiency of evidence

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in finding as a nonstatutory aggravating factor that defendant posed a dangerous threat to others, since there was no evidence that defendant posed any greater threat or danger to others than any member of the public convicted of the crime charged; furthermore, there was no merit to the State's argument that defendant posed a danger to others because she harbored deep resentment against her former lover who testified against her.

ON discretionary review of a decision of the Court of Appeals, 80 N.C. App. 486, 342 S.E. 2d 536 (1986), finding error in a judgment entered by *Hight, J.*, at the 10 June 1985 Criminal Session of Superior Court, STOKES County, upon defendant's conviction by a jury of breaking or entering and of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court imposed an active sentence of twenty years imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury conviction and a ten-year suspended sentence for the breaking or entering. The Court of Appeals held that the defendant received an error-free trial but that the trial court erred in finding aggravating factors under the Fair Sentencing Act, N.C.G.S. §§ 15A-1340.1 through -1340.7 (1983 & Cum. Supp. 1985). Pursuant to N.C.G.S. § 7A-31, the State filed a petition for discretionary review, which this Court granted on 7 July 1986. Heard in the Supreme Court 13 October 1986.

Lacy H. Thornburg, Attorney General, by K. D. Sturgis, Associate Attorney General, for the State-appellant.

Greeson and Page, by Michael R. Greeson, Jr., for defendant-appellee.

MEYER, Justice.

This appeal presents questions concerning whether the trial court, in sentencing a defendant under the guidelines of the Fair Sentencing Act, N.C.G.S. § 15A-1340.4 (1983 & Cum. Supp. 1985), properly considered certain aggravating factors in imposing a prison sentence in excess of the presumptive term prescribed for the assault of which defendant was convicted.

The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and of felonious breaking or entering. The trial court imposed the maximum active sentence of twenty years imprisonment for the assault and imposed a ten-year suspended sentence for the breaking or entering conviction. The Court of Appeals held that the defendant received a fair trial but that the trial court erred in the sentencing phase as to the assault conviction by considering as aggravating factors that (1) the offense was especially heinous, atrocious, or cruel; (2) the victim was physically infirm; and (3) the defendant poses a dangerous threat to others. No factors in aggravation or mitigation were found as to the breaking or entering conviction. We reverse the Court of Appeals holding that the sentencing judge erred in finding that (1) the offense was especially heinous, atrocious, or cruel; and (2) the victim was physically infirm. We affirm that portion of the Court of Appeals opinion holding that the sentencing judge erred in finding that the defendant poses a dangerous threat to others.

Under the Fair Sentencing Act, the trial judge is to consider certain statutory aggravating and mitigating factors in determining whether to sentence the defendant for a prison term in excess of the presumptive term. In addition to the statutory factors that the judge must consider, the judge may consider other aggravating and mitigating factors that are proved by a preponderance of the evidence and that are reasonably related to the purpose of sentencing. N.C.G.S. § 15A-1340.4(a) (1983 & Cum. Supp. 1985). If the judge imposes a prison term that differs from the presumptive term, he or she must list in the record each factor in aggravation or mitigation that is proved by a preponderance of the evidence. N.C.G.S. § 15A-1340.4(b) (1983 & Cum. Supp. 1985).

The State's evidence tended to show that on 5 December 1984 at approximately 7:30 a.m., defendant Evelyn Vaught went to Shirley Slater's home and knocked on the back door. Because the defendant was carrying a potted poinsettia, Ms. Slater assumed she was receiving a flower delivery and opened the door. The defendant handed Ms. Slater the plant and then shot Ms. Slater in the chest. Although the first shot disabled Ms. Slater, the defendant continued firing at Ms. Slater, who ultimately sustained gunshot injuries to the heart, neck, and arm as a result of this incident.

The State's evidence further showed that Ms. Slater had been dating a man with whom the defendant had been romantically involved. The evidence tended to show that the defendant persistently sought the man's affections and was disappointed when he would not return her phone calls. Additionally, the defendant had seen Ms. Slater with the man on several occasions.

In late October 1984, the victim, Ms. Slater, sustained an injury to her left foot which required that she wear a cast that went from her toes to her knee. Ms. Slater testified that while wearing the cast, she had seen the defendant at a cafeteria in Winston-Salem and that the defendant had the opportunity to observe that she was wearing a cast. Ms. Slater was using crutches and wearing the cast on the day of the shooting.

The defendant contended that she was visiting her mother and sister on the date of the shooting.

The jury convicted the defendant of felonious breaking or entering and of assault with a deadly weapon with intent to kill inflicting serious injury. At the sentencing stage, the trial judge considered the factors in aggravation and mitigation and sentenced the defendant to the maximum term of twenty years for the assault conviction.

I.

[1] The first issue we address is whether the trial court erred in finding as an aggravating factor that the offense was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-1340.4(a)(1)(f) (1983 & Cum. Supp. 1985).

In determining whether a crime is "especially heinous, atrocious, or cruel" under N.C.G.S. § 15A-1340.4(a)(1)(f), the focus is on

whether "the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983) (emphasis in original). The extent of physical mutilation of the body of the deceased or surviving victim may also be appropriate in measuring the brutality of the crime. *Id.* at 415, 306 S.E. 2d at 787. Furthermore, that the victim suffered both psychological and physical pain not normally present in the offense will support a finding of heinous, atrocious, or cruel. *State v. Brown*, 314 N.C. 588, 336 S.E. 2d 388 (1985) (second-degree murder: where the victim, who was tied to a bedpost and had a towel forced down his throat, suffered emotional distress before dying of asphyxiation); *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983) (voluntary manslaughter: where the two-year-old child victim was struck against bedpost with such force that it shattered a cast covering his lower abdomen and leg and fractured his skull).

Relying on its decision in *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983), the Court of Appeals ruled that the facts in the present case do not support a finding of heinous, atrocious, or cruel under N.C.G.S. § 15A-1340.4(a)(1)(f). In *Medlin*, the Court of Appeals held that evidence that the defendant shot the victim five times with a .22-caliber pistol and fled without rendering assistance was insufficient to support a finding of heinous, atrocious, or cruel because the evidence did not reflect excessive brutality beyond that present in any assault with a deadly weapon with intent to kill inflicting serious injury.

In *State v Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783, we discussed *Medlin* and noted:

> While the Court of Appeals in *Medlin* applied the correct standard, *i.e.* whether the offense was excessively brutal beyond that normally present in any assault with a deadly weapon with intent to kill inflicting serious injury, the court ignored, to defendant's favor, *that the victim was shot five times. Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious, or cruel.*

Id. at 413 n. 1, 306 S.E. 2d at 786 n. 1 (emphasis added).

Applying the law to the facts of the present case, it is clear from the record that there was sufficient evidence to support the trial court's finding that the offense was heinous, atrocious, or cruel. The initial shot resulted in a wound to Ms. Slater's heart and was sufficient to support a conviction of assault with a deadly weapon with intent to kill inflicting serious injury. The second, third, and fourth shots were not necessary to the conviction and resulted in a severed jugular vein and permanent nerve injury to Ms. Slater's arm.

The record also discloses ample evidence of physical pain and psychological suffering sufficient to support the trial judge's finding that the offense was heinous, atrocious, or cruel. The victim pled with the defendant to stop firing. After all shots were fired, the victim was on the ground, drifting in and out of consciousness. She felt pain and trauma, yet was unable to get help because she could not move.

We reverse the Court of Appeals holding that the trial court erroneously found that the offense was heinous, atrocious, or cruel.

II.

[2] The second issue we address is whether the trial court erred in finding as an aggravating factor that the victim was physically infirm. N.C.G.S. § 15A-1340.4(a)(1)(j) (1983 & Cum. Supp. 1985).

We have held that the victim's "*vulnerability* is clearly the concern addressed by this factor." *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E. 2d 689, 701. In most of the cases in which we have reviewed this factor, our focus has been on the victim's age, *e.g.*, *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986) (very old, targeted victim); *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (victim very young).

In *State v. Hines*, 314 N.C. 522, 335 S.E. 2d 6 (1985), we held that a victim's age does not make a defendant more blameworthy unless age "impedes a victim from fleeing, fending off attack, *recovering from its effects*, or otherwise avoid being victimized." *Id.* at 525, 335 S.E. 2d at 8 (emphasis added). This test applies with equal force where the victim's physical *infirmity*, rather

than her age, impedes her ability to flee, fend off attack, or recover from the effects of an attack.

In the present case, the Court of Appeals held that because the victim "had no opportunity, with or without the cast, to escape," 80 N.C. App. at 490, 342 S.E. 2d at 538, the trial court improperly found as an aggravating factor the victim's physical infirmity. Although the cast may have had no effect on the victim's ability to escape a rapid-fire succession of gunshots, the first of which disabled her, it may have impeded her ability to recover from the effects of the attack and thus to summon help.

The record discloses that at the time of the offense, Ms. Slater was wearing a leg cast and, as a result, her mobility was greatly impaired. After being shot, she went down; once down, she had difficulty getting up. Two hours later, she finally managed to get back to her bedroom to call for assistance. This evidence leaves little doubt that the victim's physical infirmity impeded her ability to recover from the effects of the attack and to call for assistance. Thus, the trial court did not err in finding the victim's physical infirmity as an aggravating factor.

We reverse the Court of Appeals holding that there was not sufficient evidence from which the trial judge could find as an aggravating factor that the victim was physically infirm. N.C.G.S. § 15A-1340.4(a)(1)(j) (1983 & Cum. Supp. 1985).

III.

[3] Finally, we must determine whether the trial court erred in finding as a nonstatutory aggravating factor of the assault conviction that the defendant poses a dangerous threat to others. A nonstatutory aggravating factor must be proved by a preponderance of the evidence and must be reasonably related to the purposes of sentencing. N.C.G.S. § 15A-1340.4(a) (1983 & Cum. Supp. 1985).

We agree with the Court of Appeals holding that the trial court erred in finding this nonstatutory aggravating factor. The evidence presented was not sufficient to support a finding that the defendant posed any greater threat or danger to others than any member of the public convicted of assault with a deadly weapon with intent to kill inflicting serious injury.

The State argues that because the defendant harbors deep resentment against her former lover who testified against her, the defendant poses a danger to others. If we accept this proposition, it would follow that whenever a witness testifies against a defendant who is ultimately convicted of a crime of violence, a trial judge could aggravate the sentence because the defendant poses a threat to others. Presumably, the General Assembly considered the threat of violence in determining the presumptive sentences for crimes against the person. *State v. Higson*, 310 N.C. 418, 312 S.E. 2d 437 (1985).

In conclusion, we reverse the Court of Appeals opinion insofar as it holds that the trial court erred in finding, as to the assault conviction, that (1) the offense was especially heinous, atrocious, or cruel; and (2) the victim was physically infirm. We affirm that portion of the Court of Appeals opinion holding that the trial court erroneously found as a nonstatutory aggravating factor that the defendant poses a threat to others. The case is remanded to the Court of Appeals for further remand to the Superior Court, Stokes County, for resentencing.

Affirmed in part, reversed in part, and remanded.

STATE OF NORTH CAROLINA v. BARRY LANE CARTER

No. 325A86

(Filed 4 November 1986)

1. **Criminal Law § 138.28— severity of sentence—prior convictions as aggravating factor—proof of prior conviction sufficient**

A detective's own recollections constituted acceptable evidence of defendant's prior conviction for delivering a malt beverage to a minor, and the trial court could therefore properly consider defendant's prior conviction as an aggravating factor.

2. **Criminal Law § 138.14— second degree murder—premeditation and deliberation—mental illnesses—aggravating and mitigating factors not mutually exclusive**

There was no merit to defendant's contention that the trial court's determination that defendant suffered from a mental condition, had a limited mental capacity at the time of the crime, and suffered from an explosive personality disorder was patently inconsistent with its determination that the crime was

premeditated and deliberate, since there was evidence that defendant knew of his wife's sexual relationship with the victim and vociferously expressed his objections; he and the victim had two separate altercations in the weeks prior to the shooting; defendant had threatened the victim's life in no uncertain terms; on the night of the killing defendant armed himself before going to the victim's trailer; defendant shot the victim three times, twice in the back as the victim tried to escape, then beat the victim so savagely with the gun that it broke apart in his hands; there was no evidence of shooting at close range during a struggle; and defendant later told police that his intention upon entering the trailer had been to shoot the victim. Furthermore, mental illnesses not rising to the level of legal insanity do not negate premeditation and deliberation in homicide cases, and defendant made no attempt to show that his particular mental disturbance fell within the definition of legal insanity.

3. Criminal Law § 138.14— seven mitigating factors outweighed by two aggravating factors—no abuse of discretion

The trial court in a second degree murder case did not abuse his discretion in determining that two aggravating factors—a prior conviction and premeditation and deliberation—outweighed seven mitigating factors, including a mental disturbance, strong provocation, and good character and reputation, among others.

APPEAL by defendant from judgment of *Davis, J.*, filed at the 27 January 1986 Session of Superior Court, ROWAN County, imposing a life sentence pursuant to defendant's plea of guilty to murder in the second degree. Heard in the Supreme Court 13 October 1986.

Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the state.

Weinhold, Bridges & McCanless, P.A., by Donald L. Weinhold, Jr. and R. William McCanless, for the defendant.

MARTIN, Justice.

Defendant appeals from the judgment entered against him upon his plea of guilty to murder in the second degree in the shooting death of Tony Martin Faggart. We find no error in his sentencing hearing.

At the hearing, the state's evidence tended to show that defendant and his wife were separated and that both had established sexual relationships with others. Defendant was aware that his wife had begun dating the victim and became distraught over her perceived infidelity. Defendant confronted the victim twice in the three weeks preceding the shooting, and on one of those occa-

sions he threatened the victim's life. On 3 August 1985, defendant's wife informed him that she would be spending the day with the victim. Sometime after 10:00 that evening, defendant called to see if his wife had returned home. Upon learning that she had not, he armed himself with a pistol and drove to the victim's trailer. Defendant's wife and the victim were lounging in the victim's bedroom, where they had just engaged in sexual intercourse. Defendant entered the trailer, walked into the bedroom, and opened fire. He shot the victim once in the head and, as the victim fled down the hallway, shot him twice in the back. While the victim clung to life, defendant used the gun to beat him about the head and face. The victim died soon thereafter of massive internal bleeding. Defendant told the police that he had entered the trailer intending to shoot the victim.

Defendant's evidence may be fairly summarized as follows: Defendant suffered from an explosive personality disorder and as a result had lost control of his reason at the time of the shooting. He had hoped for a reconciliation with his wife and had in fact begun cohabitating with her again in the days preceding the crime. His wife promised to break off her relationship with the victim and had gone on the 3 August date for that purpose. When she was late returning home, defendant went to the victim's trailer to find her. He carried a weapon as protection because the victim was known to keep guns in the trailer. From outside the window he heard his wife and the victim having sex and walked in to discover them naked in the bedroom. The victim jumped up and grabbed defendant, tearing his shirt. After a brief struggle, defendant fired the first shot. Defendant beat the victim after shooting him again because the victim was grabbing and pulling at him. Defendant never intended to kill the victim but acted only on impulse.

The trial judge found two aggravating factors: that defendant had a prior conviction for a criminal offense punishable by more than sixty days' confinement and that the crime was premeditated and deliberate. The judge also found seven mitigating factors: that defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense; that defendant's limited mental capacity at the time of the commission of the offense significantly reduced his culpability for the offense; that defendant acted under

strong provocation; that prior to arrest defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer; that at an early stage of the criminal process defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer; that defendant had been a person of good character or has had a good reputation in the community in which he lives; and that defendant was suffering from an undiagnosed explosive personality disorder. The judge then determined that the factors in aggravation outweighed those in mitigation and sentenced defendant to life imprisonment, a term exceeding the presumptive sentence of fifteen years. Defendant raises three issues concerning his sentencing for our consideration.

[1] In his first assignment of error defendant contends that the trial judge improperly considered as an aggravating factor his prior conviction for delivery of a malt beverage to a minor. N.C.G.S. § 18B-302 (Cum. Supp. 1985). Evidence establishing the conviction consisted solely of the following testimony by Detective C. L. Hardy at the sentencing hearing:

> Q. Has the defendant, Barry Carter, a prior record of convictions?
>
> A. Yes.
>
> Q. What has he previously been convicted of?
>
> A. Delivering a malt beverage to a minor.
>
> Q. In what year was that conviction?
>
> A. I'm not sure right off-hand. I believe it was 1980 or 1981.
>
> Q. Was that in Rowan County?
>
> A. Yes, sir.

Defendant claims that this evidence was insufficient to support a finding of the aggravating factor. This contention is meritless.

Defendant made no objection whatsoever to the introduction of the evidence, nor does his brief present any argument invoking the plain error rule with respect to the challenged testimony. N.C.G.S. § 15A-1340.4(a) provides that prior convictions may be

proved by stipulation of the parties or by a copy of the court record, but it does not purport to limit the methods of proof to these alone. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). Recognizing that the statute's enumerated methods of proof are permissive rather than mandatory, this Court has held that a prior conviction may be proven by a law enforcement officer's testimony as to his personal knowledge of the conviction. *See State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983). Thus, Detective Hardy's own recollections constituted acceptable evidence of defendant's conviction, sufficient to allow consideration of the aggravating factor.

[2] Defendant next assigns as error the trial court's finding that the crime was premeditated and deliberate. The thrust of defendant's argument seems to be that the court's determination that defendant suffered from a mental condition, had a limited mental capacity at the time of the crime, and suffered from an explosive personality disorder is patently inconsistent with its determination that the crime was premeditated and deliberate. In order to accept the expert witness's diagnosis of explosive personality disorder, the trial judge necessarily had to accept the expert's testimony that defendant's actions during the crime were purely impulsive, reactive, and unpremeditated. Therefore, defendant reasons, a finding of premeditation is unsupported by the evidence. We disagree.

We note at the outset that a court may properly find premeditation and deliberation to be an aggravating factor when sentencing a defendant who pleads guilty to murder in the second degree. Such a finding is appropriate so long as it is supported by a preponderance of the evidence. *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). Proof of premeditation and deliberation generally consists of circumstantial rather than direct evidence. Threats against the victim by the defendant, previous ill will between the victim and the defendant, the nature and number of the victim's wounds, and the brutality of the killing are some of the circumstances supporting an inference of premeditation and deliberation. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985).

The trial judge heard an array of substantial, credible evidence in each of these categories. Defendant knew of his wife's relationship with the victim and vociferously expressed his objec-

tions. He and the victim had two separate altercations in the weeks prior to the shooting, and defendant had threatened the victim's life in no uncertain terms. On the night of the killing defendant armed himself before going to the victim's trailer. Defendant shot the victim three times—twice in the back as the victim tried to escape—then beat the victim so savagely with the gun that it broke apart in his hands. No soot or stippling appeared around the wounds such as would characterize a shooting at close range during a struggle. Defendant later told police that his intention upon entering the trailer had been to shoot the victim.

Further, we find unpersuasive defendant's assertion that the existence of a mental disorder excludes the possibility of premeditated and deliberate acts. This Court has consistently rejected such notions. Mental illnesses not rising to the level of legal insanity do not negate premeditation and deliberation in homicide cases. *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981). Defendant makes no attempt to show that his particular mental disturbance falls within the definition of legal insanity. Consequently, we hold that the judge's findings of aggravating and mitigating factors were fully reconcilable both with the evidence and with one another.

[3] In his final assignment of error, defendant takes issue with the trial judge's imposition of a sentence in excess of the presumptive term. While defendant concedes that the balancing of aggravating and mitigating factors is a matter within the sound discretion of the judge, he alleges that the judge abused that discretion by weighing the factors unreasonably. Specifically, defendant points out that only two aggravating factors were found as compared to seven mitigating factors. We would direct defendant's attention to a discussion of this very issue in *State v. Melton*, 307 N.C. at 380, 298 S.E. 2d at 680:

> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. The court may very properly emphasize one factor more than another in a particular case.

The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

See also State v. Davis, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982).

As we have already observed, the judge properly found the aggravating factors of prior conviction and premeditation and deliberation. We discern neither defiance of logic nor abuse of discretion in according these factors greater weight, particularly in light of the evidence supporting the finding of premeditation and deliberation. That evidence depicted a vicious and unrelenting attack, planned in a pique of jealousy and executed as a means of revenge. The judge acted well within the bounds of reason in determining that the aggravating factors outweighed the mitigating factors.

Having held defendant's contentions to be wholly devoid of merit, we conclude that his sentence was fairly determined and should stand undisturbed.

No error.

VIRGINIA M. FARR v. THE BOARD OF ADJUSTMENT OF THE CITY OF ROCKY MOUNT, NORTH CAROLINA

No. 214A86

(Filed 4 November 1986)

1. **Municipal Corporations § 30.11— zoning ordinance—accessory building—use as residence by owner's son—ordinance not violated**

A zoning ordinance of respondent city did not prevent petitioner from allowing her son and his family to live in a detached building on her property where the ordinance provided that no accessory building could "be inhabited or used by other than the owners . . . or their employees," and "owners" must be construed as including the holder of title to the property and members of the titleholder's family.

2. **Municipal Corporations § 30.11— zoning ordinance—accessory building used as residence—no accessory use—ordinance not violated**

A provision of respondent's zoning ordinance that an "accessory use" shall not include residential occupancy by others than servants and their families did not apply to bar petitioner's son and his family from living in an accessory

building on petitioner's property, since the ordinance defined "accessory use" as "[a] use incidental to and customarily associated with the use-by-right and located on the same lot with the use-by-right," but use of the accessory *building* in this case was not an accessory *use*, but was instead the use-by-right itself, *i.e.*, single-family residential use.

3. **Municipal Corporations § 30.11— zoning ordinance—one main building—one use for lot—ordinance not violated**

There was no merit to respondent's contention that petitioner was in violation of its zoning ordinance which provided that "in no case shall there be more than one main building . . . on the lot nor more than one main use . . . per building and lot," since in this case there was only one main building, in which petitioner herself resided, and one main use, which was residential, and use of an accessory building by petitioner's family for residential purposes did not violate the ordinance.

ON appeal of a decision of the Court of Appeals, 79 N.C. App. 754, 340 S.E. 2d 521 (1986), which vacated a judgment of *Lewis, J.* entered 8 August 1983 in Superior Court, NASH County. Heard in the Supreme Court 14 October 1986.

Fitch, Butterfield & Wynn, by G. K. Butterfield, Jr., for petitioner appellee.

Dill, Fountain & Hoyle, by Randall B. Pridgen, for respondent appellant.

MITCHELL, Justice.

The issue before us is whether a zoning ordinance of the City of Rocky Mount prohibits the residential use of an accessory building by members of the family of the owner of the property. We hold that it does not.

The facts of this case are not disputed. In May 1982, the petitioner, Mrs. Virginia M. Farr, purchased property in Rocky Mount which included a house and two detached buildings. One of the detached buildings is occupied as a residence by Mrs. Farr's son, his wife, and two children. Mrs. Farr resides in the main building which is on the front of the property. The building in which her son resides is located at the rear of the property. The property is located in an R-10 zone in the City of Rocky Mount and is restricted to single family residential use.

In December 1982, the City Building Inspector notified Mrs. Farr that the residential use of the detached building by her son

was in violation of the City of Rocky Mount zoning ordinance. The notice ordered her to cease using the said accessory building as a residence and notified her of her right to appeal to the Rocky Mount Zoning Board of Adjustment.

Mrs. Farr appealed to the Board of Adjustment which heard the matter and upheld the decision of the Building Inspector. She then filed a petition for writ of certiorari with the Superior Court, Nash County, seeking reversal of the decision of the Board of Adjustment. After a hearing, Judge Donald L. Smith remanded the matter to the Board of Adjustment for the entry of findings of fact and conclusions of law. The matter came on for a rehearing before the Board of Adjustment which made detailed findings and conclusions supporting its prior decision. Thereafter, the matter was again transferred to the Superior Court pursuant to the original petition for writ of certiorari. A hearing was conducted in the Superior Court by Judge John B. Lewis, Jr., who entered an order affirming the decision of the Board of Adjustment.

The petitioner, Mrs. Farr, appealed to the Court of Appeals which concluded that neither the findings of the trial court nor the record as a whole supported the holding that petitioner was in violation of the zoning ordinance and vacated the judgment of the Superior Court. 73 N.C. App. 228, 326 S.E. 2d 382 (1985). The Court of Appeals seems to have based its decision on the supposition that Mrs. Farr was not violating the zoning ordinance because her use of the building in question was a prior non-conforming use. Further, the Court of Appeals stated in *obiter dictum* that the provisions of the ordinance as applied by the Board of Adjustment and the Superior Court were unconstitutional. Chief Judge Hedrick dissented, and the respondent Board of Adjustment appealed to this Court as matter of right.

This Court vacated the decision of the Court of Appeals by a per curiam opinion, 315 N.C. 309, 337 S.E. 2d 581 (1985), in which we concluded that the Court of Appeals had decided the case "on the basis of the principle of 'prior non-conforming use,' an issue not raised or briefed by the parties to this action and not supported by the record." *Id.* We remanded the case to the Court of Appeals for its initial consideration of the issue raised there by the petitioner, Mrs. Farr.

Upon remand, the Court of Appeals did not discuss Mrs. Farr's contentions that the ordinance did not prohibit the use to which she had put her property, but simply stated that those contentions "are without merit and should be overruled." 79 N.C. App. 754, 340 S.E. 2d 521 (1986). After again making reference to the principle of prior non-conforming use, the Court of Appeals appears to have held that the ordinance in question is unconstitutional as applied by the Board and the Superior Court in this case.

Chief Judge Hedrick again dissented expressing his opinion that the ordinance in question is not unconstitutional. *Id.* He further stated: "I do not believe the majority has addressed the principal issue raised on appeal as to whether the occupancy of the accessory building as a residence by the petitioner's son is a violation of the ordinance." *Id.* The Board of Adjustment again appealed as a matter of right.

[1] The principal issue which must be addressed on appeal in this case is whether the zoning ordinance of the City of Rocky Mount prohibits Mrs. Farr from allowing her son and his family to live in the detached building on her property. The respondent Board argues that two sections of the ordinance are applicable. The Board first points to Section VII.A, Note 2, which provides that: "An accessory *use* in a . . . R-10 . . . district shall not include the residential occupancy of an accessory building except by domestic employees employed on the premises and the immediate families of such employees . . . ." (emphasis added). We conclude that this section does not probibit the petitioner's use of her property at issue.

Assuming the detached building is an accessory building as admitted during oral arguments before this Court, the owners of the property are entitled to live there. Section IV of the zoning ordinance includes the following: "*Building, accessory:* A detached subordinate structure operated and maintained under the same ownership and located on the same lot as the main building. No such building may be inhabited or used by other than the owners . . . or their employees." This section of the ordinance prohibits only those *other than owners* from inhabitating or using accessory buildings, and by clearest implication permits accessory buildings to be used and inhabited by owners. We conclude that the

term "owners" in the context of zoning ordinances such as that before us must be construed as including the holder of title to the property and members of the title holder's family, such as Mrs. Farr's son, his wife, and children. Therefore, we further conclude that Section IV permits the residential occupancy of accessory buildings by owners and their families.

[2] Section VII.A relied upon by the respondent Board and previously quoted herein merely provides that an "accessory use" shall not include residential occupancy by others than servants and their families. Mrs. Farr's use is not an accessory *use*, as that term is defined in Section IV as follows: "*Use, accessory*: A use incidental to and customarily associated with the use-by-right and located on the same lot with the use-by-right . . . ." Here, the use of the accessory *building* by Mrs. Farr's family is not a *use* "incidental to and customarily associated with the use-by-right . . . ." The use-by-right prescribed in the ordinance for property located in an R-10 zone is single family residential use. The use by Mrs. Farr's family in the present case is the use-by-right, i.e., single family residential use. Therefore, since the use of the accessory *building* by Mrs. Farr's family is not an accessory *use* under Section IV, the limitation on accessory uses contained in Section VII.A has no application.

[3] The Board has also argued that Mrs. Farr is in violation of Section VI.C of the ordinance, which provides in pertinent part that "in no case shall there be more than one main building . . . on the lot nor more than one main use (e.g. commercial, industrial or residential) per building and lot . . . ." This section does not prohibit the use of the accessory building here by Mrs. Farr's family for residential purposes. Mrs. Farr is not in violation of this section because there is only one main building, in which she herself resides, and one main use, which is residential.

This Court has long recognized that:

> A zoning ordinance, like any other legislative enactment, must be construed so as to ascertain and effectuate the intent of the legislative body. . . . A zoning ordinance, however, is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use.

In re Application of Construction Co., 272 N.C. 715, 718, 158 S.E. 2d 887, 890 (1968) (citations omitted). We conclude that the manner in which we have construed the ordinance before us in this case both effectuates the original intent of the body adopting the ordinance and complies with the rule of liberal construction in favor of freedom of use of private property.

Because we find that the petitioner, Mrs. Farr, is not in violation of the ordinance, it is not necessary for us to reach the issue she has raised concerning the constitutionality of the ordinance.

For the foregoing reasons—entirely differing from those relied upon by the majority in the Court of Appeals—we conclude that the result reached by the Court of Appeals was correct. Accordingly, the holding of the Court of Appeals, in its decision as modified herein, is affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. DEANITH NEWTON WATKINS

No. 43A86

(Filed 4 November 1986)

Rape § 11— first degree sexual offense—testimony by seven-year-old victim—sufficiency of evidence of penetration

A seven-year-old child's testimony that defendant stuck his finger in her "coodie cat," took his hand out of her "coodie cat," when defendant's finger was in her "coodie cat" it hurt, after defendant took his finger out her "coodie cat" stung a little bit, she peed with her "coodie cat," and she indicated her vaginal area as the place of touching through the use of anatomically correct dolls to the jury constituted sufficient evidence of penetration to support a conviction for first degree sexual offense.

BEFORE *Long, J.*, at the 16 September 1985 Criminal Session of GUILFORD County Superior Court, defendant was convicted of first degree sexual offense and taking indecent liberties with a minor. Defendant was sentenced to life imprisonment with respect to the first degree sexual offense, and judgment was arrested with respect to the charge of taking indecent liberties with a minor. Defendant appeals the life sentence as of right to this

Court. N.C.G.S. § 7A-27(a). Heard in the Supreme Court 16 October 1986.

Lacy H. Thornburg, Attorney General, by Daniel C. Oakley, Special Deputy Attorney General, for the State.

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

PARKER, Justice.

The State's evidence tended to show that on or between 14 February and 4 March 1985, the victim,[1] a six-year-old girl, went to a nearby convenience store on an errand for her mother. While at the store, defendant, the store clerk, jerked the victim into a storage room, put his hand in her pants, and placed his finger in her "coodie cat," a term the victim uses to describe her private parts. The victim did not tell her mother about the incident, but she did complain of irritation of her "coodie cat," which her mother attributed to the victim's failure to wipe properly and treated with vaseline.

On or about 4 March 1985, the victim's mother, alerted by a neighbor's phone call, questioned the victim as to whether anything had ever occurred at the convenience store. The victim then told her mother of defendant's actions. The victim's mother took the victim to the police, where the child demonstrated with anatomically correct dolls what had occurred. Then the victim's mother and the investigating detective took the victim into the bathroom where the child physically demonstrated what defendant had done. Defendant offered no evidence.

At trial, on direct examination, the victim gave the following testimony describing the incident:

Q. Would you please tell us what it was that happened when you went to the store?

A. Yes.

1. Use of the victim's name in this opinion is not necessary to distinguish her from other individuals involved in the case and would add nothing of value. Therefore, in keeping with the practice established by this Court in numerous recent cases, her name has been deleted throughout this opinion to avoid further embarrassment. *See State v. Hosey,* Case No. 154PA86 (filed 7 October 1986).

Q. What was it?

A. He stuck his finger in my "coodie cat."

* * *

Q. Would you tell the jury what you do with your "coodie cat"?

A. Yes.

Q. What do you do with it?

A. I pee with it.

The victim testified that during the incident a customer entered the store.

Q. What did Deano do when that person came into the store?

A. He took his hand out and ran up there, and I snuck out the door.

Q. He took his hand out of where?

A. Out of my "coodie cat."

Q. What did it feel like when he had his finger in your "coodie cat"?

A. It hurt.

Q. Did your "coodie cat" ever hurt when Deano didn't have his finger in it?

* * *

A. It stung a little bit.

* * *

Q. It hurt a little bit? When it stung a little bit, did you tell your mother about that?

A. Yes.

Q. And what did she do about it?

A. She put some vaseline on it.

Q. Did it feel better?

A. Yes.

Also at trial, the victim demonstrated with anatomically correct dolls that defendant had put his finger in the vaginal area.

The only question presented by this appeal is whether a seven-year-old child's testimony that defendant stuck his finger in her "coodie cat," took his hand out of her "coodie cat," when defendant's finger was in her "coodie cat" it hurt, after defendant took his finger out her "coodie cat" stung a little bit, she pees with her "coodie cat," and she indicated her vaginal area as the place of touching through the use of anatomically correct dolls to the jury, constitutes sufficient evidence of penetration to support a conviction for first degree sexual offense. We hold that it does.

To convict defendant of a first degree sexual offense with a child of twelve years or less, the State need only prove: (1) the defendant engaged in a sexual act, (2) the victim was at the time of the act twelve years old or less, and (3) the defendant was at that time four or more years older than the victim. N.C.G.S. § 14-27.4 (1981). A sexual act is defined as "cunnilingus, fellatio, analingus, or anal intercourse . . . [or] the penetration, however slight, by an object into the genital or anal opening of another body . . . [except for] accepted medical purposes." N.C.G.S. § 14-27.1(4) (1979); *State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159 (1981). The sexual act relied on in this case is penetration of the genital opening.

Defendant's sole contention is that the evidence fails to prove any penetration of the victim's genital organs as required to establish a sexual act under N.C.G.S. § 14-27.1(4) and, therefore, defendant was entitled to a dismissal of the charge at the close of the evidence.

We find the evidence sufficient to prove the requisite penetration. On a motion to dismiss, the trial court must determine from all the evidence, taken in the light most favorable to the State, whether there is substantial evidence that the crime charged has been committed and that the accused is the one who did it. *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983). 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). In judging the sufficiency of the State's evidence, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most fa-

vorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

N.C.G.S. § 14-27.1(4) requires only slight penetration of the genital opening. The victim stated clearly that defendant put his finger *in* her "coodie cat" and took it *out* of her "coodie cat," and that her "coodie cat" was used "to pee."

The victim's testimony, when all reasonable inferences favorable to the State are drawn therefrom, is sufficient to permit a jury to find beyond a reasonable doubt that the defendant penetrated the genital opening with his finger. Therefore, the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence.

In defendant's trial, we find

No error.

STATE OF NORTH CAROLINA v. VIC DAMONE DAYE

No. 115PA86

(Filed 4 November 1986)

THE State's petition for discretionary review of the decision of the Court of Appeals, 78 N.C. App. 753, 338 S.E. 2d 557 (1986), vacating the defendant's sentence and remanding to the Superior Court, ALAMANCE County, was allowed on 6 May 1986. Heard in the Supreme Court 16 October 1986.

Lacy H. Thornburg, Attorney General, by Daniel C. Oakley, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellee.

PER CURIAM.

Affirmed.

BARRY K. BUCHELE, M.D. v. PINEHURST SURGICAL CLINIC, P.A.

No. 300A86

(Filed 4 November 1986)

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 at 80 N.C. App. 256, 341 S.E. 2d 772 (1986), affirming in part and reversing in part judgment by *Albright, J.*, filed on 25 January 1985 in Superior Court, MOORE County, and remanding the case for further findings. Heard in the Supreme Court 16 October 1986.

Joe McLeod and William L. Senter for plaintiff.

Van Camp, Gill, Bryan, Webb & Thompson, P.A., by James R. Van Camp and Douglas R. Gill, for defendant.

PER CURIAM.

As is implicit in the Court of Appeals opinion, the contract in question is not ambiguous. The decision of the Court of Appeals is

Affirmed.

DR. CLARENCE E. ASH, VIRGINIA N. ASH, BARBARA J. DEAN AND RODNEY A. DEAN v. BURNHAM CORPORATION

No. 323A86

(Filed 4 November 1986)

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 at 80 N.C. App. 459, 343 S.E. 2d 2 (1986), which reversed the order denying the defendant's motion to dismiss for lack of personal jurisdiction entered by *Grist, J.*, on 24 July 1985 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 13 October 1986.

Golding, Crews, Meekins & Gordon, by Rodney Dean, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and William A. Blancato, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

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

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

ALLSTATE INSURANCE CO. v. NATIONWIDE INS. CO.

No. 565P86.

Case below: 82 N.C. App. 366.

Petition by defendant (Brian Savage) for discretionary review pursuant to G.S. 7A-32 denied 4 November 1986.

BRANCH BANKING AND TRUST CO. v. WRIGHT

No. 330PA85.

Case below: 74 N.C. App. 550.

Defendant's (Mary Dianne Wright) motion to be allowed to withdraw appeal allowed 17 December 1985.

BRANNON v. BRANNON

No. 503P86.

Case below: 82 N.C. App. 149.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

DUNLAP v. DUNLAP

No. 490P86.

Case below: 82 N.C. App. 675.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

FLAHERTY v. HUNT

No. 512P86.

Case below: 82 N.C. App. 112.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

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

FOSTER v. WESTERN ELECTRIC CO.

No. 624A86.

Case below: 82 N.C. App. 656.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 4 November 1986.

HARTMAN v. HARTMAN

No. 528A86.

Case below: 82 N.C. App. 167.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 4 November 1986.

IN RE THOMPSON ARTHUR PAVING CO.

No. 526P86.

Case below: 81 N.C. App. 645.

Petition by Paving Company for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

INT. PAPER CO. v. HUFHAM

No. 488P86.

Case below: 81 N.C. App. 606.

Petition by defendants and third party plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

JONES v. LYON STORES

No. 524P86.

Case below: 82 N.C. App. 438.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

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

KNIGHT v. CANNON MILLS CO.

No. 584P86.

Case below: 82 N.C. App. 453.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

LAUREL PARK VILLAS HOMEOWNERS ASSOC. v. HODGES

No. 506P86.

Case below: 82 N.C. App. 141.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

LEIPHART v. N.C. SCHOOL OF THE ARTS

No. 592P86.

Case below: 80 N.C. App. 339.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 4 November 1986.

McNABB v. TOWN OF BRYSON CITY

No. 535PA86.

Case below: 82 N.C. App. 385.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1986.

MACE v. N. C. SPINNING MILLS

No. 531P86.

Case below: 81 N.C. App. 669.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 4 November 1986.

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

N.C. STATE BAR v. WHITTED

No. 581A86.

Case below: 82 N.C. App. 531.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 4 November 1986.

OWENSBY v. OWENSBY

No. 548P86.

Case below: 82 N.C. App. 301.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

PICKRELL v. MOTOR CONVOY, INC.

No. 562PA86.

Case below: 82 N.C. App. 238.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1986.

PRINCE v. MALLARD LAKES ASSN.

No. 533P86.

Case below: 82 N.C. App. 431.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

QUEENSBORO STEEL CORP. v. EAST COAST MACHINE & IRON WORKS

No. 527P86.

Case below: 82 N.C. App. 182.

Petition by defendant (Trust Company) for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

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

RECO TRANSPORTATION, INC. v. EMPLOYMENT SECURITY COMM.

No. 470P86.

Case below: 81 N.C. App. 415.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

SHIPMAN v. N.C. PRIVATE PROTECTIVE SERVICES BD.

No. 564P86.

Case below: 82 N.C. App. 441.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 4 November 1986.

STATE v. BROWN

No. 492P86.

Case below: 81 N.C. App. 622.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

STATE v. CROSS

No. 534P86.

Case below: 82 N.C. App. 592.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

STATE v. FREEMAN

No. 264P86.

Case below: 79 N.C. App. 177; 317 N.C. 338.

Petition by defendant for rehearing and ex mero motu hearing of claims against Appellate Defender Office and Appellate Division dismissed 4 November 1986.

STATE v. HALL

No. 614P86.

Case below: 81 N.C. App. 650.

Petition by defendant (Horace Stephens) for writ of certiorari to the North Carolina Court of Appeals dismissed as moot 4 November 1986.

STATE v. HOPE

No. 586P86.

Case below: 82 N.C. App. 592.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

STATE v. JAVIER

No. 510P86.

Case below: 82 N.C. App. 149.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

STATE v. MASON

No. 493P86.

Case below: 81 N.C. App. 680.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

STATE v. RODDEY

No. 632P86.

Case below: 81 N.C. App. 680.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 November 1986.

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

STATE v. SPENCER

No. 538P86.

Case below: 81 N.C. App. 529.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 November 1986.

STATE v. TOLER

No. 539P86.

Case below: 82 N.C. App. 529.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 November 1986.

STEVENS v. NIMOCKS

No. 590P86.

Case below: 82 N.C. App. 350.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 4 November 1986.

UPDIKE v. DAY

No. 505P86.

Case below: 82 N.C. App. 149.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986. Motion by defendant to dismiss appeal for lack of significant public interest allowed 4 November 1986.

WHITE v. TOWN OF EMERALD ISLE

No. 557P86.

Case below: 82 N.C. App. 392.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 November 1986.

STATE OF NORTH CAROLINA v. JOHN PERRY FISHER

No. 746A85

(Filed 18 November 1986)

1. **Homicide § 21.5— premeditation and deliberation—sufficient evidence**

There was sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder by stabbing the victim where the State's evidence tended to show: there was no provocation on deceased's part; defendant had commented during the preceding fall that if deceased "messes with me one more time, I'm going to cut his heart out"; defendant commented on the day of the murder that "I'm going to get drunk with [deceased] one last time tonight"; defendant commented several days after the stabbing that he ran deceased down and killed him because "I knowed he'd come back and get me"; and the killing was done in a brutal manner in that there were multiple stab wounds, including two wounds to the chest, one of which pierced deceased's heart.

2. **Homicide § 19— deceased's conviction record—continued questioning of defendant**

The trial court in a murder case did not err in allowing the State to continue to ask defendant about deceased's conviction record where the trial court sustained defendant's objections to this line of questioning, and defense counsel never asked the court to restrain the State from asking these questions but merely asked for a precautionary instruction. Moreover, any error in the court's failure to give a precautionary instruction was not prejudicial to defendant.

3. **Criminal Law § 128.2— questions about knife—denial of mistrial**

The trial court in a homicide case did not err in denying defendant's motion for a mistrial based on the State's cross-examination of defendant about whether he had slashed another person with the knife used to stab deceased where the trial court sustained defendant's objections to this line of questioning, and the record shows that the prosecutor's questions about the knife were asked in good faith.

4. **Criminal Law § 75.8— second interrogation—failure to repeat Miranda warnings**

A statement made by defendant during a second interrogation was not inadmissible because defendant was not given renewed *Miranda* warnings before the second interrogation began where the length of time between the initial warning and interrogation and the second interrogation was very brief; the statement was made in the same building only a short distance from where the initial interrogation occurred; the statement was made to an officer who was present at the initial interrogation; defendant's second statement did not materially differ from his initial statement; and defendant appeared to be of sound mind and not under the influence of alcohol or any other drug when the second statement was made. The totality of the circumstances shows that the initial *Miranda* warnings were not so stale and remote as to create a substan-

tial possibility that defendant was unaware of his constitutional rights during the second interrogation.

5. Homicide § 30.3— instruction on voluntary manslaughter not required

The trial court in a first degree murder case did not err in refusing to charge the jury on involuntary manslaughter where defendant admitted that he knowingly slashed and stabbed deceased with a hunting knife but contended that he acted in self-defense.

6. Criminal Law § 102.6; Homicide § 19.1— jury argument—failure to introduce victim's criminal conviction record—harmless error

In a first degree murder case in which defendant contended that he stabbed the victim in self-defense, the prosecutor's assertion in his closing argument that defendant failed to introduce evidence of the victim's criminal conviction record to show that the victim was a mean and violent person was arguably misleading and improper, but the impropriety did not constitute reversible error where substantial evidence had been admitted which tended to show that the victim had served time in prison and had a reputation for violence.

7. Criminal Law § 102.5— prior convictions—cross-examination of defendant—improper question—absence of prejudice

Cross-examination of defendant about whether he had been convicted of breaking and entering and larceny in 1976 when in fact he had not been involved in those crimes did not constitute prejudicial error where defendant responded that he did not remember being convicted of either crime; defendant objected only on the ground that the two crimes were juvenile offenses; the prosecutor made a good faith effort to examine the record before using such evidence at trial and was not aware that the two cases were not part of defendant's juvenile or adult criminal record; and the prosecutor offered defense counsel the opportunity to check defendant's record before going any further.

8. Constitutional Law § 48— counsel's admission of malice—no ineffective assistance of counsel

A defendant tried for first degree murder was not denied the effective assistance of counsel because his counsel admitted malice without defendant's consent in his closing jury argument.

BEFORE *Allen, J.*, at the 24 June 1985 Criminal Session of Superior Court, TRANSYLVANIA County, the defendant was convicted of first-degree murder. The jury found no aggravating factors as listed in N.C.G.S. § 15A-2000(e) and therefore unanimously recommended that the defendant be sentenced to life imprisonment. The defendant appeals as a matter of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 11 September 1986.

Lacy H. Thornburg, Attorney General, by Reginald L. Watkins, Special Deputy Attorney General and Norma S. Harrell, Assistant Attorney General, for the State.

Jeffrey P. Hunt, for the defendant-appellant.

BROWNING, Justice.

The State presented evidence which tended to show that the defendant, John Perry Fisher, and the deceased, Claude Allen Hill, had been "best friends" for a number of years; that on the evening of 3 September 1984 the defendant and Hill drove in the defendant's wife's car to a party at the home of Brenda Fisher; and that the defendant and Hill had been drinking beer and liquor, as well as smoking marijuana, earlier that same day and that they were "high off of liquor" prior to attending the party. There was also evidence that the defendant had threatened Hill with a knife in a dispute over a bottle of liquor earlier in the day.

Once at Brenda Fisher's residence and during the course of the party, Hill "patted" the defendant on the face in a playful gesture. The defendant became agitated and told Hill that he couldn't slap him like that and get away with it. Shortly thereafter the defendant stood up, kissed Hill and stated "we're all brothers." Witnesses at the party observed that the defendant had in his possession during the party a knife with a blade "at least" eight inches long.

Soon after this incident, Hill accompanied Joyce Ewbanks into the kitchen. The defendant followed them into the kitchen whereupon Hill asked him to leave so he could talk privately with Joyce. The defendant became very angry and returned to the living room saying "he was mad at the world." The defendant then left the house saying that he was going home. Several minutes later Hill and Joyce Ewbanks returned to the living room where Hill got his coat and said that he was going with the defendant. Joyce Ewbanks followed Hill because she had left her pocketbook in the defendant's car.

As Joyce Ewbanks and Hill walked to the car, Joyce asked Hill to stay and said that she would take him home later. Hill agreed and Joyce proceeded to the car where she obtained her pocketbook and said good-bye to the defendant. At that time, Hill

was standing approximately seventy-five feet from the car. Joyce began walking back towards Brenda's apartment where she met Hill. The defendant started his car and began backing it out of the driveway into the road. When the defendant reached the end of the driveway he tossed a carton of Hill's cigarettes, which Hill had left in the defendant's car, out the window, scattering them on the muddy, rain soaked ground. Hill told the defendant, "Johnny, I don't appreciate that." Whereupon, the defendant opened the car door and said "come do something about it." Hill walked to the bottom of the driveway and met the defendant. After a brief scuffle Hill backed away and ran down the road. The defendant gave immediate pursuit and upon catching him, another scuffle ensued. Seeing that the defendant and Hill were fighting, Joyce ran to Brenda's apartment to get help. Roy Norton accompanied Joyce back outside where they met the defendant walking back towards the driveway. Joyce asked the defendant where Hill was and he answered "the S.O.B. is lying down there." Joyce immediately ran down the road and found Hill lying in the ditch. Joyce then ran back towards Brenda's apartment to get help. As she neared the apartment, she saw Norton crawling out of the ditch. Norton told her that the defendant "beat the hell out of me too."

Ms. Emily Smith, a neighbor of Brenda Fisher's, testified that at approximately 11:00 p.m. she looked out of her kitchen window and saw the defendant making fast jabbing motions with his hand at an unidentified boy who was unarmed and attempting to get away. Ms. Smith saw the defendant chase Hill down the road and push him into the ditch.

Hill was dead by the time the police arrived at the scene. The autopsy performed the next day by Dr. Robert Dowlswell, a forensic pathologist, revealed multiple stab wounds on the deceased's body, one of which penetrated the victim's heart causing great loss of blood. In Dr. Dowlswell's opinion, Hill's death was caused by blood loss related to the stab wound to the heart.

The State supplied further evidence which tended to show that earlier in the day on 3 September 1984 the defendant had stated that he was "going to get drunk with Allen one last time." Additional evidence was introduced that during the preceding fall, the defendant had stated that "if Allen messes with me one

more time I'm going to cut his heart out." Further, the State presented evidence that the defendant ran Hill down and killed him because "I knowed he'd come back and get me."

The defendant presented evidence which tended to show that while at Brenda Fisher's residence Hill had asked the defendant to take him to another party and that the defendant refused. Upon leaving, the defendant, realizing that Joyce Ewbanks' purse was in his car, stopped the car in order to return the purse. At this time Hill walked up beside the car, cursed the defendant and hit the defendant in the temple. The defendant told Hill that he did not want to fight but Hill continued to hit the defendant in the head. The defendant testified that he knew that "once he [Allen] got me down that was it." The defendant further testified that in order to defend himself he pulled out his knife and began indiscriminately cutting and jabbing Hill. The defendant testified that during this time he was covering his eyes with his arm in order to protect his face and therefore could not see that he had mortally wounded Hill.

The defendant testified that Hill finally stopped hitting him and backed away. After backing away, Hill began to run away from the defendant, whereupon the defendant ran after Hill to help him and keep him from wandering off into the ditch. The defendant further testified that when he saw that Hill was badly hurt he immediately went to the car in an effort to get help for him.

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.

I.

[1] The defendant contends that the trial court erred by submitting to the jury the charge of first-degree murder. This contention is based on the claim that there was insufficient evidence of premeditation and deliberation to reach the jury on the issue of first-degree murder.

Substantial evidence must be introduced tending to prove each essential element of the offense charged before the defendant's guilt may be submitted to the jury. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). However, substantial evidence,

although it must be existing and real, 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, "[t]he 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. . . ." *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980).

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. "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, 58, 337 S.E. 2d 808, 822 (1985). "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." *Id.* The requirement of a "cool state of blood" does not require that the defendant be calm or tranquil. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). An unlawful killing is deliberate and premeditated if done as part of a fixed design to kill, notwithstanding the fact that the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant's ability to reason. *Id.*

Premeditation and deliberation relate to mental processes and ordinarily are not subject to proof by direct evidence. Instead, they are generally proved by circumstantial evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are (1) provocation on the part of the deceased; (2) 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 deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence

that the killing was done in a brutal manner. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983).

In this case there is evidence of want of provocation on the part of the deceased in that the defendant's invitation to "come do something about it" was intended, and did, provoke the altercation that ensued. Additionally, several comments made by the defendant suggest premeditation and deliberation. Specifically, a comment was made by the defendant during the preceding fall that if "Allen messes with me one more time, I'm going to cut his heart out" and a comment was also made on the day of the murder that "I'm going to get drunk with Allen one last time tonight." Lastly, the defendant's comment several days after the stabbing that he ran Hill down and killed him because "I knowed he'd come back and get me," suggests premeditation and deliberation.

Additionally, we find that there was evidence that the killing was done in a brutal manner. Specifically, Dr. Dowlswell testified that there were multiple stab wounds including two wounds to the chest, one of which hit the deceased's heart. This Court has held that the nature and number of a 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).

Using the factors set forth in *Williams*, this Court finds the State put forth substantial evidence sufficient to justify the trial court's denial of defendant's motion to dismiss. This assignment of error is overruled.

II.

[2] The defendant next contends that the trial court erred in allowing the State to continue to ask the defendant about the deceased's conviction record. This assignment of error is based upon the following exchange:

> Q. I want you to turn to this Jury like you've been doing for the last hour and tell the Jury how many times Allen Hill was ever convicted in Court for any act of violence against any of those 100 people, tell them?

MR. BLANCHARD: Objection.

THE COURT: Sustained.

Q. Isn't the truth of the matter, Mr. Fisher, and you know of at least 50 to 100 people that were assaulted terribly in this county that none of those so called assaults ever resulted in the man being convicted one time in Court anywhere?

MR. BLANCHARD: Objection.

THE COURT: Overruled.

Q. Isn't that right?

A. Sir, he was up for trial for about 8 of them right before he died. So I guess he wouldn't convicted of them, sir.

Q. You mean he was tried for 8 assaults before he died?

A. No, I'm saying he was up for at least four because they was counts took out for him. The policemen took some on him.

Q. At least 50 to 100 assaults, they didn't all occur right before he died, did they?

A. No sir, but it's like this, if a man fought you would you take a warrant out on him?

Q. Listen to my question. When did these 50 to 100 assaults in this county start, how many years ago?

MR. BLANCHARD: Objection.

THE COURT: Overruled.

Q. When did you first come to know of these 50 to 100 assaults this man did?

A. All of our life.

Q. And how old was he, 25?

A. He was 25.

Q. Tell the Members of the Jury then when in the last 25 years Mr. Hill was ever convicted of even simple assault?

MR. BLANCHARD: Objection.

THE COURT: Objection Sustained.

Q. Well, wasn't he or was he?

MR. BLANCHARD: Objection.

THE COURT: Objection Sustained.

Q. You would tell it if that was the truth, wouldn't you?

MR. BLANCHARD: Objection.

THE COURT: Objection Sustained.

MR. BLANCHARD: Your Honor, I would like a precautionary instruction to the Jury as to regard Mr. Leonard's questions.

The record shows that the trial court sustained the defendant's objections to this line of questioning. Further, the defendant's counsel never asked the court to restrain the State from asking these questions but merely asked for precautionary instruction. This request was denied without explanation. Lastly, even if the failure to give a precautionary instruction is held to be error, it does not appear from the record that the error was prejudicial error within the meaning of N.C.G.S. § 15A-1443(a). That is, it does not appear that but for the trial court's error, there was a reasonable possibility that the result would have been different from that which occurred. *State v. Milby*, 302 N.C. 137, 142, 273 S.E. 2d 716, 720 (1981).

For the reasons cited above, this Court finds that the trial court did not err in denying the defendant's request for a precautionary instruction as to the State's questions concerning the victim's criminal record. This assignment of error is overruled.

III.

[3] The defendant next contends that the trial court erred in denying his motion for a mistrial based upon the State's cross examination of the defendant. Specifically, the defendant objects to the following exchange during the cross examination of the defendant:

Q. And then, Mr. Fisher, in uh on the 21st day of July, 1983, did you assault Vicky Gontz with a deadly weapon a

hunting knife with a five inch blade by cutting her in the chest?

A. No sir.

Q. You didn't do that?

A. No sir.

Q. On that day, if this is not the very huntin' knife that you slashed Vickie Gontz in the chest with?

MR. BLANCHARD: Objection.

A. God as my witness, no.

THE COURT: Objection Sustained.

In *State v. Primes*, 314 N.C. 202, 215, 333 S.E. 2d 278, 286 (1985) this Court held that "the decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion." "The rule in this jurisdiction is that questions of the prosecutor will be considered proper unless the record shows that the question was asked in bad faith." *State v. Dawson*, 302 N.C. 581, 586, 276 S.E. 2d 348, 352 (1981).

In this case, the trial court correctly sustained the defendant's objections to the prosecutor's line of questioning. However, based on the State's showing of good faith in regard to its line of questioning, the trial court denied the defendant's motion for a mistrial. The specific statement of the prosecutor is as follows:

MR. LEONARD: Yes sir, I would like to state my good faith basis first for their second objection. Mr. Fisher was charged with that offense. I read the words of the warrant and let me see if I can put my hands on that, Judge. It reads that he assaulted the victim with a hunting knife with a blade of some several inches in length I believe and I felt it was a fair inference that this may well be the same blade or same knife. I think he certainly had the opportunity to explain it if he wanted to that he only had that knife for a short time.

There is sufficient evidence in the record to show that the prosecutor's questions as to the knife were asked in good faith. We hold that the trial judge did not abuse his discretion in denying the defendant's motion for a mistrial. This assignment of error is overruled.

IV.

[4] The defendant, in his next assignment of error, contends that the trial court erred in allowing into evidence the statement made by the defendant during a second interrogation when the defendant was not given a renewed *Miranda* warning before the second interrogation began.

In the case of *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death penalty vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210 (1976) this Court considered the question of whether *Miranda* warnings must be repeated at subsequent interrogations when they have been properly given at the first interrogation. In *McZorn*, the Court said that:

> [A]lthough *Miranda* warnings once given, are not to be accorded 'unlimited efficacy or perpetuity,' when no inordinate time elapses between the interrogations, the subject matter of the question remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required.

McZorn, 288 N.C. at 433, 219 S.E. 2d at 212 (*quoting U.S. v. Hopkins*, 433 F. 2d 1041 (5th Cir. 1970)). "However the need for a second warning is to be determined by the 'totality of the circumstances' in each case." *McZorn*, 288 N.C. at 434, 219 S.E. 2d at 212 (*quoting Commonwealth v. Ferguson*, 444 Pa. 478, 282 A. 2d 378 (1971)). "[T]he ultimate question is: did the defendant with full knowledge of his legal rights, knowingly and intentionally relinquish them?" *McZorn*, 288 N.C. at 434, 219 S.E. 2d at 212 (*quoting Miller v. U.S.*, 396 F. 2d 492, 496 (8th Cir. 1968), *cert. denied*, 393 U.S. 1031 (1969)).

The Court in *McZorn* set forth five factors, among others, that should be analyzed as part of the totality of circumstances which determine whether the initial warnings have become so stale and so remote that there is a substantial possibility that the

individual was unaware of his constitutional rights at the time of the subsequent interrogation. These five factors are:

> (1) the length of time between the giving of the first warnings and the subsequent interrogation. *See State v. Gilreath*, 107 Ariz. 318, 487 P. 2d 385 (1971) (second and third interrogations occurred 12 and 36 hours respectively after the first; repeated warnings not required) (applying *Escobedo* principles); *Watson v. State*, 227 Ga. 698, 182 S.E. 2d 446 (1971) (7 hour interval held not to require repeated warning); *People v. Hill*, 39 Ill. 2d 125, 233 N.E. 2d 367 (1968); *Commonwealth v. Clark*, 454 Pa. 329, 311 A. 2d 910 (1973) (less than an hour); *Commonwealth v. Bennett*, 445 Pa. 8, 282 A. 2d 276 (1971) (five hours) (applying *Escobedo* principles); 12 Washington Law Journal 222, 226; (2) whether the warnings and the subsequent interrogation were given in the same or different places, *United States v. Hopkins*, 433 F. 2d 1041 (5th Cir. 1970); *Brown v. State*, 6 Md. App. 564, 252 A. 2d 272 (1969); (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, *Id.*; (4) the extent to which the subsequent statement differed from any previous statements; *Brown v. State, supra*; (5) the apparent intellectual and emotional state of the suspect. *State v. Magee*, 52 N.J. 352, 245 A. 2d 339 (1968), *cert. denied*, 393 U.S. 1097, 21 L.Ed. 2d 789, 89 S.Ct. 891 (1969).

McZorn, 288 N.C. at 434, 219 S.E. 2d at 212.

Applying the first and second *McZorn* factors to the facts of this case, the record shows that the length of time between the initial warning and interrogation and the second interrogation was very brief. The defendant's initial interview lasted about thirty to thirty-five minutes. At the end of this interview, the defendant was escorted a short distance to the booking area which was in the same building where the initial interrogation occurred. Upon reaching the booking area, the defendant volunteered, without prompting by Officer Hutcheson, information about the altercation with the deceased.

As to the third *McZorn* factor, the record clearly shows that Officer Hutcheson was present with Officer Jones at the defendant's initial interrogation. As to the fourth and fifth *McZorn* fac-

tors, it is clear from the record that the defendant's subsequent statement did not materially differ from his initial statement and that the record shows that the defendant appeared to be of sound mind and not under the influence of any alcohol or other drug when the second statement was made.

In applying the *McZorn* factors to this case, the totality of the circumstances suggests that the initial *Miranda* warnings were not so stale and remote as to create a substantial possibility that the defendant was unaware of his constitutional rights during the second interrogation. Application of the *McZorn* factors suggests that the defendant knowingly and freely relinquished his legal rights during the second interview. This assignment of error is overruled.

V.

[5] The defendant's next assignment of error is that the trial court erred in failing to charge the jury as to involuntary manslaughter. At the charge conference, the trial court refused to charge the jury as to involuntary manslaughter as requested by the defendant. The defendant took exception to this refusal.

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony or resulting from some act done in an unlawful or culpably negligent manner, where fatal consequences were not improbable in light of the facts, or resulting from a culpably negligent omission to perform a legal duty. *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981); *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977). In this case, the defendant claims that evidence was presented which showed that the defendant did not intend to kill or inflict serious bodily injury on the deceased.

It is reversible error for the trial court to fail to instruct on a lesser offense when evidence has been introduced which supports the finding of such a lesser offense. Failure to instruct on the lesser crime is not cured by verdict finding the defendant guilty of the highest offense charged. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). However, the trial court is not required to charge the jury as to a lesser offense where no evidence has been submitted to support a verdict on this offense. *State v. Strick-*

land, 307 N.C. 274, 298 S.E. 2d 645 (1983); 4 Strong's N.C. Index 3d *Criminal Law* § 115 (1976). "Due process requires only that a lesser offense instruction be given if the evidence would permit a jury rationally to find him 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) (quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L.Ed. 2d 392, 401 (1980)).

In *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322 (1955) Justice (later Chief Justice) Bobbitt analyzed the intent requirement for involuntary manslaughter as follows:

> When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. In *State v. Gregory*, 203 N.C. 528, 166 S.E. 387 (1932), where the defense was that an *accidental* discharge of the shotgun caused the death of the deceased, it was stated that the presumptions arise only when there is an *intentional killing* with a deadly weapon; and since the *Gregory* case it has been often stated that these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, *intentional killing*, is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. [Citations omitted.] A specific intent to *kill*, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. . . . The presumptions do not arise if an instrument, which is *per se* or may be a deadly weapon, is not intentionally used as a weapon, *e.g.*, from an accidental discharge of a shotgun.

Gordon, 241 N.C. at 358, 85 S.E. 2d at 323-24.

In this case, the defendant admits that he knowingly slashed and stabbed the deceased with a hunting knife. The defendant's

use of a knife indicates a clear intent to inflict great bodily harm or death on the deceased. There can be no claim of accidental injury where one knowingly and willingly uses a knife to slash and stab his victim. Fatal consequences were not improbable in light of the defendant's use of his hunting knife in such a manner. As such, the defendant's actions would not fit within the definition of involuntary manslaughter and therefore the defendant would not qualify for such an instruction. This assignment of error is overruled.

VI.

[6] The defendant's next assignment of error is that the trial court should not have allowed the State to rebut the defendant's claim that the decedent was a "bad" person by arguing in its closing that the defendant had the opportunity to, but did not, introduce the decedent's criminal record into evidence.

In its closing argument, the State argued to the jury as follows:

> MR. LEONARD: He'll tell you that you can consider the apparent fairness of the witness, think about whether the witness exaggerated, whether that witness appeared to be fair. We saw Mr. Fisher for example go on the stand and say Mr. Hill there, Allen Hill must have assaulted 50 or 100 people. One thing you learn sittin' on a Jury and around Court saying something and showing something are two very different propositions. What do they have to support that? Where are those people, 50 or 100 people?
>
> MR. POWELL: Objection.
>
> THE COURT: Overruled.
>
> Where are two or three of those people? They've got the same power to bring witnesses in that I do—
>
> MR. BLANCHARD: Objection.
>
> THE COURT: Overruled.
>
> He says that Allen Hill was a bad, bad man. If he's such a bad individual, where is the record of criminal convictions?
>
> MR. BLANCHARD: Objection.

THE COURT: Overruled.

They had the opportunity to bring evidence up here from downstairs just like I did—

MR. BLANCHARD: Objection.

THE COURT: Overruled.

Where is any evidence of any criminal conviction?

MR. BLANCHARD: Objection.

THE COURT: Overruled.

And Mr. Powell sat here and talked at length about what a bad man he was. What a terrible man. How many bad people are there in Transylvania County beat up people going down the street, he beat up on 50 or 100 people including law enforcement officers and they can't bring you a case file or evidence up here to show you—

MR. BLANCHARD: Objection.

THE COURT: Overruled.

—that he's even been convicted of simple assault. That's what I mean by the apparent fairness of it all. There's a difference between saying something and proving it. You can stand up here as a lawyer or you can go up here on the witness stand as a witness and say anything you want to in the Superior Court of Transylvania County but I say prove it, let's have some hard evidence. You can consider a person's criminal record. If you are called on to believe somebody in some important decision in your day to day affairs one of the things you would probably want to know about that person would be what kind of criminal record do they have; what have they been convicted of. . . .

The defendant claims that the exchange set forth above was intended to, and did, leave the jury with the impression that the defendant could have introduced evidence of the deceased's criminal conviction record to the same extent that the State introduced evidence of the defendant's conviction record. The defendant relies on the case of *State v. Corn*, 307 N.C. 79, 296 S.E. 2d 261 (1982) in which this Court held that conviction records

of the deceased were not admissible for the purpose of establishing the deceased's reputation for violence or for the purpose of showing what the defendant knew about the deceased's violent behavior.

Although it is not cited in either the brief for the defendant or the brief for the State, it appears that the case of *State v. Burgess*, 76 N.C. App. 534, 333 S.E. 2d 563 (1985) directly addresses the issue of whether the State may argue in closing that the defendant could have, but did not, present evidence that the deceased had been convicted of any crime or crimes which would tend to show that he was a mean and violent person. We agree with *Burgess* where the North Carolina Court of Appeals, citing *Corn*, held that the trial court erred by allowing the State, in its closing argument, to bring to the jury's attention the fact that there was no evidence that the deceased had a criminal record. Having determined that it was improper to allow the State to argue that the defendant had not introduced evidence of the deceased's criminal record, the court next addressed the issue of whether such error was prejudicial.

Under N.C.G.S. § 15-1443 a defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that had the error in question not been committed, a different result would have been reached. In *Burgess*, the Court of Appeals held that since self-defense was the defendant's only defense in the case and the defendant attempted to prove self-defense by showing that the deceased was a violent and mean person, there was a reasonable possibility that the State's closing argument concerning the failure of the defendant to show the deceased's criminal conviction record caused the jury to discount the defendant's claim of self-defense. *Burgess*, 76 N.C. App. 534 at 536, 333 S.E. 2d 563 at 564.

The case *sub judice* differs from *Corn* and *Burgess* in that substantial evidence was admitted which tended to show that the victim had served time in prison and had a reputation for violence. Specifically the victim's mother, as well as several other witnesses, testified that the victim had served an active prison sentence. Further evidence showed that the victim had spent approximately five years in jail. Lastly, several witnesses testified as to the victim's violent character.

Although the district attorney's assertion during his closing argument that the defendant could have introduced the victim's criminal record is arguably wrong and misleading, it would not be *reversible* error due to the substantial evidence presented which showed that the victim did in fact have a criminal record and had served an active prison sentence. Additionally, other evidence was introduced which showed that the victim had a reputation for violence. In light of these factors, we find that the defendant was not prejudiced to such a degree as to constitute reversible error. This assignment of error is overruled.

VII.

[7] The defendant next assigns as error the trial court's allowance of questions about the defendant's criminal record by referring to specific cases in which the defendant was not involved. Specifically, the defendant was asked if he was convicted of breaking and entering and larceny in early 1976. The defendant responded that he did not remember being convicted of either crime. The defendant's counsel moved for a mistrial based on the contention that these cases were juvenile offenses which were inadmissible. After hearing arguments made outside of the jury's presence, the trial court denied the defendant's motion for a mistrial.

After the trial, the defendant's new counsel determined that the defendant had not been involved in the two crimes objected to as juvenile offenses, and therefore these crimes were not a part of the defendant's record, juvenile or adult. As such the defendant's new counsel contends that admission of those crimes constitutes reversible error.

It is admitted that when a criminal defendant takes the stand in his own defense he puts his character in issue, thereby allowing the State to cross examine him as to his criminal record, if any. *State v. McKenna*, 289 N.C. 688, 224 S.E. 2d 537 (1976). Further, it is clear that for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime punishable by more than 60 days' confinement shall be admitted if elicited or established by public record during cross examination or thereafter, as long as no more than 10 years have elapsed since the date of conviction or release from confinement imposed as a result of the conviction, whichever is later. N.C.G.S.

§ 8C R. 609. However, the issue here is not whether the defendant's criminal record is admissible but whether the admission of the two cases in which the defendant was not involved constitutes sufficient error to justify a mistrial.

As discussed above, a decision by the trial court to grant or deny a mistrial will not be disturbed absent a showing of abuse of discretion. *State v. Primes*, 314 N.C. 202, 215, 333 S.E. 2d 278, 286 (1985). Additionally, it is clear that questions asked by the prosecutor will be considered proper unless the record shows that they were asked in bad faith. *State v. Dawson*, 302 N.C. 581, 586, 276 S.E. 2d 348, 352 (1981). In this case the record clearly shows that the State was not aware that two of the cases which it used in cross examining the defendant were not part of his criminal record, juvenile or adult.

> MR. LEONARD: The State Court of Appeals in *State vs. Johnson* said; however, that Juvenile adjudication can be used if the accused takes the stand and can be used for the purpose of impeachment. So that was the reason I asked that and I don't know and still don't know if these were, in fact, juvenile adjudications. If they are, in fact, I have no reason to know. There's one thing that causes me to think they are not juvenile adjudications is that I went to—I went down to the Clerk's office this morning and I don't have those particular files I took notes on but I asked the Clerk to retrieve those two case numbers for me and she went to the regular Court files and pulled them out. She didn't go to the juvenile file, so they didn't appear to be juvenile adjudications to me and I do not think that they are.
>
> MR. BLANCHARD: Your Honor, I will say other than the defendant is what he just read. He asked him how old he was. In fact what he did was ask him his birth date and if one does somewhat simple math, one will find they are juvenile records.
>
> MR. LEONARD: Well, let me state if I may, sir. I'll give you the particular case numbers so that anyone can go make a request and see if they are taken from the adult file in cases numbers 76-464 and 465. I think those are the one's they're referring to, the breaking and entering and larceny.
>
> MR. BLANCHARD: Early in 1976.

MR. LEONARD: 76-464, 76-465, 76-1645, 1763, 1734, 1760 and 1763, I have already mentioned that one. Those are all in the adult record.

It is apparent that the district attorney made a good faith effort to examine the record before using the evidence at trial. The record also shows that the district attorney offered the defense attorney the opportunity to check the defendant's record before going any further. Lastly, even if admission of the two crimes constitutes error, it would not rise to the level of reversible error, as it was not prejudicial to such a degree as to influence the jury's verdict. For these reasons, this assignment of error is overruled.

VIII.

[8] Lastly, defendant contends that his constitutional right to adequate and effective trial counsel was violated in contravention of the Sixth Amendment. Specifically the defendant argues that his counsel's admission of malice during closing arguments was without the defendant's consent. The defendant claims that by admitting malice, his counsel precluded the jury from finding manslaughter and limited their potential verdicts to first or second-degree murder or not guilty.

The standard for determining whether counsel's representation of a criminal defendant was so deficient as to violate the defendant's Sixth Amendment rights was set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984). Under the *Strickland* test:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sen-

> tence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 80 L.Ed. 2d at 693.

The Supreme Court of North Carolina expressly adopted the *Strickland* test as the uniform standard to be applied when determining whether assistance of counsel was ineffective under the North Carolina Constitution. *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985). In *Braswell*, the Court noted that the test for prejudice as set forth in *Strickland* fully comports with the statutory test for prejudice under N.C.G.S. § 15A-1443(a). *Braswell*, 312 N.C. at 562, 324 S.E. 2d at 248.

Under the *Strickland* test the proper standard for judging an attorney's performance is one of reasonably effective assistance, considering all of the circumstances. *Strickland*, 466 U.S. at 688, 80 L.Ed. 2d at 693. The defendant must show that his counsel's representation fell below an objective standard of reasonableness as defined by professional norms. *Strickland*, 466 U.S. at 688, 80 L.Ed. 2d at 693. Judicial review of counsel's performance must be highly deferential so as to avoid the prejudicial effects of hindsight. *Strickland*, 466 U.S. at 689, 80 L.Ed. 2d at 694. Because of the difficulties inherent in determining if counsel's conduct was within reasonable standards, a court must indulge a strong presumption that counsel's conduct falls within the broad range of what is reasonable assistance. *Strickland*, 466 U.S. at 689, 80 L.Ed. 2d at 694.

The defendant contends that his counsel's actions in admitting malice without his consent is *per se* a violation of his Sixth Amendment rights. In support of this position the defendant cites *State v. Harbison*, 315 N.C. 175, 337 S.E. 2d 504 (1985). In *Harbison*, this Court held that ineffective assistance of counsel is established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without his consent. *Harbison*, 315 N.C. at 180, 337 S.E. 2d at 507-08. In *Harbison*, the defense counsel argued, without authorization by the defendant, that the defendant was definitely guilty of manslaughter but not of first-degree murder.

The case *sub judice* is factually distinguishable from *Harbison* in that the defendant's counsel never clearly admitted guilt. The defendant's counsel argued to the jury that:

> His Honor is going to submit to you a verdict form— Madam Clerk, do we have it drawn up yet? Thank you. In which its going to say, Ladies and Gentlemen of the Jury, Do you find the defendant guilty of murder in the first degree and then down below that it's going to say Do you find him guilty of second degree. Second degree is the unlawful killing of a human being with no premeditation and no deliberation but with malice, illwill. You heard Johnny testify, there was malice there and then another possible verdict is going to say Do you find him guilty of voluntary manslaughter. Voluntary manslaughter is the killing of a human being without malice and without premeditation. It's a killing. And it also has not guilty, remember that too. I asked you about that and it's not a not guilty as in some trial I wasn't there, I don't know a darn thing about it, I wasn't there, never been to Silversteen, never will go there. There are some that say, some defenses that say not guilty, that I was there. It's stupid to be there, it don't make mama proud of being there but I was there.

Although counsel stated there was malice, he did not admit guilt, as he told the jury that they could find the defendant not guilty. As this case does not fall with the *Harbison* line of cases where violation of the defendant's Sixth Amendment rights are presumed, the defendant's claim of ineffective assistance of counsel must be analyzed using the *Strickland* factors.

Under the *Strickland* test the defendant must first show that counsel's performance was deficient. Deficient is defined as evidence that counsel made errors so serious as to support a finding that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 80 L.Ed. 2d at 693. In reviewing defense counsel's conduct it is apparent that several tactical errors were made during the trial. These errors include his objections to the State's offer to introduce the victim's criminal record as well as the admission of malice in his closing argument. However, in applying the highly deferential standard of review required by *Strickland*, we find that counsel's conduct was not so deficient as to violate an objective standard of reasonableness.

Even if counsel's errors are presumed to be serious enough to raise doubt as to whether he was acting as "counsel" within the meaning of the Sixth Amendment, we find that the defendant has failed to satisfy the second prong of the *Strickland* test. Under the second prong of the *Strickland* test, the defendant must show that counsel's deficient performance prejudiced the defense to such a degree that a fair trial was not possible. That is, the defendant must show that there is a reasonable probability that, but for counsel's errors, there would have been a different result. *Strickland*, 466 U.S. at 687, 80 L.Ed. 2d at 693. After a careful review of the record we find that even if defense counsel's conduct is held to be professionally deficient, these errors did not result in prejudice sufficient to satisfy the reasonable probability standard that absent the errors a different verdict would have been handed down.

As we find that defense counsel's conduct was not deficient and that any errors that may have been committed were not prejudicial enough to call into doubt the outcome and fairness of the trial, we overrule the defendant's assignment of error.

No error.

STATE CAPITAL INSURANCE COMPANY v. NATIONWIDE MUTUAL INSURANCE COMPANY AND HOWARD E. ANDERSON AND PAULA C. ANDERSON, AND MILTON LOUIS McKINNON

No. 89PA86

(Filed 18 November 1986)

1. **Insurance § 6.2— construction of policy provisions—provisions extending coverage—provisions excluding coverage**

Provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage whenever possible by reasonable construction; on the other hand, provisions which exclude liability are not favored and all ambiguous provisions will be construed against the insurer and in favor of the insured. N.C.G.S. § 20-279.21(b)(2).

2. **Insurance § 68.4— automobile liability insurance—arising out of use of motor vehicle**

An injury arose out of the use of an automobile so as to provide coverage under an automobile liability policy where the owner of a pickup truck had

stored a rifle behind the seat of the truck because the gun rack was full; the owner saw a deer and reached for the rifle from outside the truck; and the rifle discharged, striking the passenger of the truck as he was getting out of the truck. The shooting was an incident or consequence of the use of an automobile and was not the result of some independent act disassociated from the use of the automobile. N.C.G.S. § 20-279.21(b)(2).

3. Insurance § 143— homeowners insurance—shooting in pickup truck

A homeowners insurance policy provided coverage of injuries to a third party received when the policyholder reached behind the seat of his pickup truck for a rifle to shoot a deer, the rifle discharged, and the passenger was injured. An automobile use exclusion did not apply because any liability would be based on negligent mishandling of the rifle, and the automobile use exclusion does not apply if there is nonautomobile proximate cause.

4. Insurance § 6.2— shooting accident in pickup truck—automobile liability policy and homeowners policy—coverage by both

Both an automobile liability policy and a homeowners policy provided coverage for injuries suffered by a third party when the policyholder's rifle accidentally discharged as the policyholder removed it from the truck; each insurance policy is a separate contract which must be interpreted in accordance with its own terms under the applicable rules of construction.

Chief Justice BILLINGS dissenting in part.

Justice MITCHELL dissenting.

Justice MEYER joins in the dissenting opinion.

ON discretionary review of a unanimous decision of a panel of the Court of Appeals, 78 N.C. App. 542, 337 S.E. 2d 866 (1985), reversing the judgment entered by *Barnette, J.*, at the 19 December 1984 Civil Session of Superior Court, WAKE County. Heard in the Supreme Court 11 September 1986.

Young, Moore, Henderson & Alvis, P.A., by R. Michael Strickland and A. Bradley Shingleton, for plaintiff-appellant State Capital Insurance Company.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Peter M. Foley and Kurt E. Lindquist II, for defendant-appellant Nationwide Mutual Insurance Company.

Manning, Fulton & Skinner by John B. McMillan and Charles E. Nichols, Jr., for defendant-appellees Howard E. Anderson and Paula C. Anderson.

FRYE, Justice.

The issue in this case is whether liability for personal injuries suffered by a third party when a rifle accidentally discharged while being removed by insured from a motor vehicle is covered by insured's automobile liability insurance policy or his homeowners liability insurance policy, or both. Under the facts presented in the instant case, we hold that coverage is provided by both policies.[1] We thus affirm the decision of the Court of Appeals.

On 13 November 1982, defendant Howard E. Anderson and defendant Milton Louis McKinnon traveled in Anderson's pickup truck to a tract of land in Warren County. The two had planned to survey and determine whether the property was fit for hunting by the M & K Hunting Club of which Anderson was a member. Anderson was driving while McKinnon was riding in the passenger seat. The truck was equipped with a gun rack in which were placed two guns, a shotgun and a rifle. In the storage space behind the seat Anderson had placed on a quilt a .30-30 rifle belonging to him. It was Anderson's custom to carry firearms in the storage space when the gun rack was full. Anderson brought the truck to a stop on the left side of a logging road near a ravine. Both he and McKinnon left the truck, presumably to talk with some other hunting companions whom they had followed in order to survey the property. At some point McKinnon returned to the truck. After several minutes, Anderson spotted a deer and returned to the truck in order to retrieve his rifle. Anderson opened the driver's door, moved the back of the seat forward and reached in the area where the rifle lay. At the same time McKinnon began to exit the truck. When Anderson's hand came in contact with the rifle it discharged, causing a bullet to strike McKinnon in the leg. At the time of this accident, defendants Howard E. Anderson and Paula C. Anderson were covered under both an automobile liability insurance policy issued by defendant Nationwide Mutual Insurance Company ("Nationwide") and a policy of homeowners liability insurance issued by plaintiff State Capital Insurance Company ("State Capital").

1. This holding is of course subject to the general rule that claimants are not entitled to a double recovery.

Nationwide's automobile liability insurance policy provided in pertinent part as follows:

> Part B
>
> LIABILITY COVERAGE
>
> INSURING AGREEMENT
>
> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident.
>
> . . . .
>
> FINANCIAL RESPONSIBILITY REQUIRED
>
> When this policy is certified as future proof of financial responsibility, this policy shall comply with the law to the extent required.

State Capital's homeowners liability insurance policy contained the following provision:

> SECTION II—EXCLUSIONS
>
> 1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:
>
> . . . .
>
> e. arising out of the ownership, maintenance, use, loading or unloading of:
>
> . . . .
>
> (2) a motor vehicle owned or operated by, or rented or loaned to any insured . . . .

Plaintiff State Capital brought a declaratory judgment action seeking a determination of its rights and liabilities and those of defendant Nationwide with respect to the injuries suffered by defendant McKinnon. All parties waived jury trial; the trial judge instead made findings of fact, the essence of which are recounted above, and concluded that neither policy provided coverage for damages in this case. Defendants Anderson appealed. A unanimous panel of the Court of Appeals reversed the judgment of the

trial court and held that both Nationwide's automobile liability policy and State Capital's homeowners liability policy provided coverage. We affirm this decision for the reasons stated below.

[1] The crucial issue in this case turns on a determination of the meaning given to the "arising out of" language in the compulsory motor vehicle liability statute, N.C.G.S. § 20-279.21(b)(2), and the State Capital homeowners policy exclusion. It is particularly important in the instant case to recognize that different rules of construction govern the interpretation of policy provisions which *extend* coverage as opposed to policy provisions which *exclude* coverage. In construing the coverage provision of the Nationwide automobile policy, we follow the rule that provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction. *See Moore v. Hartford Fire Insurance Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967); *Jamestown Mutual Insurance Co. v. Nationwide Mutual Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966). On the other hand, when construing the exclusion provision of the State Capital homeowners policy we are guided by the rule that provisions which exclude liability of insurance companies are not favored and therefore all ambiguous provisions will be construed against the insurer and in favor of the insured. *Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970).

I.

[2] We first consider whether the Nationwide automobile liability policy provides coverage for injuries resulting from the accidental shooting of McKinnon. The policy language states that Nationwide will insure Anderson against liability for which he "becomes legally responsible because of an auto accident." The compulsory motor vehicle liability statute provides that any motor vehicle policy certified as proof of financial responsibility[2] shall insure the named insured against loss from the liability imposed by law "for damages arising out of the ownership, maintenance or use of such motor vehicle . . . ." N.C.G.S. § 20-279.21(b)(2) (1985). It is well established in North Carolina

2. Nationwide does not contend, nor do we find any evidence in the record that the motor vehicle policy has not been certified as proof of financial responsibility. Therefore, we assume that this requirement has been met.

that as a matter of law the provisions of the Financial Responsibility Act are written into every automobile liability policy. *Nationwide Mutual Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 597 (1977). Thus, the Nationwide automobile liability policy, when properly construed, provides coverage for damages "arising out of the ownership, maintenance or use" of the automobile. In this case liability under the Nationwide policy depends on whether the damages resulting from the injuries to McKinnon arose out of the use of the automobile. In determining the meaning of the words "arising out of the use of an automobile" we are mindful that "[a] compulsory motor vehicle insurance act is a remedial statute and will be liberally construed so that the beneficial purpose intended by its enactment by the General Assembly may be accomplished." *Moore v. Hartford Fire Insurance Co. Group*, 270 N.C. 532, 535, 155 S.E. 2d 128, 130-31.

> The words 'arising out of' are not words of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than 'caused by.' They are ordinarily understood to mean . . . 'incident to,' or 'having connection with' the use of the automobile . . . . (Citations omitted.)
>
> The parties do not, however, contemplate a general liability insurance contract. There must be a causal connection between the use and the injury. This causal connection may be shown to be an injury which is the natural and reasonable incident or consequence of the use, though not foreseen or expected, but the injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile. (Citation omitted.)

Fidelity & Casualty Co. of N.Y. v. N.C. Farm Bureau Mutual Insurance Co., 16 N.C. App. 194, 198-99, 192 S.E. 2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 840 (1972).

In short, the test for determining whether an automobile liability policy provides coverage for an accident is not whether

the automobile was a proximate cause of the accident. Instead, the test is whether there is a causal connection between the use of the automobile and the accident.

We find that such causal connection exists between the use of the automobile in this case, a pickup truck, and injuries to McKinnon. The transportation of firearms is an ordinary and customary use of a motor vehicle, especially pickup trucks. In addition, use of an automobile includes its loading and unloading. *Fidelity and Casualty Co. of N.Y. v. N.C. Farm Bureau Mutual Insurance Co.*, 16 N.C. App. 194, 192 S.E. 2d 113, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 840; *see also Fireman's Fund Insurance Co. v. Canal Insurance Co.*, 411 F. 2d 265 (5th Cir. 1969). In the case *sub judice*, Anderson transported his .30-30 rifle in his pickup truck; as he attempted to unload the rifle from the truck, it discharged, causing injury to McKinnon. Since the transportation and unloading of firearms are ordinary and customary uses of a motor vehicle, and the injury-causing accident here resulted from the unloading of the transported rifle, such injuries were a natural and reasonable incident or consequence of the use of the motor vehicle.

We distinguish this case from the cases found in the Court of Appeals' decisions in *Raines v. St. Paul Fire & Marine Insurance Co.*, 9 N.C. App. 27, 175 S.E. 2d 299 (1970) (son of named insured sitting in driver's seat of parked automobile playing with gun which discharged, killing another occupant); *Nationwide Mutual Insurance Co. v. Knight*, 34 N.C. App. 96, 237 S.E. 2d 341, *disc. rev. denied*, 293 N.C. 589, 239 S.E. 2d 363 (1977) (defendant insured, the occupant of an automobile, intentionally shot into another automobile causing injury to an occupant of the second car); and *Wall v. Nationwide Mutual Insurance Co.*, 62 N.C. App. 127, 362 S.E. 2d 302 (1983) (intentional shooting of plaintiff by occupant of automobile); on the ground that each of these cases deals with injuries caused by activities not ordinarily associated with the use of an automobile. The shooting in the case *sub judice* was an incident or consequence of the use of an automobile and not the result of some independent act disassociated from the use of an automobile. Since the requisite causal connection exists between the injury suffered by McKinnon and the use of Anderson's pickup truck, we hold that with respect to the Nationwide auto-

mobile liability policy the injury arose out of the use of an automobile so as to provide coverage under that policy.

II.

[3] Next, we consider whether the exclusion in State Capital's homeowners policy excludes coverage for the injuries resulting from the accidental shooting of McKinnon. The State Capital policy insured Anderson against liability for damages for which he was liable because of bodily injury or property damage, but excluded coverage for such damages "arising out of the ownership, maintenance, use, loading, and unloading" of a motor vehicle. We first note that the determination that the injury "arose out of the use of an automobile" so as to provide coverage under the automobile liability policy does not necessarily mean that the homeowners policy does not provide coverage merely because it excludes from its policy accidents "arising out of the use" of a motor vehicle. We agree with the Court of Appeals that such a conclusion would ignore the established rule of construction that "[t]he two policies are not construed in light of each other; each policy is a separate contract of insurance between the company issuing it and the insured, and requires a separate and independent analysis in light of that relationship. *Allstate Insurance Co. v. Shelby Mutual Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967)." *State Capital Insurance Co. v. Nationwide Mutual Insurance Co.*, 78 N.C. App. 542, 549, 337 S.E. 2d 866, 870.

Keeping in mind the rules of construction, that all ambiguities in exclusion provisions are construed against the insurer and in favor of coverage, we find that under the facts in this case State Capital's homeowners policy provides coverage to Anderson for damages resulting from the injuries to McKinnon notwithstanding the exclusionary language. Although there are no North Carolina cases on point,[3] a growing number of courts in other jurisdictions have held that similar provisions in homeowners and

3. *Reliance Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E. 2d 206, *disc. rev. denied*, 293 N.C. 159, 236 S.E. 2d 704 (1977) (rifle which had been transported in a gun rack of insured's truck accidentally discharged as insured got into truck, thus injuring a bystander) involved an automobile liability policy and a homeowners automobile-use exclusion which were practically identical to those in the instant case. The Court of Appeals held that the automobile policy provided coverage. However, as the court noted, it did not determine rights with respect to the homeowners policy, as this issue was not before the court.

automobile policies provide concurrent coverage for the same accidents. *See State Farm v. Partridge*, 10 Cal. 3d 94, 514 P. 2d 123 (1973); *Travelers Insurance Company v. Aetna Casualty and Surety Company*, 491 S.W. 2d 363 (Tenn. 1963); *see also Glens Falls Insurance Company v. Rich*, 49 Cal. App. 3d 300, 122 Cal. Rptr. 696 (1975); *Waseca Mutual Insurance Company v. Noska*, 331 N.W. 2d 917 (Minn. 1983); *Lawver v. Boling*, 71 Wis. 2d 408, 238 N.W. 2d 514 (1976); 7A J. Appleman, *Insurance Law and Practice* § 4500 (Berdal ed. 1979).

The seminal case finding concurrent coverage by a homeowners insurance policy and an automobile insurance policy for a shooting incident is *State Farm v. Partridge*, 10 Cal. 3d 94, 514 P. 2d 123. In that case, the insured (Partridge) and two friends were hunting jack rabbits by shooting out of the windows of Partridge's four-wheel drive Ford Bronco as he drove through the countryside. Partridge was shooting a .357 magnum pistol which he had modified by filing the triggering mechanism to give it a "hair trigger." Partridge spotted a jack rabbit running across the road and left the road to keep the rabbit in the car's headlights. During the chase the car hit a bump, the pistol discharged, and the bullet hit the middle passenger in the spine, paralyzing her. Partridge was insured under an automobile policy and a homeowners policy, both issued by State Farm, which contained language similar to the Anderson policies. The automobile policy afforded coverage for bodily injuries "caused by accident arising out of the ownership, maintenance or use including loading or unloading of the owned motor vehicle . . . ." The homeowners policy on the other hand excluded coverage for "bodily injury . . . arising out of the [o]wnership, [m]aintenance, [o]peration, [u]se, [l]oading or [u]nloading of . . . any [m]otor [v]ehicle." State Farm argued that the exclusionary language in the homeowners policy was the same as the coverage language in the automobile policy so that they were mutually exclusive and could not provide overlapping coverage. The Supreme Court of California rejected this argument.

First, the court stated that even when language in two insurance policies is similar, the rules of construction applied to an *exclusionary clause* are substantially different from the rules of construction applied to a *coverage clause*. Exclusionary clauses are interpreted narrowly while coverage clauses are interpreted

broadly to provide the greatest possible protection to the insured. Since the terms of the policy must be construed against the insurance company, the same language in two different policies can have different meanings. The court held

> In view of the above approach the fact that an accident has been found to 'arise out of the use' of a vehicle for purposes of an automobile policy is not necessarily determinative of the question of whether that same accident falls within a similarly worded exclusionary clause of a homeowner's policy. [Citations omitted.] As one commentator has recently observed: It is clear that the expression 'use of an automobile' has different meanings under different circumstances and that, whenever possible, the Courts will apply an interpretation which gives, but never takes away, coverage for the 'use' of an automobile, thereby causing automobile and non-automobile liability policies to overlap, notwithstanding the exclusion against the 'use' of an automobile in most non-automobile liability policies. [Citations omitted.]

State Farm v. Partridge, 10 Cal. 3d 94, 100-01, 514 P. 2d 123, 127-28.

The *Partridge* court, however, declined to predicate its decision on the ambiguity of the exclusionary clause. Instead it based its decision on a second rationale that the injury in that case had two joint causes: one arising from the negligent operation of the automobile and the other arising from the negligent tampering with the firing mechanism of the pistol. The court held that the homeowners policy covered the risk related to the pistol, while the automobile policy covered the risk related to the automobile.

> Although there may be some question whether either of the two causes in the instant case can be properly characterized as *the* 'prime,' 'moving,' or 'efficient' cause of the accident we believe that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply *a* concurrent proximate cause of the injuries. [Citations omitted.] That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act.

State Farm v. Partridge, 10 Cal. 3d 94, 97, 514 P. 2d 123, 130-31.

Other courts have adopted one or both of these rationales in finding overlapping coverage in homeowners and automobile policies for certain accidents. *Travelers Insurance Company v. Aetna Casualty and Surety Company*, 491 S.W. 2d 363 (Tenn.), involved a person injured on a hunting trip when a shotgun accidentally discharged while being placed inside an automobile by the insured. The insured had automobile insurance with Aetna and homeowners insurance with Travelers. The Aetna policy insured for "bodily injury . . . arising out of the ownership, maintenance or use including, loading and unloading of an automobile." A clause in Travelers policy, however, stated that the homeowners policy "does not apply . . . [to personal liability resulting from] the ownership, maintenance, operation, use, loading or unloading of . . . automobile." The court held that ambiguities in the policy language required overlapping coverage.

> There can be little doubt that the terms 'use' and 'loading and unloading' are ambiguous, particularly in light of the courts' major efforts to define and interpret those terms. Those terms have taken on varied meanings and have been subjected to varied applications and tests in construing coverage under automobile liability policies. That being true, under facts such as those in the instant case, homeowner policies of insurance should stand on their own language and exclusions should be strongly construed against the insurer. After properly construing the ambiguous terms strictly against automobile liability carriers to provide coverage, some courts have conversely, by allowing homeowner carriers the benefit of the same construction, construed homeowner policies, bought for insurance coverage against nonvehicular liability, strictly against the insured. In keeping with the policy of the law, the inverse should be true. By holding Travelers liable in the instant case, we are neither redefining the terms nor changing the standard of causation. We are, rather, merely strictly construing those ambiguous terms and the standard of causation against the homeowner carrier standing by itself . . . . [T]he sole object of the insured in obtaining insurance is indemnity. To exclude coverage, exclusion clauses must be drafted in clear and unambiguous terms. The terms being ambiguous, they must be strictly construed against the insurer.

. . . .

> We are unable to agree that a mere connection with the loading of a vehicle, which is sufficient to allow recovery against an automobile carrier, also allows a homeowner carrier to exclude coverage. Neither does logic demand, nor will the law allow such a result.
>
> . . . .
>
> We hold that for a homeowner's policy of insurance to exclude coverage because of use, loading or unloading of an automobile, that use, loading or unloading must be the *efficient* and *predominating* cause in the strict sense of those terms. It is clear from the facts in the instant case that while the injury was connected with the use of the vehicle during the act of loading, neither that use nor act of loading was the *efficient* and *predominating cause*, the requisite causal relationship necessary to bring it within the exclusionary provisions of the policy.

Travelers Insurance Co. v. Aetna Casualty and Surety Co., 491 S.W. 2d 363, 367-68 (Tenn.) (emphasis added).

In *Glens Falls Insurance Co. v. Rich*, 49 Cal. App. 3d 300, 122 Cal. Rptr. 696, the insured, Harry DuBay, while on a hunting trip, placed a loaded shotgun under the seat of his car. Upon spotting a squirrel, the insured stopped the car and reached underneath the seat for the shotgun. When he touched the stock, the shotgun went off, injuring a passenger in the car. DuBay carried a homeowners insurance policy issued by Glens Falls Insurance Company. That policy excluded coverage "To bodily injury or property damages arising out of the ownership, maintenance, operation, use, loading or unloading of: . . . (2) any motor vehicle owned or operated by, or rented or loaned to any Insured . . . ." DuBay did not have any automobile liability insurance policy. The court found that the homeowners policy provided coverage for the injury. According to the court,

> [T]he undisputed facts established that DuBay placed a loaded gun under the front seat of his vehicle and that the gun fired when he reached for the gun. Such an act, if found to be negligent and a proximate cause of Rich's injury, would make DuBay liable to [the passenger] for his injuries. Accordingly,

> DuBay's homeowners policy would provide coverage for the passenger's claim. The trial court's determination that there was a causal connection between DuBay's use of the vehicle does not affect the coverage under the homeowners policy.

Rich, 49 Cal. App. 3d at 305, 122 Cal. Rptr. at 699. The court reasoned that the passenger could recover from the insurer if the accident arose solely from a non-automobile related cause or from a non-automobile related cause concurrent with any cause arising from the use of an automobile. Coverage would not be afforded however if the accident arose solely out of the use of an automobile. *Id.*

Finally, in *Waseca Mutual Insurance Co. v. Noska*, 331 N.W. 2d 917 (Minn.), the court held that both a homeowners and an automobile policy provided coverage for fires caused by sparks which escaped from uncovered barrels being transported to a landfill because injury resulted from the concurrence of a vehicle-related and a non-vehicle-related act. *See also Lawver v. Boling*, 71 Wis. 2d 408, 238 N.W. 2d 514 (summary judgment denied as to issue of coverage under a farm owner's policy and an automobile policy for an accident since the evidence would support a finding that injuries resulted from negligence in the operation of a truck, or from negligence in the choice of materials and manner of construction, or both); 7A J. Appleman *Insurance Law and Practice* § 4500 (Berdal ed. 1979).

In summary, the cases discussed above establish two principles with respect to determining the coverage of homeowners policies: (1) ambiguous terms and standards of causation in exclusion provisions of homeowners policies must be strictly construed against the insurer, and (2) homeowners policies provide coverage for injuries so long as a non-excluded cause is either the sole or concurrent cause of the injury giving rise to liability. Stating the second principle in reverse, the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy.

These principles find support in existing North Carolina law. First, it is well settled in North Carolina that insurance policies are construed strictly against insurance companies and in favor of the insured. *Maddox v. Colonial Life and Accident Insurance Co.*, 303 N.C. 648, 280 S.E. 2d 907 (1981); *Grant v. Emmco Insurance*

Co., 295 N.C. 39, 243 S.E. 2d 894 (1978); *Insurance Co. v. Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513 (1967). Provisions which exclude liability of insurance companies are not favored. Therefore all ambiguous provisions are strictly construed against the insurer and in favor of the insured. *Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518. We agree with the Court of Appeals' decision that when strictly construed the standard of causation applicable to the ambiguous "arising out of" language in a homeowners policy exclusion is one of proximate cause. *See State Capital Insurance Co. v. Nationwide Mutual Insurance Co.*, 78 N.C. App. 542, 337 S.E. 2d 866.

Secondly, this Court has held that when an accident has more than one cause, one of which is covered by an "all risks" insurance policy and the other which is not, the insurer must provide coverage. In *Avis v. Hartford Fire Insurance Co.*, 283 N.C. 142, 150, 195 S.E. 2d 545, 549 (1973), this Court stated: "As a general rule, coverage will extend when damage results from more than one cause even though one of the causes is specifically excluded." [Citations omitted.]

Applying these two principles to the cause *sub judice*, we hold that the exclusionary language in the State Capital homeowners policy should be interpreted as excluding accidents for which the sole proximate cause involves the use of an automobile. If there is any non-automobile proximate cause, then the automobile use exclusion does not apply.

In the present case, Anderson's liability, if any, could be based on a finding that negligent mishandling of the rifle was a proximate cause of McKinnon's injury. Therefore, the homeowners policy would provide coverage under its basic terms, and the automobile use exclusion would not apply.

III.

[4] For the reasons stated herein, we hold that both Nationwide and State Capital provide coverage under their respective policies. We note in addition that the reasoning in support of overlapping coverage is persuasive. Each insurance policy is a separate contract which must be interpreted in accordance with its own terms under the applicable rules of construction—not *in pari materia* with other policies which the insured may or may

not own. *See Allstate Insurance Co. v. Shelby Mutual Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436. Furthermore, when the properly construed terms of more than one policy provide coverage for a single accident, this result is not burdensome to the insurance companies nor against public policy—the companies have been paid premiums to cover certain risks, and when the event insured against occurs, those companies should be required to provide coverage.

We, therefore, affirm the decision of the Court of Appeals.

Affirmed.

Justice MITCHELL dissenting.

Mindful as I am of the rules of construction which require in sum that insurance policies be construed against the companies issuing them, I nevertheless feel compelled by law and the clear terms of the insurance policies involved in this case to conclude that neither policy provided coverage under these facts. Accordingly, I must respectfully dissent.

The motor vehicle liability insurance policy issued by Nationwide Mutual Insurance Company in the present case included as a matter of law language insuring the named insured against loss from liability "for damages arising out of the ownership, maintenance or use of such motor vehicle. . . ." N.C.G.S. § 20-279.21(b)(2) (1985). The majority states that the test for determining whether the motor vehicle liability policy provides coverage "is whether there is a causal connection between the use of the automobile and the accident." The majority then "finds" such a causal connection to exist in the present case. I do not agree.

It is clear in the present case that Anderson returned to his parked pickup truck to get his rifle after seeing a deer. As he unloaded the rifle from the truck, it discharged wounding McKinnon who was standing on the opposite side of the truck. The majority's finding that McKinnon's injury was causally connected to the use of the truck in this case, would seem to require a similar "finding" had the truck been on blocks and inoperable in Anderson's yard at the time the accident occurred. I fail to see any principled way of distinguishing the "use" of the vehicle in the hypothetical situation from the "use" actually involved here. I

would not allow recovery in either situation under the terms made a part of the liability policy by the statute.

The simple fact of the matter is that in this case the accident arose out of the ownership and use of the rifle and was in no way causally connected to the use of the truck. I do not believe that the cases relied upon by the majority support its determination that a causal connection existed between the use of the truck in the present case and the injuries to McKinnon. Most of those cases involved situations in which the vehicle was in motion or being placed in motion by the driver at the time of the accident. *E.g. Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E. 2d 206, *disc. rev. denied*, 293 N.C. 159, 236 S.E. 2d 704 (1977) (rifle discharged as driver prepared to drive away and reached to insert key in ignition); *Casualty Co. v. Insurance Co.*, 16 N.C. App. 194, 192 S.E. 2d 113, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 840 (1972) (key in ignition switch negligently turned causing truck to move forward); *State Farm v. Partridge*, 10 Cal. 3d 94, 514 P. 2d 123 (1973) (insured shooting a "hair trigger" pistol at jack rabbits while driving his vehicle after them). In each of those cases the actual driving or operation of the motor vehicle properly could have been found to be at least concurring negligence and one proximate cause of the resulting injury. The result should be different, however, when as in the present case the accident and resulting injury arose solely from the removal of a gun from a motor vehicle which was parked and not itself being driven or otherwise "used" at the time of the accident. *Raines v. Insurance Co.*, 9 N.C. App. 27, 175 S.E. 2d 299 (1970) (no coverage for accidental discharge of gun killing other occupant in parked automobile).

The majority next holds that the injury resulting from the accidental shooting of McKinnon was covered by the homeowner's policy issued by State Capital Insurance Company. That policy specifically excluded coverage, *inter alia*, for damages arising out of the "unloading" of a motor vehicle. In removing the rifle from the truck, Anderson clearly was "unloading" a motor vehicle. *See* Black's Law Dictionary 1378 (rev. 5th ed. 1979). The accident and resulting injury in this case arose from the unloading. In my view, the term "unloading" as used in the exclusionary section of the homeowner's policy clearly and unambiguously excludes coverage for the accident in the present case. *Contra Travelers In-*

surance Co. v. Aetna Casualty & Sur. Co., 491 S.W. 2d 363 (Tenn. 1973).

Although my heart might go to the insured in a case such as this, I simply can find no way in good conscience that my mind can follow. I dissent.

Justice MEYER joins in this dissenting opinion.

Chief Justice BILLINGS dissenting in part.

If the motor vehicle liability policy provides coverage in this case because the accident arose out of the use of the insured's motor vehicle, then I fail to understand how a homeowner's policy that specifically excludes from coverage bodily injury arising out of the use of a motor vehicle owned by the insured can be construed to provide coverage. To me, this is not a matter of "liberal" versus "strict" construction of insurance policies; we are merely asked to apply common sense to words chosen to prevent exactly what the majority determines is the result in the case *sub judice*. The exclusion in the homeowner's policy unmistakably notifies the insured that coverage is not provided if the liability arises out of the use of a motor vehicle owned by an insured. While there may be some ambiguity about whether under the circumstances the insured's liability arose out of the use of the insured's vehicle, once it is established either that the liability did or did not arise out of that use, the terms and therefore the reach of neither policy are ambiguous.

I agree with Justice Mitchell's analysis of the coverage provided by the Nationwide Mutual Insurance Company's motor vehicle liability policy and therefore would hold that coverage is not provided by that policy. I disagree with Justice Mitchell in his conclusion that the State Capital Insurance Company's homeowner's policy does not provide coverage. As indicated above, since the accident did not arise out of the use of the motor vehicle, the exclusion contained in the other policy excluding coverage for liability arising out of the use of the motor vehicle does not apply. The only remaining question is whether the exclusion for liability arising out of the "loading or unloading" of a motor vehicle owned by an insured excludes the liability in the case *sub judice*.

The correct resolution of the question of coverage under the homeowner's policy is the construction of the word "unloading." If "unloading" is construed to mean the removal of any item from the vehicle, then the exclusion applies and coverage is not provided. If, however, the word is construed to mean the removal from the vehicle of cargo,[1] defined as "the lading or freight of a ship, airplane, or vehicle,"[2] the transportation of which is the primary purpose for which the vehicle was being used,[3] then the exclusion does not apply to the removal of the rifle from the vehicle in the case *sub judice*. Giving to the words "loading and unloading" the more restrictive construction, I would hold that the accident did not arise out of the insured's "unloading" of the vehicle and that the exclusion in the homeowner's policy does not apply. I would hold that the State Capital Insurance Company's policy alone provides coverage.

NATIONWIDE MUTUAL INSURANCE COMPANY v. RONNIE WAYNE LAND, JESSIE H. PRUITT, ARCHIE ROLAND TALLEY, NORTH CAROLINA NATIONAL BANK AND LUMBERMENS MUTUAL CASUALTY COMPANY

No. 58PA86

(Filed 18 November 1986)

1. Insurance § 82— no coverage by lessor's insurer

In an action in which a lessor's insurer sought a declaratory judgment to determine whether a blanket insurance policy issued to the lessor, NCNB, provided coverage for injuries received by third parties in an automobile collision involving a leased car, the facts did not support the conclusion that the driver was NCNB's lessee at the time of the collision and the insurance policy did not provide coverage under N.C.G.S. § 20-279.21(b)(2) because the actions of NCNB clearly manifested its termination and rejection of the lease; the failure to locate and repossess the automobile did not alter the fact that the lessor-lessee relationship had been terminated. A clause providing that the lessee

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1. See the definition of "unload" in Webster's Third New International Dictionary 2503 (1961).

2. *Id.* at 339.

3. See the cases cited in the majority opinion. Note especially *Casualty Co. v. Insurance Co.*, 16 N.C. App. 194, 192 S.E. 2d 113, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 840 (1972) (truck's three 500 gallon tanks were being loaded with pressurized anhydrous ammonia).

would not be released from any of his lease obligations in the event of termination prior to the expiration of the lease's term was nothing more than an acceleration or liquidated damages clause. N.C.G.S. § 20-281.

2. Insurance § 87.2— leased automobile—breach of lease—no insurance coverage under omnibus clause

In an action in which an automobile lessor's insurer sought a declaratory judgment to determine whether its policy provided coverage under its omnibus clause to a lessee involved in an accident, the lessee's use of the automobile at the time of the collision was outside the scope of the express permission granted by the lessor, NCNB, because the lessee's use materially deviated from the express terms and conditions of the lease agreement; furthermore, there was no implied permission for use of the automobile from NCNB's allegedly insufficient efforts to recover the automobile after the lessee's default because implied permission is strongly negated by evidence that the use of the automobile was by virtue of a restricted express permission. Possession of a valid registration card by the lessee does not support implied use absent findings as to how the lessee obtained possession of the registration card.

Justice MITCHELL dissenting.

Justice FRYE joins in the dissenting opinion.

ON defendants' petition pursuant to N.C.G.S. § 7A-31 for discretionary review of a decision of the Court of Appeals, reported at 78 N.C. App. 342, 337 S.E. 2d 180 (1985), reversing the decision entered by *Morgan, J.*, at the 19 November 1984 Civil Session of Superior Court, ROCKINGHAM County. Heard in the Supreme Court 13 October 1986.

Petree, Stockton & Robinson, by James H. Kelly, Jr., for plaintiff-appellee.

Tuggle, Duggins, Meschan & Elrod, P.A., by J. Reed Johnson, Jr., for defendant-appellants.

PARKER, Justice.

Plaintiff Nationwide Mutual Insurance Company (Nationwide) seeks a declaratory judgment to determine whether a blanket automobile insurance policy issued by Nationwide to North Carolina National Bank (NCNB) provides coverage for injuries sustained by defendants Ronnie Wayne Land and Jessie H. Pruitt in an automobile collision that occurred in South Carolina on 12 April 1981. At the time of the accident, defendant Lumbermens Mutual Casualty Company provided uninsured motorists coverage for the ve-

hicle occupied by Land and Pruitt. A 1979 Chrysler Cordoba automobile owned by defendant NCNB and driven by defendant Archie Roland Talley was involved in the accident. The issue in this case is whether the Nationwide policy affords coverage for the liability incurred by Archie Roland Talley in the collision.

All parties waived a jury trial, and the trial court entered judgment declaring that Nationwide provided compulsory coverage pursuant to N.C.G.S. § 20-281 (1983)[1] and voluntary coverage pursuant to the terms of its policy, "for legal liability of Archie Roland Talley for personal injury and property damage arising out of the operation of NCNB's 1979 Chrysler automobile on April 12, 1981 . . . ." The Court of Appeals reversed, holding that Talley was neither a lessee nor an insured, and, therefore, that Nationwide's policy provided neither compulsory nor mandatory coverage.

On discretionary review in this Court, defendants advance two alternative theories for finding coverage under the Nationwide policy: (1) that § 281 requires the policy to provide coverage because of the existence of a lessor-lessee relationship between NCNB and Talley; and (2) that the policy itself provides coverage for Talley as an "insured" because he was operating the automobile with the permission of NCNB.[2] We find that the Nationwide policy provides coverage under neither of these theories and consequently affirm the Court of Appeals.

I.

The stipulations, admissions, and evidence in the record indicate that on 7 December 1979, Talley entered into a lease agreement with NCNB that provided that Talley rent the 1979 Chrysler Cordoba automobile, which would be owned by and registered to NCNB, for thirty-six months at a stated monthly rental payment. The lease required that Talley maintain liability, comprehensive, and collision insurance on the automobile during the

1. All statutes referred to in this opinion are in Chapter 20 of the General Statutes of North Carolina. Hence, further statutory references will be to section numbers within Chapter 20.

2. Defendants do not address in their brief the issue of whether there is statutory coverage of Talley's "lawful possession" of the automobile on 12 April 1981 under § 279.21(b)(2).

term of the lease. The lease further provided that Talley's failure to pay any rental payment when due or to maintain the insurance coverage in full force and effect would constitute "events of default." Also listed as events of default were other specified occurrences, such as when NCNB "reasonably deems itself insecure or its prospects for payment . . . impaired." Upon the occurrence of any event of default, the lease granted NCNB the right to terminate the lease without releasing Talley from any of his obligations under the lease agreement and the right to demand and receive immediate possession of the automobile.

Before closing the transaction, Mr. Watson, the NCNB loan officer who handled Talley's account, had a credit check run on Talley and called an automobile leasing company with which Talley had previously done business. Upon finding nothing derogatory, Watson proceeded to close the transaction. Talley delivered an insurance form, required by NCNB, indicating he had insurance coverage with Nationwide of the type and in the amount required by the lease. Watson verified that such a policy was in effect. Although no Nationwide policy was ever received by NCNB, NCNB subsequently received a policy meeting the lease requirements from United States Fidelity and Guaranty Company (USF&G). This policy provided coverage from 15 February 1980 to 15 May 1980. At the close of the transaction, Talley paid the first and last monthly rental payments as required by the lease. On 25 January 1980, Talley paid the January and February 1980 monthly rental payments.

In March 1980, a detective from the Winston-Salem Police Department informed Watson that a warrant had been issued in South Carolina for the arrest of Archie Roland Talley for grand theft larceny. At that time, Talley's March 1980 rental payment was past due. Upon investigation, Watson learned that he had received information from the sales department rather than the collections department of the leasing company with which Talley had dealt previously. The collections department then advised Watson that they had experienced numerous problems with Talley on previous leases. Based on the police detective's information that Talley had an address in Georgia prior to the North Carolina address that he gave to NCNB, Watson had a Georgia credit check run on Talley and discovered further derogatory credit information.

On or about 28 March 1980, Watson went with the police detective to Talley's place of employment; there he was advised by the manager that Talley had told the manager earlier in the day in a telephone call that he was quitting his job and leaving town. Watson next went to Talley's Winston-Salem address and was advised by Talley's brother that Talley had left town. Talley's brother did not know where Talley could be located, but he agreed to notify Watson if he received any information as to Talley's whereabouts. On 28 March 1980, NCNB assigned Talley's account to the Automobile Recovery Bureau in Atlanta, Georgia, with instructions to locate Talley, to repossess the automobile, and to accept no further payments.

On 2 April 1980, NCNB sent to the Winston-Salem address designated in the lease by Talley as his address a "demand letter," advising Talley that he was in default, demanding that Talley pay the unpaid "net balance," and directing Talley "to surrender to North Carolina National Bank any collateral" securing the account. During the months of April and May 1980, Watson continued in his efforts to locate Talley and the automobile, contacting persons in South Carolina, including Talley's former wife, as well as persons in Atlanta, including USF&G, Talley's insurance carrier. USF&G advised Watson that it was also seeking Talley in order to notify him that his policy was cancelled for nonpayment of premiums.

In June 1980, when Talley's account with NCNB was ninety days past due, NCNB "charged off" the account and assigned it to NCNB's recovery department. On 20 August 1980, NCNB's vice president in charge of consumer credit had a warrant taken out in Forsyth County, North Carolina, for the arrest of Talley, based on the allegation that Talley had obtained possession of the automobile by fraud in violation of § 106.1. No further report was made nor was any contact made with State law enforcement agencies or the Division of Motor Vehicles.

On 12 April 1981, while driving the automobile under the influence of alcohol in Myrtle Beach, South Carolina, Talley was involved in an automobile collision resulting in serious injuries to defendants Land and Pruitt, who thereafter commenced civil actions against Talley in South Carolina based upon Talley's alleged negligence. At the time of the collision, the 1979 Chrysler automo-

bile displayed a current North Carolina license plate and inspection sticker, and Talley had in his possession a current registration card identifying NCNB as the owner of the automobile.

NCNB's file on its transaction with Talley contained the registration card expiring 15 February 1981 for the automobile; the file contained no registration card for the period in which the collision occurred. The North Carolina Division of Motor Vehicles ordinarily would mail the registration and the license plate renewal materials to the registered owner of the leased vehicle, in this case, NCNB. NCNB, in turn, customarily forwards these materials to the lessee. In those cases where a lessee's account is in default, NCNB's usual procedure is not to forward these materials to the lessee, but to hold the registration card and renewal materials in its file. NCNB's file for Talley's account also contained information, developed by NCNB's recovery department, that Talley had a parole officer in South Carolina, that Talley had a South Carolina driver's license, and that Talley had been charged with drunk driving and the automobile had been impounded, but later recovered by Talley.

Based upon its findings of fact, the trial court made the following conclusions of law, *inter alia*:

> 6. At the time of the accident on April 12, 1981, Archie Roland Talley was a lessee of NCNB, operating the 1979 Chrysler automobile as a member of the public subject to and within the meaning of GS § 20-181.
>
> 7. Nationwide is required by GS § 20-181 to provide insurance coverage, up to the face amount of Nationwide's policy 61-GA-640-273-0002 ($500.00 [sic] for bodily injury/$250,000 for property damage) for liability imposed by law for bodily injury or property damage arising out of the operation of the 1979 Chrysler automobile by Archie Roland Talley, specifically including personal injury and property damage sustained by Ronnie Wayne Lane [sic] and Jessie H. Pruitt.
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> 8. Archie Roland Talley had initial permission from NCNB to operate the 1979 Chrysler automobile.
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> 9. NCNB was insufficiently aggressive in seeking to recover the 1979 Chrysler automobile and allowed the vehicle to be registered with the North Carolina Department [sic] of

Motor Vehicles and display a current safety inspection sticker for year 1981.

10. NCNB's course of conduct constitutes mutual acquiescence or lack of objection signifying assent to the operation of the 1979 Chrysler automobile by Archie Roland Talley at the time of the accident on April 12, 1981.

11. NCNB's efforts were ineffective to revoke initial permission to Archie Roland Talley to operate the 1979 Chrysler automobile on April 12, 1981.

12. Archie Roland Talley had permission from NCNB to operate the 1979 Chrysler on April 12, 1981.

13. Alternatively, Nationwide provides voluntary coverage under policy 61-GA-640-273-0002 with NCNB for legal liability of Archie Roland Talley arising out of the operation of the 1979 Chrysler automobile on April 12, 1981, up to the limits of Nationwide's policy ($500,000 bodily injury/$250,000 property damage).

II.

[1] At the time Talley and NCNB executed the lease and at the time of Talley's collision with the automobile occupied by defendants Land and Pruitt, the relevant portion of § 281 provided the following:

> [I]t shall be unlawful for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public for operation by the rentee or lessee unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee . . . . Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages . . . .

Defendants contend that the insurance coverage mandated by § 281 cannot be terminated by a lessee's violation of the lease agreement, even if it results in the lessor's termination of the lease pursuant to its terms, but that the lessor-lessee relationship continues to exist and § 281 remains in effect until either the

lease expires by virtue of its own terms or the lessor regains possession of the leased automobile. This is so, contend defendants, because the language of § 281 is absolute, and because this Court in *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 338 S.E. 2d 92 (1986) held that the liability carrier for a lessor is required to provide coverage as mandated by § 281 despite direct violation of the lease agreement by the lessee. In addition, defendants argue that this Court's acceptance of the proposition—that a lessee, while still in possession of the leased automobile, will cease to be a lessee if he violates some provision of the lease—would impose upon the courts "an unworkable quagmire of decisional problems in future cases." Finally, defendants contend that the purpose of § 281 is to place the risk of liability for damages caused by the operator of a leased automobile upon the lessor and the lessor's insurance carrier, not to place that risk upon innocent members of the public. We find no merit in these contentions on the facts of this case.

There is no doubt that § 281 prescribes mandatory terms which become a part of every liability insurance policy covering automobile lessors in this State. *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 346, 338 S.E. 2d 92, 96; *Insurance Co. v. Broughton*, 283 N.C. 309, 315, 196 S.E. 2d 243, 247 (1973). Consequently, the Nationwide policy issued to NCNB must afford coverage for Talley's operation of the automobile at the time of the collision on 12 April 1981 if the relationship of lessor-lessee existed between NCNB and Talley at that time.

Defendants rely on the recent case of *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 338 S.E. 2d 92, which involved a lessee father who permitted his nineteen-year-old daughter to drive his leased automobile in violation of a lease provision prohibiting the use of the automobile by anyone under the age of twenty-one. The daughter was involved in a collision while driving the automobile. In finding that the lessor's insurer provided coverage under § 281 in spite of the lessee's clear violation of the lease agreement, this Court stated, "The public policy expressed in § 281 is that even where automobile rental agreements are violated it is preferable to provide coverage for innocent motorists rather than to deny such coverage because of the violation." *American Tours*, 315 N.C. at 348, 338 S.E. 2d at 97.

We believe that the *American Tours* case is distinguishable from the case *sub judice*. In *American Tours*, the lessor-lessee relationship unquestionably existed between the leasing corporation and the father of the underaged driver at the time of the collision; the lessee's violation of a single provision of the lease did not effectively terminate that relationship. In the case *sub judice*, considerably more than an isolated violation of the lease agreement had occurred prior to the time of the collision on 12 April 1981. Talley had not made the monthly rental payments required under the lease since February 1980. As a result of the information received by NCNB through its investigation in March 1980, NCNB clearly considered itself insecure. The nonpayment of rent and the insecurity of the lessor constituted events of default under the terms of the lease, permitting NCNB to terminate the lease. On 2 April 1980, NCNB sent a letter to Talley, demanding payment or, in the alternative, surrender of the collateral, the 1979 Chrysler automobile. This notice was mailed to Talley at the address that Talley had listed on the lease as his address; Talley's brother was living at that address at that time. Upon receiving no response from this notice, NCNB sought to repossess the automobile by assigning the account to an automobile recovery service and by having a warrant issued for Talley's arrest. Talley further violated the terms of the lease by allowing the insurance issued by USF&G to lapse and by denying NCNB the right to inspect the automobile. The actions of NCNB clearly manifested its termination and rejection of the lease. NCNB's failure to actually locate and repossess the automobile does not in any way alter the fact that the lessor-lessee relationship between NCNB and Talley had been terminated. To hold otherwise on the facts of this case would render a lessor powerless to terminate a leasing arrangement where for all intents and purposes a defaulting lessee has converted and secreted a leased automobile.

Defendants contend that the lessor-lessee relationship between NCNB and Talley remained in effect on 12 April 1981 despite Talley's default and NCNB's efforts to repossess the automobile because the lease provided that in the event of its termination prior to the expiration of its term, the lessee would not be released from any of his obligations under the lease. We see no merit in this contention since this provision of the lease is nothing more than an acceleration or liquidated damages clause providing

for lessor's remedy in the event of a premature termination of the lease for any reason. It cannot be argued successfully that this language extends the lessor-lessee relationship beyond the termination of the lease.

We hold, therefore, that the facts herein stated do not support a conclusion that Talley was NCNB's lessee at the time of the collision on 12 April 1981. Since no lessor-lessee relationship existed at the time of the collision, the Nationwide policy insuring NCNB affords no coverage under § 281.

III.

[2] In the alternative, defendants argue that the Nationwide policy, through its standard omnibus clause, provided coverage for Talley on 12 April 1981 because NCNB had not effectively withdrawn the permission it had originally granted to Talley for the use of the automobile and because NCNB acquiesced in and permitted Talley's continued use of the automobile after the violations of the lease occurred.

The Nationwide policy includes in its coverage, "The Named Insured" and "any other person while using an owned automobile or a hired automobile with the permission of the Named Insured, provided his actual operation . . . is within the scope of such permission . . . ." In order to determine whether such a clause, generally called an "omnibus clause," provides coverage for a specific accident, "[I]t is first necessary to decide whether the permission or consent of the named insured was granted to the person operating a motor vehicle at the time of the accident . . . and secondarily to determine whether the particular use made at the time was within the scope of the permission granted." 12 Couch on Insurance § 45:441 (1981). The permission that gives coverage under an omnibus clause may be express or implied. *Hawley v. Insurance Co.*, 257 N.C. 381, 384, 126 S.E. 2d 161, 164 (1962). This Court has explained the difference in the two kinds of permission in the following terms:

> Where express permission is relied upon it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, implied permission involves an inference arising from a course of conduct or relationship between the parties,

> in which there is mutual acquiescence or lack of objection under circumstances signifying assent.

Hawley v. Insurance Co., 257 N.C. at 384, 126 S.E. 2d at 164-165. In the case *sub judice*, defendants argue and the trial court found that on 12 April 1981, Talley was operating the 1979 Chrysler automobile with both the express and the implied permission of NCNB.

NCNB clearly gave Talley express permission to operate the automobile on 7 December 1979. However, in *Hawley*, this Court stated that express permission may be limited, for "To hold that the scope of any permission cannot be limited would be strange 'in view of the fact . . . owner could sue . . . bailee for conversion of the automobile in exceeding his permission.' " *Hawley*, 257 N.C. at 387, 126 S.E. 2d at 167 (quoting 7 J. Appleman, *Insurance Law and Practice* § 4366 (1962)). Moreover, "It is well established in this State that when the bailee deviates in a material respect from the grant of permission his use of the vehicle, while such deviation continues, is not a permitted use" within the meaning of an omnibus clause. *Wilson v. Indemnity Corp.*, 272 N.C. 183, 190, 158 S.E. 2d 1, 7 (1967). *See also Fehl v. Surety Co.*, 260 N.C. 440, 133 S.E. 2d 68 (1963).

The question of whether a deviation from express permission was minor or material has been addressed by this Court in several cases. In *Fehl v. Surety Co.*, 260 N.C. 440, 133 S.E. 2d 68, a prospective purchaser of an automobile obtained the permission of the salesman to drive the car seven miles down the road to the purchaser's home so that he could show the car to his wife; he promised the salesman he would return the car by 6:00 that evening. This Court found that the prospective purchaser's use of the automobile resulting in a collision the next day, seventy miles away, was outside the scope of the owner's permission under the omnibus clause of the owner's insurance policy because the facts showed a major deviation from the permitted use. Likewise, in *Wilson v. Indemnity Co.*, 272 N.C. 183, 158 S.E. 2d 1, this Court found that a bailee's use of the insured vehicle was outside the scope of the owner's permission where the owner gave bailee permission to drive the automobile down the road to a service station so long as the bailee returned the automobile within the hour, and the bailee was involved in a collision nearly twelve

hours later. Finally, in *Rhiner v. Insurance Co.*, 272 N.C. 737, 158 S.E. 2d 891 (1968), this Court found a material deviation from an express permitted use where the owner gave the bailee permission to drive the insured automobile ten blocks to pick up the bailee's clothing and to bring the automobile owner a bottle of liquor, and the bailee was involved in a car accident nearly two hours later, twenty miles away.

Although in the case *sub judice* it is unquestioned that NCNB, the insured owner, gave Talley its express permission to operate the automobile, this permission was not unlimited, but was subject to the terms and conditions of the lease agreement signed by Talley when he received possession of the automobile. Among the specific terms of the lease were the requirements that the lessee pay monthly rental fees, that the lessee maintain insurance on the leased vehicle, that the lessee not use the vehicle while under the influence of alcohol, and that the lessee advise NCNB of the location of the vehicle upon request by NCNB. In his operation of the automobile on 12 April 1981, Talley was in violation of all of the aforementioned terms and conditions of the lease. Therefore, we find that Talley's use of the automobile at the time of the collision was outside the scope of the express permission given by NCNB because it materially deviated from the express terms and conditions of the lease agreement.

Defendants also contend that NCNB's "insufficiently aggressive" efforts to recover the automobile after Talley's default and the fact that Talley had in his possession a valid registration card for the automobile, listing NCNB as the owner, create the inference that NCNB "acquiesced in" or impliedly permitted Talley's continued use of the automobile.

In showing an owner's implied permission to bring a use of the insured automobile under the coverage of an omnibus clause, "[T]he relationship between the owner and the user, such as kinship, social ties, and the purpose of the use, all have bearing on the critical question of the owner's implied permission for the actual use." *Bailey v. Insurance Co.*, 265 N.C. 675, 678, 144 S.E. 2d 898, 900 (1965). In the case *sub judice*, the relationship between the parties was governed by a lease, which is a contract that sets out the rights and duties of the parties to the relationship. A contention that an automobile use is impliedly permitted is strongly

negated by evidence showing that the use of the automobile is by virtue of a restricted express permission. *Rhiner v. Insurance Co.*, 272 N.C. 737, 739, 158 S.E. 2d 891, 893.

Although "It may be found that the insured has given implied permission where the named insured has knowledge of a violation of instructions and fails to make a significant protest," 6C J. Appleman, *Insurance Law and Practice* § 4365 (1979), such is not the case here. As recited above, when NCNB became aware of Talley's violations of the lease, it made efforts to contact him at his place of employment and at his home as designated in the lease agreement, sent a letter giving notice of default to the address designated in the lease, hired an automobile recovery bureau to repossess the car, and caused a warrant for Talley's arrest to be issued. These actions by NCNB constitute at the very least a "significant protest," and served to revoke the initial permission granted Talley to use the automobile. Likewise, implied permission cannot be inferred from the fact that at the time of the accident Talley had in his possession a valid registration card for the automobile. As the Court of Appeals pointed out, absent any findings as to how Talley obtained possession of the registration or that NCNB provided it to Talley, the mere fact that Talley possessed the registration card does not support a conclusion that NCNB acquiesced in Talley's use of the automobile.

For the reasons herein stated, we are of the opinion that the conclusions reached by the trial court that Talley had express or implied permission of NCNB to operate the automobile on 12 April 1981 are not sufficiently supported by that court's findings. Consequently, Nationwide's policy did not afford coverage for Talley's use of the automobile under the terms of the policy.

Therefore, it is the decision of this Court that the Nationwide insurance policy affords no coverage, compulsory or voluntary, for Talley's operation of the automobile on 12 April 1981. The decision of the Court of Appeals is therefore

Affirmed.

Justice MITCHELL dissenting.

For reasons well stated in Part III of the opinion of the majority, I agree that Talley had deviated materially from the per-

mission given him to use the vehicle in question, and that the standard omnibus clause of the Nationwide policy did not provide coverage for his use. I must respectfully dissent, however, from Part II of the majority opinion and from the result reached by the majority.

N.C.G.S. § 20-281 unambiguously provides in pertinent part that every "motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee . . . from any liability imposed by law for damages . . . caused by accident arising out of the operation of such motor vehicle . . . ." The clear legislative intent was to prevent any gap in North Carolina's compulsory liability insurance program by requiring that the lessor maintain liability insurance on all rented or leased vehicles so as to provide coverage for all rentees and lessees who might not have other insurance. As this Court pointed out in *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 338 S.E. 2d 92 (1986), N.C.G.S. §§ 20-281 and 20-279.21 are parts of a legislative package designed to protect innocent citizens from financially irresponsible motorists. We clearly indicated in *American Tours* that the liability insurance carrier for the lessor may not escape its duty to provide coverage under any policy required by N.C.G.S. § 20-281 by showing that the use of the motor vehicle by the lessee was in direct violation of the terms of the lease. This being the established law, I believe that such insurance coverage must be held to remain in force and effect until the expiration of the term of the lease or an earlier express termination of the lease.

The evidence before the trial court in the present case tended to show that, on 2 April 1980, North Carolina National Bank sent a letter to Talley at his address as shown in the lease agreement. That letter informed Talley that he was in default under the lease agreement. It then continued by stating:

> Accordingly, notice is herewith given that North Carolina National Bank makes demand that:
>
> You pay the entire unpaid "net balance" of $6,570.40.
>
> If the above demand is not met within five (5) days from this date, you are further advised to surrender to North Carolina

> National Bank any collateral which secured the account above identified.
>
> Your failure to comply with this demand within the five days will necessitate our taking legal action which will result in additional expense to you.

This letter of 2 April 1980 to the defendant was stipulated in evidence.

For me, the question which must be answered prior to a proper resolution of this case is whether the quoted letter of 2 April 1980 from North Carolina National Bank to Talley was an effective termination of the lease prior to the expiration of its term. Certainly, the terms of the lease itself gave North Carolina National Bank the authority to terminate it by reason of the default by Talley. Although not entirely free from ambiguity, the letter of 2 April 1980, when read in context with the other evidence in this case, would have supported a determination by the trial court that North Carolina National Bank had given Talley specific notice of termination of the lease and, therefore, had effectively terminated the lease prior to the expiration of its term. However, the trial court did not specifically focus on this question and made no such determination. Therefore, I would reverse the decision of the Court of Appeals and remand this case to that court for its further remand to the Superior Court, Rockingham County, for appropriate findings and conclusions and the entry of judgment thereon.

Justice FRYE *joins in this dissenting opinion.*

IN THE MATTER OF: WILLIAM VANCE STALLINGS, JUVENILE

No. 716PA85

(Filed 18 November 1986)

1. Criminal Law § 66.11; Infants § 17— showup of juvenile—court order not required

The statute prohibiting the use of certain nontestimonial identification procedures against juveniles without a court order, N.C.G.S. § 7A-596, does not require a court order for a "showup" of a juvenile conducted at the crime scene shortly after the crime occurred.

2. Criminal Law § 66.11; Infants § 17— showup identification of juvenile—no impermissible suggestiveness

A showup identification of a juvenile was reliable and not impermissibly suggestive in violation of due process under the totality of the circumstances where a breaking or entering victim was able clearly to observe two juveniles coming from her house; although the victim did not see the juveniles' faces, she accurately described the suspects in terms of age, race, hair color and dress; the victim's attention was focused on the juveniles; she consistently identified respondent juvenile as one of the perpetrators; and there was a lapse of only forty-five to sixty-five minutes between the original sighting and the subsequent identification.

Chief Justice BILLINGS concurring.

Justice MITCHELL joins in this concurring opinion.

Justice MARTIN dissenting.

Justices FRYE and PARKER join in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, 77 N.C. App. 592, 335 S.E. 2d 529 (1985), reversing an order of *LaBarre, J.*, at the 15 November 1984 Juvenile Session of the DURHAM County District Court, denying the juvenile's motion to suppress evidence from an investigatory "showup" and finding the juvenile to have violated N.C.G.S. § 14-54(a), felonious breaking or entering with intent to commit larceny therein. At the 12 December 1984 Juvenile Session of the DURHAM County District Court, *Read, J.*, presiding, the juvenile was adjudged delinquent. The juvenile appealed from both judgments. The Court of Appeals did not address the order of *Read, J.*, but reversed *Judge LaBarre's* denial of the juvenile's motion to suppress. The State's petition for discretionary review was granted on 7 April 1986. Heard in the Supreme Court 16 October 1986.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, John H. Watters, Assistant Attorney General, and Robert E. Cansler, Assistant Attorney General, for the State-appellant.

Susan K. Seahorn, Assistant Public Defender, for juvenile-appellee.

North Carolina Association of Police Attorneys, by Dawn S. Bryant, President, amicus curiae.

MEYER, Justice.

On 15 October 1984 at approximately 10:00 a.m., the victim, Mrs. Nell Knott, left her home to visit her neighbor Brenda Hamby. After having coffee, the two ladies went into Ms. Hamby's backyard to look at the tomatoes in her garden. While standing by the garden, the ladies observed two young boys coming out of the side door of Mrs. Knott's house. The side door was approximately thirty yards from where the ladies were standing. Mrs. Knott was shocked by the two boys coming out of her house. She yelled at them, saying "what are you doing in my house"? The boys began to run, and Mrs. Knott gave chase until she tired.

Failing to catch the two boys, Mrs. Knott returned to her home and checked the inside of her house. She noticed that the contents of her purse had been rearranged and a part of her wallet was out. She then dialed the 911 emergency telephone number and told the operator what had happened. Detective Crabtree arrived approximately fifteen to twenty minutes later.

Mrs. Knott described both boys as being fairly short. One of them had long brown hair and was wearing jeans and a black T-shirt with a picture on the back. The other boy had on a cap, a black coat, and jeans. Both suspects were described as white males.

After talking with the victim, Detective Crabtree drove in the direction the suspects had been last seen running and stopped at a convenience store located approximately one-quarter mile from the victim's home. Crabtree asked the store clerk if he had seen two white male juveniles in the store. The clerk replied that he had, and pointed behind a display rack. Crabtree walked behind the display rack and saw the two suspects "scrunched down" behind the display rack. Stallings was wearing a black T-shirt, with letters or writing on the back, and jeans. His companion, Drane, had on a black cap, a black jacket, tennis shoes, and jeans. Both suspects' jeans were wet and covered with beggar lice.

Detective Crabtree asked the boys to accompany him to Mrs. Knott's house. Crabtree and the suspects arrived at her house approximately thirty to forty-five minutes after he had left to search for the suspects. (The total time elapsed from the time the victim called the police to the arrival of the suspects back at her house was somewhere between forty-five and sixty-five minutes.)

Crabtree and the suspects got out of the patrol car and approached the victim. Detective Crabtree asked Mrs. Knott, "[A]re these the ones"? The victim first replied, "I don't know." Crabtree asked her to explain her answer. She responded, "I know those are the boys that came out of my house but I don't know what I want to do about it; I'm scared." Crabtree asked her two or three times to be sure he had the right suspects. Mrs. Knott responded that they were the ones and continued to question him about what would be done with them. Detective Crabtree then transported the two juveniles to the Sheriff's Department.

At the hearing before Judge LaBarre, Mrs. Knott testified, over objection, to the showup. She also made an in-court identification of the juvenile. The juvenile moved to suppress both the evidence regarding the showup and the in-court identification by Mrs. Knott. These motions were denied, and the juvenile appealed. The Court of Appeals reversed the denial of the motion to suppress. The State sought and this Court granted discretionary review of the Court of Appeals' judgment.

[1] The juvenile first argues that the pretrial identification procedure in this case—a "showup"—was conducted in violation of N.C.G.S. § 7A-596. This statute requires a court order before certain "nontestimonial identification" procedures are conducted. These include

> identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a juvenile.

Detective Crabtree did not secure a court order before taking the juvenile before the prosecuting witness. The juvenile argues that a showup is "similar" to a lineup and is, therefore, prohibited by the statute absent a court order. We disagree.

Provisions dealing with criminal procedure in the juvenile context are codified in Article 48 of Chapter 7A of the North Carolina General Statutes. A reading of this Article persuades us that in enacting these statutes, the legislature's primary concern was the growing problem of juvenile crime. This has been well

documented. *See* North Carolina Department of Crime Control & Public Safety, A Crime Control Agenda for North Carolina, at 338 (1978) ("The juvenile crime rate is the most serious problem confronting the criminal justice system today."). Article 48, then, must be read as a legislative attempt to deal with this problem.

The value of the showup as an investigatory technique has been recognized in many jurisdictions. *See, e.g., Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411 (1972); *Stanley v. Cox*, 486 F. 2d 48 (4th Cir. 1973), *cert. denied*, 416 U.S. 958, 40 L.Ed. 2d 760 (1975); *Terry v. Peyton*, 433 F. 2d 1016 (4th Cir. 1970); *State v. Perkins*, 141 Ariz. 278, 686 P. 2d 1248 (1984); *People v. Craig*, 86 Cal. App. 3d 905, 150 Cal. Rptr. 676 (1978); *People v. Weller*, 679 P. 2d 1077 (Colo. 1984); *State v. Hudson*, 508 S.W. 2d 707 (Mo. 1974); *Hudson v. State*, 675 S.W. 2d 507 (Tex. Crim. 1984). Showups are an efficient technique for identifying a perpetrator when the trail is still fresh. *See generally* J. Cook, Constitutional Rights of the Accused § 6:3, at n. 19 (2d ed. 1986). This Court has, on numerous occasions, sanctioned the use of showups. *See, e.g., State v. Turner*, 305 N.C. 356, 289 S.E. 2d 368 (1982); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

As the Court of Appeals observed, showups of adults do not require a court order and are admissible if due process requirements are met. *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967); *State v. Sanders*, 33 N.C. App. 284, 235 S.E. 2d 94, *disc. rev. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977). For the reasons expressed herein, there is an even more compelling reason that the same rule should apply to showups of juveniles, and we so hold.

While we have found no controlling authority involving showups of juveniles, the history of N.C.G.S. § 7A-596 indicates that its purpose was to empower officials to conduct the same identification procedures on juveniles as adults. Final Report, Juvenile Code Revision Committee, at 185, Comment C (1979). We find that legitimate juvenile law enforcement objectives may be met through the use of showups.

Another major concern of the legislature in enacting Article 48 was finding the least restrictive means to achieve legitimate law enforcement objectives. N.C.G.S. § 7A-594 sets out this goal:

A law-enforcement officer, when he takes a juvenile into temporary custody, should select the least restrictive course of action appropriate to the situation and needs of the juvenile from the following:

(1) To divert the juvenile from the court by

a. Release;

b. Counsel and release;

c. Release to parents;

d. Referral to community resources;

(2) To seek a petition;

(3) To seek a petition and request a custody order.

An examination of the nontestimonial identification techniques listed in N.C.G.S. § 7A-596, including lineups, reveal that they are all methods that intrude significantly upon the juvenile's privacy. The showup, by contrast, is a much less restrictive means of determining, at the earliest stages of the investigation process, whether a suspect is indeed the perpetrator of a crime. If not, the innocent juvenile can be released with little delay and with minimal involvement with the criminal justice system. If so, the juvenile can be expeditiously processed and intervention begun immediately. The showup thus serves the dual goals of protecting the juvenile from more restrictive investigatory techniques such as those listed in the statute and of expediting criminal investigations.

If, as the juvenile contends, the legislature intended to absolutely forbid showups without a court order, this policy of least restriction would be severely undercut. If we were to adopt the reasoning and argument advanced by the juvenile here, it would mean that if an officer reached a crime scene immediately upon the happening of a break-in and found the juvenile perpetrator huddled under the porch of the house he had just fled, the officer could not ask the eyewitness homeowner if the juvenile was the one who the homeowner had just seen inside the house. Such a result would be absurd and could not have been intended by our legislature in enacting N.C.G.S. § 7A-596. The juvenile's reading of the statute would effectively eliminate the showup from the repertoire of investigative techniques available to law enforce-

ment officers. We hold that the legislature did not intend this result. We find that *State v. Norris*, 77 N.C. App. 525, 335 S.E. 2d 764 (1985), upon which the juvenile relies, does not accurately reflect the intent of the legislature in this regard.

[2] The juvenile argues, in the alternative, that even if the statute does not expressly forbid showups without court orders, the showup conducted in this case violated the fourteenth amendment to the United States Constitution. The juvenile correctly notes that the constitution prohibits pretrial identification procedures that are so suggestive as to pose a danger of misidentification. *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401 (1972). There have been cases where showups were invalidated for this reason. *See, e.g., Smith v. Coiner*, 473 F. 2d 877 (4th Cir. 1973); *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978). Judge LaBarre, sitting as the fact-finder, determined that the showup was not impermissibly suggestive and denied the juvenile's motion to suppress. The juvenile nevertheless argues that the procedure followed in this case was constitutionally infirm. Again, we disagree.

In determining whether an identification is reliable, the *Biggers* Court adopted a "totality of the circumstances" approach. Some of the factors that may be examined in determining the reliability of a showup identification are (1) the witness' opportunity to observe the accused, (2) the witness' degree of attention, (3) the accuracy of the witness' description, (4) the witness' level of certainty, and (5) the time elapsed between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. at 199, 34 L.Ed. 2d at 411. *See also State v. Lyszaj*, 314 N.C. 256, 333 S.E. 2d 288 (1985); *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977).

Applying the above factors to the case at hand, we find that the showup identification was reliable. Mrs. Knott was able to observe clearly the boys coming from her house. While it is true that the boys' faces were not seen, the victim was nevertheless able to give the investigating officer information regarding their race, dress, hair color, size, and approximate age. It is clear that Mrs. Knott's attention was focused on the boys who had come running from her house. Her motivation to observe carefully was great; her susceptibility to distraction slight. The description given to the detective accurately described the suspects in terms

of age, race, hair color, and dress. While the juvenile makes much of the fact that Mrs. Knott had originally seemed unsure of her identification, it became clear that her uncertainty was merely a concern for what would happen to the boys she had identified. She consistently identified this juvenile as one of the perpetrators. Finally, there was a lapse of only forty-five to sixty-five minutes between the original sighting and the subsequent identification. This factor also militates in favor of the validity of this showup.

In summary, we hold that the legislature did not intend to preclude the use of the showup in juvenile investigations. This technique serves the important law enforcement objective of efficiency and protects the juvenile from more intrusive identification techniques. While a juvenile is, of course, protected from showups that are so suggestive as to be unreliable, we agree with the trial court that the showup in this case was properly conducted and properly admitted into evidence.

The juvenile makes several other arguments based upon the premise that the showup in this case was impermissible. Also, the North Carolina Association of Police Attorneys, as *amicus curiae*, suggests that if we find the showup to be prohibited in this case, we decide that showups without court orders are nonetheless permissible in cases where juveniles are tried as adults. Since we have held that the showup was permissible under both the statute and the constitution, we need not address these other concerns.

Reversed.

Chief Justice BILLINGS concurring.

When the identical definition of a term appears in two places in our General Statutes and a question arises as to the interpretation of the term, I find it instructive to consider the context and history of both definitions in determining the meaning which the General Assembly intended.

The term "nontestimonial identification" first appeared in North Carolina statutes in 1973 as part of Article 14 of the Criminal Procedure Act, Chapter 15A. A review of that Article and of case law regarding identification procedures known as

showups makes it obvious that showups were not intended to be covered by the definition of nontestimonial identification contained in N.C.G.S. § 15A-271.

"Showup" is a term used for an identification procedure that involves a one-on-one confrontation between a suspect and a witness. Because no person is exhibited to the witness other than the one selected by the law enforcement agent as the likely perpetrator of the crime, the procedure is inherently suggestive. However, that suggestiveness is not alone sufficient to require suppression of the identification; the United States Supreme Court has applied a "totality of the circumstances" test for the courts to apply in considering whether the procedure used was likely to have resulted in mistaken identification, considering its suggestiveness. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140 (1977).

When the United States Supreme Court addressed in *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967), the constitutionality of using evidence derived from showups, it emphasized the urgent necessity for utilizing that procedure in the particular case as a reason for the Court's approval. Necessity in that case resulted from the fear that the victim/witness might die from the wounds inflicted and be unavailable for a later, more informal, identification. Although later cases make it clear that urgent necessity is not an absolute requirement in support of the constitutionality of suggestive identification procedures, *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140, nevertheless the showup is generally considered to be a tool to be used only in situations which justify immediate action. *See Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411 (1972). When in 1973 the General Assembly enacted N.C.G.S. § 15A-271 defining "nontestimonial identification," the list of identification procedures did not specifically include showups, for a very good reason: showups as normally conducted by their very nature could not be subjected to the 72-hour notice requirement of N.C.G.S. § 15A-277. Thus, it is my view that the statutory definition of nontestimonial identification was not intended to include the exhibition of a suspect to a witness at or near the scene of a crime shortly after the crime occurred and shortly after the suspect's apprehension.

When N.C.G.S. § 7A-596 was enacted in 1979, prohibiting the use of certain procedures against a juvenile without a court

order, the statutory definition of "nontestimonial identification" in the earlier statute, N.C.G.S. § 15A-271, was carried forward without change into § 7A-596. Because I believe that the same definition was not intended to mean one thing in one place within the General Statutes and something else in another place, I concur in the majority view that the juvenile statute was not intended to prohibit showups and that a reasonably conducted showup wherein a suspected juvenile is exhibited for identification to a witness shortly after an offense and the juvenile's lawful apprehension does not violate N.C.G.S. § 7A-596.

Justice MITCHELL joins in this concurring opinion.

Justice MARTIN dissenting.

I respectfully dissent. Contrary to the majority's holding, I believe that careful scrutiny of N.C.G.S. § 7A-596 demonstrates that showups are within the contemplation of the statute. The legislature clearly drafted its definition of nontestimonial identification procedures so that it logically must include showups. In listing the types of procedures requiring court orders, N.C.G.S. § 7A-596 reads "voice samples, photographs, and lineups or similar identification procedures requiring the presence of a juvenile." The majority seems to argue that showups are much less intrusive upon a juvenile's privacy when compared with all of the listed procedures and therefore are not "similar" procedures under the statute. I fear the majority misunderstands the syntax of the sentence in question. The phrase "or similar identification procedures" does not refer back to the entire list (as it would if the sentence read "voice samples, photographs, lineups, or similar identification procedures") but instead refers only to the word "lineups." Overlooking one important comma and the word "and" changes the meaning entirely. If we are to interpret the statute as it was written by the legislature, we need compare showups only to lineups in determining if they are indeed similar procedures.

While a showup usually occurs earlier in the investigative process, in purpose and in practice it is closely related to a lineup and has been consistently treated as similar by the courts. *See Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967); *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149 (1966). Like the

lineup, it is an eyewitness-oriented procedure which seeks to identify the perpetrator of a crime by allowing the witness to view the suspect. The majority fails to explore adequately any perceived dissimilarities between showups and lineups, but makes much of the fact that N.C.G.S. § 7A-594 directs law enforcement officers to pursue the "least restrictive course of action" when taking juveniles into custody. The majority reasons that showups, because they may occur early in the investigation and thus allow quick release from suspicion, constitute a minimal intrusion upon the juvenile. This is most emphatically not the case.

Showups are recognized to be innately more suggestive than lineups. *United States v. Wade*, 388 U.S. at 234, 18 L.Ed. 2d at 1161; *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128, 59 L.Ed. 2d 90 (1979). They must be used with great caution to avoid infringing upon constitutional rights. In labelling the showup as unrestrictive, the majority goes so far as to claim that the procedure actually protects the juvenile more than other identification techniques would. I believe this assertion erroneously equates protection with convenience. It is unclear to me what benefit the juvenile can derive from being subjected to the dangers of an inherently suggestive identification performed without a court order and without the presence of an attorney. While the fact that the procedure is over quickly may expedite the investigation, it potentially imperils the rights of the juvenile far more than the less suggestive lineup would and must fail the least-restrictive-means test for that reason. Even accepting the majority's argument that the juvenile benefits from a supposedly quicker release, the gain is an inconsequential one when compared to the protections lost. In any case, I remain unconvinced that obtaining a court order creates significant inconvenience and delay. Since juvenile suspects are routinely released into the custody of their parents, the length of the juvenile's detention would not materially increase if a court order were obtained before the showup is conducted. Such an order could easily be obtained once the juvenile has been released from temporary police custody, and the use of showups would not be eliminated completely. The majority's red herring concerning a juvenile discovered under the porch of the victim's house does not prove the need for showups without a court order. In such a situation, the officer's investigation is or reasonably should be focused upon a

single prime suspect who has been closely connected to the scene of the crime. No hardship results in seeking a court order before conducting a showup, lineup, or other identification procedure.

In my view, the enactment of a lengthy and detailed juvenile code shows great concern on the part of the legislature not only for dealing effectively with juvenile crime, as the majority suggests, but also for safeguarding the individual rights of juveniles. Juveniles are not, after all, miniature adults. Our criminal justice system recognizes that their immaturity and vulnerability sometimes warrant protections well beyond those afforded adults. It is primarily for that reason that a separate juvenile code with separate juvenile procedures exists.

I find persuasive evidence in the structure of the juvenile code and in the history of N.C.G.S. § 7A-596 itself that the legislature intended to favor juvenile protections over law enforcement expediency. Although one of the purposes of N.C.G.S. § 7A-596 is to authorize nontestimonial identification orders like those allowed for adults, the legislature is careful to indicate that the adult criminal code is a separate entity and that adult identification procedures will not apply to persons charged under the juvenile code. This implies that the two identification sections, while identically worded, will not always be identically interpreted and applied. I would point out that the other provisions relating to nontestimonial identification of juveniles are similar to those in adult cases but contain some significant modifications. For example, nontestimonial identification is authorized only if the offense would be punishable by more than two years in prison if committed by an adult. *See* N.C.G.S. § 7A-598 (1986). Also, any person conducting nontestimonial identification of a juvenile pursuant to N.C.G.S. § 7A-596 without a court order is guilty of a misdemeanor. *See* N.C.G.S. § 7A-602 (1986).

Such modifications demonstrate the legislature's intention to treat juvenile nontestimonial identification much more conservatively than similar adult identifications, limiting and controlling the situations in which juveniles can be subjected to the procedures. The legislature clearly was not willing to sanction as broad a use of juvenile nontestimonial identification as that in adult cases. It defies logic to suggest that the legislature, in enacting these juvenile protections, meant to sacrifice juveniles to

suggestive showup identifications for the sake of expediting an investigation. Nowhere does the legislative history of N.C.G.S. § 7A-596 even remotely hint at such a result. The majority, in looking to the Juvenile Code Revision Committee's report for guidance, ignores the implications of the committee's commentary. The committee plainly states, in reference to N.C.G.S. § 7A-596, that "[t]his section requires that an officer obtain a court order before fingerprinting, photographing or conducting *any other nontestimonial identification* on a juvenile." Final Report, Juvenile Code Revision Committee, at 185, Comment C (1979) (emphasis added). Far from indicating that the statute was drafted with some exclusions in mind, this language is all-encompassing. It demonstrates the committee's desire to place a comprehensive prohibition on the conducting of juvenile identification procedures without a court order.

Taking into account the similarity between lineups and showups, the greater risk to juvenile rights posed by showups, and the legislative intent to provide broader protections to juveniles, I would affirm the holding of the Court of Appeals that showups require a court order under N.C.G.S. § 7A-596.

The interesting question raised by the amicus curiae brief must await resolution until presented in a proper case.

Justices FRYE and PARKER join in this dissenting opinion.

R. DOUGLAS LEMMERMAN, GUARDIAN AD LITEM FOR JONATHAN SHANE TUCKER, A MINOR, AND SYLVIA A. TUCKER v. A. T. WILLIAMS OIL COMPANY

No. 224A86

(Filed 18 November 1986)

1. Appeal and Error § 57.2— findings of jurisdictional fact—conclusiveness on appeal

The Supreme Court has traditionally considered the superior court's findings of jurisdictional fact to be binding on appeal if supported by the evidence when the question was whether the Industrial Commission or the superior court had jurisdiction over a claim.

2. Master and Servant § 49.1— workers' compensation—minor as employee of defendant

Findings by the trial court that defendant's manager had hired the minor plaintiff, that he had authority to hire and fire employees for defendant, and that the jobs the minor did were in the course of defendant's business and that he was engaged in doing them when he fell were supported by the evidence and sufficient to support the court's conclusion that the minor plaintiff was an employee of defendant at the time of the accident. Furthermore, the parties' own conclusion about their legal relationship was not binding on the court, nor was the manager's denial of hiring the minor; failure of the manager to comply with certain procedural formalities did not affect the minor's status as an employee; the child did not perform gratuitous services; and the child was not the personal employee of the manager.

Justice MARTIN dissenting.

Justice PARKER joins in this dissenting opinion.

APPEAL by plaintiffs from a decision of the North Carolina Court of Appeals, 79 N.C. App. 642, 339 S.E. 2d 820 (1986), *Webb, J.*, dissenting, which affirmed an order of the Superior Court, FORSYTH County, dissmissing plaintiffs' action for lack of subject matter jurisdiction. Heard in the Supreme Court 8 September 1986.

Molitoris & Connolly, by Theodore M. Molitoris and Anne Connolly, for plaintiff-appellants.

Nichols, Caffrey, Hill, Evans & Murrelle, by R. Thompson Wright, for defendant-appellee.

FRYE, Justice.

The sole issue on this appeal is whether the Court of Appeals correctly affirmed the trial court's conclusion that plaintiff Shane Tucker was an employee of the defendant, A. T. Williams Oil Company. For the reasons set forth in this opinion, we conclude that the Court of Appeals was correct in so affirming.

On 1 December 1982, plaintiff Shane Tucker, then aged eight, slipped on a sidewalk on defendant's property and fell, cutting his hand. He and his mother, plaintiff Sylvia Tucker, filed this action against defendant on 26 June 1984. In their complaint, plaintiffs alleged in essence that Shane Tucker's injuries were proximately caused by defendant's negligence. They sought damages for medical expenses, lost wages, and pain and suffering. R. Douglas Lem-

merman was appointed *guardian ad litem* for the minor plaintiff Shane.

Defendant filed an answer and raised as one of its defenses lack of subject matter jurisdiction. It asserted that the child Shane was its employee as defined by the Workers' Compensation Act and that the Industrial Commission accordingly had exclusive jurisdiction over plaintiffs' claim. Following preliminary discovery, defendant moved to dismiss for lack of subject matter jurisdiction. Upon the parties' stipulation that the trial judge find jurisdictional facts, Judge DeRamus made findings and concluded that Shane was an employee injured within the course and scope of his employment with defendant as defined in the Workers' Compensation Act. The judge therefore dismissed plaintiffs' action for lack of subject matter jurisdiction. Plaintiffs appealed to the Court of Appeals, which affirmed with a dissent by Webb, J., on the question of whether the evidence supported the conclusion that plaintiff Shane was an employee of defendant.

"By statute the Superior Court is divested of original jurisdiction of all actions which come within the provisions of the Workmen's Compensation Act." *Morse v. Curtis*, 276 N.C. 371, 375, 172 S.E. 2d 495, 498 (1970). The Act provides that its remedies shall be an employee's only remedies against his or her employer for claims covered by the Act. N.C.G.S. § 97-10.1 (1985). Remedies available at common law are specifically excluded. *Id.* Therefore, the question of whether plaintiff Shane Tucker was defendant's employee as defined by the Act is clearly jurisdictional. *See Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976); *Morse v. Curtis*, 276 N.C. 371, 172 S.E. 2d 495. This issue is not affected by the fact that the minor may have been illegally employed because the Act specifically includes within its provisions illegally employed minors.[1] N.C.G.S. § 97-2(2) (1985). *See also McNair v.*

1. The argument has been made that since the minor plaintiff may have been illegally employed, *see* N.C.G.S. § 95-25.5, defendant should not be allowed to prevail upon this defense. However, "[a] universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E. 2d 806, 808 (1964). "If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and . . . dismiss the suit." *Id.* Therefore, if the Industrial Commission has jurisdiction over the claim of an illegally employed minor and the superior court does not, the superior court would have the duty to raise this issue *ex mero motu*.

Ward, 240 N.C. 330, 82 S.E. 2d 85 (1954); *Lineberry v. Mebane*, 219 N.C. 257, 13 S.E. 2d 429 (1941).

[1] The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court. *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645 (1965). When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. *In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962). Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction. *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E. 2d 806, 808 (1964). In the instant case, the question of subject matter jurisdiction was raised before the superior court. That court accordingly followed the proper procedure and made findings of fact and conclusions of law in resolving the issue. *Id.* The threshold question on this appeal is whether the superior court's findings of jurisdictional fact are binding on this Court on appeal if supported by the evidence.

This Court has held repeatedly that jurisdictional facts found by the Industrial Commission, even when supported by competent evidence, are not binding upon the courts on appeal, and that that the reviewing court has the duty to make its own independent findings. *See Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E. 2d 215 (1983); *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280; *Aycock v. Cooper*, 202 N.C. 500, 163 S.E. 569 (1932). Plaintiffs argue that this Court should similarly have the duty to find its own jurisdictional facts on appeals from the superior court even when the superior court has made findings of jurisdictional fact.

Our review of the applicable law in this State, however, shows that this Court had traditionally considered the superior court's findings of jurisdictional fact to be binding on appeal if supported by the evidence when the question was whether the Industrial Commission or the superior court had jurisdiction over a claim.[2] *See Morse v. Curtis*, 276 N.C. 371, 378, 172 S.E. 2d 495, 501

2. As a historical note that may be of some interest, originally, appeals from the Industrial Commission were to the superior court. 1929 N.C. Sess. Laws ch. 120, § 60. The superior court sat in this capacity as a reviewing court, and the find-

("We recognize the oft-repeated rule that findings of fact by a trial judge are conclusive when supported by competent evidence . . ."); *Burgess v. Gibbs*, 262 N.C. 462, 466, 137 S.E. 2d 806, 809 ("Plaintiff's assignments of error to the court's findings of fact are overruled, because an examination of the evidence in the record . . . shows that all challenged findings of fact are supported by competent evidence. Consequently, the challenged findings . . . are binding and conclusive upon us . . ."). We see no reason to disturb this rule. Accordingly, we turn now to an examination of the sufficiency of the evidence to support the facts found.

[2] The trial judge made the following findings of facts pertinent to this issue:

> 3. Prior to the incident referred to in the complaint, Ken Schneiderman was employed as the manager of the defendant's place of business on Wendover Avenue in Greensboro, North Carolina. As manager, Schneiderman had the authority to hire and fire such employees as he deemed necessary to assist him in the operation of the business, and all wages paid to any of the employees which he hired were deducted from the commission which he received from the defendant.
>
> 4. Ken Schneiderman employed the minor plaintiff, and paid him varying amounts to perform duties at the defendant's service station—convenience store, including putting up cigarettes, picking up trash, stocking bottles in the cooler, and other odd jobs from time to time while the minor's mother, Sylvia A. Tucker, worked as a cashier for the store.
>
> EXCEPTION NO. 1

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ings of the Industrial Commission were generally binding upon it if supported by any competent evidence. *See Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280. However, the Commission's findings of jurisdictional fact were not binding on the superior court and the superior court could make independent findings. *Id.* This Court consistently held, however, that the superior court's findings were binding on review by this Court if supported by the evidence. *See, e.g., Burgess v. Gibbs*, 262 N.C. 462, 137 S.E. 2d 806. When the legislature altered the manner of appeal from the Industrial Commission in 1967, by-passing the superior court and going directly to the Court of Appeals instead, *see* 1967 N.C. Sess. Laws ch. 669, this Court retained the rule that the Commission's findings of jurisdictional fact were not binding on the reviewing court. *See Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E. 2d 215; *Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257. However, since appeals no longer come *via* the superior court, retention of this rule meant that the appellate courts themselves were forced to make findings of jurisdictional facts.

5. At the time the minor plaintiff was injured in the accident referred to in the complaint, the minor plaintiff had been performing chores of stocking cigarettes, picking up trash, and other work which was in the course of the trade or business of defendant A. T. Williams Oil Company.

EXCEPTION NO. 2

6. At the time of the incident described in the complaint, the minor plaintiff Jonathan Shane Tucker was a casual employee of defendant A. T. Williams Oil Company, and was performing duties within the course of the trade and business of A. T. Williams Oil Company in the operation of the gas station and convenience store on Wendover Avenue in Greensboro, North Carolina.

EXCEPTION NO. 3

7. Defendant A. T. Williams Oil Company employs more than four persons, and is subject to the provisions of the North Carolina Workers Compensation Act, N.C.G.S. § 97-1, *et seq.*

Our review of the record shows that there is ample evidence to support each disputed finding.[3]

Plaintiff Shane testified at his deposition that he routinely accompanied his mother to her job as part-time cashier at defendant's store and service station, a Wilco. According to his description, he ordinarily did his homework, ate a snack, and performed odd jobs about the station. These jobs consisted of picking up trash in the store, taking out the garbage, and stocking cigarettes and drinks. He had been doing these jobs for almost a month at the time of the accident. The child said that the jobs generally took him between half an hour and one hour to complete. In return, the store manager, Ken Schneiderman, would pay him a dollar, occasionally more depending on the amount of work he had done. A fair reading of the child's testimony discloses that he clearly expected to be paid for his efforts.

3. Although plaintiff did not except to finding #3, we note that the evidence supporting it is uncontradicted.

The child also testified that on the day of the accident he had nearly finished his tasks and was on his way to ask Schneiderman if there was anything else Schneiderman wanted him to do when he slipped and fell. He said at one point that he believed that Schneiderman did later give him his dollar, although he was not clear on this point.

The child's mother, Sylvia Tucker, corroborated Shane's account. She testified that at the time of the accident, she was working from 4 p.m. to 7 p.m. as a part-time cashier at Wilco. Schneiderman had Shane "put up stock, straighten the shelves up and pick up trash inside the building" and occasionally outside as well. Mrs. Tucker testified that her understanding was that the child was going to be paid for what he did. Although she told Schneiderman originally that Shane would work without being paid, he rejected this offer and told her and the child that he would pay Shane for his work. She believed that Schneiderman paid Shane a dollar a day.

Schneiderman signed an affidavit, introduced into evidence, stating that he had hired Shane Tucker for a few dollars to put up cigarettes but with no set hours or wages.

Also before the judge was plaintiffs' verified complaint, which describes plaintiff Shane as defendant's employee and says that he was "casually hired and paid $1.00 a day by the manager of defendant's station, Ken Schneiderman, to put up cigarettes and to do other odd jobs on defendant's premises whenever assistance was needed . . . ."

We believe that this evidence amply supports the trial judge's findings that Schneiderman, who had the authority to hire and fire employees, hired the minor plaintiff to do odd jobs as needed in defendant's service station/convenience store business. Specifically, these tasks included stocking cigarettes and drinks, and picking up trash. At the time of the accident, Shane was engaged in doing these tasks.

We also agree with the trial judge's conclusion that plaintiff Shane was defendant's employee at the time of the accident. Once the underlying facts are established, the nature of the relationship is a question of law and fully reviewable on appeal. *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944). This Court has previously defined an employee as follows:

'An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the Workmen's Compensation Act . . . .'

Lucas v. Stores, 289 N.C. at 219, 221 S.E. 2d at 261 (quoting from *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 173 S.E. 603 (1934)). The statutory definition (N.C.G.S. § 97-2(2) (1985)) adds nothing to the common law definition. *Id.* The trial judge found that Schneiderman had hired the child, that he had authority to hire and fire employees for defendant, and that the jobs Shane did were in the course of defendant's business and that he was engaged in doing them when he fell. We believe these facts, taken together, will support the conclusion that the plaintiff Shane was an employee of defendant at the time of the accident.

Plaintiffs, however, contend that the evidence does not support the facts and the facts do not support the conclusion.

First, they argue that none of the parties considered Shane to be defendant's employee. They note that Shane at one point said that his employment was "not exactly" a job. Furthermore, in his deposition testimony, Schneiderman explicitly denied hiring Shane, retracting the statement in his affidavit.

We do not find plaintiffs' argument on this point persuasive.

Initially, we note that the parties' own conclusion about their legal relationship is not binding on the court. *See Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E. 2d 35 (1980); *see also Rucker v. Hospital*, 285 N.C. 519, 206 S.E. 2d 196 (1974). Moreover, immediately after Shane said that his employment was "not exactly" a job, he described the relationship as helping in the store and getting paid for it. He repeated this description in a later portion of his testimony.

Nor do we believe that Schneiderman's denial of hiring Shane was binding upon the trial judge. Schneiderman essentially gave inconsistent testimony. Initially, in his affidavit, he said that he had hired Shane. Later, in his deposition, he denied hiring him. His deposition testimony contradicted that of Shane and Mrs. Tucker on some points—most notably on the frequency of the child's presence at the Wilco. The trial judge resolved these con-

tradictions and declined to adopt Schneiderman's version. His findings are not vitiated merely by the presence of conflicting evidence. *Morse v. Curtis*, 276 N.C. at 378, 172 S.E. 2d at 501. We also note on this issue that Schneiderman repeatedly said that he could not remember details and was evasive on important points. Furthermore, at one point in his deposition, he said, "He [Shane] wasn't an employee. Did you ever hear of child labor? You know, I'm smart enough to know that."[4]

Moreover, we note that Mrs. Tucker was unsure of her own status. She testified that she did not know whether she herself was a "real employee."

Second, plaintiffs argue that Shane could not have been an employee because Schneiderman did not comply with certain procedural formalities. He did not take an application from Shane or report him on the list of employees he turned into his supervisor for withholding purposes. His normal practice was to pay employees from the cash register;[5] he paid Shane from his pocket.

We do not believe that any of these factors is dispositive. Our Court of Appeals has held that failure to follow technical procedures such as withholding F.I.C.A. and income taxes is not controlling on the issue of whether an employer-employee relationship exists. *See Durham v. McLamb*, 59 N.C. App. 165, 296 S.E. 2d 3 (1982); *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E. 2d 35. We also do not think that Schneiderman's method of paying Shane was as significant under the facts of this case as it might otherwise be, because all wages came out of Schneiderman's commission. He therefore paid all of the employees at Wilco out of his own money.

Third, plaintiffs contend that Shane was not an employee but instead performed gratuitous services. In addition to Schneiderman's testimony denying that he hired Shane, rejected by the trial judge, plaintiffs cite Mrs. Tucker's original statement to

4. Schneiderman testified that he hired his own children to work at the Wilco and that defendant promoted this arrangement because "you could work your kids for less money." *See also* § 95-25.5(i) (1985) (most of the provisions of the statute prohibiting child labor do not apply to their parents).

5. He paid their net pay out of the register and submitted their names and pay records to his supervisor for payment of payroll taxes.

Schneiderman that he did not have to pay the child. However, this evidence in fact supports the opposite conclusion, that Shane was an employee. Schneiderman was offered the chance to avail himself of Shane's gratuitous services, but he specifically rejected it and said that he wanted to pay the child for his work. The evidence shows, and the judge found, that he did so.

Finally, plaintiffs contend that if Shane was an employee, he was Schneiderman's personal employee. We disagree. Schneiderman had the authority to hire employees for defendant, and the evidence shows and the trial judge found that the tasks the child performed were in the course of defendant's business, not Schneiderman's personal affairs. We find the facts of this case similar to those of *Michaux v. Bottling Co.*, 205 N.C. 786, 172 S.E. 406 (1933). In *Michaux*, defendant company gave its truck drivers permission to hire and fire helpers as needed to assist them in the distribution of defendant's products. The drivers paid the helpers out of their own wages or commissions. Plaintiff's intestate, a minor, was such a helper who was killed while assisting in a delivery. This Court, noting that the deceased minor's services had been "necessary to the proper and efficient distribution" of defendant's products, essentially found that the deceased was defendant's employee at the time of his death.

For all of the foregoing reasons, the decision of the Court of Appeals is affirmed.

Affirmed.

Justice MARTIN dissenting.

I must respectfully dissent. First, the majority opinion allows the defendant corporation to profit from its own illegal act. Here, defendant corporation claims that it hired plaintiff Shane, an eight-year-old child, as an employee. Defendant's act would be a direct violation of N.C.G.S. § 95-25.5(d), punishable by imposition of civil penalties. This statute establishes the public policy of this state that it is unlawful for employers to employ children thirteen years of age or less.

The public policy of North Carolina also will not permit a wrongdoer to take advantage of or enrich itself as a result of its own wrong. *Carver v. Carver*, 310 N.C. 669, 314 S.E. 2d 739 (1984);

In re Estate of Perry, 256 N.C. 65, 123 S.E. 2d 99 (1961); *Garner v. Phillips*, 229 N.C. 160, 47 S.E. 2d 845 (1948). "It is a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong . . . ." *Garner* at 161, 47 S.E. 2d at 846. Further citation of authority is not necessary for this basic principle of law. The principle is especially applicable where, as here, the power of the parties is so disparate—an eight-year-old child versus a large corporation! The inequity of defendant's plea in bar is thus magnified by the relationship of the parties.

Defendant corporation seeks to defeat the infant plaintiff's cause for personal injuries resulting from the negligence of defendant by using as a shield its own unlawful act of employing the child. This case is not like *McNair v. Ward*, 240 N.C. 330, 82 S.E. 2d 85 (1954), where plaintiff's own evidence established that he was an employee of defendant. In *McNair* the defendant did not present any evidence. To the contrary, here defendant affirmatively attempted to prove that plaintiff child was its employee. Defendant's unlawful employment of the child was one of the direct causes of his injuries, and defendant now seeks to use that unlawful employment to avoid responsibility for those injuries. This will not do, and this Court should not in all good conscience permit defendant to take advantage of its own wrongful act.

Even if this Court allows defendant to rely upon an inequitable defense, the evidence fails, in at least one respect, to support a finding that plaintiff child was defendant's employee. We must not overlook that defendant has the burden of proof to sustain its plea in bar. As the majority states, the right to demand payment from the *employer*, A. T. Williams Oil Company, is an essential element of the employment status. Defendant has failed to carry its burden as to this element.

The evidence in many respects is in conflict. However, defendant has failed to produce a shred of evidence that the eight-year-old child had a right to demand payment for his services from A. T. Williams Oil Company. Also, there is no evidence that plaintiff child could have made such a demand from Schneiderman, albeit defendant argues that plaintiff was its employee and not Schneiderman's. All of the testimony showed that the infrequent payment of amounts ranging from twenty-five cents to a dollar came out of Schneiderman's own money, out of his own

pocket. The payments were not made from the cash register, as were payments to defendant's employees. Thus, the record is simply devoid of any evidence that the child could have demanded payment from the corporate defendant for services he rendered to Schneiderman.

On the other hand, the record is replete with evidence that plaintiff child was *not* an employee of defendant's. Shane was not a listed employee for workers' compensation purposes; his name was not reported to the defendant corporation for tax withholding purposes; Schneiderman testified explicitly that Shane was not an employee.

The majority relies upon *Michaux v. Bottling Co.*, 205 N.C. 786, 172 S.E. 406 (1934). The status of plaintiff as an employee was not at issue in *Michaux*. The Industrial Commission made no finding with respect to whether plaintiff was an employee of defendant's, nor did this Court in its opinion. The issue decided in *Michaux* was whether the accident arose out of and in the course of employment, not whether plaintiff was an employee.

I submit that the more analogous case is *Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976). Lucas had been discharged as an employee of defendant's. His wife also worked for defendant on a double shift from 7:00 a.m. to 11:00 p.m. After Lucas was discharged, he would go with Mrs. Lucas to work and assist her in managing the convenience store. Defendant's district manager knew that Lucas was at the store and told Mrs. Lucas to let Lucas run the cash register "as long as the ABC law didn't catch him." He also worked on the books and made bank deposits. Mrs. Lucas paid Lucas $2.00 an hour for his work out of her own paycheck. During the course of a robbery of the store, Lucas was shot and killed, and his widow brought a claim for compensation under the Act. The Industrial Commission found that he was an employee at the time in question. The Court of Appeals reversed the Commission, and this Court affirmed. The Court stated that the acts of Lucas in going with his wife to the store and helping out in the work were entirely consistent with the desire of an unemployed husband to be with his wife at her work and to assist her in the performance of her duties, especially where the work location was likely to attract armed robbers at night. This Court found no contract of employment existed.

Likewise, here defendant desired to employ Sylvia Tucker, plaintiff child's mother, to work in the convenience store. She could not do so unless defendant agreed to let her eight-year-old son come to the store after school and remain until she completed her work. Defendant agreed to this plan. While on the premises the child from time to time performed menial tasks for Schneiderman, who sometimes would give the boy payments ranging from twenty-five cents to a dollar for his work. This is entirely consistent with the problem of a working mother who needs employment but must also supervise her young child. Shane was on the premises not as an employee of the corporate defendant, but because it was necessary in order for his mother to work. Such are the demands of our modern society. As in *Lucas*, plaintiff child was not an employee of defendant's.

Assuming arguendo that defendant may rely upon its plea in bar and that there is sufficient evidence to support a finding that Shane was an employee of defendant's, the trial court erred in sustaining defendant's plea in bar. If it is true, as defendant insists, that there was a contract of employment between Shane and the defendant, it was a contract with an infant and voidable at the option of the infant, Shane. *Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E. 2d 19 (1970); *Barger v. Finance Corp.*, 221 N.C. 64, 18 S.E. 2d 826 (1942). Upon disaffirmance of a contract by an infant, the contract is void ab initio. *Id.* The status of the parties is as if there had never been a contract between them.

By bringing this common law action against defendant, the infant plaintiff has disavowed the former contract between the parties and relinquished any rights he may have had under the Workers' Compensation Act by virtue of the contract. By disavowing the contract, he has elected to pursue his common law remedy. That Shane avoided the contract by instituting the action is of no moment; it is just as effective as writing a letter of disaffirmance to defendant prior to commencing the action. The lawsuit and the evidence and contentions by plaintiff Shane clearly notified defendant that the contract was avoided. Upon plaintiff infant's disaffirmance of the contract, it was void ab initio and defendant could not rely upon a nonexisting contract to defeat plaintiff infant's action.

For the above reasons I vote to allow the infant plaintiff to pursue his common law action against defendant.

Justice PARKER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ERNEST JIMENEZ AGUALLO

No. 188A86

(Filed 18 November 1986)

1. **Criminal Law § 73.2— child rape victim—statements to pediatrician—within medical treatment exception to hearsay rule**

Statements of a child rape victim to a physician were admissible under the medical diagnosis or treatment exception to the hearsay rule where the child was taken to a doctor by a social services worker as part of the Child Medical Examiner Program; there was no evidence that law enforcement authorities initiated the visit; *State v. Stafford*, 317 N.C. 568, could be distinguished because the victim there visited the physician three days prior to trial for the purpose of trial preparation, while the statements here were made during the initial examination by the physician for the purpose of treating the alleged sexual abuse; and the victim's statements identifying defendant were pertinent to diagnosis and treatment because the statements suggested the nature of the problem, which dictated the type of diagnostic examination, and were pertinent to the continued treatment of possible psychological and emotional problems. N.C.G.S. § 8C-1, Rule 803(4).

2. **Criminal Law § 86.8— child rape victim—opinion of physician as to credibility—not admissible**

The trial court erred in a prosecution for the rape of a child by admitting the testimony of a physician that the child was believable, and the error was prejudicial because the State's case hinged upon the victim's testimony and cross-examination raised some doubts about her credibility. N.C.G.S. § 8C-1, Rule 608(a).

Chief Justice BILLINGS dissenting in part.

BEFORE *Washington, J.*, at the 29 October 1985 Criminal Session of Superior Court, FORSYTH County, defendant was convicted of first-degree rape and received the mandatory life sentence. The defendant appeals as of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court on 8 September 1986.

Lacy H. Thornburg, Attorney General, by Elisha H. Bunting, Jr., Assistant Attorney General, for the State.

Keith Stroud for defendant-appellant.

MEYER, Justice.

This case presents two significant questions with respect to the testimony of a physician who examined a child rape victim. First, defendant argues that the trial court erred in allowing the examining physician to testify as to statements made to her by the victim. Second, defendant argues that the trial court erred in allowing the examining physician to testify as to whether the child victim was "believable."

We find that the child's statements to the physician were for the purpose of medical diagnosis and treatment and were thus admissible under Rule 803(4) of the North Carolina Rules of Evidence (N.C.G.S. § 8C-1, Rule 803(4) (Cum. Supp. 1985)). Because we also find that the physician's opinion testimony as to the believability of the child should have been excluded under Rules 608 and 405(a) of the North Carolina Rules of Evidence (N.C.G.S. § 8C-1, Rules 608 and 405(a) (Cum. Supp. 1985)), we order a new trial.

We decline to address the defendant's additional assignments of error, which raise questions not likely to recur at a new trial.

On 9 September 1985, the defendant was indicted on the charge of first-degree rape. N.C.G.S. § 14-27.2 (Cum. Supp. 1985). The indictment alleged that sometime between 20 November 1984 and 17 December 1984,[1] the defendant unlawfully, willfully, and feloniously engaged in vaginal intercourse with the victim, a nine-year-old child.

The State's evidence tended to show that between August and November 1984, the defendant lived with Mary, the victim's mother, and her two daughters, one of whom was the victim. In

1. The initial indictment alleged that the acts for which the defendant was charged occurred between 20 November 1984 and 17 December *1985*. On the defendant's motion to dismiss the indictment, the court ruled that the indictment contained a typographical error and thus restricted evidence of alleged wrongful acts to the period between 20 November 1984 and 17 December *1984*.

November, the defendant and Mary were married. Mary's two daughters continued to live in the same house as the defendant and Mary Aguallo.

One night in December 1984, Mary Aguallo awoke from her sleep and went into the living room of the apartment she shared with defendant and her two daughters. She saw the victim lying in front of the stool in front of the couch, and the defendant was on his knees in front of the victim, with his pants down but his underwear on. Mary told the victim to go into her room and later that evening arranged to have her mother, Betty Blackwell, take the children to her home. Mary stayed with the defendant at the apartment that evening, and the next day the defendant left by airplane for California.

On or about 20 December 1984, Mary took the victim to Dr. John Thomas' office and requested that the doctor give the child a physical examination. However, Mary did not tell the doctor about the incident with her husband or request that Dr. Thomas examine the victim's vaginal area.

In January 1985, leaving the victim with Betty Blackwell, Mary went to California to see the defendant. She stayed with the defendant in California for six months, until July 1985, when the defendant was arrested. She testified that she wanted to return to North Carolina prior to July 1985, but that she had no money and that the defendant managed to keep the checks that she earned while working for the defendant's family.

The nine-year-old victim testified that at some time, she could not remember the date, the defendant had laid her on the stool in front of the couch and "put his hot dog into my private place." She further testified that she told some of her school classmates about the incident with the defendant. According to the victim, one of her classmates then related the incident in a letter that was found in the school playground.

Betty Blackwell, the victim's grandmother, testified that on the evening that Mary sent the children to her house in July 1984, she examined the victim with a flashlight and noticed that her "privacy was very inflamed, red, inflamed."

Ms. Amy Collins of the Davie County Department of Social Services testified that sometime in June 1985 the principal of

Pinebrook Elementary School informed her of a report of possible child sexual abuse. Ms. Collins interviewed the victim. In July of 1985 she took the victim to the office of Dr. Sarah Sinal, a pediatrician at the Bowman-Gray School of Medicine in Winston-Salem. Ms. Collins also arranged therapy treatment for the victim at the Davie County Mental Health Clinic.

Dr. Sarah Sinal testified that she first saw the victim on 10 July 1985 and that the child was brought in on the Child Medical Examiner Program as an alleged sexual abuse case. Over objection, she testified as to what the victim told her prior to the physical examination. This testimony was consistent with the victim's testimony and implicated the defendant as the perpetrator of the offense. Over objection, Dr. Sinal also testified that the victim was a believable child.

The defendant testified that on the night in question, he was watching television with the children. He sat down on the couch and unbuttoned his pants and put his zipper halfway down. When he got up to change the channel, his pants came down as he was getting off the couch. The defendant had told the victim to go to her bedroom at the time her mother entered the room.

Dr. John Thomas testified for the defendant. He had seen the victim at his office on 20 December 1984. At the time, the victim was not anxious nor were any statements made to him to raise any suspicions that the child had been abused.

The jury found the defendant guilty of first-degree rape.

I.

[1] We first address the defendant's contention that the trial court erred in allowing Dr. Sinal to testify as to statements made to her by the victim. Because the record discloses no instruction limiting the admissibility of this evidence for corroborative purposes, we must determine whether Dr. Sinal's testimony was admissible as substantive evidence. The defendant argues that the statements are hearsay and not otherwise admissible under the North Carolina Rules of Evidence, Rule 803(4), exception applicable to statements made for the purpose of medical diagnosis or treatment. We disagree.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted. N.C. R. Evid. 801(c). Hearsay is not admissible except as provided by statute or the Rules of Evidence. N.C. R. Evid. 802.

On direct examination, Dr. Sarah Sinal testified that the victim came to her office on 10 July 1985. She was brought in by her grandmother and Amy Collins, a protective services worker. Dr. Sinal determined that the victim was brought in on the Child Medical Examiner Program.

Before conducting a physical examination, Dr. Sinal spoke with the victim. Dr. Sinal testified that as part of a set routine, she spoke with the children prior to an examination.

Over objection, Dr. Sinal was allowed to testify as to the conversation she had with the victim. She offered the following testimony as to what the victim told her:

> [B]efore Christmastime her stepfather, whose name she said was Ernie Aguallo, said to her one evening, "Do you want to see what boys and girls do when they get older?" And she told me that she said, "No," and that he said, "Well, I'm going to show you anyway." And she said at that point he unzipped his fly and took out his hot dog and I have an anatomical diagram and I asked her to identify the hot dog on the anatomical diagram and she pointed to the penis. And she said that he put his hot dog up inside of her and I asked her where and on the anatomical diagram she identified or pointed to the vagina. And I asked her whether he actually just touched her with his hot dog or whether it actually went up inside of her and she said that it went up inside of me [sic]. I asked her if it was painful and she said, "Yes, that it hurt a lot," and she started to yell but was afraid to.

Dr. Sinal's testimony was hearsay because it was offered to prove the truth of the matter asserted—that Ernest Aguallo indeed had vaginal intercourse with the victim. We must determine whether the statement is admissible under the authority of hearsay exceptions codified in Rules 803 and 804.

Rule 803 provides in pertinent part:

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

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

N.C. R. Evid. 803(4).

The Commentary to Rule 803(4) suggests that statements made for the purpose of medical diagnosis or treatment have circumstantial guarantees of trustworthiness because of the patient's strong motivation to be truthful.

The defendant argues that the statements do not fall within the exception of Rule 803(4) because the victim's statements to the doctor were not for purpose of treatment or diagnosis, but rather for the purpose of gathering evidence for the State. The defendant's argument is belied by the facts.

The child was allegedly raped sometime between 20 November and 17 December 1984. In June 1985, Amy Collins, a social worker, was first made aware that the child was a possible rape victim. In July 1985, she brought the child to Dr. Sinal as part of the Child Medical Examiner Program. There is no evidence that law enforcement authorities initiated the visit to Dr. Sinal, which was primarily for the purpose of diagnosis and treatment.

The defendant argues that this case is controlled by *State v. Stafford*, 317 N.C. 568, 346 S.E. 2d 463 (1986), in which we held that certain statements made by the prosecutrix to her physician did not fall within the Rule 803(4) exception. In *Stafford*, the alleged rape of a nine-year-old occurred in December 1983. The victim was examined by her physician in January 1984 and later on 13 July 1984, three days prior to trial. There was no testimony that the prosecutrix visited the physician on 13 July for the purpose of diagnosis or treatment, and the physician admittedly did not make a diagnosis or treat the patient on that date.

In *Stafford*, this Court noted that the statements in question were not made for the purpose of diagnosis or treatment and that the statements were made to the physician three days before trial. We held that the statements were made by the victim to the

physician for the "purpose of preparing and presenting the state's 'rape trauma syndrome' theory at trial." *Stafford*, 317 N.C. at 574, 346 S.E. 2d at 467.

Stafford is distinguishable from the present case, in which the victim visited Dr. Sinal several months prior to trial. Dr. Sinal diagnosed the patient's condition, whereas in *Stafford* no diagnosis was made when the victim visited the physician three days prior to trial. Also, the present case differs from *Stafford* inasmuch as the statements were made during the initial examination by the physician for the purpose of treating the alleged sexual abuse, whereas in *Stafford* the statements were made during a subsequent visit in preparation for trial.

Having concluded that the statements made to Dr. Sinal were for the purpose of medical diagnosis and treatment, we must determine whether the *victim's statements* identifying the perpetrator of the crime were "reasonably" pertinent to diagnosis or treatment.

In *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985), we held that identity of the perpetrator is pertinent to the treatment or diagnosis of a child rape victim. In *Smith*, we noted that courts that have addressed the issue have admitted statements identifying the perpetrator of child sexual abuse where the motivation for the statement is to disclose information to aid in medical treatment or diagnosis.

It is important to note that the exception embodied in Rule 803(4) was not intended to make admissible a patient's statement to her doctor concerning *fault*. The Commentary notes:

> Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light.

Commentary, N.C. R. Evid. 803(4).

Recently, in *United States v. Renville*, 779 F. 2d 430 (8th Cir. 1985), the Eighth Circuit analyzed the application of the Rule 803(4) exception within the context of child sexual abuse cases.

Generally, under Rule 803(4), in the overall run of cases, statements as to an assailant's identity are seldom pertinent to di-

agnosis and do not ordinarily promote effective treatment. The patient has no sincere desire to account for fault because it is irrelevant to an anticipated course of treatment. Therefore, ordinarily such statements are not properly covered by the Rule 803(4) exception to the hearsay rule. *Renville*, 779 F. 2d at 436. However, in the context of a child sexual abuse or child rape, a victim's statements to a physician as to an assailant's identity are pertinent to diagnosis and treatment.

The *Renville* court noted two reasons why the identity of a perpetrator is pertinent to diagnosis in a child sexual abuse case. First, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home. *Id.* at 437-38. *See generally* Moore, *The Medical Diagnosis and Treatment Exception of the Hearsay Rule—The Use of the Child Protective Team in Child Sexual Abuse Prosecutions*, 13 N. Ky. L. Rev. 51 (1986); S. Saltzburg & K. Reddin, *Federal Rules of Evidence Manual* § 803(4) (4th ed. 1986 & Supp. 1986); McCormick on Evidence § 292, n. 14 (3d ed. 1984).

In the present case the victim's statements were pertinent to diagnosis and treatment. First, the statements suggested to Dr. Sinal the nature of the problem, which, in turn, dictated the type of examination she performed for diagnostic purposes. Additionally, the victim's identification of the defendant as perpetrator was pertinent to continued treatment of the possible psychological and emotional problems resulting from the rape.

Because the victim's statements were made for the purpose of and were pertinent to "medical diagnosis or treatment," Dr. Sinal's hearsay testimony was properly admitted under the Rule 803(4) exception to the hearsay rule. *See generally* 4 Weinstein's Evidence § 803(4)[01] (1986); 1 Brandis on North Carolina Evidence § 161 (2d rev. ed. 1982 & Supp. 1986); McCormick on Evidence § 292 (3d ed. 1984).

II.

[2] The defendant argues that the trial court erred in allowing Dr. Sinal, a pediatrician, to express her opinion that the victim

was "believable." The defendant asserts that Dr. Sinal was not qualified as an expert in determining believability and that her opinion as to the believability of the victim did not assist the jury.

We find that this "opinion" testimony is inadmissible under Rules 608(a) and 405.

Rule 608 provides in pertinent part:

> (a) *Opinion and reputation evidence of character.*—The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion *as provided in Rule 405(a)*, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

N.C.R. Evid. 608(a) (emphasis added). As noted in the official Commentary to Rule 608(a), the phrase "as provided in Rule 405(a)" was inserted to make clear that expert testimony on the credibility of a witness is not admissible.

Likewise, under Rule 405, which deals with methods of proving character, "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." N.C.R. Evid. 405(a).

In *State v. Heath*, 316 N.C. 339, 341 S.E. 2d 565 (1986), we held that it was prejudicial error to allow the victim's clinical psychologist to express her opinion as to whether the victim might have fabricated the facts of a sexual assault.

In the present case, the following exchange occurred on direct examination of Dr. Sinal:

> Q. Based on that conversation and the conversations you have with the children, do you normally form opinions as to whether they are believable or not?
>
> A. Yes.
>
> MR. STROUD: OBJECTION, your Honor.
>
> COURT: OVERRULED.
>
> EXCEPTION NO. 18

Q. After talking to . . . [the victim], did you form an opinion about whether she was believable or not?

A. Yes, sir.

MR. STROUD: OBJECTION, your Honor.

COURT: OVERRULED.

EXCEPTION NO. 19

Q. What was that, please?

A. I think she's believable.

This testimony amounted to an expert's opinion as to the credibility of the victim. As in *Heath*, we find that the testimony is inadmissible under the mandate of Rule 608(a).

Having found that the court erred in allowing Dr. Sinal to testify that the victim was believable, we must determine whether the error was so prejudicial as to warrant a new trial.

A defendant is prejudiced by adverse evidentiary rulings where there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443 (1983).

The evidence of the defendant's guilt was strong but not overwhelming. Based on the victim's testimony, a jury could reasonably conclude that the defendant was guilty of rape. In addition to the testimony of the victim, the State offered evidence that the victim consistently told the same story to others. Finally, there was medical evidence of penetration. However, because the physical examination of the victim took place more than six months after the alleged rape, it was impossible to determine whether the penetration resulted from the sexual abuse alleged in the indictment or some other cause. Therefore, the State's case hinged on the victim's testimony and thus upon her credibility. Cross-examination of the victim raised some doubts about the victim's credibility. Because it is likely that any doubts the jurors may have had about the victim's credibility were allayed by the pediatrician's testimony that she found the victim to be "believable," we conclude that absent this testimony, there is a reasonable possibility that a different result would have been reached by

the jury. Accordingly, for the prejudicial effect of the error in the admission of this testimony, we order a new trial.

New trial.

Chief Justice BILLINGS dissenting in part.

Although N.C.G.S. § 8C-1, Rule 803(4) was clearly intended to liberalize the hearsay exception allowing introduction for substantive use of statements made for purposes of medical diagnosis or treatment, the rule must not be applied mechanically, without regard for its intent and justification.

The benchmark for use of hearsay testimony is an identifiable reason for recognizing that the statement made by a declarant out of court and not under oath is inherently reliable. That inherent reliability may be found in the self-interest of a person seeking medical treatment. The patient, seeking help for his or her medical condition, realizes that in order for the physician to make an accurate diagnosis and to provide effective treatment, the information regarding the onset of symptoms, the location and kind of pain, etc. must be accurately related. *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). The information is inherently reliable only if the speaker realizes the necessity for the information to be correct.

In the majority opinion, the focus seems to be placed, not upon the realization by the child that accurate identification of her abuser was necessary to her treatment, but upon the doctor's knowledge of why information, usually "irrelevant to an anticipated course of treatment," (318 N.C. 590, 597, 350 S.E. 2d 76, 80) and "ordinarily . . . not properly covered by the Rule 803(4) exception to the hearsay rule," (*id.*) is useful for the treatment of the sexually abused child.

In the case *sub judice*, nothing in the majority opinion indicates that the child sought medical treatment or was aware that her truthful identification of her abuser was necessary in aid of treatment. The visit to the physician's office was prompted not by the child's seeking either physical or psychological help necessitated by an act that occurred seven months earlier, but by adults' reaction to information that a criminal act had taken place. Instead of adopting a mechanical rule that so long as the recipient

of an out of court declaration has a medical degree, the statement of a patient is admissible at trial if the *physician* is aware of some diagnosis or treatment use which he or she can make of the information, I would require at least some basis upon which to infer that the *declarant* was aware of the heightened need for truthfulness. If, as I suspect, the basis for the majority's faith in the reliability of the statement has more to do with the age of the victim than it does with her realization of the need for truthfulness in order to get appropriate treatment, this Court should encourage the legislature to consider the appropriateness of special rules for obtaining evidence in child sexual abuse cases[1] rather than to try to fit this testimony into a mold which cannot contain it. As at least one commentator has observed, "Concern over the recent revelations of child sex abuse have [sic] caused several state

1. See Unif. R. Evid. Rule 807 (1986). The American Bar Association approved Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged at its 10 July 1985 meeting. The guidelines recommend allowance of videotaped depositions as follows:

3. In criminal cases and juvenile delinquency and child protection proceedings where child abuse is alleged, court procedures and protocol should be modified as necessary to accommodate the needs of child witnesses including:

. . .

j) When necessary the court should permit the child's testimony at a pretrial or noncriminal hearing to be given by means of a videotaped deposition.

American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged* 1-2 (1985). In North Carolina the Governor's Crime Commission recommended "that the General Assembly enact legislation to allow for the electronic transmission or recording of child victim testimony which protects the defendant's right to confront the witnesses against him or her" and drafted a proposed act. Governor's Crime Commission, Department of Crime Control and Public Safety, *Missing Children: A Report to the Governor* 6-9 (1985).

For discussions of the problem and references to legislation adopted by various states see R. Eatman & J. Bulkley, *Protecting Child Victim/Witnesses: Sample Laws and Materials* 17-34 (National Legal Resource Center for Child Advocacy & Protection 1986); National Legal Resource Center for Child Advocacy and Protection—Child Sexual Abuse Law Reform Project, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases* 11-12, 26-27 (American Bar Association, Young Lawyers Division 1985); *Selected State Legislation: A Guide for Effective State Laws to Protect Children* 20-21 (National Center for Missing & Exploited Children 1985); D. Whitcomb, E. Shapiro & L. Stellwagen, *When the Victim Is a Child* 59-68 (U.S. Department of Justice, National Institute of Justice 1985).

courts to expand, if not distort, the concept of diagnosis or treatment." M. Graham, *Handbook of Federal Evidence* § 803.4 at 828 n. 4 (2d ed. 1986).

In the case *sub judice* the hearsay declarant also testified at trial and was subject to confrontation and cross-examination by the defendant; therefore substantive use of the hearsay evidence does not raise questions about violation of the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. The majority opinion appropriately does not deal with the Confrontation Clause problem since it was not raised. However, I fear that this case may encourage prosecutors to rely exclusively upon the testimony of physicians, relating hearsay statements of child victims in sex abuse cases, to identify the abusers. I therefore dissent from the holding that the statement of the child to the witness was admissible as substantive evidence, and I also write to suggest that prosecutors exercise caution in relying exclusively on hearsay statements to prove the offense in cases of child sexual abuse.

STATE OF NORTH CAROLINA v. LEJHOYN DEMERICK HOLLAND

No. 484A85

(Filed 18 November 1986)

1. **Robbery § 4— robbery with dangerous weapon—missing items not on defendant—insufficiency of evidence**

In a prosecution of defendant for robbery with a dangerous weapon, the evidence was insufficient to establish that the victim possessed a watch or ring at the time of the alleged robbery, and the fact that these items were absent from the scene of the alleged robbery and never recovered thereafter was insufficient to establish proof of the crime charged.

2. **Robbery § 4— defendant as perpetrator—possession of recently stolen property—insufficiency of evidence**

In a prosecution of defendant for robbery with a dangerous weapon, the State could not rely on the doctrine of possession of recently stolen property to prove defendant's identity as the robber where, even if the evidence were sufficient to establish that the watch belonging to the victim was stolen, the State failed to present any identifying characteristic, beyond the generic description "gold watch," to establish that the gold watch seen in the victim's possession prior to his death and the gold watch seen in defendant's possession after the victim's death were the same; there was no evidence that a television

was ever seen in defendant's possession, and the testimony of defendant's intent to steal a television could in no manner establish defendant's possession; and the general description of a class ring was insufficient for the purpose of identification of the item, nor was there evidence that defendant had possession of the ring at any time. Furthermore, defendant's theft of the watch, ring and television, committed contemporaneously with the theft of an automobile, could not be inferred by defendant's possession of the automobile, since the State's evidence raised only a suspicion that the watch, ring and television were stolen.

3. **Larceny § 7.2— felonious larceny of automobile—value—insufficiency of evidence**

In a prosecution of defendant for felonious larceny where there was no direct evidence of a stolen car's value, evidence that the victim owned two automobiles, one of which was the stolen 1975 Chrysler Cordoba, that it was his favorite and he took especially good care of it, always keeping it parked under a shed, was insufficient to establish that the value of the car exceeded $400.

Chief Justice BILLINGS dissenting in part.

Justice MITCHELL joins in this dissenting opinion.

BEFORE *Rousseau, J.*, at the 20 May 1986 Criminal Session of Superior Court, ROCKINGHAM County, defendant was convicted of first degree murder, robbery with a dangerous weapon, and felonious possession of stolen property. Defendant was sentenced to a term of life imprisonment for the first degree murder conviction, a consecutive term of forty years for the robbery with a dangerous weapon conviction, and a concurrent term of ten years for the felonious possession of stolen property conviction. Defendant appeals the life sentence as of right to this Court pursuant to N.C.G.S. § 7A-27(a). This Court allowed defendant's motion to bypass the Court of Appeals as to the lesser sentences pursuant to N.C.G.S. § 7A-31(b). Heard in the Supreme Court 11 September 1986.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant appellant.

PARKER, Justice.

We note at the outset of our discussion that defendant has abandoned Assignments of Error Nos. 1, 4, 7, and 8 by failing to

advance any argument in his brief to support them. N.C. R. App. P. 28(a). On the basis of his six remaining assignments of error, defendant contends that the trial court erred by denying his motions to dismiss for insufficient evidence the charges of robbery with a dangerous weapon and of felonious possession of stolen property, by denying his request for special jury instructions, and by allowing prejudicial statements to influence his sentence for robbery with a dangerous weapon. We conclude that the conviction of robbery with a dangerous weapon should be vacated, and that the conviction of felonious possession should be reversed and remanded to Superior Court for resentencing as a misdemeanor because of insufficient evidence. We find no error in the jury instructions given by the trial court. We do not address the propriety of the sentence for robbery with a dangerous weapon since this conviction has been vacated.

The State's evidence tended to show that Virginia and Allen Carroll found the nude body of their next-door neighbor and tenant, Kenneth Hurley, the victim, lying on the floor in the bedroom of his residence in Reidsville, N.C., at approximately 8 a.m., on Sunday, 14 October 1984. The victim had numerous stab wounds to his chest which caused his death late Friday, 12 October, or early Saturday, 13 October. The Carrolls were concerned about the victim since at approximately 1 a.m., on Saturday, 13 October, Mr. Carroll, upon returning home from his work, observed the victim's 1975 Chrysler Cordoba automobile parked in the victim's driveway with the lights on and the motor running and thought that he observed something in the back seat. Shortly thereafter, the Cordoba backed out and rapidly departed. The Carrolls never observed the Cordoba again and did not see the victim until their investigation on Sunday at which time they used their passkey to gain entrance into the victim's locked residence. The victim's bedroom was ransacked, and although the rest of the victim's residence was undisturbed, a Magnavox television that had previously been located upon a bookcase in the living room was missing and the television antenna wire lay on the floor beside the bookcase. There was an area clear of dust on top of the bookcase, and some ceramic figurines that had been knocked off lay on the floor in front of the bookcase. Mr. Carroll testified that the victim also owned a gold watch and a class ring set with a red stone. The television, the watch, and the ring were never found.

The 1975 Chrysler Cordoba was located in Danville, Virginia, on Monday, 15 October. The defendant had possession of the Cordoba on Saturday, 13 October; Robert Thompson and Daryl Taylor each had possession of the Cordoba on Saturday and Sunday, 13 and 14 October. Neither Thompson nor Taylor was acquainted with the victim, but the defendant was acquainted with the victim and had been sexually involved with him prior to Friday, 12 October.

Defendant and Taylor were arrested and indicted for first degree murder, robbery with a dangerous weapon, and possession of a stolen vehicle. Thompson was arrested and indicted for possession of a stolen vehicle. All charges against Taylor and Thompson were dismissed by the State in return for their truthful testimony. The defendant did not testify and presented no evidence at the trial.

Defendant's motions to dismiss all charges against him and his request for special jury instructions on the application of the doctrine of recent possession were denied.

Other relevant facts are discussed in the issues which follow.

I.

[1] Defendant first contends that his motion to dismiss the charge of robbery with a dangerous weapon should have been allowed by the trial court because the State's evidence was insufficient to establish that a watch, a ring, and a television had been stolen.

On a motion to dismiss, the trial court must determine from all the evidence, taken in the light most favorable to the State, whether there is substantial evidence that the crime charged has been committed and that the accused is the person who did it. *State v. Smith*, 307 N.C. 516, 299 S.E. 2d 431 (1983). 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). In judging the sufficiency of the State's evidence, the trial court must consider all the evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

"It is fundamental law that the proof of a charge in criminal cases involves the proof of two distinct propositions: (1) that the act itself was done, and (2) that it was done by the person or persons charged. The proof of the corpus delicti is just as essential as is the proof of the identity of the person or persons committing the offense, and proof thereof is a prerequisite to conviction." *State v. Norggins*, 215 N.C. 220, 222, 1 S.E. 2d 533, 535 (1939).

To support a conviction of robbery with a dangerous weapon, the State must prove that the accused "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." N.C.G.S. § 14-87 (1981).

The evidence tended to show that on Friday, 12 October, at 3 p.m., defendant told Daryl Taylor that he was going to North Carolina to steal a car and a television, and would kill the owner if necessary. At that time defendant knew the victim, had been sexually involved with him, and hoped to meet the victim on Friday, 12 October. Defendant's companions, Michael Cabiness and Robert Thompson, could account for defendant's whereabouts until 10:30 p.m., Friday, 12 October. Taylor and Thompson testified that the next time they saw defendant was 8 p.m., Saturday, 13 October, at which time defendant was driving the victim's Cordoba. Defendant invited Thompson and Taylor to go driving, telling them that the car was "hot," but would not be missed until Monday, 15 October.

To prevail, the State must establish by substantial evidence that the victim possessed the personal property and this property was taken from him by defendant. To support this conclusion, the State offered the evidence of Mr. Carroll who testified that the victim owned a gold watch. Frances Brown, the victim's co-worker, testified that the victim was wearing a gold watch at 5:30 p.m., on Friday, 12 October, when he delivered some pictures to her. Defendant's companion, Michael Cabiness, testified that he saw defendant wearing a gold watch on Monday, 15 October, some three days after the victim's death. The only identifying characteristic given to any description of the watch was that the watch was a gold one. No other evidence connected the watch with the victim or defendant.

As to the ring, Mr. Carroll testified that the victim owned a class ring set with a red stone. Frances Brown testified that the victim usually wore a gold class ring set with a red stone, but she could not say whether he was wearing the ring when she last saw him on Friday, 12 October. The only evidence that associated defendant with any ring was that of Robert Gray of the Rockingham County Sheriff's Department, who testified that defendant's statement to the police included a description of a gold class ring set with a red stone, bearing the words "Lansing High School, 1954," and engraved on the inside of the band with the initial "K" or "H," which defendant said he saw in the possession of Taylor after the victim's death. No ring was ever found, and no evidence was presented to clearly identify as the victim's the ring described by defendant in his statement.

Mr. Carroll testified that the victim had a television, but he was unable to say when he had last seen the television in the victim's residence. Taylor testified that on Friday, 12 October, defendant said that he intended to steal a television. No evidence exists that a television was seen in defendant's possession at any time. The State also presented evidence that when the victim's body was discovered on Sunday, 14 October, the Magnavox television that previously had been located on a bookcase in the living room was gone, and a television antenna wire lay on the floor beside the bookcase. There was an area clear of dust on the top of the bookcase, and some ceramic figurines that had been knocked off lay on the floor in front of the bookcase.

This evidence is insufficient to establish that the victim possessed the watch or the ring at the time of the alleged robbery. The fact that these items were absent from the scene of the alleged robbery and never recovered thereafter is insufficient to establish proof of the crime charged.

[2] The State next relies upon the doctrine of possession of recently stolen property to prove defendant's identity as the robber. To invoke this doctrine, the State must prove beyond a reasonable doubt each fact necessary to give rise to the inference; namely, that the property is stolen and that the stolen property was found in defendant's possession and under his control recently after the theft. *State v. Gonzalez*, 311 N.C. 80, 316 S.E. 2d 229 (1984); *State v. Voncannon*, 302 N.C. 619, 276 S.E. 2d 370 (1981).

> The identity of the fruits of the crime must be established before the presumption of recent possession can apply. The presumption is not in aid of identifying or locating the stolen property, but in tracking down the thief upon its discovery.

State v. Foster, 268 N.C. 480, 485, 151 S.E. 2d 62, 66 (1966) (quoting *State v. Jones*, 227 N.C. 47, 49, 40 S.E. 2d 458, 460 (1946)).

The watch listed in the indictment is a non-unique, mass-produced item distributed in national markets. Possession of a non-unique item similar or identical to a stolen item standing alone is not sufficient to establish defendant's possession of the stolen item.

The matter of non-unique items was considered in *Foster*, 268 N.C. 480, 151 S.E. 2d 62, where six new automobile tires were stolen from a service station. Six tires, identical to the ones stolen, were found in the defendant's possession shortly after the theft. This Court held that defendant's possession of like items was insufficient for the application of the recent possession doctrine because the owner could not positively identify as his own the tires which defendant possessed and was accused of stealing. Even if it were to be conceded that the tires were stolen, there was no evidence that they were stolen from the owner's service station and were the owner's property. In such cases, the State must also identify the item as stolen by reference to characteristics other than its appearance: the assemblage or combination of items recovered, the quantity of items recovered, and the stamps and marks on items recovered. *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968); *State v. Owens*, 75 N.C. App. 513, 331 S.E. 2d 311 (1985); *State v. Hales*, 32 N.C. App. 729, 233 S.E. 2d 601 (1977); *State v. Crawford*, 27 N.C. App. 414, 219 S.E. 2d 248 (1975), *disc. rev. denied*, 288 N.C. 732, 220 S.E. 2d 621 (1975).

Even if the evidence were sufficient to establish that the watch belonging to the victim was stolen, a review of the State's evidence shows that the State has failed to present any other identifying characteristic, beyond the generic description "gold watch," to establish that the gold watch seen in the victim's possession prior to his death and the gold watch seen in defendant's possession after the victim's death was the same.

There is no evidence in the record that a television was ever seen in defendant's possession, and the testimony of defendant's intent to steal a television can in no manner establish defendant's possession.

The general description of the class ring is clearly insufficient for the purposes of identification of the item. There is no evidence that defendant had possession of the ring at any time; consequently, the State's evidence is also insufficient as to this item.

These deficiencies prevent the application of the doctrine of recent possession as to the watch, the ring, and the television for the purpose of inferring that defendant was the thief.

The State further contends that, under the doctrine of recent possession of stolen property, defendant's theft of the watch, the ring, and the television, committed contemporaneously with the theft of the Chrysler Cordoba, may be inferred by defendant's possession of the stolen automobile. The State urges that defendant's possession of the Cordoba supports the inference that defendant also stole the watch, the ring, and the television. This additional inference, which would permit the State to survive the motion to dismiss, is permissible only if evidence exists of the contemporaneous crimes. *State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980).

To conclude that defendant stole the watch, the ring, and the television because of his possession of the automobile would require the stacking of inferences on the basis of circumstantial evidence. This we believe would be impermissible.

> A basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence and not upon some other inference or presumption.

State v. Ledford, 315 N.C. 599, 610, 340 S.E. 2d 309, 317 (1986) (quoting *State v. Parker*, 268 N.C. 258, 262, 150 S.E. 2d 428, 431 (1966)).

The State's evidence raises only a suspicion that the watch, the ring, and the television were stolen; consequently, the State

has failed to prove the *corpus delicti*. Defendant's motion to dismiss should have been allowed. We vacate the judgment of the defendant's conviction of armed robbery with a dangerous weapon.

II.

[3] Defendant next assigns as error the denial of his motion to dismiss the felonious possession of the stolen automobile. His sole contention is that the State failed to establish that defendant's possession of the victim's Chrysler Cordoba was felonious.

The fair market value of stolen property at the time of the theft must exceed the sum of four hundred dollars for the possession to be felonious. Otherwise, the possession will constitute a misdemeanor. N.C.G.S. § 14-72 (1981).

Defendant's plea of not guilty placed every essential element of the charge in issue, including the automobile's value. *State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969).

Although the State offered no direct evidence of the Cordoba's value, there is in the record evidence tending to show that the victim owned two automobiles and that the 1975 Chrysler Cordoba was his favorite one of which he took especially good care, always keeping it parked under a shed, and that a picture of this automobile was exhibited to the jury for the purpose of establishing the location of the automobile when discovered after its theft. The State contends that this evidence is sufficient to support the jury's finding that the automobile's value at the time of the theft exceeded four hundred dollars. We are not convinced and find that the substantiality of the evidence is insufficient for presentation of the issue of value to the jury. The jury may not speculate as to the value. Although the trial court properly instructed the jury as to the difference between misdemeanor and felony possession, the evidence was not such as would justify the jury in finding that the value of the Cordoba exceeded four hundred dollars.

Hence, although the verdict will not be disturbed, the judgment is vacated; and this case is remanded to the Superior Court, Rockingham County, for the pronouncement of a judgment herein as upon a verdict of guilty of misdemeanor possession of stolen property and defendant resentenced accordingly.

III.

Defendant next assigns as error the trial court's denial of defendant's request for special jury instructions. Defendant contends that the trial court, when giving the standard instruction to the jury on possession of recently stolen property, committed reversible error in refusing to summarize the conflict between the State's evidence and defendant's evidence as to the times of possession of the Chrysler Cordoba.

Defendant has failed to comply with the North Carolina Rules of Appellate Procedure, Rule 10(b)(2). Although defendant properly indicated what he considered to be the objectionable portion of the jury instructions, defendant failed to set out the substance of the omitted instruction requested by him, and this prevents the preservation of the objection for the purposes of appeal.

We have, however, reviewed the jury instructions given by the trial court and, although the specific language of defendant's argument is not included, it does appear that the instruction, when read as a whole, presents the issue of possession by others for the jury's consideration.

In this assignment of error, we find no error.

IV.

Defendant's last assignment of error directed to the imposition of the maximum sentence for robbery with a dangerous weapon need not be addressed in this opinion since defendant's conviction on that charge has been here vacated.

For the reasons heretofore stated, the conviction of robbery with a dangerous weapon is vacated, and the conviction of felonious possession of stolen property is reversed and remanded to the Superior Court, Rockingham County, for resentencing as a misdemeanor. We find no error in the conviction of first degree murder, and we find no error in the jury instructions given by the trial court.

No. 84CRS11512—No error.

No. 84CRS11991—Judgment vacated.

No. 84CRS10672—Judgment vacated and remanded for a new sentencing hearing.

Chief Justice BILLINGS dissenting in part.

I respectfully dissent from that portion of the majority opinion that holds that the evidence was insufficient to support the defendant's conviction for robbery of the television and watch.

The majority seems to conclude[1] that the evidence fails to establish either that the items of personal property were taken from the victim or that the defendant took the property.

Regarding the television, the evidence considered in the light favorable to the State showed that the victim had for a period of time possessed a television that sat on a shelf in his living room. Although no one testified that it was present in the room at the moment that the victim was killed, the victim's neighbors from whom he had rented the house for 19 years noticed immediately upon entering the living room on Sunday morning, 13 October 1984, that the victim's television set was "missing." The victim's bedroom had been ransacked; the dust pattern on the bookshelf in the living room indicated that the television had been recently removed; the antenna from the television was lying on the floor; and although the rest of the living room was orderly, broken ceramic figures lying in front of the book shelf suggested that they had fallen when the television was taken hurriedly. The victim's body was found in a locked house. Mrs. Carroll, the neighbor who, along with her husband, owned the house, had been home all day Saturday and was concerned because she saw neither the victim nor his car all day Saturday. These facts rebut any inference that missing items may have been taken by someone who came along after the victim was killed. I believe that the conclusion that the television was taken at the time of the murder of the victim is inescapable from the evidence.

1. I say "seems to conclude" because although the opinion discusses insufficient evidence of the taking of the television, the watch and the ring, the conclusion following the discussion of the evidence of possession by the victim is that "[t]his evidence is insufficient to establish that the victim possessed the watch or the ring at the time of the alleged robbery." (Slip op. at 7, 318 N.C. 602, 607, 350 S.E. 2d 56, 59.)

I reach the same conclusion regarding evidence that the victim possessed the watch at the time of his murder. All of the evidence shows that the murder occurred late Friday night or very early Saturday morning. The victim's car was seen leaving his house around 1:00 a.m. Saturday morning, being driven in a manner inconsistent with the victim's driving habits, and was never again seen at the victim's residence. Only a few hours before he was murdered, the victim was wearing his gold watch, an item that he usually wore. When his body was discovered, the watch as well as other items were missing from his house, the bedroom of which had been ransacked. Although the officers who searched the house were not looking specifically for a watch or ring, they conducted a search to determine what personal belongings were actually inside the house and did not find a television set, watch, class ring or other jewelry. It simply defies reason to find that the evidence is insufficient to justify a reasonable inference that these items were taken from the victim at the time that he was murdered.

The majority seems to say that in order for a defendant to be convicted of robbery, the State must affirmatively show possession of the items by the defendant following the robbery. I do not believe such a showing is invariably necessary.

In the case *sub judice* the evidence shows that the defendant knew the victim and was expecting the victim to pick him up on Friday night, 12 October 1984. The defendant told a friend that he was going to go to North Carolina and get a car and a television and that he would kill the owner if necessary. The next day he was in possession of the car owned by the victim, who had been murdered in his home in North Carolina. The victim's television as well as other items of personal property, including a watch that he had been seen wearing on Friday evening, were not in the victim's house. The defendant told one of his friends that the car would not be missed until Monday and that he had killed the owner. I would hold that this evidence supports a reasonable inference that the defendant not only murdered the victim, an inference that the defendant does not contest on this appeal, but also that the defendant took from the victim at the time of the murder the items which were shown to have been in his possession shortly before the murder and to be missing afterwards.

Justice MITCHELL joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. CHUL YUN KIM

No. 783A85

(Filed 18 November 1986)

1. **Rape § 4; Criminal Law § 87.1— questioning of rape victim about penetration —no leading question**

There was no merit to defendant's contention in a prosecution for rape that the trial court erred by allowing the State to ask the victim a leading question during direct examination, since the question with regard to penetration, though it could be answered yes or no, was not a leading question as it did not suggest that the victim choose one answer over the other.

2. **Criminal Law § 89.3— prior statements of victim—admissibility for corroboration**

The trial court in a rape case did not commit plain error by allowing the State to introduce as corroborative evidence prior statements of the victim which contained new and additional information not referred to in the victim's testimony since the testimony as to pretrial statements of the victim clearly tended to add weight or credibility to the victim's trial testimony.

3. **Rape § 10; Criminal Law § 50.1— child psychologist—examination as to rape victim's truthfulness—error**

In a prosecution for first degree rape, the trial court erred in allowing an expert witness to testify concerning the victim's truthfulness during the expert's evaluation and treatment of her since the witness's contact with the victim was solely in her role as a child psychologist; the question posed by the prosecutor clearly invoked the witness's status as an expert and sought to establish the credibility of the victim as a witness; the question and answer complained of came immediately after the witness had given lengthy testimony concerning the victim's statements to her about the sexual acts by defendant so that the witness's testimony that the victim had "never been untruthful with me about it" must have been construed by the jury as expert opinion testimony that the victim's accusations against defendant as related to the witness were true; the State's case against defendant hinged almost totally on the credibility of the victim; and the erroneous admission of the expert's testimony demonstrated a reasonable possibility that a different result would have been reached at trial had the error not been committed. N.C.G.S. 8C-1, Rules 405(a) and 608(a).

Justice MARTIN dissenting.

Justices MEYER and BROWNING join in this dissenting opinion.

APPEAL by the defendant from judgment entered on 13 September 1985 by *Ross, J.*, in Superior Court, ROWAN County.

The defendant was convicted, upon proper indictments, for five counts of first degree rape. The trial court consolidated the

cases for judgment and sentenced the defendant to imprisonment for 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 on 14 October 1986.

Lacy H. Thornburg, Attorney General, by Michael R. Morgan, Assistant Attorney General, for the State.

Cruse and Spence, by Thomas K. Spence, for defendant-appellant.

MITCHELL, Justice.

The defendant, Chul Yun Kim, has presented six assignments of error on appeal. He contends *inter alia* that the trial court erred by allowing the State to ask the victim a leading question during direct examination. He also asserts that it was error for the trial court to allow a police investigator to give corroborative testimony which went beyond the victim's testimony at trial. The defendant further contends that it was error to permit an expert witness to testify about the truthfulness of the victim during her evaluation and treatment resulting from the crimes charged. He also argues that the trial court erred by denying his motion to dismiss at the close of all the evidence.

We agree with the defendant that the trial court erred by allowing an expert witness to testify concerning the truthfulness of the victim. As a result, the defendant is entitled to a new trial.

The State's evidence tended to show that the victim[1] and her younger sister lived with their father. The victim's mother had visitation rights, and the children stayed with her from time to time on weekends and holidays.

The victim testified that the defendant Chul Yun Kim was her mother's live-in boyfriend. The defendant had sexual intercourse with the victim on many occasions during her visits with

1. Use of the victim's name in this opinion is not necessary to distinguish her from other individuals involved in the case and would add nothing of value. Therefore, in keeping with the practice established by this Court in numerous recent cases, her name has been deleted throughout this opinion to avoid further embarrassment. *See, e.g., State v. Hosey*, 318 N.C. 330, 332 n. 1, 348 S.E. 2d 805, 807 n. 1 (1986) and cases cited therein.

her mother in 1984. The victim was either ten or eleven years old on each occasion. Kim was thirty years old in 1984.

On 14 July 1984, the victim's mother and younger sister were shopping and cleaning house, so the victim went with the defendant to his shoeshop in Salisbury. She went to sleep on an army cot in the back room of the shop. While she was asleep, the defendant Kim pulled off her clothes. Kim then awakened the victim and had sexual intercourse with her. He told the victim not to tell anyone, and she complied because she was afraid.

During the weekend of 27-29 July 1984, the victim again went alone with Kim to his shoeshop. He told her to undress, and she did. The defendant again had sexual intercourse with her on the cot.

During the week of 12-19 August 1984, the victim was alone again with the defendant in his shoeshop. At about 5:10 p.m., he turned on a machine, then called the victim's mother to say that he would be late because he had more work to do. He then turned off the machine and had sexual intercourse with the victim.

At the end of August 1984, the victim's mother and younger sister went to the grocery store leaving the victim and the defendant Kim alone in the house. The defendant began to have sexual intercourse with the victim in his bedroom then left and returned with a condom. He put the condom on and completed intercourse with the victim.

The victim's mother later found condoms in Kim's locked briefcase which she had forced open with a screwdriver. She testified that he had never used condoms during sexual intercourse with her.

On 2 November 1984, the victim was awakened when the defendant Kim came into her bedroom and pulled down her underwear in the middle of the night. While the victim pretended to be asleep, the defendant had sexual intercourse with her. Her younger sister, sleeping next to her in the same bed, did not awaken.

The next morning the victim's mother and younger sister went to the shoeshop while the victim and Kim went to Charlotte. When they returned home from Charlotte, the defendant put on

his housecoat and told the victim to put on her mother's housecoat. He then had sexual intercourse with her.

The defendant Kim testified that he came to America from Korea in 1974. He owned a house and worked sixteen hours a day at the shoe repair shop and a mill during 1984. Kim said that he never had sexual relations with the victim, but that she had written him sexually suggestive notes. He also testified that he did not remember having any condoms in the house, and that he had never bought any such things in his life.

[1] The defendant first contends that the trial court erred by allowing the State to ask the victim a leading question during direct examination. Although the defendant acknowledges that he did not object to the question or answer at trial, he contends that admission of the question and answer was such grievous error as to be "plain error" necessitating a new trial. *See generally, State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986); *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). We conclude that the trial court committed neither plain error nor any error at all. The exchange at issue was as follows:

> A. . . . and I sat on the bed and he told me to lay down so I laid down and he spread my legs apart and had sexual intercourse with me.
>
> Q. . . . did you know the term sexual intercourse at that time?
>
> A. No.
>
> Q. Have you learned that in the process of discussion of these matters with other people?
>
> A. Yes.
>
> . . . .
>
> Q. You were ten years old at the time?
>
> A. Yes.
>
> . . . .
>
> Q. *When you say he had sexual intercourse with you, did he get his penis inside you?*

A. Yes, he did.

EXCEPTION NO. 1.

(Emphasis added.)

The question to which the defendant has belatedly taken exception was not a leading question.

> A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no. [Citations omitted.] However, simply because a question may be answered yes or no does not make it leading, unless it also suggests the proper response.

State v. Thompson, 306 N.C. 526, 529, 294 S.E. 2d 314, 316-17 (1982) (quoting *State v. Britt*, 291 N.C. 528, 539, 231 S.E. 2d 644, 652 (1977)). The fact that the question in the present case could be answered yes or no did not make it a leading question, since it did not suggest that the victim choose one answer over the other.

The extent to which a question may be deemed suggestive and, as a result, leading "depends not only on the form of the question but also on the context in which it is put." *State v. Thompson*, 306 N.C. at 529, 294 S.E. 2d at 317. When considered in context, the question here did not suggest an answer to the witness, but merely directed her attention to a proper subject of inquiry without giving her guidance as to whether she should answer affirmatively or negatively. *See generally, State v. Thompson*, 306 N.C. at 529-31, 294 S.E. 2d at 317. The trial court committed no error by allowing either the question or the witness's answer.

[2] Next, the defendant asserts that the trial court committed plain error by allowing the State to introduce as corroborative evidence prior statements of the victim which contained new and additional information not referred to in the victim's testimony. The defendant argues that references to such additional matters rendered the officer's testimony inadmissible for corroborative purposes. We do not agree.

One of the police investigators testified that the victim had used anatomically correct dolls to demonstrate acts of sexual intercourse, cunnilingus, sodomy and fellatio which the defendant had committed with her. The victim had testified at trial only

about acts of sexual intercourse. The defendant made no objection to the investigator's testimony in this regard. Therefore, our review is limited to a review for plain error, and we conclude that none occurred.

In order to be admissible as corroborative evidence, the pre-trial statement of a witness need not merely relate facts brought out in the witness's testimony at trial. A witness's prior oral and written statements, although including additional facts not referred to in his trial testimony, may be admitted if they tend to strengthen and add credibility to his trial testimony. *State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986); *State v. Riddle*, 316 N.C. 152, 340 S.E. 2d 75 (1986); *State v. Higgenbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985). Here, the testimony as to pre-trial statements of the victim clearly tended to add weight or credibility to the victim's trial testimony and were, therefore, admissible[2] as corroborative evidence. *See id.*

[3] The defendant also contends that the trial court erred by allowing an expert witness to testify concerning the victim's truthfulness during the expert's evaluation and treatment of her. We agree and hold that the error entitles him to a new trial.

The testimony complained of was part of an attempt by the prosecutor to rehabilitate the victim as a witness after she had been impeached by cross-examination concerning a prior inconsistent statement. The prosecutor sought to demonstrate her character for truthfulness.

Dr. Sharon Barnette, a child psychologist, was qualified at trial as an expert witness in the field of Rehabilitation and School Psychology. The testimony at issue is the following:

> Q. Dr. Barnette, as you evaluated and treated [the victim], did you ever find her untruthful with you?
>
> MR. GERNS: OBJECTION.

2. We are not required to decide whether this corroborative evidence could be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C.G.S. § 8C-1, Rule 403 (1986). The prosecutor may choose not to use that part of the victim's prior statement containing matters going beyond her trial testimony at the defendant's new trial. Additionally, no such issue is squarely presented by the defendant as a part of this appeal.

COURT: OVERRULED.

A. She's never been untruthful with me about it. Everything she had to say to me somehow I'd find out later that she was telling the truth.

MR. GERNS: MOVE TO STRIKE.

COURT: DENIED.

EXCEPTION NO. 5

Rule 608(a) of the North Carolina Rules of Evidence addresses impeachment and rehabilitation of a witness's credibility. It provides in pertinent part:

> (a) *Opinion and Reputation Evidence of Character.* The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked . . . .

N.C.G.S. § 8C-1, Rule 608 (1986). The commentary[3] to Rule 608 emphasizes that "[t]he reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible."

The relevant portion of Rule 405, which governs methods of proving character, provides:

> (a) *Reputation or Opinion.* In all cases in which evidence of character . . . is admissible, proof may be made by testimony as to reputation or . . . in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. *Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.*

3. The commentaries printed with the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, are not binding authority. However, we do give them substantial weight in our efforts to comprehend legislative intent. *State v. Hosey*, 318 N.C. 330, 337-338 n. 2, 348 S.E. 2d 805, 809-810 n. 2 (1986).

N.C.G.S. § 8C-1, Rule 405 (1986) (emphasis added). Rules 608 and 405(a), read together, forbid an expert's opinion testimony as to the credibility of a witness. *State v. Heath*, 316 N.C. 337, 342, 341 S.E. 2d 565, 568 (1986).

We conclude that both the State's question and the expert's answer were improperly allowed. Dr. Barnette's contact with the victim was solely in her role as a child psychologist. Their sessions together began as a result of the acts which resulted in these charges against the defendant. The ten sessions involved psychotherapy to assist the victim in overcoming her negative responses to the incidents. The question posed by the prosecutor clearly invoked Dr. Barnette's status as an expert and sought to establish the credibility of the victim as a witness. Such evidence was inadmissible and should have been excluded. *Id.*

Additionally, the question and answer complained of came immediately after Dr. Barnette had given lengthy testimony concerning the victim's statements to her about the sexual acts by the defendant. Dr. Barnette's testimony that the victim had "never been untruthful with me about it" must have been construed by the jury as expert opinion testimony that the victim's accusations against the defendant as related to Dr. Barnette were true. In short, Dr. Barnette's answer amounted to an expert opinion that the defendant was guilty of the rapes for which he stood charged. The admission of such evidence clearly was error. *State v. Heath*, 316 N.C. at 341-42, 341 S.E. 2d at 569. The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial—determination of the truth. *See United States v. Azure*, 801 F. 2d 336 (8th Cir. 1986) (applying Federal Rules of Evidence); *United States v. Barnard*, 490 F. 2d 907, 912 (9th Cir. 1973), *cert. denied*, 416 U.S. 959, 40 L.Ed. 2d 310 (1974) (same).

Having found error in this regard, we must determine whether the error was prejudicial to the defendant. We conclude that it was.

In order to bear his burden of showing that prejudice exists as a result of an error arising other than under the Constitution of the United States, the defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at his

trial." N.C.G.S. 15A-1443(a) (1983). In this case, only the defendant and the victim purported to have personal knowledge of whether the rapes charged against the defendant actually had occurred. Each gave testimony absolutely conflicting with the testimony of the other. Therefore, the State's case against the defendant hinged almost totally on the credibility of the victim. Given this situation, we can only conclude that the erroneous admission of the expert's opinion that the victim was telling the truth demonstrates a "reasonable possibility" that a different result would have been reached at trial had the error not been committed. As a result, we hold that the defendant is entitled to a new trial.

The defendant also assigns as error the trial court's denial of his motion to dismiss at the close of all of the evidence at trial. It suffices to say here that the testimony of the victim taken in the light most favorable to the State provided substantial evidence of each element of the offenses charged and substantial evidence that the defendant committed them. This assignment of error is without merit and is overruled.

The defendant has brought forward other assignments of error and supporting contentions. As such purported errors are not likely to recur at a new trial, we find it unnecessary to address them.

For the reasons previously stated herein, the defendant is entitled to a new trial.

New trial.

Justice MARTIN dissenting.

I respectfully dissent. The testimony of Dr. Barnette which the majority decides was erroneously permitted was not an expert opinion as to the victim's character or reputation for truthfulness; the testimony was a response based upon personal knowledge to a factual question. Dr. Barnette testified merely that the victim was "never untruthful with me . . . [and that] [e]verything she had to say to me somehow I'd find out later that she was telling the truth." This is not an expert opinion that the victim was *always* truthful, that is, had a reputation or character for truthfulness, but merely a statement of fact that during Dr. Barnette's firsthand experience with the victim, the victim was

not untruthful to her. Compare *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986), in which we found error in asking an examining psychiatrist whether he had "form[ed] an *opinion* about whether [the victim] was believable or not" (emphasis added), and *State v. Heath*, 316 N.C. 339, 341 S.E. 2d 565 (1986), in which we found error in asking an expert if she had "an opinion as to whether or not [the victim] was suffering from any type of . . . mental condition which could or might have caused her to make up a story about the sexual assault." Although Dr. Barnette had been qualified to testify as an expert witness, the particular testimony she gave in response to the question ("Dr. Barnette, as you evaluated and treated [the victim], did you ever find her untruthful with you?") was not an expert opinion; it was a factual statement. As such, it falls neither under N.C.R. Evid. 608(a) nor 405 and was properly admitted into evidence.

I also disagree with the majority's assumption that "the testimony complained of was part of an attempt by the prosecutor to rehabilitate the victim as a witness after she had been impeached by cross-examination concerning a prior inconsistent statement." There is no evidence of record that this was the purpose for which the testimony was offered. It could just as well have been offered to test the strength of the witness's own experience with the victim, or for some other purpose.

Finally, assuming, but in no way conceding, that the testimony was erroneously allowed by the trial court, I cannot agree that such an alleged error was prejudicial under N.C.G.S. § 15A-1443(a). The jury had before it plenty of evidence corroborating the victim's account of events. It also heard Dr. Barnette testify that the victim had discussed with her the possibility of lying about the identity of the person who had committed the sexual acts. The jury, as fact finder, was thus well apprised of potential problems with the victim's credibility and could make its own assessment of it. Defendant has failed to show how the testimony at issue here can reasonably be said to have tipped the balance against him.

For these reasons I find no reversible error in the admission of Dr. Barnette's statement.

I am authorized to state that Justices MEYER and BROWNING join in this dissenting opinion.

STATE OF NORTH CAROLINA v. KENNETH ALFRED WILLIAMS

No. 75A86

(Filed 18 November 1986)

1. **Rape and Allied Offenses §§ 3, 5— forcible rape charged—insufficiency of evidence—intercourse with female under 13 shown but not charged**

Where defendant was charged with forcible first degree rape pursuant to N.C.G.S. § 14-27.2(a)(2), but no evidence was presented to show that the alleged rape entailed the use of a weapon, the infliction of serious injury, or aiding and abetting, and the trial judge did not instruct the jury on forcible rape, the failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment amounted to a dismissal of that charge and all lesser-included offenses. Furthermore, though there was evidence that defendant committed vaginal intercourse with a female under thirteen years of age and therefore could have been convicted of first degree rape pursuant to N.C.G.S. § 14-27.2(a)(1), he was not so charged, and he could be convicted, if at all, only of the particular offense charged in the warrant or bill of indictment.

2. **Rape and Allied Offenses § 6— forcible rape charged—instruction on intercourse with female under 13 improper**

Where defendant was charged with forcible first degree rape but the trial court instructed on vaginal intercourse with a female under thirteen years of age, such instructions were error because they allowed the jury to convict on grounds other than those charged in the indictment; moreover, the instructions were a basic violation of due process because defendant was never charged with the only rape offense which the jury was instructed to consider.

3. **Criminal Law § 34.8— father's taking of 12-year-old daughter to x-rated movie —evidence admissible to show plan**

In a prosecution of defendant for rape and incest, the trial court did not err in admitting evidence that defendant had taken his daughter to an x-rated movie and had told her to look at scenes depicting graphic sexual acts, since the daughter's presence at the film at defendant's insistence and his comments to her showed his preparation and plan to engage in sexual intercourse with her and to assist in that preparation and plan by making her aware of such sexual conduct and arousing her. N.C.G.S. § 8C-1, Rule 404(b).

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing life sentence after defendant's convictions of first-degree rape and incest at the 29 October 1985 Criminal Session of ROBESON County Superior Court, *Johnson (Lynn), J.*, presiding.

Lacy H. Thornburg, Attorney General, by James C. Gulick, Special Deputy Attorney General, for the State.

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

BROWNING, Justice.

In his appeal defendant contends the trial court (1) committed reversible error in failing to dismiss the first and second-degree rape charges for insufficient evidence; (2) committed plain error in instructing the jury on a theory of rape not charged in the indictment; and (3) committed reversible error in admitting evidence that defendant had taken his daughter to an x-rated movie and told her to look at scenes depicting graphic sexual acts. We find merit in defendant's first and second contentions. The trial court's failure to instruct the jury on forcible rape was the equivalent of a dismissal of that crime and all lesser included offenses. Although the jury returned a verdict of "Guilty of First Degree Rape," the judge instructed the jury only on rape of a female under thirteen years, a theory of rape not charged in the indictment. We find no error in defendant's trial and conviction of incest.

I.

The indictment charging defendant with rape alleged that he "unlawfully, willfully and feloniously did ravish and carnally know Dolly Marie Williams, a female person, by force and against her will." The indictment alleged that the offense was in violation of N.C.G.S. § 14-27.2(a)(2) and N.C.G.S. § 14-27.3(a)(1), our statutes governing first-degree rape and second-degree rape by use of force and against the victim's will. The crimes were alleged to have occurred on 1 August 1985.

The State's first witness was Dollie Marie Williams. Ms. Williams testified that she was thirteen years old and that her last birthday had fallen on 16 August 1985. Defendant, she testified, was her natural father. She had moved in with defendant, his wife and their children at the end of February 1985.

According to the witness, defendant had touched her on several occasions between the end of May 1985 and the end of July 1985. Although she had been fully clothed on those occasions, this

conduct had involved her breasts and "private parts" and she had disliked it and had asked defendant to quit doing it. Defendant had said nothing on those occasions. She stated that she did not tell anybody about defendant's conduct because she had been present on prior occasions when he made belligerent remarks and those remarks had made her afraid. She had also seen him strike two of his stepchildren.

In early July, Williams said, defendant had told her to take off her shorts and panties. She complied because she was afraid of defendant. That fear was rooted in having been previously exposed to defendant's belligerence. She stated defendant then had vaginal intercourse with her. Afterwards, defendant told her not to say anything.

According to Williams, defendant continued to have vaginal intercourse with her on a regular basis in the weeks that followed. One day, she recalled, she had heard somebody get out of a bed in another room during one of the times defendant had touched her. A few days after that, employees of the Department of Social Services interviewed her. When first interviewed, the prosecutrix did not relate the events about which she testified. Subsequently, the interviewer, Becky Morrow, told her that she had received information from one of the other children that there had been sexual contact between Ms. Williams and defendant. In response to that accusation, Ms. Williams gave the version of events that she was testifying to at trial.

As to the offenses charged, Ms. Williams testified that defendant had sent the four younger children out to the yard at around 1:20 in the afternoon and, shortly thereafter, called her to come back to the bathroom. He kissed and touched her, before telling her to take off her shorts and panties. She complied and then bent over, holding the bathtub, while defendant engaged in vaginal intercourse with her.

Melissa Barnes, defendant's stepdaughter, testified that she had once seen Dollie Williams in the same bed as defendant, and that defendant's hand had been touching Williams' buttocks.

Shirley Williams, defendant's wife, gave testimony corroborating that of Melissa Barnes, her daughter. She also testified, over defendant's repeated objections, that defendant had

taken her and Dollie Williams to a drive-in movie, which she described as x-rated. According to the witness, the movie had contained explicit sexual scenes and defendant had encouraged his daughter to look at them.

Becky Morrow, the case worker who interviewed Dollie Williams, gave corroborative testimony based on Williams' prior statements to her.

Dr. Michael Hunt testified that he had examined Dollie Williams and that his findings were consistent with a sexually active young woman. He had found no evidence of trauma.

Detective Kenneth Sealey gave corroborating testimony based on Dollie Williams' prior statements. Sealey also testified that he collected samples for a rape kit and sent it to the North Carolina Bureau of Investigation laboratory, along with some sheets taken from household items found in defendant's truck.

Jed Taub, from the State Bureau of Investigation laboratory, testified that he found semen stains on the sheet that Sealey had sent to them. He identified them as type O. Taub identified a blood sample taken from defendant as also being type O.

Defendant presented a number of witnesses.

Dollie Mae Williams testified that her granddaughter, Dollie Williams, the prosecutrix, had been at her house throughout the time that she alleged the crimes charged had taken place. Defendant had been there for much of that time.

Clara Barnes, Dollie Mae Williams' next door neighbor, testified that she had seen Dollie Williams at Mrs. Williams' house at the time that she had testified to having sexual intercourse in defendant's trailer some miles away.

Lillie Hickman testified that she saw defendant's truck at Mrs. Williams' house at around 1:20 p.m. on 1 August 1985. Dollie Williams and defendant's stepchildren were on the porch of the house at that time. When Mrs. Hickman returned between 2:30 and 3:00 p.m., she stopped to visit and again saw Dollie Williams at that location.

Robert Hickman confirmed Lillie Hickman's testimony. He said he had been driving her to the hospital and back at the time they saw defendant's truck and his children.

Defendant moved to dismiss the charges at the close of the evidence. The court denied his motion.

II.

[1] In his first assignment of error, defendant contends that the evidence presented at trial was insufficient to sustain his conviction on the indictment for forcible first-degree rape and, for that reason, that the trial court erred in denying his motion to dismiss that charge. This contention is based on the State's failure to present substantial evidence of each of the essential elements of the charge as laid in the indictment. No evidence was presented to show that the alleged rape entailed the use of a weapon, the infliction of serious injury or aiding and abetting. Proof of at least one of those elements is necessary to sustain a conviction for first-degree rape under N.C.G.S. § 14-27.2(a)(2), the theory of prosecution under which defendant was charged. Although the trial judge denied defendant's motion to dismiss, when he charged the jury he did not instruct them on forcible rape; he instructed only on the offense of vaginal intercourse with a female under thirteen years of age.

It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment. *State v. Faircloth*, 297 N.C. 100, 253 S.E. 2d 890 (1979); *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969); *State v. Lawrence*, 264 N.C. 220, 141 S.E. 2d 264 (1965); *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699 (1946).

While evidence was adduced at trial that indicated that a basis existed upon which the State could have brought defendant to trial on a theory of rape based on Dollie Williams' age pursuant to N.C.G.S. § 14-27.2(a)(1), defendant was not so charged. Having chosen forcible first-degree rape as its theory of prosecution and having brought defendant to trial, the State was bound to prove all of the material elements of that charge and could not rely on proof of rape pursuant to N.C.G.S. § 14-27.2(a)(1). The failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment amounted to a dismissal of that charge and all lesser included offenses. Therefore, we hold that the trial judge did in fact dismiss the first and second-degree rape charges alleged in the indictment.

III.

[2] We next are asked to consider whether the trial court committed plain error in instructing the jury on a theory of rape 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. But, we hold that the jury instructions were more than erroneous; they were a basic violation of due process because the defendant was never charged with the only rape offense which the jury was instructed to consider. "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E. 2d 149, 151 (1940).

N.C.G.S. § 14-27.2, first-degree rape, provides:

(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 under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; 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.

Whereas, N.C.G.S. § 14-27.3, second-degree rape, provides:

(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the

act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class D felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 5.)

The bill of indictment under which defendant was tried and convicted charged him with an offense in violation of N.C.G.S. § 14-27.2(a)(2), and § 14-27.3(a)(1). The indictment further provides:

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 ravish and carnally know Dolly Marie Williams, a female person, by force and against her will.

[NOTE: This indictment is sufficient to charge both First and Second Degree Rape of a female person when force was used. G.S. 15-144.1(a); G.S. 15-155. A prosecutor who only intends to prosecute for Second Degree Rape may want "Second Degree" typed before "Rape" in the offense block.

This indictment is not sufficient to charge first degree rape of a child of the age of 12 years or less or second degree rape of a handicapped person. See G.S. 15-144.1(b) and (c) to indict for these offenses.]

However, the trial court instructed the jury that they could find defendant guilty of first-degree rape if they found "that on or about August 1, 1985, Kenneth Alfred Williams engaged in vaginal intercourse with Dollie Marie Williams, and that at that time, Dollie Marie Williams was a child under the age of thirteen years, and that Kenneth Alfred Williams was at least twelve years old and was at least four years older than Dollie Marie Williams."

The requirements of a valid indictment are that it be sufficiently certain in the statement of the accusation so as to identify the offense with which the accused is charged; to protect the accused from being twice put in jeopardy for the same offense; to enable the accused to prepare for trial and to enable the court on conviction or plea of guilty to pronounce sentence according to the rights of the case. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d

897 (1970). An indictment that does not accurately and clearly allege all of the elements of the offense is inadequate to support a conviction. *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977). Finally, the failure of the allegations to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction. *See, e.g., State v. Thorp*, 274 N.C. 457, 164 S.E. 2d 171 (1968). (Burglary indictment charged felonious purpose of ravishing and carnally knowing, but the court's instructions told the jury that they could find defendant guilty if he "entered with the intent to commit a felony.")

Because the jury in this case was instructed and reached its verdict on the basis of the elements set out in N.C.G.S. § 14-27.2(a)(1), whereas defendant had been charged with rape on the basis of the elements set out in N.C.G.S. § 14-27.2(a)(2) and N.C.G.S. § 14-27.3(a)(1), the indictment under which defendant was brought to trial cannot be considered to have been a valid basis on which to rest the judgment. Therefore, we hold that the instructions given to the jury pursuant to N.C.G.S. § 14-27.2(a)(1) were fundamentally in error. For the reasons discussed in Sections II and III of this opinion, the judgment entered on defendant's conviction must be vacated.

IV.

[3] By his final assignment of error, defendant contends that the trial court erred in admitting evidence that defendant had taken his daughter to an x-rated movie and had told her to look at scenes depicting graphic sexual acts.

Rule 404(b) of the North Carolina Rules of Evidence 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.

Defendant argues that the trial court's ruling that the evidence pertaining to the x-rated movie went to the state of mind of the defendant makes a mockery of both the letter and intent of the rule. He further argues that it serves to tell the jury that a

perverse or immoral mental state at the time of this incident is probative of defendant's guilt of rape and incest and that kind of presumption is precisely the evil the rule seeks to avoid.

The State contends that the testimony regarding the x-rated film was admissible to prove defendant's specific sexual intent, preparation and plan with regard to his daughter. We hold that the daughter's presence at the film at defendant's insistence, and his comments to her show his preparation and plan to engage in sexual intercourse with her and assist in that preparation and plan by making her aware of such sexual conduct and arousing her. Therefore, we reject this assignment of error.

For the reasons given we conclude that the judgment in 85CRS13991 as to forcible first-degree rape must be arrested. Because the sentence in 85CRS13991 as to first-degree rape was combined with the sentence in 85CRS13990 as to incest, the sentence in 85CRS13990 must be vacated and 85CRS13990 is remanded to the Superior Court of Robeson County for a new sentencing hearing.

No. 85CRS13991—Judgment arrested.

No. 85CRS13990—Vacated in part and remanded for a new sentencing hearing.

STATE OF NORTH CAROLINA v. WALTER BRYANT, JR.

No. 290A86

(Filed 18 November 1986)

Criminal Law § 138.26— sentence—great monetary loss as aggravating factor—factor applicable only to property damage

In imposing a sentence in excess of the presumptive term for assault with a deadly weapon with intent to kill inflicting serious injury, the trial judge erred in finding as an aggravating factor that the offense involved damage causing great monetary loss based on the victim's medical expenses and lost wages, since the statutory aggravating factor of damage causing great monetary loss applies only to property damage and not to personal injury.

Justice MARTIN dissenting.

Justices MITCHELL and BROWNING join in this dissenting opinion.

State v. Bryant

APPEAL by the defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 80 N.C. App. 63, 341 S.E. 2d 358 (1986), affirming sentences imposed by the trial court following the defendant's conviction at the 13 August 1984 Criminal Session of Superior Court, HALIFAX County, *Allsbrook, J.*, presiding.

The defendant was tried upon indictments charging him with assault with a deadly weapon with intent to kill Marvin Hardy, assault with a deadly weapon with intent to kill inflicting serious injury on Margie Bryant, and discharging a firearm into an occupied vehicle. He was acquitted of the assault on Marvin Hardy and convicted of the other two offenses. From an active sentence of seven years on the conviction of aggravated assault against Margie Bryant, the defendant appealed to the Court of Appeals. Heard in the Supreme Court 14 October 1986.

Lacy H. Thornburg, Attorney General, by Dolores O. Nesnow, Assistant Attorney General, for the State.

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

BILLINGS, Chief Justice.

In imposing a sentence in excess of the three-year presumptive term, the trial judge found as an aggravating factor that "The offense involved damage causing great monetary loss," factor 23 on the sentencing form supplied by the Administrative Office of the Courts and taken from N.C.G.S. § 15A-1340.4(a)(1)m. The evidence upon which the aggravating factor was based was the victim's testimony that as the result of her injuries she had incurred medical expenses of approximately $5,000.00 plus lost wages of $1,000.00. The Court of Appeals rejected the defendant's contention that the statutory aggravating factor of damage causing great monetary loss applies only to property damage and not to personal injury. Eagles, J., dissented from the portion of the majority opinion that upheld the application of that aggravating factor to include monetary loss resulting from personal injury.[1]

1. Although Judge Eagles in his dissent also disagrees with the majority's rejection of the defendant's contention that use of the aggravating factor of damage causing great monetary loss improperly relies upon evidence necessary to prove an

We agree with the defendant and Judge Eagles and reverse the Court of Appeals.

N.C.G.S. § 15A-1340.4 contains a list of aggravating factors that a judge must consider in determining the appropriate sentence for a person convicted of a felony. In construing those statutory aggravating factors, it is our duty not to substitute our own view as to what should or could constitute statutory aggravating factors, but to construe the statute in a reasonable manner consistent with the apparent intent of the General Assembly, guided by the rule of statutory construction that criminal statutes are to be strictly construed. *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978).

N.C.G.S. § 15A-1340.4(a)(1) (1983) sets forth 16 factors listed as "a." through "p." However, within most factors are set forth two or more alternative or disjunctive provisions, such as "c. The defendant was hired *or* paid to commit the offense," and "i. The defendant was armed with *or* used a deadly weapon at the time of the crime." (Emphasis added.) By separating out each of these alternative or disjunctive provisions, the Administrative Office of the Courts has provided to the trial courts a sentencing form which contains 27 separate statutory factors, one of which is "23. The offense involved damage causing great monetary loss."

In construing the legislative intent regarding the contested factor, we find it helpful to consider the factor in its statutory context, not isolated as it appears on the sentencing form.

Factor m. listed in N.C.G.S. § 15A-1340.4(a)(1), from which factor 23 on the sentencing form is derived, is "The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband."

Without question, the aggravating factor as worded can be construed as the State would have us construe it. Whether that construction, which is possible but not compelled, is in fact the interpretation intended by its drafters may be determined by looking to the sparse legislative history available and by a commonsense reading of the provision itself.

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element of the offense, i.e., serious injury, the defendant has not brought that issue forward in his brief to this Court.

When N.C.G.S. § 15A-1340.4 was enacted in 1979, the list of aggravating factors was limited to three, which were:

(a) In committing the offense, the defendant inflicted bodily injury on another person substantially in excess of the minimum amount necessary to prove the offense.

(b) In committing the offense, the defendant inflicted property loss or damage substantially in excess of the minimum amount necessary to prove the offense.

(c) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants in its commission.

1979 N.C. Sess. Laws ch. 760.

In 1981, the list of aggravating factors was rewritten and expanded. (1981 N.C. Sess. Laws ch. 179.) Former factor (a) was deleted and no factor including the phrase "inflicted bodily injury" was carried forward, although the new factor "f. The offense was especially heinous, atrocious, or cruel" was among those added and addresses some of the same concern that was addressed by original factor (a).

The list of new aggravating factors, introduced on 4 February 1981 as Senate Bill 72, replaced old factor (b), which had referred to the defendant's having "inflicted property loss or damage substantially in excess" of the amount necessary for the offense, with new factor m., worded as follows:

> The offense involved an attempted or actual taking or damage of great monetary value, or the offense involved an unusualaly [sic] large quantity of contraband.

See North Carolina Academy of Trial Lawyers, *Presumptive Sentencing*, 1981. Obviously because one does not "take" monetary value, and "damage" creates loss rather than value, the drafters rewrote factor m to take care of the grammatical problem which existed with the factor as introduced. The rewritten version requires the "taking of property" and "damage causing . . . loss." This legislative history supports a construction of the statute consistent with the view that the General Assembly intended for the factor to apply only to monetary loss resulting from damage to property.

We are further convinced of that construction by the fact that lawyers and judges reading and applying factor m. since its enactment in 1981 have consistently applied it only to property damage, as evidenced by the fact that in this case, tried 13 August 1984, is the first time that the construction urged by the State has been applied to this factor in cases brought to the appellate courts, although we have reviewed numerous cases in which the injuries inflicted on victims resulted in long hospitalization and incapacity.

Finally, we believe that application of the Court of Appeals' decision would create a great deal of uncertainty about when and whether the factor exists. Must the trial judge find the aggravating factor if the victim of an assault inflicting serious injury is a business executive who loses several thousands of dollars in salary? Is that situation subject to aggravation, but not the same injury to a school child or housewife who does not lose wages as the result of the injury? If the victim suffers no actual monetary loss because loss resulting from the injuries is covered by insurance, does the factor not apply? Or does loss to the insurance company constitute loss which the sentencing judge must consider? We do not believe that the General Assembly intended to tie this factor to remote effects of the defendant's crime which are dependent upon a variety of factors over which the defendant had no control and about which he had no knowledge. Of course, the judge does have the authority to require the defendant, as a condition of probation or parole, to make restitution of monetary loss to the victim. N.C.G.S. §§ 15A-1343(d), 15A-1374(b)(11a), 148-57.1.

We believe that it would require quite a liberal interpretation of the statute to conclude that the General Assembly intended, by using the word "damage" rather than "injury," when they had used the phrase "bodily injury" in an earlier version to express the idea urged upon us here, and by placing the factor among a group of purely property-related factors, to convey the message that it intended by that factor to require trial judges to consider the amount of an injured victim's hospital expenses and lost wages in determining the appropriate sentence.

However, none of this discussion should be interpreted as a ruling by this Court that under no circumstances may the finan-

cial burden imposed upon the victim by his or her injury ever be considered a non-statutory aggravating factor. We merely hold that consideration of that factor is not statutorily mandated.

For the reasons stated above, the decision of the Court of Appeals is reversed and the case remanded to that court for further remand to the Superior Court of Halifax County for resentencing upon the guilty verdict of assault with a deadly weapon with intent to kill inflicting serious injury.

Reversed and remanded.

Justice MARTIN dissenting.

I respectfully dissent. The majority's characterization of N.C.G.S. § 15A-1340.4(a)(1)(m) (1983) as "replacing" only N.C.G.S. § 15A-1340.4(b) (1981) is grossly misleading. When the new list of aggravating factors was enacted by the legislature in 1981, *both* old factor "a" (concerning infliction of bodily injury) and old factor "b" (concerning property loss) were simultaneously repealed. 1981 N.C. Sess. Laws ch. 179. If we are to interpret new factor "m" as having "replaced" anything, it is *both* old factor "a" and old factor "b." As such, it is appropriate to construe factor "m" as referring to the infliction of loss to either property or to bodily health.

I also cannot agree that the fact that the text of factor "m" as found in Senate Bill 72 was changed between the 4 February 1981 draft and the later draft eventually introduced supports the construction of the statute urged by the majority. The version of 4 February 1981 is so ungrammatical and contains such an obvious typographical error that it is clear that factor "m" was simply not typed in the way the drafters intended. It stands to reason that the change appearing in the later draft merely corrected this clerical error rather than adding anything substantially to the meaning of the text.

The current statute may be read grammatically as follows:

[A] The offense involved [either]

[1] an attempted or actual taking of property of great monetary value or

[2] damage causing great monetary loss, or

[B] the offense involved an unusually large quantity of contraband.

Analysis of the first part of the statute reveals that—"replacing" old factors "a" and "b"—the legislature was concerned with the *taking* of valuable property in one clause and *damage* generally in another. The obvious intent was to provide that if a defendant deprived someone of something valuable, whether by removal or injury, this fact should be considered an aggravating factor during sentencing for the offense causing the deprivation. If a criminal defendant's acts injure a person, depriving him of his own health and causing him to incur great monetary loss, the defendant's "offense involved . . . damage causing great monetary loss."

This interpretation requires no liberality of statutory construction. It is in accord with the legislative history of N.C.G.S. § 15A-1340.4(a) and with the presumption we must apply that the General Assembly relies on commonsense definitions of words when drafting statutes. "When the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a definite meaning is apparent or definitely indicated by the context." *State v. Lee*, 277 N.C. 242, 243, 176 S.E. 2d 772, 773 (1970). *Accord State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159 (1981) (courts may consult dictionaries to ascertain ordinary meaning of words in statutes). Black's Law Dictionary 351 (5th ed. 1979) defines "damage" as "[l]oss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's *person or property* . . . By damage we understand *every* loss or diminution of what is a man's own, occasioned by the fault of another. The harm, detriment or loss sustained by reason of an injury." (Emphases ours.) Webster's Ninth New Collegiate Dictionary 323 (1984) lists as its primary definition of "damage": "1: loss or harm resulting from *injury to person*, property, or reputation." (Emphasis ours.) *See Cherry v. Gilliam*, 195 N.C. 233, 235, 141 S.E. 594, 595 (1928) ("The word 'damages' is defined as compensation which the law awards for an injury—'injury' meaning a wrongful act which causes loss or harm to another."). Because "damage" includes injury to a person, the phrase "or damage causing great monetary loss" in N.C.G.S. § 15A-1340.4(a)(1)(m) must include monetary loss resulting from personal injuries.

I would also point out that the issue of whether "the General Assembly intended to tie this factor to remote effects of the defendant's crime which are dependent upon a variety of factors over which the defendant had no control and about which he had no knowledge" is not before us in the instant case. The expensive medical care needed by defendant's ex-wife after defendant shot her from close range in the back and arm was a direct, not a "remote," consequence of defendant's criminal acts. If a person can be held liable for money damages in a civil action for all of the reasonably foreseeable consequences of his *negligent* acts, then surely a criminal defendant should be held to have taken the risk of being given a greater sentence if his *intentional* acts directly involve "damage causing great monetary loss." *See Lane v. R. R.*, 192 N.C. 287, 290, 134 S.E. 855, 857 (1926) ("The broad general rule, with respect to compensatory damages, which are given as the pecuniary equivalent for the injury done, is that the wrongdoer is liable to the person injured for all the natural and direct or proximate consequences of his wrongful act or omission . . . . In the case of torts . . . [s]uch liability extends not only to injuries which are directly and immediately caused by his act, but also to such consequential injuries, as according to the common experience of men, are likely to result from such act."). In the instant case, it strains credulity to think that when defendant shot his ex-wife he was unaware that the damage he caused to the victim would result in expensive medical care.

For the above reasons I vote to affirm the decision of the Court of Appeals.

Justices MITCHELL and BROWNING join in this dissenting opinion.

STATE OF NORTH CAROLINA v. JAMES CURTIS SOWELL AND LONNIE ALONYA SAMUEL

No. 330A86

(Filed 18 November 1986)

1. **Criminal Law § 138.26— sentence—great monetary loss as aggravating factor—factor applicable only to personal property**

In a prosecution of defendants for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in finding as an aggravating factor that the offense involved damage causing great monetary loss based on the victim's hospital and medical expenses, since this factor applies only to damage to property causing great monetary loss and not to great monetary loss incurred because of a personal injury. N.C.G.S. 15A-1340.4(a)(1)m.

2. **Assault and Battery § 13— assault with deadly weapon with intent to kill inflicting serious injury—medical expenses incurred by victim—same evidence not used to prove element of offense and aggravating factor**

There was no merit to defendant's contention that consideration of the medical expenses incurred by the assault victim was prohibited by N.C.G.S. § 15A-1340.4(a)(1), which provides that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, since evidence of large medical and hospital expenses may be used to establish the element of serious injury but such expenses are not inherent in every instance of a serious injury, nor are such expenses a necessary method for proving the element of serious injury; moreover, the State did not rely on such expenses to establish the element of serious injury, but instead presented evidence of the permanent disabilities suffered by the victim as a result of the assault to prove serious injury.

Justice MARTIN dissenting in part.

Justices MITCHELL and BROWNING join in this dissenting opinion.

APPEAL by defendants of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 80 N.C. App. 465, 342 S.E. 2d 541 (1986), affirming sentences imposed by the trial court following defendants' convictions at the 27 May 1985 Criminal Session of Robeson County Superior Court, *McLelland, J.*, presiding.

Defendants were tried on indictments charging them with assault with a deadly weapon with intent to kill inflicting serious injury on Charles Sisk. Defendants were each convicted of the offense, received an active sentence of fifteen years, and appealed to the Court of Appeals. Heard in the Supreme Court 14 October 1986.

Lacy H. Thornburg, Attorney General, by J. Charles Waldrup, Associate Attorney General, for the State.

Bruce F. Jobe, for defendant appellant Sowell.

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

PARKER, Justice.

[1] In imposing sentences in excess of the presumptive terms, the trial court found as an aggravating factor for each defendant that "The offense involved damage causing great monetary loss," which is listed as Factor 23 on the sentencing form supplied by the Administrative Office of the Courts and derived from N.C.G.S. § 15A-1340.4(a)(1)m (1983). This aggravating factor was based upon the victim's testimony at the sentencing hearing when, in response to the question of what was his best recollection as to the total amount of his hospital and medical expenses, he answered that he had "seen somewhere in the area of thirty to forty thousand dollars" and had been told by his employer that "it was between seventy-five and a hundred thousand." Both defendants appealed the trial court's consideration of this aggravating factor in sentencing to the Court of Appeals, which affirmed the sentences. For the reasons stated in Judge Eagle's dissent, on the same issue, in *State v. Bryant*, 80 N.C. App. 63, 341 S.E. 2d 358 (1986), Judge Becton dissented from that portion of the majority opinion that affirmed the trial court's interpretation of N.C.G.S. § 15A-1340.4(a)(1)m as including monetary loss resulting from personal injury.

Based on Judge Becton's dissent, defendants contend that the trial court's consideration of the victim's medical and hospital expenses, in aggravation of the sentences under N.C.G.S. § 15A-1340.4(a)(1)m, was erroneous for two reasons. First, defendants argue, this factor applies only to damage to property causing great monetary loss and not to great monetary loss incurred because of a personal injury. We agree with defendants and for the reasons stated in this Court's recent decision in *State v. Bryant*, Case No. 856SC386 (filed 18 November 1986), we reverse the Court of Appeals and find that N.C.G.S. § 15A-1340.4(a)(1)m does not include monetary loss resulting from personal injury.

[2] Next, defendant Sowell contends that consideration of the medical expenses incurred by the victim also is prohibited by N.C.G.S. § 15A-1340.4(a)(1) (1983), which provides that "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation." Defendant Sowell argues that the monetary loss suffered by the victim was simply additional evidence of the seriousness of the injury inflicted in the assault, and that introduction of this evidence at the sentencing hearing was impermissible because it was not a separate factor to be considered by the trial court for any other purpose.

When considering defendant Sowell's argument, this Court must focus on whether it was essential for the State to use this evidence in establishing the element of serious injury for conviction of this crime. *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). Although evidence of large medical and hospital expenses is both properly and frequently used to establish the element of serious injury, such expenses are not inherent in every instance of a serious injury, nor are such expenses a necessary method for proving the element of serious injury. The loss of an eye or a limb may not generate large medical expenses, yet undeniably the injury would still be serious. In addition, the State did not rely on such expenses to establish the element of serious injury, and instead presented evidence of the permanent disabilities suffered by the victim as a result of the assault to prove serious injury. Consequently, this Court finds that defendant Sowell's argument is without merit.

We have recognized that when a victim suffers multiple injuries, one of which would be sufficient to establish the element of serious injury, the additional injuries may be considered when sentencing a defendant without violating the prohibition in N.C.G.S. § 15A-1340.4(a)(1) against use of the same evidence to prove both an element of an offense and an aggravating factor. *State v. Vaught*, 318 N.C. 480, 349 S.E. 2d 583 (1986); *State v. Carter*, 318 N.C. 487, 349 S.E. 2d 580 (1986). In these cases, however, the aggravating factor considered by the trial court was N.C.G.S. § 15A-1340.4(a)(1)f (1983), "The offense was especially heinous, atrocious or cruel."

The monetary loss incurred by the victim as a result of the assault was found as a statutory aggravating factor by the trial court. Whether or not the monetary loss could have been found as a non-statutory aggravating factor is not before this Court.

For the reasons stated above, the decision of the Court of Appeals is reversed and the case remanded to that court for further remand to the Superior Court of Robeson County for resentencing in the convictions of assault with a deadly weapon with intent to kill inflicting serious injury.

Reversed and remanded.

Justice MARTIN dissenting in part.

For the reasons set forth in my dissenting opinion in *State v. Bryant* (No. 290A86, filed 18 November 1986), I dissent from that part of the majority opinion holding that N.C.G.S. § 15A-1340.4 (a)(1)(m) applies only to damage to property causing great monetary loss and not to monetary loss resulting from personal injuries caused by a defendant during the commission of his offense.

Justices MITCHELL and BROWNING join in this dissenting opinion.

STATE OF NORTH CAROLINA v. GEORGE ANTHONY MORRIS

No. 245A86

(Filed 18 November 1986)

Larceny § 7.2— value of stolen property—refusal to submit verdict of misdemeanor larceny—error

The trial court erred in refusing to submit a possible verdict of misdemeanor larceny to the jury where the only evidence concerning the value of the stolen articles was the owner's estimate of replacement cost for the used tools; the jury could have inferred that fair market value was less than replacement cost; and the jury could have concluded that fair market value was less than $400.

Justice MARTIN dissenting.

ON grant of a writ of certiorari to review a decision of the Court of Appeals, 79 N.C. App. 659, 339 S.E. 2d 834 (1986), *Becton, J.*, dissenting, which found no error in defendant's trial and subsequent conviction of felonious larceny. Heard in the Supreme Court 13 October 1986.

Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

Isabel Scott Day, Public Defender, by Gail M. Phillips (Merritt), Assistant Public Defender, for defendant-appellant.

FRYE, Justice.

The sole issue before this Court is whether the trial court erred in refusing to submit a possible verdict of misdemeanor larceny to the jury where the only evidence concerning the value of the stolen articles was the owner's estimate of replacement cost. For the reasons stated in this opinion, we hold that the trial court erred.

According to the evidence introduced at trial by the State, defendant was seen pushing a lawn mower and edger down a street in the vicinity of Cove Creek Road in Charlotte in the rain at about 2:15 a.m. on 6 July 1984 by Officer Matthews of the Charlotte Police Department. She stopped him. Defendant told her that he had borrowed the mower and edger from a friend who lived in a nearby house. Another officer went to the house to verify defendant's story, but no one was at home. Officer Matthews arrested defendant and took him into custody.

The mower and edger were subsequently identified as items belonging to one Charles Gouch. The door to Gouch's storage shed had been forced open. Gouch testified at trial that he had not given anyone permission to take the mower and edger and also that he had not been to the shed for a couple of weeks.

Defendant was charged in a single indictment with felonious breaking and entering and with felonious larceny. The jury acquitted him of breaking or entering but found him guilty of felonious larceny. *See* N.C.G.S. § 14-72(a) (1986). Finding one factor in aggravation, the trial judge sentenced defendant to a term of four years and recommended work release. Defendant appealed to the Court of Appeals, which found no error with a dissent by

Becton, J. Defendant attempted to appeal to this Court; his notice of appeal reached the office of the Clerk of the Court of Appeals on the last day before his time to appeal had expired but did not reach the office of the Clerk of the Supreme Court until the following day. Defendant accordingly also petitioned for a writ of certiorari. Upon motion by the State, this Court dismissed defendant's appeal but allowed his petition for a writ of certiorari on 6 May 1986.

The trial judge instructed the jury on felonious breaking or entering, felonious larceny pursuant to a breaking or entering, and felonious larceny of goods valued at more than $400. Defendant requested an instruction on misdemeanor larceny (of goods valued not more than $400), but the trial judge refused. Defendant contends that, based upon the evidence presented at trial, this refusal was error. We agree.

Our review of the record discloses that the State's only evidence concerning the value of the items was provided by the testimony of Mr. Gouch. On direct examination, he estimated the approximate value of the mower and the edger together to be $500. On cross-examination, however, he explained that this figure represented replacement cost of both items.[1] He did not remember what he had paid for either, nor was he sure how long he had owned them. He thought he had owned the edger for about a year, and the mower for about two years. Although in explaining how he had identified the items Mr. Gouch did say that the edger "looked like new," there was no evidence at all about the condition of the lawn mower.

It is well established that the trial court is required to instruct on a lesser-included offense when there is evidence from which the jury could infer that the defendant committed the lesser offense. *State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312 (1981); *see also State v. Peacock*, 313 N.C. 554, 330 S.E. 2d 190 (1985). "Too, it would be appropriate to give such instructions where the evidence, although sufficient to support a finding that the value of the property involved was more than [$400], is equivocal and

1. We note in passing that "value" in N.C.G.S. § 14-72(a) (1986) refers to fair market value, not replacement cost. *State v. Dees*, 14 N.C. App. 110, 187 S.E. 2d 433 (1972). Defendant, however, failed to object to the admission of this evidence.

susceptible of diverse inferences." *State v. Jones*, 275 N.C. 432, 438, 168 S.E. 2d 380, 384 (1969). The State argues that there was no such evidence in the instant case. It contends that the jury could either accept Mr. Gouch's valuation or reject it and acquit defendant entirely. We disagree with this contention. Mr. Gouch did provide an estimated value of $500 for the mower and edger. However, he also testified that this amount represented replacement cost and that both items were used. The mower was about two years old and the edger, one. Aside from Mr. Gouch's statement, made in a different context, that the edger "looked like new," there was no evidence about the condition of the tools, nor of their original cost. We believe that the jury could have inferred from this evidence that the fair market value of the tools was less than their replacement cost, and also that it might well have concluded that this value was not more than $400. Under these circumstances, it was error for the trial judge not to have charged on misdemeanor larceny when properly requested.

Because defendant was acquitted of breaking or entering, under the facts of this case his conviction for felonious larceny depends upon the value of the stolen goods. *See State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380. We therefore agree with defendant that the trial judge's error was prejudicial.

For all the above reasons, we reverse the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, Mecklenburg County, for a new trial.

New trial.

Justice MARTIN dissenting.

I respectfully dissent. The only evidence of the value of the stolen items was presented through the testimony of Mr. Gouch. On direct examination he was asked:

> Q. Do you know the approximate value of [the Lawn Boy mower and the edger]?
>
> A. I would say $500.00 for the pair, for both of them.
>
> Q. All right.
>
> A. Just estimating.

During cross-examination Mr. Gouch was asked:

> Q. Mr. Gouch, how long had you had that lawn mower and edger?
>
> A. How long have I had it?
>
> Q. Yes, sir.
>
> A. Oh, probably had the edger a year and probably two years on the lawn mower, I would say. Now, all that's just estimates. I don't know for sure.
>
> Q. Do you remember how much you paid for them when you bought them?
>
> A. Really, I don't. I just estimated the cost at $500.00 to replace them. So, I don't really know what I paid for them.

Defendant did not object to or seek to strike any of this testimony. The defendant also did not object to the trial court's instructions to the jury that for defendant to be found guilty of felonious larceny the state must prove beyond a reasonable doubt that either the property must have been taken after a breaking or entering "or that the property was worth more than $400.00, on this night in question." In the absence of a request by defendant for further instructions on value, the trial judge was not required to instruct the jury that the proper measure of value under the statute of the stolen goods is not replacement value but fair market value at the time the goods were stolen. *E.g., State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973).

It is well settled that a defendant is entitled to have a lesser included offense submitted to the jury only when there is evidence to support it. *E.g., State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986); *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983); *State v. Shaw*, 305 N.C. 327, 289 S.E. 2d 325 (1982).

> Submission of a lesser included offense when there is no evidence to support the milder verdict is not required when the indictment charges felony murder, arson, burglary, robbery, rape, larceny, felonious assault, or any other felony whatsoever. In all such cases if the evidence tends to show that the crime charged in the indictment was committed and there is no evidence tending to show commission of a crime

of lesser degree, the court correctly refuses to charge on unsupported lesser degrees. The *presence* of evidence tending to show commission of a crime of lesser degree is the determinative factor.

State v. Poole, 298 N.C. 254, 259-60, 258 S.E. 2d 339, 343 (1979) (Huskins, J., dissenting). In the present case there was *no* evidence before the jury that the value of the stolen goods was less than $500. Mr. Gouch's best estimate that their value was $500 was not rebutted by defendant and thus constituted the only evidence on the element of value. In the absence of any evidence that the stolen goods were worth less than $400, it was not error for the trial court to refuse to submit lesser included offenses to the jury. *E.g., State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828.

STATE OF NORTH CAROLINA v. ERNEST LEE MARTIN

No. 749PA85

(Filed 18 November 1986)

Constitutional Law § 48— defense counsel's communication of plea bargain to defendant—no ineffective assistance of counsel shown

The trial court did not err in denying defendant's motion for appropriate relief based on ineffective assistance of counsel where defendant alleged that trial counsel failed to communicate a plea bargain offer to him, but there was no evidence that a definitive plea offer was ever made between the district attorney and defense counsel.

ON defendant's petition for review of an order entered by *Lane, J.*, at the 9 November 1984 Criminal Session of Superior Court, WAYNE County, denying defendant's Motion for Appropriate Relief based *inter alia* on ineffective assistance of counsel. Certiorari was granted by the Supreme Court on 18 February 1986. Heard in the Supreme Court 15 October 1986.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

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

BROWNING, Justice.

Defendant was convicted of first-degree murder in the perpetration of a felony and was sentenced by Cowper, J. to life imprisonment at the 20 June 1977 Criminal Session of Superior Court, Wayne County. On 6 July 1984 defendant, appearing *pro se*, filed a Motion for Appropriate Relief in Superior Court, Wayne County alleging *inter alia*, ineffective assistance of counsel. Resident Superior Court Judge R. Michael Bruce appointed counsel to represent defendant. Defendant filed an Amended Motion for Appropriate Relief on 17 September 1984. This motion was heard by Lane, J. at the 9 November 1984 Criminal Session of Superior Court, Wayne County. After making findings of fact and conclusions of law, Judge Lane entered an order denying relief on 20 December 1984.

Defendant bases his Motion for Appropriate Relief on the failure of his trial counsel to communicate plea offers made by the district attorney before and during defendant's trial for murder and robbery. Specifically, defendant claims that the district attorney, Donald Jacobs, offered defendant, through his trial counsel, Herbert Hulse, Sr., a ten year sentence in exchange for a guilty plea by defendant to a lesser charge. Defendant alleges that Hulse never communicated this offer to him at any time and that Hulse's failure to communicate the alleged plea offer constitutes ineffective assistance of counsel. In conclusion, defendant contends that the superior court's findings of fact did not support a denial of his Motion for Appropriate Relief but rather compel a conclusion that appropriate relief is warranted in this case.

The standard for determining whether there has been a violation of a criminal defendant's sixth amendment right to effective assistance of counsel was set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984). In *Strickland*, the Supreme Court set forth a two-prong test to be used in analyzing ineffective assistance of counsel claims. Under this test the defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant to such a degree as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. at 687, 80 L.Ed. 2d at 693. The *Strickland* test was specifical-

ly adopted by the Supreme Court of North Carolina in *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985).

In *State v. Simmons*, 65 N.C. App. 294, 309 S.E. 2d 493 (1983) the North Carolina Court of Appeals held that, absent a showing of extenuating circumstances, failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel. In *Simmons*, affidavits were filed by the assistant district attorney prosecuting the case, counsel representing the defendant, and counsel representing a codefendant acknowledging that a plea had in fact been offered by the assistant district attorney. Counsel for the defendant erroneously believed that the plea offer was conditioned on acceptance by the codefendant and failed to inform his client of the offer after the codefendant refused to accept the plea. Affidavits filed by the other parties present at the meeting indicated that the offer was not conditional on acceptance by both defendants but was rather an unconditional offer. Based upon these affidavits, the court ruled that the defendant's Sixth Amendment right to effective assistance of counsel had been violated.

In the case *sub judice*, defendant's Motion for Approriate Relief is based upon N.C.G.S. §§ 15A-1415(b)(3) and (b)(6), contending that his conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina in that he was denied effective assistance of counsel. N.C.G.S. § 15A-1420(c) sets forth the procedural rules to be used in hearings on Motions for Appropriate Relief. Pursuant to N.C.G.S. § 15A-1420(c)(5), "[i]f an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion." Therefore, in this case defendant had the burden during the evidentiary hearing of proving by a preponderance of the evidence that a definite plea offer was made by the district attorney to Mr. Hulse.

In *State v. Stevens*, 305 N.C. 712, 291 S.E. 2d 585 (1982), this Court held that in reviewing orders denying a defendant's Motion for Appropriate Relief, findings of fact made by the trial judge are binding upon the petitioner if they are supported by evidence. This Court in *Stevens* further stated that this rule would apply even though the evidence presented at the hearing was conflicting and notwithstanding the defendant's testimony at the hearing

to the contrary. *State v. Stevens*, 305 N.C. at 720, 291 S.E. 2d at 591; *State v. Baker*, 312 N.C. 34, 40, 320 S.E. 2d 670, 675 (1984); *State v. Bush*, 307 N.C. 152, 168, 297 S.E. 2d 563, 573 (1982).

In his order denying defendant's motion, Judge Lane made numerous findings of fact. Specifically as to the existence of a plea offer, Judge Lane found:

> 16. That the District Attorney for the State does not recall whether or not if he communicated an offer to the Defendant's attorney for a plea bargain;
>
> 17. That the Attorney for the Defendant does not recall any such offer, and did not communicate such an offer;

Lastly, it should be noted that Judge Lane made no finding of fact that there was any direct communication of a definite plea offer between Mr. Jacobs and Mr. Hulse.

After a careful review of the motion hearing transcript, we also find no evidence that there was any direct offer of a definite plea between Mr. Jacobs and Mr. Hulse. Specifically the motion hearing transcript includes sworn testimony by Mr. Hulse that he never received a plea offer from Mr. Jacobs. At the motion hearing Mr. Hulse testified about the alleged offer of a plea bargain as follows:

> Mr. Jacobs, I, uh, was never offered by anybody at anytime to my recollection a proposal to plead Ernest Martin guilty in exchange for a—sentence of ten years. I know I never received any such offer from you. I know you and I never discussed it, uh, from that standpoint. There might have been some vague discussions about a plea of guilty and leaving the punishment up to the Judge. . . .

Additionally, the transcript shows that Mr. Hulse reaffirmed this statement on several other occasions during direct and cross examination. Finally, District Attorney Jacobs stated during the hearing that, "I searched by memory and I cannot definitely say one way or another whether or not I offered any plea, whether or not I didn't offer any plea. I just don't remember." Therefore, the factual situation in the case *sub judice* is in sharp contrast to that in *Simmons*, as here there is no evidence that a definitive plea of-

fer was ever made between the district attorney and the defense counsel.

We do not find it unusal that Mr. Jacobs might fail, in 1984, to remember the events of a case which happened some seven years earlier. Where, as in this case, defendant had knowledge of the alleged wrong immediately after trial and failed to timely raise the issue, it is not unreasonable to surmise that memories would be faded and that defendant would be unable to carry the required burden of proof.

After a careful examination of the evidence, as preserved in the motion hearing record, we cannot find that defendant has satisfied his burden of proof by proving by a preponderance of the evidence that a definite plea offer was made by the district attorney to Mr. Hulse. Additionally, as there is evidence to support the findings of fact made by Judge Lane, we are compelled to uphold his order denying relief. Although the record presents conflicting evidence, there is no direct evidence that a definitive plea offer was ever made between District Attorney Jacobs and Mr. Hulse. The record clearly shows that Mr. Hulse, under oath, unequivocally denied that any such offer was made and that the district attorney, Mr. Jacobs, does not recall whether any such offer was made. In light of these facts, and the record as a whole, we find that Judge Lane did not abuse his discretion in denying defendant's Motion for Appropriate Relief.

No error.

STATE OF NORTH CAROLINA v. DARRICK WAYNE BAILEY

No. 380PA86

(Filed 18 November 1986)

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 80 N.C. App. 678, 343 S.E. 2d 434 (1986), awarding the defendant a new trial.

Lacy H. Thornburg, Attorney General, by Floyd M. Lewis, Assistant Attorney General, for the State-appellant.

William T. Davis for defendant-appellee.

PER CURIAM.

We conclude that the State's petition for discretionary review was improvidently allowed.

Petition for discretionary review improvidently allowed.

STATE OF NORTH CAROLINA v. PRATHER STRICKLAND

No. 36A86

(Filed 6 January 1987)

1. **Rape and Allied Offenses § 5— physical force in addition to fear—sufficient evidence of rape**

The State's evidence was sufficient to show that defendant used physical force as well as the victim's fear and fright to have vaginal intercourse with the victim so as to support defendant's conviction of second degree rape under N.C.G.S. § 14-27.3(a)(1) where it tended to show that, after defendant learned the victim was not feeling well, he broke the latch off her screen door, forced his way into her home, grabbed her from behind and put his hand over her mouth, pulled her into a bedroom by her arm, pushed her onto the bed, and had sexual intercourse with her without her consent.

2. **Burglary and Unlawful Breakings § 6— instructions—use of word "basically"**

The trial court did not err in instructing the jury that it should return a verdict of guilty of felonious breaking or entering if it found beyond a reasonable doubt that defendant opened a closed screen door and "basically" went into the victim's home without her consent and with the intent to commit second degree rape.

3. **Criminal Law § 138.28— prior convictions—proof by detective's recollections**

The trial court could properly find as a factor in aggravation that defendant had prior convictions punishable by more than sixty days' confinement based upon a detective's recollections of those convictions.

4. **Constitutional Law § 48— sentencing—right to effective assistance of counsel**

Sentencing is a critical stage of a criminal proceeding to which the right to effective assistance of counsel applies.

5. Constitutional Law § 48— sentencing—effective assistance of counsel not denied

Defendant was not denied the effective assistance of counsel at his sentencing hearing where an objection to a detective's testimony concerning defendant's prior convictions would have been ineffective; trial counsel acted affirmatively to protect defendant's rights twice during the brief hearing by objecting to testimony and making a motion for appropriate relief; defendant has not brought forward any evidence of factors in mitigation that he contends should have been presented; and the record does not indicate that trial counsel's minimal remarks were other than part of his litigation strategy during the sentencing phase of the trial.

Justice WEBB dissenting.

APPEAL by defendant from a judgment of life imprisonment by *Johnson, J.*, filed at the 12 August 1985 session of Superior Court, ROBESON County. Heard in the Supreme Court 8 December 1986.

Lacy H. Thornburg, Attorney General, by Thomas H. Davis, Jr., Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for the defendant.

MARTIN, Justice.

Upon indictments proper in form defendant was convicted of burglary in the first degree and rape in the second degree. The state's evidence shows that defendant and the victim were neighbors, that they had known each other for about nine years, and that prior to the rape they had never had sexual intercourse with one another. On the evening of 23 April 1985, instead of going to a party with her daughter, the prosecuting witness stayed at home because she was sick. Sometime after dark defendant came to the victim's house, stood outside of the locked screen door, and asked her if he could come inside. The victim, who had been getting ready to go to bed, told defendant to leave her alone, that she was sick, and that she didn't want him there. She got up and tried to close the wooden door which adjoined the screen door, but defendant "broke the latch off the screen door and pushed the wooden door open. Then he grabbed me from behind and put his hand over my mouth . . . ." Defendant dragged the victim into her daughter's bedroom and forced her to submit to vaginal intercourse against her will.

At trial defendant did not testify although he presented witnesses whose testimony tended to support a defense based on alibi.

[1] Defendant's first assignment of error is that the trial court erroneously denied his motion to dismiss at the close of all the evidence. As Chief Justice Branch stated for the Court in *State v. Brown*:

> It is well settled that upon 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. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). 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. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980).

310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984).

In the instant case defendant contends that the state failed to present substantial evidence of force to sustain his conviction of rape in the second degree under N.C.G.S. § 14-27.3(a)(1), which provides:

> § 14-27.3. *Second-degree rape.*
>
> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person;
>
> . . .

Defendant argues that the state's evidence showed nothing more than that the victim had a mere "general fear" of the defendant, which, under *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984), would be insufficient to establish that the defendant used force within the meaning of N.C.G.S. § 14-27.3(a)(1). We find no merit in this argument.

The force necessary to sustain a conviction of rape under N.C.G.S. § 14-27.3(a)(1) need not be actual physical force, but may be constructive force such as fear, fright, or coercion. *E.g., State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977); *State v. Armstrong*, 287 N.C. 60, 212 S.E. 2d 894 (1975), *vacated in part*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976); *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969). In *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470, though holding that "[e]vidence of physical resistance is not necessary to prove lack of consent in a rape case in this jurisdiction" and that the victim's testimony "provided substantial evidence that the act of sexual intercourse was against her will," this Court stated that although the victim's

> general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape.

310 N.C. at 408-09, 312 S.E. 2d at 475-76. This "general fear" theory is applicable only to fact situations similar to those in *Alston*. *But see generally* Estrich, *Rape*, 95 Yale L.J. 1087, 1105-1112 (1986) (discussing force as an element of rape and criticizing the analysis applied in *Alston*). Defendant's reliance upon *Alston* is inappropriate.

In the instant case, not only had the victim and defendant had no prior sexual relationship, but the state submitted substantial evidence that defendant used both actual physical force and constructive force against the victim during the course of the offense. The victim testified that after defendant learned she was not feeling well, he refused to leave her premises, broke the latch off her screen door, forced his way into her home, and "grabbed [her] from behind and put his hand over [her] mouth." The victim also testified as follows:

> Q. And he pulled you into the bedroom?
>
> A. He pulled me into the bedroom by my arm.
>
> Q. Did you scream or holler?
>
> A. I couldn't, I was scared of what would happen.

. . . .

Q. How did you get on the bed?

A. He pushed me on the bed.

Q. Did you fight with him, at the time?

A. I couldn't fight with him.

Q. Did he have a hold of you at that time?

A. Yes, sir.

Q. What happened when he pushed you onto the bed?

A. He pulled my panties off and had sex with me.

. . . .

Q. Did he have power over you the entire time?

A. Yes, sir.

The investigating officer who interviewed the victim also testified that the victim stated to him the day after the rape that defendant had "put his hand on her mouth and dragged her into the bedroom and had sex with her."

We hold that the evidence is sufficient to show that defendant used physical force as well as the victim's fear and fright to commit the crime. *See, e.g., State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 ("force" used when defendant put his hand over the victim's mouth, took off her pants, and had vaginal intercourse with her; victim testified that she was afraid for her life during the assault); *State v. Armstrong*, 287 N.C. 60, 212 S.E. 2d 894 (similar). Considering the evidence in the light most favorable to the state, it is clear that upon learning she was sick, ignoring her demand that he leave her alone, and breaking through a locked door to enter her home, defendant used force to make the victim submit to vaginal intercourse. We reject defendant's assignment of error.

[2] Defendant next assigns as error the trial judge's statement during his charge to the jury that "if you find from the evidence beyond a reasonable doubt that on or about April 23, 1985, Prather Strickland opened a closed screen door and basically went

into [the victim's home] without her consent, intending at that time to commit second degree rape, it would be your duty to return a verdict of guilty of felonious breaking or entering." Although during trial defendant did not object to this charge to the jury, and in fact answered "no" when asked by the court if there were "any requests for correction to the charge," defendant now contends on appeal that the court's use of the word "basically" in the portion of the charge just quoted amounted to plain error. *See, e.g., State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984) (plain error for trial court to have submitted to the jury a theory of kidnapping not alleged in the indictment).

Defendant correctly concedes that because of his failure to object to the court's charge during trial, he has waived his right to appellate review of this assignment of error. N.C.R. App. P. 10(b)(2). Only in those instances where upon a review of the entire record an alleged error is so fundamental, so basic, so prejudicial, so lacking in its elements that justice cannot have been done, and the alleged error amounts to a denial of a fundamental right of the accused or to a miscarriage of justice, will an assignment of error which defendant has already waived be considered by the appellate courts. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) (enunciating plain error rule). Upon the record in this case, the charge by the trial court does not reveal error, much less plain error. Defendant's assignment of error is meritless.

[3] Defendant's third contention on appeal is that the trial court erred during sentencing in finding as a factor in aggravation that defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days' confinement. N.C.G.S. § 15A-1340.4(a)(1)(o) (1983). Defendant contends that the following testimony of Detective Oxendine constituted all of the evidence of this aggravating factor, and that this evidence was insufficient as a matter of law to support a finding under N.C.G.S. § 15A-1340.4(a)(1)(o):

> Q. Are you aware of the record the defendant has?
>
> A. I have seen a copy, yes.
>
> Q. Are you aware of the convictions he has for counterfitting [sic]?
>
> A. Yes, sir.

Q. I believe he received an active sentence on that?

A. Yes, sir.

Q. I believe he also has a conviction of armed robbery?

A. Yes, sir.

Q. Did he receive an active sentence on that?

A. Yes, sir.

Q. I believe he has other driving offenses, is that right?

A. Yes, sir.

MR. TOWNSEND: That's all Judge.

Defendant entered no objection to this testimony at trial. We find that this assignment of error is governed by *State v. Carter*, 318 N.C. 487, 349 S.E. 2d 580 (1986), in which we stated:

> In his first assignment of error defendant contends that the trial judge improperly considered as an aggravating factor his prior conviction for delivery of a malt beverage to a minor. N.C.G.S. § 18B-302 (Cum. Supp. 1985). Evidence establishing the conviction consisted solely of the following testimony of Detective C. L. Hardy at the sentencing hearing:
>
> Q. Has the defendant, Barry Carter, a prior record of convictions?
>
> A. Yes.
>
> Q. What has he previously been convicted of?
>
> A. Delivering a malt beverage to a minor.
>
> Q. In what year was that conviction?
>
> A. I'm not sure right off-hand. I believe it was 1980 or 1981.
>
> Q. Was that in Rowan County?
>
> A. Yes, sir.
>
> Defendant claims that this evidence was insufficient to support a finding of the aggravating factor. This contention is meritless.

> Defendant made no objection whatsoever to the introduction of the evidence, nor does his brief present any argument invoking the plain error rule with respect to the challenged testimony. N.C.G.S. § 15A-1340.4(a) provides that prior convictions may be proved by stipulation of the parties or by a copy of the court record, but it does not purport to limit the methods of proof to these alone. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). Recognizing that the statute's enumerated methods of proof are permissive rather than mandatory, this Court has held that a prior conviction may be proven by a law enforcement officer's testimony as to his personal knowledge of the conviction. *See State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983). Thus, Detective Hardy's own recollections constituted acceptable evidence of defendant's conviction, sufficient to allow consideration of the aggravating factor.

Id. at 490-91, 349 S.E. 2d at 581-82. We reject defendant's assignment of error.

[4] Finally, defendant contends that he was denied effective assistance of counsel because at his sentencing hearing his attorney offered no evidence in mitigation, "failed to make any remarks at all . . . [and failed] to oppose the state's showing in aggravation." We begin by noting that the sentencing hearing was so brief that it required only two double-spaced typewritten pages of transcription. Secondly, defendant inaccurately contends that his attorney was entirely silent during the hearing, as he did object to the state's questioning of Detective Oxendine concerning a "similar offense" in which defendant was involved. In addition, after the trial court announced defendant's sentence, defendant's attorney orally made a motion for appropriate relief and gave notice of appeal in open court.

We agree with the Court of Appeals that "sentencing is a critical stage of a criminal proceeding to which the right to effective assistance of counsel applies." *State v. Davidson*, 77 N.C. App. 540, 544, 335 S.E. 2d 518, 521, *disc. rev. denied*, 314 N.C. 670, 337 S.E. 2d 583 (1985). In *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E. 2d 241, 248 (1985), this Court held that:

> When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's con-

duct fell below an objective standard of reasonableness. *Strickland v. Washington, [466]* U.S. *[668]*, 80 L.Ed. 2d 674, 693 (1984). In order to meet this burden defendant must satisfy a two part test.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error was so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.* (Emphasis added.)

Id. at *[687]*, 80 L.Ed. 2d at 693.

This Court went on to state that "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." 312 N.C. at 563, 324 S.E. 2d at 249.

[5] As suggested earlier, defendant's attorney did not err in failing to argue that Detective Oxendine's testimony was insufficient to support a finding in aggravation under N.C.G.S. § 15A-1340.4(a)(1)(o). Nor, contrary to what defendant asserts in his brief to this Court, was defendant's attorney utterly silent during the sentencing hearing. Trial counsel affirmatively acted to protect defendant's rights twice during the brief hearing. We also reject defendant's argument that silence is tantamount to a negative comment by counsel. In addition, defendant has not brought forward any evidence of factors in mitigation that he contends should have been presented during the sentencing hearing. His arguments that during the sentencing hearing trial counsel could have highlighted the "positive" aspects of defendant's offense and urged the trial judge to impose presumptive sentences concurrently do not convince us that there exists a reasonable probability that had such remarks been made different sentences would have been imposed. *State v. Braswell*, 312 N.C. at 563, 324 S.E. 2d at 249. The record does not indicate that trial counsel's minimal remarks were other than part of his litigation strategy during the

sentencing phase of trial. We find no prejudice to defendant under these facts and thus find no merit in this assignment of error. *See generally State v. Taylor*, 79 N.C. App. 635, 339 S.E. 2d 859, *disc. rev. denied*, 317 N.C. 340, 346 S.E. 2d 146 (1986) (and cases cited therein).

For reasons set forth above, we find

No error.

Justice WEBB dissenting.

I dissent. I would concur if the majority were willing to overrule *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984) but if *Alston* is precedent I do not believe the defendant may be convicted of rape in this case. In *Alston* the evidence showed that on previous occasions the defendant had beaten the prosecuting witness and that she was afraid of him. On the occasion in question he forced the victim to accompany him by twisting her arm and threatening to "fix her face." This Court held there was not sufficient evidence of force to submit a charge of rape to the jury. This Court said, "there was no substantial evidence that threats or force by the defendant on June 15 were sufficiently related to sexual conduct to cause Brown (the prosecuting victim) to believe that she had to submit to sexual intercourse with him or suffer harm. Although Brown's general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape."

The prosecuting victim in *Alston*, as the prosecuting victim in this case, did not physically resist the defendant. In neither case did the defendant use more force than was necessary to have intercourse. In neither case was there a specific threat by the defendant to harm the victim if she resisted. On this evidence *Alston* says there is not enough evidence to submit rape to the jury. I believe *Alston* was decided incorrectly and should be overruled. If it is not to be overruled, however, I believe we are bound to reverse the rape conviction in this case.

I note that the majority opinion contains the following statement. "This 'general fear' theory is applicable only to fact situations similar to those in *Alston*." If the majority means by this that *Alston* on its facts has no precedential value I might concur. There are other interpretations however, and I therefore dissent.

STATE OF NORTH CAROLINA v. RONALD JUNIOR COTTON

No. 257A85

(Filed 6 January 1987)

Criminal Law § 35— evidence that offense committed by another—erroneously excluded

The trial court erred in a prosecution for burglary and rape by excluding evidence that the crimes charged and another similar offense were committed by the same person and that that person was not defendant. The evidence would have been admissible against defendant under N.C.G.S. § 8C-1, Rule 404(b) to show that he had committed similar crimes, and the rule must be applied in like manner to allow a defendant to introduce evidence of very similar crimes of another when such evidence tends to show that the other person committed the crime for which defendant is on trial. Moreover, the evidence here was relevant within the meaning of N.C.G.S. § 8C-1, Rule 401, and prior decisions are expressly disapproved to the extent that those decisions tend to indicate that a defendant may not present evidence that the crime charged was committed by another unless the crime was one that only could have been committed by one person acting alone.

APPEAL by the defendant from judgments entered by *Brannon, J.*, on 16 and 17 January 1985 in Superior Court, ALAMANCE County.

The defendant was tried on proper indictments for first degree burglary, first degree rape and first degree sexual offense. A jury found him guilty on all the charges. The trial court sentenced the defendant to life imprisonment for first degree rape (Case Number 84CRS10258) and to a consecutive sentence of fifty years for first degree burglary (Case Number 84CRS10257). The defendant expressly consented to an order continuing prayer for judgment for five years on the first degree sexual offense conviction (Case Number 84CRS10259) unless the district attorney should pray judgment at an earlier time.

The defendant appealed his rape conviction and the resulting life sentence to the Supreme Court as a matter of right under N.C.G.S. § 7A-27(a). On 3 May 1985, the Supreme Court entered an order allowing the defendant to bypass the Court of Appeals with regard to his conviction for first degree burglary and first degree sexual offense. Heard in the Supreme Court 10 December 1986.

Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

W. Phillip Moseley for the defendant.

MITCHELL, Justice.

The defendant contends *inter alia* that the trial court erred by excluding evidence tending to show that the crimes charged and another similar offense were committed by the same person —not the defendant. We agree and hold that the defendant is entitled to a new trial on the charges of first degree rape and first degree burglary. As no judgment has been entered on the first degree sexual offense conviction, it is not ripe for appellate review and is remanded to the Superior Court, Alamance County.

The State's evidence at trial tended to show *inter alia* that the victim of the crimes for which the defendant was charged was asleep in her apartment in Burlington at approximately 3:00 a.m. on 29 July 1984. She was awakened by the presence of a tall "light-skinned" black male. He jumped on her, covering her mouth with his hand and holding a knife to her throat. When she tried to scream, he told her to "shut up" or he would cut her. While continuing to threaten the victim with the knife, he committed cunnilingus upon her and had sexual intercourse with her. Both of these acts were against her will. At some point the assailant went into another room of the apartment and the victim escaped through the rear door. At a later live lineup, the victim positively identified the defendant as her assailant.

The defendant introduced evidence that two other break-ins and sexual assaults were committed in this same manner, on the same night, and near the site of the crimes for which he was charged. Thereafter, the defendant tendered evidence that the victim of one of the other very similar attacks identified a person

other than the defendant as the perpetrator. Further, she selected the other person after viewing the same lineup from which the victim in the present case identified the defendant. The trial court excluded this evidence. The defendant argues that the exclusion of such evidence in this case was error entitling him to a new trial. We agree.

A simple but often misapplied rule of evidence has evolved from *State v. McClain*, 240 N.C. 170, 81 S.E. 2d 364 (1954): "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 (2d rev. ed. 1982) (emphasis added). The same rule is codified as Rule 404(b) of the North Carolina Rules of Evidence. *State v. DeLeonardo*, 315 N.C. 762, 769, 340 S.E. 2d 350, 355-56 (1986); N.C.G.S. § 8C-1, Rule 404(b) (1986).

Rule 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (1986). Such evidence is relevant and admissible under Rule 404(b) against a defendant "if the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under the Rule 403 balancing test." *State v. Scott*, 318 N.C. 237, 248, 347 S.E. 2d 414, 420 (1986).

During the defendant's cross-examination of Detective Mike Gauldin of the Burlington Police Department, the trial court admitted evidence showing that within a few hours of the crimes resulting in this appeal, two similar crimes were committed nearby—one in the same condominium complex and the other "a couple of blocks" away. In all three instances a "light-skinned" black male wearing a blue shirt with white stripes entered the rear of the dwelling after rendering an outside light inoperable. In all three situations the assailant made a statement to the victim before assaulting her, such as: "Hey baby, how are you doing?"

During the cross-examination of Detective Gauldin, the trial court conducted a hearing out of the jury's presence. The defend-

ant tendered testimony of Detective Gauldin that the victim of the crimes giving rise to this appeal viewed a live lineup of seven individuals. Upon her first viewing of the lineup, she stated, "It is between number four and number five." After again viewing the lineup and having the participants repeat certain phrases, she identified subject number five as her assailant. That subject was the defendant. The victim of one of the two similar attacks was shown the identical lineup and positively identified subject number four as the perpetrator. The trial court excluded the tendered evidence on grounds that it was not relevant under Rule 401.

Dean Brandis has noted correctly that: "The commission of a certain act is never directly evidential of the commission of a similar act at some other time. There is always some intermediate step in the reasoning." 1 Brandis on North Carolina Evidence § 91 at 342 (2d rev. ed. 1982). Even so, the rule has been that if evidence of any act by a defendant logically tends to prove a fact other than his character or disposition, which fact in turn supports a reasonable inference that he committed the crime charged, such evidence is admissible. *See* 1 Brandis on North Carolina Evidence § 91 at 343 (2d rev. ed. 1982). This view was codified by the adoption of Rule 404(b), under which evidence such as was excluded in this case is admissible if it is relevant for any purpose other than merely to show that the defendant has a propensity for the type of conduct for which he is being tried. *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986).

More specifically, this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b), such as establishing the defendant's identity as the perpetrator of the crime charged. *See State v. Scott*, 318 N.C. 237, 347 S.E. 2d 414 (1986) and cases cited therein. Such evidence is admissible unless the other offense were not sufficiently similar or were too remote in time from the commission of the offense charged. *Id.* Therefore, had the evidence in question here tended to show that the defendant committed the other very similar crimes, it would have been admissible against him. *Id.* Certainly Rule 404(b) must be applied in like manner to allow a defendant to introduce evidence of very similar crimes of another, when such evidence tends to show that the other person committed the crime for which the defendant is on trial.

Additionally, we conclude that the excluded evidence was relevant within the meaning of Rule 401 of the North Carolina Rules of Evidence, even though it was offered as evidence of the guilt of one other than the accused. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981); *State v. Allen*, 80 N.C. App. 549, 342 S.E. 2d 571, *disc. rev. denied*, 317 N.C. 707, 347 S.E. 2d 441 (1986). Under Rule 401 such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant. To the extent that our prior decisions tend to indicate that a defendant may not present evidence to show that the crime charged was committed by another *unless* the crime was one that *only could have* been committed by *one person* acting alone, however, those decisions are expressly disapproved. *E.g., State v. Lane*, 166 N.C. 333, 81 S.E. 620 (1914); *State v. Fogleman*, 164 N.C. 458, 79 S.E. 879 (1913); *State v. Millican*, 158 N.C. 617, 74 S.E. 107 (1912); *State v. Lambert*, 93 N.C. 618 (1885); *State v. Beverly*, 88 N.C. 632 (1883); *State v. Baxter*, 82 N.C. 602 (1880); *State v. Davis*, 77 N.C. 483 (1887); *State v. Bishop*, 73 N.C. 44 (1875); *State v. Haynes*, 71 N.C. 79 (1874); *State v. May*, 15 N.C. 328 (1883) (*seriatim*). The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy. N.C.G.S. § 8C-1, Rule 401 (1986). *See generally* 1 Brandis on North Carolina Evidence § 93 (2d rev. ed. 1982).

The evidence excluded here showed that within a few hours during the same night, three homes in close proximity were broken into and the female occupants sexually assaulted. The *modus operandi* in each case was very similar. From this evidence, the jury reasonably could have concluded that the three attacks were committed by the same person. The excluded evidence also tended to show that a specific person other than the defendant committed one of the very similar break-ins and assaults. Further, nothing in evidence tended to show that any of the three break-ins and attacks were committed by more than a single individual. The excluded evidence therefore tended to show that the same person committed all of the similar crimes in the neighborhood in question on that night and that the person was someone other than the defendant.

The excluded evidence tended to establish a fact of consequence to the determination of the action and was both relevant and admissible under Rule 401. N.C.G.S. § 8C-1, Rule 401 (1986). The trial court erred in ruling to the contrary.

The trial court additionally ruled that the evidence in question was inadmissible under Rule 403 of the North Carolina Rules of Evidence because the "probative value, if any, that it might have is substantially outweighed by the dangers of unfair prejudice . . . ." Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). It is unnecessary, however, for us to consider whether the trial court abused its discretion. When taken in context, it is apparent that the trial court excluded this evidence as a matter of law based on the erroneous view that it was not relevant under Rule 401 and, therefore, had no probative value at all under Rule 403. Where the trial court has discretion but erroneously fails to exercise it and rules as a matter of law, the prejudiced party is entitled to have the matter reconsidered. *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984); *Byrd v. Mortenson*, 308 N.C. 536, 302 S.E. 2d 809 (1983); *Capps v. Lynch*, 253 N.C. 18, 116 S.E. 2d 137 (1960); 1 Brandis on North Carolina Evidence § 28 (2d rev. ed. 1982). If necessary, the trial court may consider the proper exercise of its discretion in this regard during the new trial to which we conclude the defendant is entitled.

We hold that the defendant is entitled to a new trial in case number 84CRS10258 (first degree rape) and case number 84CRS 10257 (first degree burglary). Case number 84CRS10259 (first degree sexual offense) is not ripe for appellate review since no judgment has been entered therein, and it is remanded to the Superior Court, Alamance County.

Case No. 84CRS10258 (first degree rape)—new trial.

Case No. 84CRS10257 (first degree burglary)—new trial.

Case No. 84CRS10259 (first degree sexual offense)—Remanded.

STATE OF NORTH CAROLINA v. RICKY DEAN WORTHAM

No. 289PA86

(Filed 6 January 1987)

1. **Assault and Battery § 7; Rape and Allied Offenses § 3.1— indictment for attempted rape—assault on female not lesser included offense**

The element of assault in assault on a female is not legally the same as the overt act in an attempted rape, and the crime of assault on a female thus contains an element, the assault, which is not contained in the crime of attempted second degree rape. Moreover, the crime of assault on a female also includes two other elements which are not present in the crime of attempted rape—that the defendant must be (1) a male person and (2) at least eighteen years old. Therefore, the offense of assault on a female is not a lesser included offense of second degree rape, and the trial court had no jurisdiction to convict or sentence defendant for assault on a female based upon an indictment for attempted rape.

2. **Criminal Law §§ 171.1, 177.3— offenses consolidated for judgment—vacation of one offense—remand for resentencing**

Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

ON defendant's petition for discretionary review of a decision of the North Carolina Court of Appeals, 80 N.C. App. 54, 341 S.E. 2d 76 (1986), finding no error in defendant's trial which resulted in convictions of first degree burglary and assault on a female.

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

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

EXUM, Chief Justice.

The question presented on this appeal is whether the offense of assault on a female, N.C.G.S. § 14-33(b)(2), is a lesser included offense of attempted second degree rape, N.C.G.S. § 14-27.3(a)(1). We conclude it is not and reverse the Court of Appeals' decision to the contrary.

I.

Defendant was tried on a three-count indictment charging first degree burglary, felonious larceny, and attempted second degree rape.

Evidence for the state tended to show that on the evening of 10 August 1984 the victim was asleep on a sofa underneath an open window when she awoke to find a man, whom she positively identified as the defendant, leaning over her through the window "getting ready to crawl on top" of her. The victim jumped up and screamed and the intruder jumped back outside. The victim's panties, which were intact and properly fit when she went to sleep, had been slit open. Defendant presented alibi evidence.

The jury acquitted defendant of larceny and attempted rape, but found him guilty of assault on a female and first degree burglary. The trial court consolidated these convictions for judgment and sentenced defendant to twenty years imprisonment for which 215 days' credit was given for confinement before judgment.

On defendant's appeal to the Court of Appeals he argued among other things that the trial court had no jurisdiction to convict or sentence him for assault on a female because this crime was not charged in the indictment and is not a lesser included offense of attempted rape which was charged. Applying the test set forth in *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982), the Court of Appeals disagreed and concluded that an indictment charging attempted rape necessarily includes assault on a female as a lesser offense.

We allowed defendant's petition for discretionary review of the lesser included offense issue.[1]

II.

[1] In *Weaver*, we held that assault on a child under the age of twelve is not a lesser included offense of first degree rape of a child of the age of twelve or less. We said there that the defini-

1. The Court of Appeals also rejected other assignments of error directed to the sufficiency of the evidence on the burglary case and the admission of evidence of other similar crimes committed by defendant. Defendant does not seek review of the Court of Appeals rulings on these aspects of the case.

tions accorded the offenses determine whether one is a lesser included offense of another. Since *Weaver* it has been the rule that the determination of whether one offense is a lesser included of another must be based on a strict analysis of the elements of the two offenses.

> [A]ll of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a definitional, not a factual basis.

State v. Weaver, 306 N.C. at 635, 295 S.E. 2d at 379.

Turning to the instant case, we note the elements of an attempted rape are (1) "the *intent* to commit the rape and (2) an *overt act* done for that purpose . . . ." *State v. Freeman*, 307 N.C. 445, 449, 298 S.E. 2d 376, 379 (1983). The elements of an assault on a female are (1) an assault (2) upon a female person (3) by a male person (4) who is at least eighteen years old. N.C.G.S. § 14-33 (b)(2).

The Court of Appeals thought the fundamental question in this case was whether the overt act element in attempted rape is legally the same as the assault element in assault on a female. The Court of Appeals concluded it was. We disagree.

The legal definition of the overt act necessary for attempted rape is an act "done for that purpose which goes beyond mere preparation but falls short of the completed offense." *State v. Freeman*, 307 N.C. at 449, 298 S.E. 2d at 379. The legal definition of an assault in the crime of assault on a female is "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *State v. Jeffries*, 57 N.C. App. 416, 291 S.E. 2d 859, *disc. rev. denied and appeal dismissed*, 306 N.C. 561, 294 S.E. 2d 374 (1982).

Obviously these two definitions are not equivalent in law. The element of assault in assault on a female is not legally the same as the overt act in an attempted rape. Thus the crime of as-

sault on a female contains an element, the assault, which is not contained in the crime of attempted second degree rape.

In reaching its decision the Court of Appeals, while acknowledging the *Weaver* definitional test as the proper one to apply, actually applied a factual test. This is evident from this passage in the Court of Appeals opinion:

> As a practical matter, we cannot conceive of any act which would constitute a step in a direct movement toward a rape and which would in the ordinary course of events result in a consummated rape which would not put a person of reasonable firmness in apprehension of such immediate bodily harm.

State v. Wortham, 80 N.C. App. at 58, 341 S.E. 2d at 79. The Court of Appeals thus concluded that because in fact the overt act required for attempted rape must always amount to an assault, the overt act element in attempted rape is the same as the assault element in assault on a female.

We need not decide whether as a factual matter, or as the Court of Appeals put it, "as a practical matter," the overt act required for attempted rape must always amount to an assault. Under *Weaver* this is not the proper test. The question is whether the legal definitions of the two elements are the same. As we have demonstrated, they are not.

The crime of assault on a female also includes two other elements which are not present in the crime of attempted rape. They are that the defendant in the crime of assault on a female must be first, a male person, and second, at least eighteen years old. These are not elements of the crime of attempted rape.

We conclude that assault on a female is not a lesser included offense of attempted second degree rape because the assault offense contains essential elements which are not contained in the attempted rape offense.

In reaching its decision on the lesser included offense issue the Court of Appeals relied in part on *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983). In *Freeman* defendant was indicted for first degree burglary and attempted second degree rape. He was convicted of first degree burglary and assault on a female. On his appeal he raised no assignment of error relating to his conviction

of assault on a female; all assignments of error were instead directed to his first degree burglary conviction. Although the Court stated in *Freeman* that "as to defendant's trial on [assault on a female] we find no error," *id.* at 451, 298 S.E. 2d at 380, defendant had not assigned error to this aspect of his trial. The question we now address, therefore, was not presented for our consideration in *Freeman*. Insofar, however, as the result in *Freeman* in the assault on a female conviction conflicts with our decision today in the lesser included offense issue, the *Freeman* result is disapproved.

Assault on a female not being a lesser included offense of attempted second degree rape for which defendant was indicted and defendant not having been otherwise charged with such an assault, the trial court had no jurisdiction to try, convict or sentence defendant for that offense. The result is that the Court of Appeals decision to the contrary on this point is reversed. Defendant's conviction of assault on a female is vacated. The case is remanded to the Court of Appeals for further remand to the Superior Court of Cumberland County for the purpose of resentencing defendant on his first degree burglary conviction, which has become final. Defendant is entitled to be present and be heard at the sentencing procedure.

[2] In choosing to remand the burglary conviction for resentencing, we are not inadvertent to *State v. Daniels*, 300 N.C. 105, 265 S.E. 2d 217 (1980).[2] In *Daniels*, defendant was convicted of involuntary manslaughter and armed robbery. The trial court consolidated the convictions for judgment and imposed a life sentence. This Court on appeal reversed the involuntary manslaughter conviction for insufficiency of the evidence to support it. It found no error, however, "in the trial of the armed robbery case and in the judgment entered." *Id.* at 116, 265 S.E. 2d at 223. Noting that the trial court could have sentenced defendant to a term of not less than seven years nor more than life imprisonment upon the armed robbery conviction standing alone, the Court said:

2. *Daniels* was followed in *State v. Fie*, 80 N.C. App. 577, 343 S.E. 2d 248 (1986), and *State v. Christopher*, 58 N.C. App. 788, 295 S.E. 2d 487 (1982). Because of reasons given *infra* in text, neither *Daniels*, *Fie* or *Christopher* should be considered authoritative on whether the case should be remanded for resentencing.

"Because of the verdicts rendered by the jury, the armed robbery charge became the dominant charge. For the purpose of sentencing, the court consolidated the charges and imposed a sentence of life imprisonment. It is self-evident that the single sentence imposed was within the parameters of the punishment authorized for the crime of armed robbery."

Id. at 115-16, 265 S.E. 2d at 223.

Suffice it to say that *Daniels* was a pre-Fair Sentencing Act case. Under the Fair Sentencing Act, our appellate courts have more supervision over sentencing judgments of the trial divisions than they did before the Act. *See, e.g., State v. Parker*, 315 N.C. 249, 337 S.E. 2d 497 (1985); *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

Reversed in part.

Remanded for resentencing.

STATE OF NORTH CAROLINA v. THOMAS HENRY COOKE

No. 189A86

(Filed 6 January 1987)

1. **Rape and Allied Offenses § 5— first degree sexual offense with stepdaughter— evidence sufficient**

There was sufficient evidence to support a conviction of first degree sexual offense where there was uncontroverted testimony that defendant's younger stepdaughter was under the age of thirteen and that defendant was twenty-nine, and testimony from two eyewitnesses who saw the younger daughter performing fellatio upon defendant. There is no requirement that the victim testify, and the fact that the jury did not find the two older children

credible on four other charges was a matter of credibility for the jury to determine. N.C.G.S. § 14-27.4(a)(1) (1986).

2. Constitutional Law § 80; Rape and Allied Offenses § 7— first degree sexual offense—mandatory life sentence—not cruel and unusual punishment

The mandatory life sentence for first degree sexual offense is constitutional. Eighth Amendment to the United States Constitution.

Chief Justice EXUM and Justices WEBB and WHICHARD did not participate in the consideration or decision of this case.

APPEAL by defendant from a sentence of life imprisonment imposed by *Freeman, J.*, following defendant's conviction of first-degree sexual offense at the 18 November 1985 Session of Superior Court, STANLY County. Heard in the Supreme Court 15 October 1986.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

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

FRYE, Justice.

The primary issue on this appeal is the sufficiency of the evidence to support defendant's conviction for first-degree sexual offense. We conclude that the evidence is sufficient and find no error in defendant's conviction and sentence.

Defendant was tried at the 18 November 1985 Session of Superior Court, Stanly County, on charges of sexual activity[1] by a substitute parent with his elder stepdaughter, second-degree sexual offense with his stepson, statutory rape of his elder stepdaughter and one count each of statutory sexual offense with his two stepdaughters.[2] The jury found defendant guilty of first-degree sexual offense with the younger stepdaughter but was

1. The term "sexual activity by a substitute parent" is taken from the trial court's charge to the jury and the defendant's brief. The record on appeal does not include the indictment for this offense. We express no opinion as to the appropriateness of the terminology. N.C.G.S. § 14-27.7 (1986) makes it a Class G felony for one who has assumed the position of a parent in the home of a minor to engage in vaginal intercourse or a sexual act with the minor. Consent is not a defense.

2. We shall not refer to the names of the three minors involved in this case, to spare them further embarrassment.

unable to agree on a verdict on the other four charges after approximately nine hours of deliberation. The trial judge, with the consent of both parties, accordingly declared a mistrial in each of the first four cases. Defendant moved to set aside the verdict and for a new trial. The trial judge denied both motions and proceeded to impose the mandatory sentence of life imprisonment for defendant's conviction of first-degree sexual offense with the younger stepdaughter. Defendant accordingly appealed to this Court as a matter of right.

According to the evidence presented at trial, defendant, then aged twenty-five, married the mother of the three alleged victims in November 1980. At that time, the son was eleven years old, the elder daughter was nine, and the younger daughter was seven. The son and the elder daughter testified at defendant's trial. The son was then sixteen and the elder daughter fourteen. The elder daughter testified that defendant had forced her to engage in sexual intercourse with him on a regular basis from sometime in December 1980 (she was not certain of the date) through July 1985. He had also forced her to perform fellatio on more than one occasion. The son testified that defendant had similarly forced him to engage in both oral and anal sex on a regular basis beginning in 1981, and that defendant had once forced him to have sex with his elder sister. Both the son and the elder daughter testified that they had told no one about defendant's actions because they were afraid of him. During the summer of 1985, however, the son became increasingly upset about the sexual abuse and began to be afraid that defendant would try to molest his (the son's) girlfriend. About 7 July 1985, he told his mother that defendant had been sexually abusing all three children.

The younger daughter did not testify at defendant's trial. The only evidence the State offered to support the charge of first-degree sexual offense with her was the eyewitness accounts of her brother and sister. The elder daughter testified that on 12 June 1985, when the younger girl was eleven or twelve, the two came home from their school where they had been assisting in a library project and found defendant at home. The elder daughter began to do some housework which took her into the living room. She explicitly described at the trial seeing the younger daughter performing fellatio upon defendant. She said that her brother was at his driver's education class at the time. The son testified that

he had seen defendant engage in oral sex with the younger daughter on more than one occasion, and that on 12 June 1985, upon his return from his driver's education class, he saw her performing fellatio upon defendant.

Defendant testified in his own behalf and vehemently denied any wrongdoing. He called several character witnesses who testified to his good reputation in the community. He also sought to impeach the testimony of the two older children. His elder stepdaughter had testified that he had scars on his back but not his front, and his stepson testified that he had acne scars on his body; defendant introduced medical and photographic evidence that he had no acne scars and had two visible scars on his front. Various witnesses testified that the son had recently become impatient of all authority, that he wanted a car that defendant refused to give him on the grounds that he was not yet sufficiently mature and responsible, and that he had threatened to kill defendant because of this refusal. There was also testimony that the elder daughter wanted to date, and defendant refused to let her because she was too young. Finally, there was testimony that the son and the elder daughter had an improper relationship, that defendant had caught them together, and that they had threatened to accuse him of improper relations with them.

[1] Defendant contends before this Court that the trial judge abused his discretion by denying defendant's motion to set aside the verdict, because the evidence was not sufficient to support his conviction. We disagree with this contention.

First, we find that there was sufficient evidence to sustain defendant's conviction.[3]

It is a well-settled rule in North Carolina that a criminal defendant may not be convicted unless the state presents substantial evidence of each element of the offense. *See State v. McCoy*, 303 N.C. 1, 24, 277 S.E. 2d 515, 532 (1981). Carlton, J., writing for the Court, ably explained this requirement in *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E. 2d 740. 752 (1982):

3. Defendant also renewed an earlier motion to dismiss at the close of all the evidence. This motion was denied. Although we have noted that defendant listed this denial as one of the exceptions forming the basis of the assignment of error on which defendant's argument is based, defendant did not argue this exception.

> The issue of whether the evidence presented constitutes substantial evidence is a question for the court . . . . 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 . . . .

(Citations omitted.) This Court has also held that this standard is totally consistent with the one set forth by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed. 2d 560, 573 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (emphasis in the original)). *See State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

In the instant case, the State presented clear evidence of each element of the offense for which defendant was convicted. The statute under which defendant was convicted required the State to prove that the defendant engaged in a sexual act with a victim who was under the age of thirteen, and defendant was at least twelve years old and at least four years older than the victim. *See* N.C.G.S. § 14-27.4(a)(1) (1986). The term "sexual act" includes fellatio. *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E. 2d 350, 353 (1986). There was uncontroverted testimony that the younger daughter was under the age of thirteen and defendant was twenty-nine, and testimony from two eyewitnesses who saw the younger daughter performing fellatio upon defendant.

The core of defendant's argument is essentially that because he was convicted solely on the basis of the uncorroborated testimony of the two older children, whom part of the jury evidently did not find credible with respect to the other four charges, there was insufficient credible evidence to sustain his conviction. This Court, however, has said repeatedly that credibility is a matter for the jury to determine. *See State v. Paige*, 316 N.C. 630, 653, 343 S.E. 2d 848, 862 (1986). It is not inconceivable that the jurors could have agreed on the charge involving the younger daughter but been divided in their assessment of the testimony relating to individual elements of the other four charges.

Defendant further complains because the younger daughter herself did not testify. While it is true that in most sexual offense cases the victim does testify, nevertheless there is no requirement that the victim testify before the accused may be convicted.[4] *E.g.*, *State v. MacDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983) (circumstantial evidence was sufficient to support a jury finding of attempted rape of the deceased victim, which in turn supported defendant's conviction of felony murder). *See also Gregory v. Commonwealth*, 610 S.W. 2d 598 (Ky. 1980); *State v. Cermak*, 365 N.W. 2d 238 (Minn. 1985); *Commonwealth v. Cole*, 299 Pa. Super. 429, 445 A. 2d 829 (1982). In the instant case, the State presented the graphic testimony of two eyewitnesses who described clearly and in detail the act they witnessed. Under these circumstances, their testimony is sufficient evidence to sustain defendant's conviction notwithstanding the failure of the victim to testify.

Second, this Court has previously said that "[m]otions to set aside the verdict and for a new trial are addressed to the sound discretion of the trial court, and, absent abuse of discretion, refusal to grant them is not reviewable." *State v. McKenna*, 289 N.C. 668, 689, 224 S.E. 2d 537, 551, *death sentence vacated*, 429 U.S. 912, 50 L.Ed. 2d 278 (1976); *see also State v. McKenzie*, 292 N.C. 170, 178, 232 S.E. 2d 424, 430 (1977). A judge does not abuse his discretion unless his decision is "so arbitrary that it could not have been the result of a reasoned decision." *State v. Woodward*, 318 N.C. 276, 347 S.E. 2d 435, 436 (1986) (*per curiam*). We find no abuse of discretion herein.

[2] Defendant also argues that North Carolina's mandatory life sentence for all persons convicted of first-degree sexual offense violates the eighth amendment to the United States Constitution. This court has previously determined that the mandatory life sentence for first-degree sexual offense is constitutional, *see State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985), and we decline to reexamine this question.

For the reasons discussed herein, we find no error in defendant's trial and sentence.

4. We note that the instant case is not one wherein the State seeks to convict a defendant on the basis of the victim's out-of-court statements, a situation which may raise somewhat different problems.

No error.

Chief Justice EXUM and Justices WEBB and WHICHARD did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. THOMAS M. HOOPER

No. 103A86

(Filed 6 January 1987)

Criminal Law § 48.1— assertion of constitutional rights—erroneously admitted

The Court of Appeals erred by finding prejudicial error and awarding a new trial in a homicide prosecution where the trial court admitted testimony that defendant had given a statement which ended with the assertion of his constitutional rights. The evidence presented by the State was ample to show defendant's motive, opportunity, and means to kill the victim, and points overwhelmingly to his culpability.

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

THE State appeals from a decision of a divided panel of the Court of Appeals, 79 N.C. App. 93, 339 S.E. 2d 70 (1986), ordering a new trial for defendant upon his conviction of murder in the second degree. Judgment was entered by *Gudger, J.*, at the 17 January 1985 Criminal Session of Superior Court, POLK County. Heard in the Supreme Court 11 December 1986.

Lacy H. Thornburg, Attorney General, by Sylvia Thibaut, Assistant Attorney General, for the State-appellant.

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant-appellee.

WHICHARD, Justice.

On the morning of 28 July 1983, Todd Bradfield was found unconscious in his truck just off Hogback Mountain Road near Tryon, North Carolina. He had two gunshot wounds in his head. He was taken to a local hospital, where he died several days later without having regained consciousness.

Defendant was arrested the afternoon of 28 July in Greenville, South Carolina, on a fugitive from justice warrant charging him with assault with a deadly weapon. He was detained in the Greenville Law Enforcement Center and given his *Miranda* warnings. According to the testimony of Officer Reed, an agent with the State Bureau of Investigation, defendant waived his rights and responded to questions. His responses included a statement, the substance of which Officer Reed recounted in the following testimony:

> Mr. Hooper stated that he had been working surveillance on Mr. Bradfield because Bradfield had moved in with his wife, Sarah Hooper. He said that he had in his possession over two hundred photographs of Mr. Bradfield and Sarah Hooper and that he and some of his friends had made these photographs. He said that one of the friends that had helped him make these photographs was Ed Penry, and he described Ed Penry as an expert photographer. He further said that, on occasions, his roommate, Pete Peterson, had helped him with the surveillance and that he said that Mr. Peterson "was with me this morning," and then stopped right there and asserted his Constitutional rights at that point.

Defendant's counsel objected but did not move to strike this testimony. This Court has said that "[f]ailure to move to strike a portion of an answer, even though the answer is objected to, results in waiver of the objection." *State v. Marlow*, 310 N.C. 507, 523, 313 S.E. 2d 532, 542 (1984). Defendant otherwise properly noted his exception in the record in accord with Rule 10(a)(1) of the Rules of Appellate Procedure. In order to review what defendant contends was an error of fundamental magnitude, we exercise our supervisory jurisdiction and pass upon the question presented despite the fact that defendant's objection is deemed waived. Rule 2, Rules of Appellate Procedure; *State v. Elam*, 302 N.C. 157, 161, 273 S.E. 2d 661, 664 (1981).

Defendant contends that Officer Reed's remark that defendant had "stopped . . . and asserted his Constitutional rights" was a violation of those rights. The Court of Appeals agreed and awarded defendant a new trial. Judge (now Justice) Webb dissented on the grounds that he did not believe the admission of Officer Reed's statement was prejudicial error. When an appeal is

taken pursuant to N.C.G.S. 7A-30(2), the scope of this Court's review is properly limited to the issue upon which the dissent in the Court of Appeals diverges from the opinion of the majority. Rule 16(b), Rules of Appellate Procedure; *Blumenthal v. Lynch, Sec. of Revenue*, 315 N.C. 571, 577-78, 340 S.E. 2d 358, 361 (1986). Because the Court of Appeals panel agreed that Officer Reed's testimony violated defendant's constitutional rights, we do not address this question. We examine only whether any error in admitting this testimony was prejudicial.

The test for whether an error of constitutional magnitude is prejudicial is codified at N.C.G.S. 15A-1443(b): "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." *Id.; Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967). "Harmless beyond a reasonable doubt" has been interpreted to mean that "there is no reasonable possibility" that the erroneous admission of evidence "might have contributed to the conviction." *State v. Castor*, 285 N.C. 286, 292, 204 S.E. 2d 848, 853 (1974).

> Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless.

Id., quoting State v. Taylor, 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972) (citations omitted).

We are persuaded that the evidence in question here "was of such insignificant probative value when compared with the overwhelming competent evidence of guilt that its admission did not contribute to defendant's conviction and therefore admission of the evidence was harmless . . . beyond a reasonable doubt." *State v. Gardner*, 315 N.C. 444, 449, 340 S.E. 2d 701, 706 (1986), *quoting State v. Williams*, 288 N.C. 680, 693, 220 S.E. 2d 558, 568 (1975).

Evidence presented by the State was largely circumstantial; but it was ample to show defendant's motive, opportunity, and means to kill Bradfield.

Defendant's wife testified that she and defendant had been separated since November 1982. She had met Bradfield in March 1983, and she was planning to marry him and to move with her three children to a house he was building in Tryon. The house mysteriously burned down on 1 July. Defendant and his wife were involved in a custody dispute throughout that summer.

A number of neighbors testified that they were aware that defendant had been watching his wife and Bradfield in preparation for his custody case; defendant's attorney in that matter testified that he had advised defendant to conduct such surveillance.

A resident of Hogback Mountain Road testified that at ten o'clock a.m. on 28 July he had been driving down the road when he met two vehicles coming up the mountain "as if one were chasing the other or they were racing each other." The first vehicle he later identified as Bradfield's truck; the second he described as "a small sports car, like a Toyota . . . [which was] blue or gray." Another resident of Hogback Mountain Road testified that, at approximately the same time that morning, she heard a sound like that of a car backfiring. The sound was repeated three times, and she then heard a car crash. As she walked towards where the sounds had originated, she saw a gray compact car moving down the road "at quite a clip." The witness who had met Bradfield's truck and the small gray car on the road described the driver of the second vehicle as a white male in his late thirties or early forties, with glasses and a beard with gray streaks. An SBI agent who had interviewed defendant in connection with the fire at Bradfield's Tryon house thought these features described defendant, and, suspecting that defendant had assaulted Bradfield, he requested South Carolina authorities to arrest defendant.

A search of the truck defendant had been driving when he was arrested in South Carolina revealed a duffel bag behind the front seat containing a .45 caliber handgun, a box of .45 caliber ammunition, and a dark, curly wig. An SBI firearms expert testified that a bullet taken from Bradfield's skull had been fired by

that handgun, as had four .45 caliber shell casings found inside Bradfield's truck.

The SBI officer who had initially interviewed defendant concerning the fire at Bradfield's house testified that, around five o'clock on the afternoon of the 28th, he took wipings from defendant's hands. The swabs were later analyzed for the presence of gunshot residue. The forensic chemist who performed the analysis testified that he found a "significant" concentration of particles, meaning that they were "indicative of gunshot residue"; but he was unwilling to give an opinion that defendant had fired a gun because the particles were not dispersed over defendant's hands in the "normal" pattern of concentrations. Nevertheless, the chemist's report closed with the remark that "this does not eliminate the possibility that the subject would have fired a gun."

Finally, the same officer also testified that, while defendant was out on bond following his being charged with Bradfield's murder, defendant told him that he appreciated the officer's continuing the investigation despite the fact that they had "the motive, the gun, [and] the man. . . ."

We find that the foregoing evidence, including the implication of defendant's own admission, points overwhelmingly to his culpability in the murder. Any error in admitting that portion of defendant's statement in which he asserted his constitutional right to remain silent thus "did not contribute to [his] conviction and therefore . . . was harmless . . . beyond a reasonable doubt." *Gardner*, 315 N.C. at 449, 340 S.E. 2d at 706.

The decision of the Court of Appeals ordering a new trial is accordingly

Reversed.

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

E. F. BLANKENSHIP COMPANY v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, WILLIAM R. ROBERSON, JR., SECRETARY, OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, AND NORTH CAROLINA STATE HIGHWAY ADMINISTRATOR, BILLY ROSE

No. 205A86

(Filed 6 January 1987)

Appeal and Error § 64— evenly divided Court—decision affirmed without becoming precedent

Where one member of the Supreme Court did not participate in the consideration or decision of the case and the remaining six justices are equally divided, the decision of the Court of Appeals is affirmed without becoming a precedent.

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

APPEAL by plaintiff pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 79 N.C. App. 462, 339 S.E. 2d 439 (1986), which affirmed the dismissal of plaintiff's action by *Bailey, J.*, at the 25 February 1985 session of Superior Court, WAKE County. Heard in the Supreme Court 11 December 1986.

Blanchard, Tucker, Twiggs & Abrams, P.A., by Charles F. Blanchard and Donald R. Strickland, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by Evelyn M. Coman, Assistant Attorney General, for defendant-appellees.

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.

Affirmed.

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

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND THE PUBLIC STAFF OF THE NORTH CAROLINA UTILITIES COMMISSION v. MARTHA H. MACKIE, APPLICANT-APPELLANT

No. 108A86

(Filed 6 January 1987)

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, 79 N.C. App. 19, 338 S.E. 2d 888 (1986). This Court allowed both parties' petitions for discretionary review of additional issues.

On 25 January 1984, the applicant filed an application with the North Carolina Utilities Commission to discontinue water and sewer services. Following a hearing on 10 April 1984, the hearing examiner issued a Recommended Order denying the applicant's request. This order was subsequently adopted by the Commission, with one minor alteration, on 10 September 1984. Applicant appealed to the Court of Appeals which affirmed in part, vacated in part, and remanded, with one judge dissenting.

Heard in the Supreme Court 8 December 1986.

Robert P. Gruber, Executive Director, by Antionette Wike, Chief Counsel, and Vickie L. Moir, for the Public Staff.

I. Beverly Lake, for the applicant-appellant.

PER CURIAM.

The decision of the Court of Appeals is affirmed, with this modification: the parties may present on remand additional evidence of reasonable expenses of operation and the revenues which the water and sewer systems may reasonably be expected to produce.

Modified and affirmed.

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

NELDA D. COSTNER, WIDOW OF THE DECEASED AND NELDA D. COSTNER, ADMINISTRATRIX OF THE ESTATE OF AUSTIN F. COSTNER, DECEASED, EMPLOYEE v. A. A. RAMSEY & SONS, INC., EMPLOYER; BITUMINOUS INSURANCE COMPANIES, CARRIER

No. 412A86

(Filed 6 January 1987)

Appeal and Error § 64— absence of majority vote—Court of Appeals decision undisturbed

Where two members of the Supreme Court did not participate in the consideration or decision of a case, the remaining members of the Court are divided three to two, and there is thus no majority of the Court voting to either affirm or reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

Justices WEBB and WHICHARD did not participate in the consideration or decision of this case.

APPEAL by plaintiff-appellant from a decision of a divided panel of the Court of Appeals reported at 81 N.C. App. 121, 343 S.E. 2d 607 (1986), reversing an award of the North Carolina Industrial Commission entered in I.C. File No. 715130 and remanding the case for further order of the Commission. Heard in the Supreme Court 9 December 1986.

Bridges, Bridges & Morgan, P.A., by Forrest Donald Bridges, for plaintiff-appellant.

Caudle & Spears, P.A., by Lloyd C. Caudle and Richard S. Guy, for defendant-appellees.

PER CURIAM.

Justices Webb and Whichard took no part in the consideration or determination of this case. The remaining members of this Court being divided three to two as to the result and thus there being no majority of the Court voting to either affirm or reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

Affirmed.

Justices WEBB and WHICHARD did not participate in the consideration or decision of this case.

IN THE MATTER OF THE APPLICATION AND CLAIM OF MELVIN C. WALSH, JR., A MEMBER OF THE ASHEVILLE POLICE DEPARTMENT, FOR RETIREMENT FOR DISABILITY WHILE ACTING IN THE LINE OF DUTY

No. 229PA86

(Filed 6 January 1987)

ON discretionary review of the decision of the Court of Appeals, 79 N.C. App. 611, 340 S.E. 2d 497 (1986), vacating judgment entered by *Lewis, J.*, on 25 April 1985 in Superior Court, BUNCOMBE County, and remanding the cause with instructions. Heard in the Supreme Court 9 December 1986.

Roberts, Stevens & Cogburn, P.A., by Max O. Cogburn, Isaac N. Northup, Jr., and Glenn S. Gentry, for petitioner-appellee.

William F. Slawter and Frank M. Parker, for respondent-appellant, City of Asheville.

PER CURIAM.

Discretionary review improvidently allowed.

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

HARDAWAY CONSTRUCTORS, INC. (SUCCESSOR AND ASSIGN TO B. F. DIAMOND CONSTRUCTION COMPANY, INC.) v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 304A86

(Filed 6 January 1987)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(a) from decision of the Court of Appeals, 80 N.C. App. 264, 342 S.E. 2d 52 (1986), which reversed judgment rendered during 28 May 1985 civil session of WAKE County Superior Court and entered 5 June 1985 by *Battle, J.* Heard in the Supreme Court 8 December 1986.

Sanford, Adams, McCullough & Beard by Charles C. Meeker; Of Counsel: Lewis & McKenna by Michael F. McKenna, for plaintiff appellee.

Lacy H. Thornburg, Attorney General, by Eugene A. Smith, Senior Deputy Attorney General, and Evelyn M. Coman, Assistant Attorney General, for defendant appellant.

PER CURIAM.

Affirmed.

THE TOWN OF WINTON v. JOHN A. SCOTT; MRS. JOHN A. SCOTT; JOHN W. ELEY; JANICE B. ELEY; ARMSTEAD VANN; HEIRS, DEVISEES, AND ALL OTHER PERSONS CLAIMING UNDER ARMSTEAD VANN; MATILDA VANN; HEIRS, DEVISEES, AND ALL OTHER PERSONS CLAIMING UNDER MATILDA VANN; SOLOMON VANN; HEIRS, DEVISEES AND ALL OTHER PERSONS CLAIMING UNDER SOLOMON VANN; SARAH VANN; HEIRS, DEVISEES, AND ALL OTHER PERSONS CLAIMING UNDER SARAH VANN; ARZULA VANN; HEIRS, DEVISEES, AND ALL OTHER PERSONS CLAIMING UNDER ARZULA VANN

No. 320A86

(Filed 6 January 1987)

APPEAL of right by defendants pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 80 N.C. App. 409, 342 S.E. 2d 560 (1986), affirming the judgment of *Small, Judge*, entered on 16 August 1985 in Superior Court, HERTFORD County. Heard in the Supreme Court 10 December 1986.

Moore, Wright, and Hardison, by Thomasine E. Moore, Paul A. Hardison, and Bowen C. Tatum, Jr., for defendant-appellants John A. Scott and Patricia F. Scott.

Baker, Jenkins & Jones, P.A., by Robert C. Jenkins, for defendant-appellees.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

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

ALLEN v. PULLEN

No. 509P86.

Case below: 82 N.C. App. 61.

Petition by plaintiff and third-party defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

BEESON v. McDONALD

No. 619P86.

Case below: 82 N.C. App. 669.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

BIVENS v. EIMCO-ELKHORN

No. 629P86.

Case below: 82 N.C. App. 764.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

BRISSON v. WILLIAMS

No. 507P86.

Case below: 82 N.C. App. 53.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1986.

BRITT v. BRITT

No. 566PA86.

Case below: 82 N.C. App. 303.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 January 1987.

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

BROWN v. BOONE

No. 628P86.

Case below: 82 N.C. App. 761.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

COOK v. SOUTHERN BONDED, INC.

No. 573P86.

Case below: 82 N.C. App. 277.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

DANIELS v. N. C. DIVISION OF MOTOR VEHICLES

No. 574P86.

Case below: 82 N.C. App. 591.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

DEPT. OF TRANSPORTATION v. HIGDON

No. 659P86.

Case below: 82 N.C. App. 752.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987. Motion by plaintiff to dismiss appeal for lack of significant public interest allowed 6 January 1987.

DEPT. OF TRANSPORTATION v. QUICK AS A WINK OF ASHEVILLE

No. 660P86.

Case below: 82 N.C. App. 755.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987. Motion by plaintiff to dismiss appeal for lack of significant public interest allowed 6 January 1987.

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

DILLINGHAM v. YEARGIN CONSTRUCTION CO.

No. 638PA86.

Case below: 82 N.C. App. 684.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 January 1987.

DOUGLAS v. CENTURY HOME BUILDERS, INC.

No. 578P86.

Case below: 82 N.C. App. 591.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

DURHAM HIGHWAY FIRE PROTECTION ASSOC. v. BAKER

No. 589P86.

Case below: 82 N.C. App. 583.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

EAST CAROLINA OIL TRANSPORT v. PETROLEUM FUEL & TERMINAL CO.

No. 641P86.

Case below: 82 N.C. App. 746.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

ESTEEL CO. v. GOODMAN

No. 640P86.

Case below: 82 N.C. App. 692.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

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

FORD v. PEACHES ENTERTAINMENT CORP.

No. 663P86.

Case below: 83 N.C. App. 155.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

GRACE BAPTIST CHURCH v. CITY OF OXFORD

No. 456A86.

Case below: 81 N.C. App. 678.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 6 January 1987. Motion by defendants to dismiss appeal for lack of substantial constitutional question denied 6 January 1987.

HOLIDAY v. CUTCHIN

No. 610P86.

Case below: 82 N.C. App. 660.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

HOWELL v. WATERS

No. 536P86.

Case below: 82 N.C. App. 481.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

IN RE APPEAL OF DUKE POWER CO.

No. 582P86.

Case below: 82 N.C. App. 492.

Petition by Guilford County for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

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

IN RE BABY BOY SHAMP

No. 620P86.

Case below: 82 N.C. App. 606.

Petition by DSS and Guardian for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

IN RE FORECLOSURE OF COMBS

No. 511P86.

Case below: 82 N.C. App. 149.

Petition by Koumparakis for discretionary review pursuant to G.S. 7A-30 denied 18 November 1986. Motion by appellee to dismiss appeal for lack of substantial constitutional question allowed 18 November 1986. Motion by Koumparakis pursuant to Rule 27 for reconsideration of the petition denied 6 January 1987.

KINSER v. FOY

No. 587P86.

Case below: 82 N.C. App. 591.

Petitions by plaintiff and defendants for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

LYERLY v. MALPASS

No. 546P86.

Case below: 82 N.C. App. 224.

Petition by defendant (Inlet Point, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

McMURRAY v. SURETY FEDERAL SAVINGS & LOAN ASSOC.

No. 653P86.

Case below: 82 N.C. App. 729.

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 6 January 1987.

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

MOORE v. N.C. FARM BUREAU MUT. INS. CO.

No. 626P86.

Case below: 82 N.C. App. 616.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

MURRAY v. BIGGERSTAFF

No. 462P86.

Case below: 81 N.C. App. 377.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 November 1986.

NCNB v. POWERS

No. 580P86.

Case below: 82 N.C. App. 540.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

ROGERS & HUDSON PROPERTIES v. BEST HEALTH, INC.

No. 623P86.

Case below: 82 N.C. App. 761.

Petition by defendant (Lorraine M. Kromnick) for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

STATE v. ALSTON

No. 555PA86.

Case below: 82 N.C. App. 372.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 18 November 1986.

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

STATE v. BLAKE

No. 692A86.

Case below: 83 N.C. App. 77.

Petition for discretionary review by defendant pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues denied 6 January 1987.

STATE v. BLANKENSHIP

No. 552PA86.

Case below: 82 N.C. App. 285.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 6 January 1987.

STATE v. BURNETTE

No. 678P86.

Case below: 82 N.C. App. 762.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 January 1987.

STATE v. CONNARD

No. 625P86.

Case below: 82 N.C. App. 762.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987. Motion by Attorney General to dismiss appeal for lack of significant public interest allowed 6 January 1987.

STATE v. COPELAND

No. 588P86.

Case below: 82 N.C. App. 591.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

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

STATE v. GRIER

No. 631P86.

Case below: 70 N.C. App. 40.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 November 1986.

STATE v. HALL

No. 6P87.

Case below: 83 N.C. App. 542.

Petition by defendant for writ of supersedeas and temporary stay denied 9 January 1987.

STATE v. HARRISON

No. 706P86.

Case below: 83 N.C. App. 342.

Petition by defendant for writ of supersedeas denied 11 December 1986. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

STATE v. HURST

No. 513PA86.

Case below: 82 N.C. App. 1.

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 18 November 1986. Motion by defendant to dismiss appeal for lack of significant public interest denied 18 November 1986.

STATE v. ISOM

No. 575P86.

Case below: 82 N.C. App. 592.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

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

STATE v. LANEY

No. 579P86.

Case below: 82 N.C. App. 592.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987. Motion by Attorney General to dismiss appeal for lack of significant public interest allowed 6 January 1987.

STATE v. MASON

No. 704A86.

Case below: 83 N.C. App. 342.

Motion by Attorney General to dismiss appeal for failure to show a substantial constitutional question allowed 6 January 1987.

STATE v. MOORMAN

No. 577PA86.

Case below: 82 N.C. App. 594.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1986. Motion by the Attorney General to dismiss defendant's appeal for lack of substantial constitutional question allowed and petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 18 November 1986. Petition by defendant for writ of supersedeas and temporary stay denied 30 December 1986.

STATE v. NEWTON

No. 545A86.

Case below: 82 N.C. App. 555.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

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

STATE v. PERRY

No. 1P87.

Case below: 83 N.C. App. 543.

Petition by defendant for writ of supersedeas and temporary stay allowed 7 January 1987 on condition defendant have a good and sufficient bond in the sum of $25,000 to assure his compliance with the judgment of superior court.

STATE v. POOLE

No. 656P86.

Case below: 82 N.C. App. 117.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

STATE v. SHAVERS

No. 710P86.

Case below: 83 N.C. App. 342.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 January 1987.

STATE v. SIMMONS

No. 630P86.

Case below: 80 N.C. App. 725.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 November 1986.

STATE v. STOUTT

No. 690A86.

Case below: 83 N.C. App. 160.

Motion by Attorney General to dismiss appeal for failure to show a substantial constitutional question allowed 6 January 1987.

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

STATE v. TAYLOR

No. 657P86.

Case below: 83 N.C. App. 160.

Petition by defendant for writ of supersedeas and temporary stay denied 13 November 1986.

STATE v. TEASLEY

No. 554P86.

Case below: 82 N.C. App. 150.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 January 1987.

STATE v. TEASLEY

No. 661P86.

Case below: 83 N.C. App. 159.

Petition by defendant for writ of supersedeas and temporary stay denied 22 December 1986. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 January 1987.

STATE v. TRUEBLOOD

No. 568P86.

Case below: 82 N.C. App. 763.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

STATE v. WESTER

No. 608P86.

Case below: 82 N.C. App. 763.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 January 1987.

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

STEVENS v. NIMOCKS

No. 590P86.

Case below: 82 N.C. App. 350.

Motion by plaintiff pursuant to Appellate Rule 27 for reconsideration of denial of petition for writ of certiorari to the Court of Appeals (318 N.C. 511) denied 6 January 1987.

STOCKS OIL COMPANY, INC. v. TYSON

No. 497P86.

Case below: 81 N.C. App. 681.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

WAGNER v. BARBEE AND SEILER v. BARBEE

No. 621P86.

Case below: 82 N.C. App. 640.

Petition by Donald Lee Barbee, Jr. for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

WATKINS v. URBAN

No. 560P86.

Case below: 82 N.C. App. 302.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

WEST v. HAYS

No. 576P86.

Case below: 82 N.C. App. 574.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 6 January 1987.

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

WILLIAMS v. BROSNAN

No. 583P86.

Case below: 82 N.C. App. 593.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987. Motion by defendants to dismiss appeal for lack of significant public interest allowed 6 January 1987.

WOOD v. LINDSAY PUBLISHING COMPANY

No. 622P86.

Case below: 82 N.C. App. 763.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 January 1987.

PETITIONS TO REHEAR

ALFORD v. SHAW

No. 132PA85.

Case below: 318 N.C. 289.

Petition by plaintiff allowed 6 January 1987.

FORBES HOMES, INC. v. TRIMPI

No. 326A86.

Case below: 318 N.C. 473.

Petition by plaintiff denied 6 January 1987.

IN RE STALLINGS

No. 716PA85.

Case below: 318 N.C. 565.

Petition by juvenile allowed 6 January 1987.

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

LEMMERMAN v. WILLIAMS OIL CO.

No. 224A86.

Case below: 318 N.C. 577.

Petition by plaintiffs denied 29 December 1986.

TATUM v. TATUM

No. 161A86.

Case below: 318 N.C. 407.

Petition by plaintiff denied 6 January 1987.

APPENDIXES

AMENDMENT TO STATE BAR RULES
RELATING TO DISCIPLINE AND
DISBARMENT OF ATTORNEYS

PRINTING DEPARTMENT PROCEDURES

CONTINUING LEGAL EDUCATION

AMENDMENT TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

ARTICLE IX

Discipline and Disbarment of Attorneys

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 4, 10, 14, and 25 as appear in 310 NC at pages 798, 804, 815, and 823 are amended as follows:

ARTICLE IX

Discipline and Disbarment of Attorneys

§ 4. STATE BAR COUNCIL—POWERS AND DUTIES IN DISCIPLINE AND DISBARMENT MATTERS.

By adding a new subsection (8) as follows:

§§ (8) To hear appeals of the Secretary's determination of security for cost of reinstatement hearings for disbarred lawyers or other determinations made by the Secretary concerning cost in such proceedings.

§ 10. SECRETARY—POWERS AND DUTIES IN DISCIPLINE AND DISBARMENT MATTERS.

By adding a new subsection (6) to read as follows:

§§ (6) To determine the amount of security necessary to cover the cost of reinstatement proceedings of disbarred lawyers.

§ 14. FORMAL HEARINGS.

To amend subsection 21 by substituting the word, "record," for the word, "transcript," as appears in the second sentence so that subsection 21 will read as follows:

§§ (21) In all hearings conducted pursuant to this section, a complete record shall be made of evidence received during the course of the hearing. Such record shall be made in the form and by means authorized for civil trials in the courts of this state.

§ 25. REINSTATEMENT.

(A) After disbarment: By adding the following sentence at the end of the first sentence of paragraph (1) so that this complete subparagraph reads:

(1) No person who has been disbarred may have his license restored but upon order of the Council after the filing of a verified petition for reinstatement and the holding of a hearing before a Hearing Committee of the Disciplinary Hearing Commission as provided herein. No such hearing shall be commenced until a bond or other security for the costs of such hearing has been deposited with the Secretary in an amount not to exceed $500.

By deleting § 25(A)(4)(c) and inserting in lieu thereof:

The Secretary shall be responsible for having the hearing transcribed upon written request made after the hearing by the petitioner or Counsel. If the petitioner requests the transcription, the petitioner shall provide a bond or other security satisfactory to the Secretary for the costs of transcribing, copying and transmitting the record to the Council in an amount to be set by the Secretary based upon the length of the hearing, the number of pages of exhibits to be copied and other estimated costs. If the petitioner fails to request the transcription and post the bond or other security required by this section within 90 days of petitioner's receipt of a copy of the committee's report, or if the Counsel does not request the transcription, the Secretary shall not cause the hearing to be transcribed, and only the hearing committee's report and recommendation shall be forwarded to the Council for its consideration. At any time the record may be shortened or summarized by written agreement of the petitioner and Counsel. The costs of transcribing, copying, and transmitting the record shall be taxed by the Council as a part of the costs of the proceeding.

By deleting § 25(A)(6) as it now reads and inserting in lieu thereof:

Any determination made by the Secretary concerning the amount of security or costs may be appealed to the Council upon notice being given to the Secretary within

10 days of petitioner's receipt of the Secretary's determination. The Council, in its discretion, may enter orders concerning security for costs or assessment of costs as it deems necessary.

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 July 24, 1987.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of September 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 7 day of October, 1987.

JAMES G. EXUM, JR.
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 7 day of October, 1987.

WHICHARD, J.
For the Court

AMENDMENT TO
INTERNAL OPERATING PROCEDURES
SUPREME COURT PRINTING DEPARTMENT

The Internal Operating Procedures; Mimeographing Department, 295 NC 743-744 are hereby amended as follows:

"8. Until such time as the Court may order further, records, briefs, petitions, and any other documents which may be required by the Rules of Appellate Procedure or by order of the appropriate appellate court to be reproduced, shall be printed at a cost of $5.00 per printed page where the document is retyped and printed at a cost of $2.00 per printed page where the Clerk determines that the document is in proper format and can be reproduced directly from the original."

By order of the Court in conference this the 3rd day of September 1987 to become effective 15 September 1987.

WHICHARD, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

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IN THE MATTER OF A PETITION OF THE NORTH CAROLINA STATE BAR RE:	)	ORDER
THE ESTABLISHMENT OF A PROGRAM FOR CONTINUING LEGAL EDUCATION	)	

****

The North Carolina State Bar, authorized by Chapter 84 of the North Carolina General Statutes to license, supervise and discipline attorneys, has petitioned this Court to establish, in the exercise of its inherent power, a Program For Continuing Legal Education for the purpose of enhancing the professional competence and professional responsibility of attorneys who are licensed to practice law in North Carolina and who are officers of this Court.

The Court has studied the petition of the North Carolina State Bar, its Resolution and its supporting Memorandum. The Court is of the opinion that it should grant the petition of the North Carolina State Bar and order the establishment of a Program For Continuing Legal Education to enhance the professional competence and professional responsibility of North Carolina attorneys to the end that the public might be better served and that the public's confidence in the legal profession, the courts and the administration of justice might be increased.

NOW, THEREFORE, in the exercise of its inherent power to supervise and regulate the conduct of attorneys in this State, the Supreme Court of North Carolina does hereby ORDER, ADJUDGE AND DECREE:

1. The Program For Continuing Legal Education is hereby established.

2. The Program For Continuing Legal Education shall be administered by the North Carolina State Bar pursuant to the Continuing Legal Education Rules attached hereto which are hereby adopted by this Court as Rules of Court. Authority to adopt regulations to implement the Continuing Legal Education Rules is hereby delegated to the Council of the North Carolina State Bar.

3. The North Carolina State Bar shall submit annually a report to this Court accounting for all monies collected and expended in the administration of the Program For Continuing Legal Education.

4. Jurisdiction over the actions of the North Carolina State Bar in administering the Program For Continuing Legal Education shall remain with this Court for the entry of future orders when and as necessary to accomplish the purposes of the Program For Continuing Legal Education.

Done by the Court in Conference this the 7 day of October, 1987.

JAMES G. EXUM, JR.
Chief Justice
For the Court

RULES FOR CONTINUING LEGAL EDUCATION PROGRAM

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RULES FOR CONTINUING LEGAL EDUCATION PROGRAM

RULE 1: PURPOSE

The purpose of these Continuing Legal Education Rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining attorneys who do not comply with such rules. The Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.

At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition (through additions to the body of law, modifications and amendments) and are increasing in complexity. One cannot render competent legal services without continuous education and training.

The same changes and complexities, as well as the economic orientation of society, result in confusion about the ethical requirements concerning the practice of law and the relationships it creates. The data accumulated in the discipline program of the North Carolina State Bar argue persuasively for the establishment of a formal program for continuing and intensive training in professional responsibility and legal ethics.

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Rules of Professional Conduct themselves—to insure that the public at large is served by lawyers who are competent and maintain high ethical standards.

RULE 2: DEFINITIONS

(A) "Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.

(B) "Approved activity" shall mean a specific, individual legal education activity presented by an accredited sponsor or present-

ed by other than an "accredited sponsor" if such activity is approved as a legal education activity under these Rules by the Board of Continuing Legal Education.

(C) "Active member" shall include any person who is licensed to practice law in the state of North Carolina and who is an active member of the North Carolina State Bar.

(D) "Board" means the Board of Continuing Legal Education created by these Rules.

(E) "Continuing Legal Education" or "CLE" is any legal, judicial or other educational activity accredited by the Board.

(F) "Council" shall mean the North Carolina State Bar Council.

(G) "Credit hour" means an increment of time of 60 minutes which may be divided into segments of 30 minutes or 15 minutes, but no smaller.

(H) "Inactive member" shall mean a member of the North Carolina State Bar who is on inactive status.

(I) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. The Board may exempt from this definition those programs which it finds (i) to be conducted by public or quasi-public organizations or associations for the education of their employees or members and (ii) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.

(J) "Membership and Fees Committee" shall mean the Membership and Fees Committee of The North Carolina State Bar.

(K) A "newly admitted active member" is one who becomes an active member of The North Carolina State Bar for the first time, has been reinstated, or has changed from inactive to active status.

(L) "Practical skill courses" are those courses which are devoted primarily to instruction in basic practice procedures and techniques of law as distinct from substantive law. Examples of such courses would include preparation of legal documents and correspondence and development of specific basic lawyering skills, such as voir dire, jury argument, introducing evidence, and efficient management of a law office.

(M) "Professional responsibility" shall mean those courses or segments of courses devoted to instruction in legal ethics and/or professional liability.

(N) "Rules" shall mean the provisions of the Rules For Continuing Legal Education established by the Supreme Court of North Carolina.

(O) "Sponsor" is any persons or entity presenting or offering to present one or more continuing legal education programs, whether or not an accredited sponsor.

(P) "Year" shall mean calendar year.

RULE 3: BOARD OF CONTINUING LEGAL EDUCATION: ESTABLISHMENT, COMPOSITION, TERMS & DUTIES

(A) There is hereby established by the North Carolina State Bar the Board of Continuing Legal Education (CLE), which shall have the authority to establish regulations governing a Continuing Legal Education Program for attorneys licensed to practice law in this State.

(B) The Board shall be composed of nine attorneys who are currently licensed and in good standing to practice law in North Carolina and shall be appointed by the Council of the North Carolina State Bar (Council). One of the attorneys shall be designated annually by the Council as the chairperson of the Board. The members of the Board shall be appointed by the Council to staggered terms of office. The term of office shall be for three years; provided however, that the initial appointees shall serve as follows: Three shall serve for one year after appointment; three shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment to a vacancy among the members shall be made by the Council for the remaining term of that member leaving the Board. No member shall be eligible for appointment to more than two consecutive full three year terms. Meetings of the Board shall be held at regular intervals, at such times and places and upon such notice as the Board may from time to time prescribe.

(C) The Board shall have the following duties:

(1) To exercise general supervisory authority over the administration of these Rules.

(2) To adopt and amend regulations consistent with these Rules with the approval of the Council.

(3) To establish an office or offices and to employ such persons as the Board deems necessary for the proper administration of these Rules, and to delegate to them appropriate authority, subject to the review of the Council.

(4) To report annually on the activities and operations of the Board to the Council and make any recommendations for changes in the Rules or methods of operation of the Continuing Legal Education Program.

(D) The Board shall submit an annual budget to the Council for approval. Expenses of the Board shall not exceed the annual budget approved by the Council.

RULE 4: SCOPE AND EXEMPTIONS

(A) Except as provided herein these Rules shall apply to every active member licensed by the North Carolina State Bar.

(B) The Governor, the Lieutenant Governor, and all members of the Council of State, all members of the federal and state judiciary, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly and members of the United States Armed Forces on full-time active duty are exempt. All active members, including members of the judiciary, who are exempt are encouraged to attend and participate in legal education programs.

(C) Any active member residing outside of North Carolina or any active member residing inside North Carolina who is a full-time teacher at the Institute of Government of the University of North Carolina at Chapel Hill or at a law school in North Carolina accredited by the American Bar Association and who in each case neither practices in North Carolina nor represents North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these Rules upon written application to the Board. Such application shall be filed on or before the due date for the payment of annual dues, or sooner as the circumstances may require, and shall be in effect for the year for which the application was made.

(D) The Board may exempt an active member from the continuing legal education requirement for a period of not more than

one year at a time upon a finding by the Board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption, or for a longer period upon a finding of a permanent disability.

(E) Nonresident attorneys from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of N.C.G.S. § 84-4.1 shall not be subject to the requirements of these Rules.

RULE 5: CONTINUING LEGAL EDUCATION PROGRAM

(A) Each active member subject to these rules shall complete twelve (12) hours of approved Continuing Legal Education during each calendar year beginning January 1, 1988 as provided by these Rules and Regulations adopted thereunder.

(B) Of the twelve (12) hours, (i) at least two hours shall be devoted to the area of professional responsibility, including legal ethics and professional liability; and (ii) at least once every three calendar years, each member shall be required to attend a specially designated three (3) hour block course of instruction devoted exclusively to the area of professional responsibility, including legal ethics and professional liability, which will satisfy the requirement of (B)(i).

(C) During each of the first three years of admission, newly admitted active members shall be required to take a minimum of nine of the twelve hours of Continuing Legal Education in practical skills courses. The Board may provide by regulation for exempting newly admitted members with prior experience as practicing lawyers from the requirements of this paragraph.

(D) Members may carry over up to twelve credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule 5(B)(i), but may not include those hours required by Rule 5(B)(ii). Additionally, newly admitted active members may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

RULE 6: ACCREDITATION STANDARDS

The Board shall approve continuing legal education activities which meet the following standards and provisions:

(A) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(B) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility or ethical obligations of lawyers.

(C) Credit may be given for continuing legal education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs.

(D) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and equipped with suitable writing surfaces or sufficient space for taking notes.

(E) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. It is recognized that written materials are not suitable or readily available for some types of subjects. The absence of written materials for distribution should, however, be the exception and not the rule.

(F) Any accredited sponsor must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the Board in accordance with regulations.

(G) In-house continuing legal education and self-study shall not be approved or accredited for the purposes of complying with Rule 5.

(H) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the Board. However, the Board must be satisfied that the content of the activity would enhance legal skills or the ability to practice law.

RULE 7: ACCREDITATION OF SPONSORS AND PROGRAMS

(A) An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing legal education activities may apply for accredited sponsor status to the Board. The Board shall approve a sponsor as an accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in Rule 6 and regulations established by the Board.

(B) Once an organization has been accredited as an accredited sponsor, then the continuing legal education programs sponsored by that organization are presumptively approved for credit, provided that the standards set out in Rule 6 and the provisions of Rule 10 are met. The Board may at any time reevaluate and grant or revoke the presumptive approval status of an accredited sponsor.

(C) Any organization not accredited as an accredited sponsor which desires approval of a course or program shall apply to the Board which shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule 6. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the Board within 15 days of receipt of the notice of disapproval. The decision by the Board on an appeal is final.

(D) An active member desiring approval of a course or program which has not otherwise been approved shall apply to the Board which shall adopt regulations to administer approval requests consistent with the requirement of Rule 6. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the Board within 15 days of the receipt of the notice of disapproval. The decision by the Board on an appeal is final.

(E) The Board may provide by regulation for an announcement of accreditation for an approved continuing legal education program.

(F) The Board may provide by regulation for the accredited sponsor, sponsor and active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the Board.

RULE 8: CREDIT HOURS

The Board may designate by regulation the number of credit hours to be earned by participation, including, but not limited to, teaching, in continuing legal education activities approved by the Board.

RULE 9: ANNUAL REPORT

Commencing in 1989, each active member of the North Carolina State Bar shall make an annual written report to the North Carolina State Bar in such form as the Board shall prescribe by regulation concerning compliance with the Continuing Legal Education Program for the preceding year or declaring an exemption under Rule 4.

RULE 10: FINANCES

(A) The cost of administration of the Board shall be borne by the continuing legal education activities as follows:

(1) Accredited sponsors located in North Carolina (for courses offered within or outside North Carolina), or accredited sponsors not located in North Carolina (for courses given in North Carolina), or unaccredited sponsors located within or outside of North Carolina (for accredited courses within North Carolina) shall, as a condition of conducting an approved activity, agree to remit a list of North Carolina attendees and to pay a fee for each active member of The North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the Board upon approval of the Council. Any sponsor, including an accredited sponsor, which conducts an approved activity which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved activity shall comply with (A)(2).

(2) The Board shall fix a reasonably comparable fee to be paid by individual attorneys who attend, for CLE credit, approved continuing legal education activities for which the sponsor does not submit a fee under section (1). Such fee shall accompany the member's annual affidavit. The fee shall be set by the Board upon approval of the Council.

(B) Funds may be expended for the proper administration of the Board. The members of the Board shall serve on a voluntary basis without compensation, but may be reimbursed for the reasonable expenses incurred in attending meetings of the Board or its committees.

RULE 11: NONCOMPLIANCE

(A) An attorney who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these Rules may be suspended from the practice of law in the State of North Carolina.

(B) The Board shall notify an attorney who appears to have failed to meet the requirements of these Rules that the attorney will be suspended from the practice of law in this State, unless the attorney shows good cause why the suspension should not be made or the attorney shows that he has complied with the requirements within a 90-day period (180 days in 1989 only) after receiving the notice. Notice shall be forwarded to the attorney's address as shown in the records of The North Carolina State Bar by certified mail. Ninety-three days after mailing (one hundred and eighty-three days in 1989 only) such notice, if no affidavit is filed with the Board by the attorney attempting to show good cause or attempting to show that the attorney has complied with the requirements of these Rules, the attorney's license shall be suspended by order of The North Carolina State Bar.

(C) If the attorney responds to the notice, the Board shall review all affidavits and other documents filed by the attorney to determine whether good cause has been shown or to determine whether the attorney has complied with the requirements of these Rules within the 90-day period (180 days in 1989 only). If the Board determines that good cause has been shown or that the attorney is in compliance with these Rules, it shall enter an appropriate order. If the Board determines that good cause has not been shown and that the attorney has not shown compliance with these Rules within the 90-day period (180 days in 1989 only), then the Board shall refer the matter to the Council for determination after hearing by the Membership Committee. If the Council, after hearing by the Membership Committee, shall determine that the attorney has not complied with these Rules and that good cause therefore has not been shown, it shall suspend the attorney's license to practice law in North Carolina until compliance is shown. The procedures to be followed by the Council and the Membership Committee shall be the same as those followed when the Council and Membership Committee consider whether to suspend an attorney's license for the nonpayment of dues.

RULE 12: REINSTATEMENT

Any member who has been suspended for noncompliance may be reinstated upon recommendation of the Board upon a showing that the member's continuing legal education deficiency has been cured. The member shall file a petition with the Board seeking reinstatement in which the member shall state with particularity the accredited legal education courses which the member has attended and the number of credit hours obtained since the last reporting period prior to the member's suspension. The petition shall be accompanied by a reinstatement fee, the amount of which shall be determined by the Board upon approval of the Council. Within thirty (30) days of the receipt of the petition for reinstatement, the Board shall determine whether the deficiency has been cured. If the Board finds that the deficiency has been cured and the reinstatement fee paid, the Board shall advise the Secretary of the North Carolina State Bar who shall issue an order of reinstatement. If the Board determines that the deficiency has not been cured or that the reinstatement fee has not been paid, the Board shall refer the matter to the Membership and Fees Committee for hearing. Any member who complies with the requirements of the Rules during the 90-day probationary period (180 days in 1989 only) under Rule 11(B) shall pay a late compliance fee, the amount of which shall be determined by the Board upon approval of the Council.

RULE 13: CONFIDENTIALITY

Unless otherwise directed by the Supreme Court of North Carolina, the files, records and proceedings of the Board, as they relate to or arise out of any failure of any active member to satisfy the requirements of these Rules shall be deemed confidential and shall not be disclosed, except in furtherance of the duties of the Board or upon the request of the active member affected or as they may be introduced in evidence or otherwise produced in proceedings under these Rules.

RULE 14: EFFECTIVE DATE

(A) The effective date of these Rules shall be January 1, 1988.

(B) Active Members licensed prior to July 1 of any calendar year shall meet the continuing legal education requirements of these Rules for such year.

(C) Active Members licensed after June 30 of any calendar year must meet the continuing legal education requirements of these Rules for the next calendar year.

RULE 15: REGULATIONS

The following Regulations for the Continuing Legal Education Program are hereby adopted and shall remain in effect until revised or amended by the Board with the approval of the Council. The Board may adopt other regulations to implement the Continuing Legal Education Program with the approval of the Council.

REGULATIONS GOVERNING CONTINUING LEGAL EDUCATION

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REGULATION 1: ORGANIZATION

1.1 *Quorum.* Five members shall constitute a quorum of the Board.

1.2 *The Executive Committee.* The Executive Committee of the Board shall be comprised of the chairperson, a vice chairperson elected by the members of the Board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the Board that may arise between meetings of the full Board. In such matters it shall have complete authority to act for the Board.

1.3 *Other Committees.* The chairperson may appoint from time to time any committees he or she deems advisable of not less than three members for the purpose of considering and deciding matters submitted to them.

1.4 *Definitions.* As used herein, "Board" means the Board of Continuing Legal Education, "CLE" means continuing legal education, and "Rules" mean the Rules for the Continuing Legal Education Program adopted by the Supreme Court of North Carolina.

REGULATION 2: GENERAL COURSE APPROVAL

2.1 *Law School Courses.* Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Regulation 5.1. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

2.2 *Bar Review/Refresher Course.* Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

2.3 *Approval.* CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, on an individual program basis or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(a) If approval is requested before the course or program is presented, the application and supporting documentation

shall be submitted at least 45 days prior to the date on which the course or program is scheduled.

(b) If approval is requested after the applicant has attended a course or program the application and supporting documentation shall be submitted within 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.

(c) the application shall be submitted on a form furnished by the Board;

(d) the application shall contain all information requested on the form;

(e) the application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic, and shows each date and location at which the program will be offered;

(f) the application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

2.4 *Course Quality.* The application and materials provided shall reflect that the program to be offered meets the requirements of Rule 6. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval.

2.5 *Records.* Sponsors, including accredited sponsors, shall within 30 days after the course is concluded:

(a) furnish to the Board a list in alphabetical order, on magnetic tape if available, of the names of all North Carolina attendees;

(b) remit to the Board the appropriate sponsor fee.

2.6 *Announcement.* Sponsors, including accredited sponsors, who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the Board on Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of _____ hours, of which _____ hours will also apply in the area of professional responsibility. This course is not sponsored by the Board.

2.7 *Notice.* Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the Board.

The Board will mail a notice of its decision on CLE activity approval requests within 15 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the Board, or if the Board timely notifies the sponsor that the matter has been tabled and the reason therefor.

2.8 *In-House CLE and Self-Study.* No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the Board under Rule 2(I).

2.9 *Facilities* . Sponsors ordinarily must provide a facility with adequate lighting and temperature control ventilation. For a nonclinical CLE activity, the facility should be set up in classroom or similar style to provide a writing surface for each preregistered attendee or sufficient space for taking notes, and shall provide sufficient space between the chairs in each row to permit easy access and exit to each seat. Crowding in the facility detracts from the learning process and will not be permitted.

2.10 *Course Materials.* Sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish upon request of the Board a copy of all materials presented and distributed at a CLE course or program.

REGULATION 3: ACCREDITED SPONSORS

In order to receive designation as an "accredited sponsor" of courses, programs or other continuing legal education activities under Rule 7(A), the application of the sponsor must meet the following requirements:

(a) the application for accredited sponsor status shall be submitted on a form furnished by the Board;

(b) the application shall contain all information requested on the form;

(c) the application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list

the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials;

(d) the application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization;

(e) the application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule 6.

(f) notwithstanding the provisions of (c), (d) and (e) above, any law school which has been approved by The North Carolina State Bar for purposes of qualifying its graduates for the North Carolina Bar exam, may become an accredited sponsor upon application to the Board.

REGULATION 4: ACCREDITATION OF VIDEOTAPE OR OTHER AUDIOVISUAL PROGRAMS

4.1 The Board may permit an active member to receive credit for attendance at, or participation in, videotape presentations or where audiovisual recorded or reproduced material is used.

4.2 An attorney attending such a presentation is entitled to credit hours if:

(a) The presentation from which the program is made would, if attended by an active member, be an accredited course; and

(b) All other conditions imposed by these regulations, or by the Board in advance, are met.

4.3 Unless the entire program has been produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the Board. Board Form _____ may be utilized for this purpose.

4.4 To receive approval for attendance at such programs, the following conditions must be met:

(a) The person or organization sponsoring the program must keep accurate records of attendance, and must forward a copy of the record of attendance of active members to the

Board within 30 days after presentation of the videotape program is completed.

(b) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which substantially pertain to the subject matter of the program. Any materials made available to persons attending the course from which the program is made must be made available to those persons attending the program who desire to receive credit under these regulations.

(c) Attendance must be verified by a responsible party who is not attempting to earn credit hours by virtue of attendance at that presentation. Proof of attendance may be made by the verifying person on Board Form _____.

(d) A suitable classroom or rooms must be available for viewing the program and taking of notes.

4.5 A minimum of five active members must physically attend the presentation of the program.

EXAMPLE (1): Attorney X, an active member, attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Attorney X is also entitled to receive credit, if the additional conditions under Regulation 4 are also met.

EXAMPLE (2): Attorney Y, an active member, desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the Board. Attorney Y may not receive any credit hours for attending that videotape presentation without advance approval from the Board.

EXAMPLE (3): Attorney Z, an active member, attends a videotape program. The presentation of the program from which the videotape was made has already been held, and approved by the Board for credit. However, no person is present at the videotape program to record attendance. Attorney Z may not obtain credit for viewing the videotape program, unless it is viewed in the presence of a person who is not attending the videotape program for credit, and who verifies the attendance of Attorney Z and of other attorneys at the program. All other conditions must also be met (i.e., materials available

at the original presentation must be available at the videotape presentation, at least five active members must be present, etc.).

REGULATION 5: COMPUTATION OF CREDIT

5.1 *Computation Formula.* CLE and ethics hours shall be computed by the following formula:

$$\frac{\text{sum of the total minutes of actual instruction}}{60} = \text{Total Hours}$$

The instruction may be in no less than 15 minute segments. A block of instruction could be 15 minutes, 30 minutes, 45 minutes, or one hour in length. For example, a block of instruction totalling 45 minutes would equal .75 hours toward CLE.

5.2 *Actual Instruction.* Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(a) Introductory remarks;

(b) Breaks;

(c) Business meetings;

(d) Keynote speeches or speeches in connection with meals;

(e) Questions and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length.

5.3 *Teaching.* As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, a presentation of 45 minutes would qualify for 4.5 hours of credit.

REGULATION 6: FEES

6.1 *Sponsor fee.* The sponsor fee, a charge paid directly by the sponsor, shall be paid by accredited sponsors for each pro-

gram wherever held and by unaccredited sponsors for each approved program held within North Carolina. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee is set at $ per approved CLE hour per active member of the North Carolina State Bar in attendance. It is computed as shown in the following formula and example:

Fee: $
× Total Approved CLE hours (× 6)
× Number of NC Attendees (100)
= Total Sponsor Fee ($)

6.2 *Attendee Fee.* The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney should remit the fees along with his or her affidavit before January 31 following the calendar year for which the report is being submitted. The amount of the fee is set at $ per approved CLE hour for which the attorney claims credit. It is computed as shown in the following formula and example:

Fee: $
× Total Approved CLE hours (× 3.3)
= Total Attendee Fee ($)

6.3 *Fee Review.* The Board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the Board in a nonprofit manner.

6.4 *Uniform Application.* The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee.

REGULATION 7: SPECIAL CASES AND EXEMPTIONS

7.1 Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The Board shall review and approve or disapprove such plans on an individual basis and without delay.

7.2 Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances

may be granted by the Board on a yearly basis upon written application of the attorney.

7.3 Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The Board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

REGULATION 8: GENERAL COMPLIANCE PROCEDURES

8.1 *Affidavit.* Prior to December 31 of each year, commencing in 1988, the prescribed affidavit form shall be mailed to all active members of The North Carolina State Bar.

8.2 *Late Filing Penalty.* Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the January 31 due date shall pay a $75.00 late filing penalty. The due date for filing the affidavit for the 1988 reporting year only shall be March 31, 1989. This penalty shall be submitted with the affidavit. An affidavit that is either received by the Board or postmarked on or before January 31 (March 31 in 1989 only) shall be considered to have been timely filed. An attorney who complies with the requirements of the Rules during the probationary period under Rule 11 shall pay a late compliance fee of $125.00.

REGULATION 9: NONCOMPLIANCE PROCEDURES

9.1 *Reinstatement Fee* . The uniform reinstatement fee is $250 and must accompany the reinstatement petition.

9.2 *Policy.* Reinstatement will be granted only upon a showing that the member has attended sufficient approved CLE activity to make up his or her previous deficiency.

9.3 *Petition.* The petition for reinstatement shall list the CLE activities according to a form provided by the Board.

REGULATION 10: AUTHORITY FOR APPEALS

10.1 *Appeals.* Except as otherwise provided, the Board is the final authority on all matters entrusted to it under these

Rules. Therefore, any decision by a committee of the Board pursuant to a delegation of authority may be appealed to the full Board.

10.2 *Procedure.* A decision made by the staff of the Board pursuant to a delegation of authority may also be reviewed by the full Board, but should first be appealed to any committee of the Board having jurisdiction on the subject involved. All appeals shall be in writing. The Board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 64. Determination and Disposition of Cause; Affirmance

Where one member of the Supreme Court did not participate and the remaining six justices are equally divided, the decision of the Court of Appeals is affirmed without becoming a precedent. *E. F. Blankenship Co. v. N.C. Dept. of Transportation*, 685.

Where two members of the Supreme Court did not participate, and the remaining members are divided three to two, there is thus no majority and the decision of the Court of Appeals is left undisturbed and stands without precedential value. *Costner v. A. A. Ramsey & Sons*, 687.

ASSAULT AND BATTERY

§ 7. Assault on a Female

Assault on a female is not a lesser included offense of second degree rape, and the trial court had no jurisdiction to convict defendant for assault on a female based upon an indictment for attempted rape. *S v. Wortham*, 669.

§ 13. Competency of Evidence

Consideration of medical expenses incurred by an assault victim as an aggravating factor was not prohibited by the statute providing that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. *S. v. Sowell*, 640.

§ 15.7. Defense of Self or Property; Instruction not Required

The trial court in a felonious assault case should have instructed the jury on the right of one attacked in his own home to act in self-defense without first retreating, but the court's failure to give such an instruction was not plain error. *S. v. Lilley*, 390.

ATTORNEYS AT LAW

§ 3.1. Nature and Extent of Attorney's Authority

When an attorney wrote to plaintiff that, if plaintiff would continue to make payments on his client's mobile home, the attorney would reimburse plaintiff from the proceeds of a settlement or recovery on the client's personal injury claim, subject to the client's approval, the attorney did not make a personal promise to pay but acted only as agent for his client in establishing a contract between the client and plaintiff which the client breached when he revoked the authorization for the attorney to reimburse plaintiff out of settlement proceeds. *Forbes Homes, Inc. v. Trimpi*, 473.

BAILMENT

§ 3.3. Liabilities of Bailee to Bailor; Actions; Sufficiency of Evidence

Plaintiff's evidence was sufficient to show that defendant was bailee of a helicopter leased by defendant to take flying lessons from his own instructor. *U.S. Helicopters, Inc. v. Black*, 268.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.8. Sufficiency of Evidence of Breaking or Entering and Larceny of Residential Premises

Evidence was sufficient to permit the jury to find that defendant was the person who committed the offense of breaking or entering with the intent to commit larceny at two particular residences. *S. v. Sumpter*, 102.

§ 6. Instructions Generally

The trial court did not err in instructing the jury to return a verdict of guilty of felonious breaking or entering if defendant opened a closed screen door and "basically" went into the victim's home without her consent and with the intent to commit second degree rape. *S. v. Strickland*, 653.

CONSPIRACY

§ 6. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for first degree murder and conspiracy to commit murder though it consisted mainly of the testimony of a co-conspirator. *S. v. Lowery*, 54.

CONSTITUTIONAL LAW

§ 24.7. Service of Process on Foreign Corporations

There were sufficient minimum contacts to justify the exercise of personal jurisdiction over defendant. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 361.

§ 28. Due Process Generally in Criminal Proceedings

Defendant was not denied equal protection when a codefendant's motion for merger of his conspiracy conviction with his first degree murder conviction was granted but defendant's convictions were not merged where the codefendant's murder conviction was predicated solely on his participation in the conspiracy and defendant actually participated in the killing. *S. v. Lowery*, 54.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not err in denying defendant's motions for the appointment of a pathologist or other medical experts, although defendant arguably made a threshold showing of a specific necessity for the assistance of such experts. *S. v. Penley*, 30.

Where defendant made a preliminary showing that his sanity at the time of the offense was likely to be a significant factor at trial, the State was required to provide access to a psychiatrist's assistance on this issue. *S. v. Gambrell*, 249.

§ 34. Double Jeopardy

The constitutional prohibition against double jeopardy precluded defendants from being convicted for both the first degree kidnapping and first degree rape of two victims. *S. v. Belton*, 141.

§ 45. Right to Appear Pro Se

Trial counsel's failure to perfect defendant's appeal is not a basis for granting a new trial on the ground of ineffective assistance of counsel. *S. v. Lowery*, 54.

Defendant is entitled to a new trial because the trial judge failed to conduct the mandatory inquiry under G.S. 15A-1242 before allowing defendant's request to remove his appointed counsel and represent himself. *S. v. Dunlap*, 384.

CONSTITUTIONAL LAW — Continued

§ 48. Effective Assistance of Counsel

Defendant was not denied the effective assistance of counsel in this trial for murder and conspiracy to commit murder. *S. v. Lowery*, 54.

A defendant tried for first degree murder was not denied the effective assistance of counsel because his counsel admitted malice without defendant's consent in his closing jury argument. *S. v. Fisher*, 512.

Defendant was not denied the effective assistance of counsel because his attorney failed to communicate a plea bargain offer to him where there was no evidence that a definitive plea offer was ever made by the district attorney. *S. v. Martin*, 648.

Defendant was not denied the effective assistance of counsel at his sentencing hearing. *S. v. Strickland*, 653.

§ 60. Racial Discrimination in Jury Selection Process

The State did not deliberately exclude qualified black men and women from the petit jury solely on the basis of their race through the exercise of peremptory challenges in a case involving black men charged with raping and kidnapping white women. *S. v. Belton*, 141.

§ 80. Life Imprisonment Sentences

The mandatory life sentence for first degree sexual offense is constitutional. *S. v. Cooke*, 674.

CONTRACTS

§ 25. Pleadings Generally in Actions on Contracts

Plaintiffs' complaint failed to state a claim for breach of contract where plaintiffs alleged that defendant physician agreed to retain or replace an intrauterine device during the course of two surgical procedures performed by defendant on plaintiff wife but failed to do so. *Jackson v. Bumgardner*, 172.

CORPORATIONS

§ 4. Authority and Duties of Directors

The trial judge properly granted defendants' motions for summary judgment in a shareholders' derivative action where plaintiffs alleged fraud and self-dealing by a majority of the board of directors; the directors established a special investigative committee to conduct an investigation and determine whether any legal action should be initiated; and the committee recommended that all except two of the claims investigated not be asserted and that the remaining two claims be settled. *Alford v. Shaw*, 289.

§ 6. Right of Stockholders to Maintain Action

The Supreme Court adopted a version of the business judgment rule in a shareholders' derivative action in which self-dealing and fraud were alleged against the majority of the board of directors. *Alford v. Shaw*, 289.

CRIMINAL LAW

§ 34.5. Admissibility of Evidence of Other Offenses to Show Identity of Defendant

Evidence of prior instances of defendant's sexual misconduct was not admissible under Rule of Evidence 404(b) in a prosecution for first degree sex offense. *S. v. Scott*, 237.

CRIMINAL LAW — Continued

The trial court did not err in a prosecution for felonious larceny by admitting evidence that defendant had sold stolen property to the State's witness in the past. *S. v. Weaver*, 400.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Modus Operandi

The trial court did not err in admitting evidence that defendant had taken a rape and incest victim to an x-rated movie and had told her to look at scenes depicting graphic sexual acts. *S. v. Williams*, 624.

§ 35. Evidence that Offense Was Committed by Another

The trial court erred in a prosecution for burglary and rape by excluding evidence that the crimes charged and another similar offense were committed by a person other than defendant. *S. v. Cotton*, 663.

§ 46.1. Flight of Defendant as Implied Admission; Competency of Evidence

The trial court properly admitted evidence and instructed the jury concerning defendants' flight from a law officer immediately before their arrest, and there was no merit to one defendant's contentions that he did not know that the officer was a police officer and that he ran instinctively only because his codefendant ran. *S. v. Belton*, 141.

§ 48.1. Silence of Defendant As Implied Admission; Silence Incompetent

The Court of Appeals erred by finding prejudicial error in a homicide prosecution from the admission of testimony that defendant had given a statement which ended with the assertion of his constitutional rights. *S. v. Hooper*, 680.

§ 50.1. Admissibility of Opinion Testimony

The trial court in a rape case erred in allowing an expert witness to testify concerning the child victim's truthfulness during the expert's evaluation and treatment of her. *S. v. Kim*, 614.

§ 66.11. Identification of Defendant; Confrontation at Scene of Crime or Arrest

The statute prohibiting the use of certain nontestimonial identification procedures against juveniles without a court order does not require a court order for a "showup" of a juvenile conducted at the crime scene shortly after the crime occurred. *In re Stallings*, 565.

A showup identification of a juvenile was reliable and not impermissibly suggestive in violation of due process under the totality of the circumstances. *Ibid.*

§ 66.17. Identification of Defendant; Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving other Pretrial Identification Procedures

Though a kidnapping and rape victim's pretrial showup identification of defendant was unnecessarily suggestive, it was nevertheless reliable and was properly admitted into evidence. *S. v. Flowers*, 208.

§ 66.18. Voir Dire to Determine Competency and Admissibility of In-Court Identification Generally; When Voir Dire Required

The trial court in a kidnapping and rape case erred in denying defendant's motion for a voir dire of the prosecutrix to determine the admissibility of her in-court identification of him where the prosecutrix, on voir dire concerning another matter, testified that she identified defendant as one of her assailants only because she heard him admit during a codefendant's continuance hearing that he had engaged in sexual relations with her. *S. v. Flowers*, 208.

CRIMINAL LAW – Continued

§ 73. Hearsay Testimony in General

Statements made by a murder victim, before he knew of his impending death, in which he identified defendant as the person who shot him possessed circumstantial guarantees of trustworthiness to make them admissible under G.S. 8C-1, Rule 804(b)(5). *S. v. Penley*, 30.

Where the State specifically indicated to the trial court that it was relying on Rule 804(b)(5) in offering into evidence statements by a murder victim, and defendant raised no objection based upon an absence of written notice, it was permissible for the trial court to assume that the statutory requirement of written notice was met. *Ibid.*

§ 73.2. Statements not within Hearsay Rule

The trial court did not err in allowing a sexual offense victim's mother to testify as to what a counselor told her concerning the victim's behavior where the testimony merely related to the existence of the victim's resentment and anger and not to their cause. *S. v. Ramey*, 457.

Statements of a child rape victim to a physician were admissible under the medical diagnosis or treatment exception to the hearsay rule. *S. v. Aguallo*, 590.

§ 75.5. Confession; Admissibility; Requirement that Defendant Be Warned of Constitutional Rights Generally

Defendant's testimony, given at a codefendant's hearing on a motion to continue, that he had engaged in consensual sexual relations with the prosecutrix on the date of the alleged crimes of kidnapping and rape was not given under such coercive circumstances that defendant's constitutional rights were infringed when he was not warned of his right not to incriminate himself. *S. v. Flowers*, 208.

§ 75.8. Confession; Admissibility; Requirement that Defendant Be Warned of Constitutional Rights; Warning Before Resumption of Interrogation

A statement made by defendant during a second interrogation was not inadmissible because defendant was not given renewed Miranda warnings before the second interrogation began. *S. v. Fisher*, 512.

§ 75.9. Volunteered and Spontaneous Statements

The trial court properly admitted defendant's statements made to police officers where an officer's uncontradicted testimony showed that, after first indicating that he would exercise his right to counsel, defendant initiated further conversations with the officer and voluntarily waived his rights. *S. v. Penley*, 30.

The trial court properly admitted a spontaneous statement defendant made to police in the absence of his retained counsel. *Ibid.*

§ 85.3. Character Evidence; State's Cross-Examination of Defendant

In a prosecution for a first degree sex offense, cross-examination of defendant about prior instances of sexual misconduct was not permissible to attack defendant's credibility under Rule of Evidence 608(b). *S. v. Scott*, 237.

§ 86.8. Credibility of Interested Parties; State's Witnesses

The trial court erred in a prosecution for the rape of a child by admitting the testimony of a physician that the child was believable. *S. v. Aguallo*, 590.

§ 87.1. Leading Questions

Although a question with regard to penetration could be answered yes or no, it was not an impermissible leading question. *S. v. Kim*, 614.

CRIMINAL LAW — Continued

§ 88.1. Conduct and Scope of Cross-Examination

The purpose of the qualification "ordinarily" used in G.S. 8C-1, Rule 611(c) is to furnish a basis for denying the use of leading questions when cross-examination is cross-examination in form only and not in fact. *S. v. Hosey*, 330.

It was not reversible error for the court to limit leading questions on cross-examination without conducting a voir dire hearing or making any formal declaration that the witness was friendly to the party cross-examining her where the record on appeal showed that the witness was entirely friendly to the party cross-examining her. *Ibid.*

§ 89.1. Evidence of Character Bearing on Credibility; Character Witnesses

The trial court did not commit plain error in allowing a child victim's mother and sister to testify that the victim told the truth. *S. v. Ramey*, 457.

§ 89.3. Corroboration of Witnesses; Prior Consistent Statements

The trial court in a sexual offense prosecution erred in allowing a detective to testify that statements of the victim had at all times been consistent, but such error did not constitute plain error requiring a new trial. *S. v. Ramey*, 457.

The trial court properly admitted oral and written statements made by a sexual offense victim to a detective although the statements included additional facts not referred to in the victim's testimony. *Ibid.*

The trial court in a rape case did not commit plain error by allowing the State to introduce as corroborative evidence prior statements of the victim which contained new and additional information not referred to in the victim's testimony. *S. v. Kim*, 614.

§ 89.8. Impeachment of Witnesses; Promise or Hope of Leniency

Defendant's rights under G.S. 15A-1054(c) and due process were not violated by the district attorney's failure to disclose an alleged plea agreement with a witness who testified against defendant where there was no formal agreement and defense counsel was aware the witness would testify for the State under a hope of leniency. *S. v. Lowery*, 54.

§ 92.1. Consolidation of Offenses Against Multiple Defendants Proper; Same Offense

The trial court did not err in granting the State's motion for joinder of defendant with a murder victim's husband for trial on charges of murder and conspiracy to commit murder. *S. v. Lowery*, 54.

§ 92.2. Consolidation of Offenses Against Multiple Defendants Proper; Related Offenses

The trial court did not err in joining for trial kidnapping, rape, robbery and sex offenses against two defendants, and there was no merit to one defendant's contention that joinder deprived him of a fair trial because his defense was antagonistic to that of his codefendant. *S. v. Belton*, 141.

§ 93. Order of Proof

Defendant was not prejudiced when the trial court allowed the State to present new evidence on rebuttal. *S. v. Lowery*, 54.

§ 98. Presence and Conduct of Witnesses

The trial court did not err in limiting defendant to six character witnesses and in allowing his remaining witnesses to stand up and give their names and addresses to the jury without first being sworn. *S. v. Ramey*, 457.

CRIMINAL LAW — Continued

§ 99.2. Expression of Opinion by the Court; Questions, Remarks, and other Conduct during Trial

The trial court did not express an opinion that the State had proven a number of facts when he gave a short summary of what the prosecuting witness contended after the trial had been interrupted repeatedly by the jury's being asked to leave the courtroom. *S. v. Flowers*, 208.

§ 99.8. Expression of Opinion by Court; Examination of Witnesses by Court

The trial court did not express an opinion in asking a child victim how many times he had been touched between the legs by defendant and how old the victim was when the first incident occurred. *S. v. Ramey*, 457.

§ 102. Argument of Counsel

The trial court did not err in allowing defense counsel to reopen his closing argument to argue six contentions prepared by defendant pro se but denying argument with regard to seventeen other contentions. *S. v. Penley*, 30.

§ 102.5. Conduct of Prosecutor in Cross-Examining Defendant

Cross-examination of defendant about whether he had been convicted of breaking and entering and larceny in 1976 when in fact he had not been involved in those crimes did not constitute prejudicial error. *S. v. Fisher*, 512.

§ 102.6. Particular Conduct and Comments in Jury Argument

The prosecutor's jury argument that defendant failed to introduce evidence of the victim's criminal conviction record to show that the victim was a mean and violent person in support of his defense of self-defense was arguably misleading and improper, but the impropriety did not constitute reversible error. *S. v. Fisher*, 512.

§ 119. Requests for Instructions

The trial court did not err in failing to give defendant's requested instruction that the presumption of innocence alone was not sufficient to support a verdict of not guilty. *S. v. Flowers*, 208.

§ 124. Sufficiency and Effect of Verdict in General

The trial court did not err in accepting the jury's verdicts where the verdict sheets returned by the jury had the word "yes" in the space provided for the word "guilty" and the date "1 March 1985" in the space provided for the words "not guilty." *S. v. Penley*, 30.

§ 128.2. Particular Grounds for Mistrial

The trial court in a homicide case did not err in denying defendant's motion for a mistrial based on the State's cross-examination of defendant about whether he had slashed another person with a knife used to stab deceased. *S. v. Fisher*, 512.

§ 138.14. Sentence; Consideration of Aggravating and Mitigating Factors in General

The trial court did not abuse its discretion in finding that the single aggravating factor of prior convictions outweighed the seven mitigating factors found. *S. v. Penley*, 30.

The trial court's findings that defendant suffered from a mental condition, had a limited mental capacity at the time of the crime, and suffered from an explosive personality disorder were not inconsistent with its finding that the crime was premeditated and deliberate. *S. v. Carter*, 487.

CRIMINAL LAW — Continued

The trial court in a second degree murder case did not abuse its discretion in determining that two aggravating factors outweighed seven mitigating factors. *Ibid.*

§ 138.21. Sentence; Aggravating Factors; Especially Heinous, Atrocious, or Cruel Offense

The evidence was sufficient to support the trial court's finding that an assault with a deadly weapon with intent to kill inflicting serious injury was heinous, atrocious or cruel. *S. v. Vaught*, 480.

§ 138.24. Sentence; Aggravating Factors; Age of Victim or Physical Infirmity

The trial court erred in aggravating defendant's sentence for taking indecent liberties with a minor on the ground that the thirteen-year-old victim was very young. *S. v. Sumpter*, 102.

The trial court did not err by finding that defendant's crimes were aggravated by the age of the victim who was 79 years old. *S. v. Thompson*, 395.

The trial court did not err by finding as an aggravating factor that the victim was physically infirm. *Ibid.*

The trial court did not err in finding as an aggravating factor that an assault victim was physically infirm where the victim was wearing a leg cast which greatly impaired her mobility. *S. v. Vaught*, 480.

§ 138.26. Sentence; Aggravating Factors; Great Monetary Loss

The statutory aggravating factor of damage causing great monetary loss applies only to property damage and not to personal injury, and the trial judge thus erred in finding as an aggravating factor that a felonious assault offense involved damage causing great monetary loss based on the victim's medical expenses and lost wages. *S. v. Bryant*, 632; *S. v. Sowell*, 640.

§ 138.28. Sentence; Aggravating Factors; Prior Convictions

A detective's recollections constituted acceptable evidence of defendant's prior conviction for delivering a malt beverage to a minor. *S. v. Carter*, 487.

The trial court could find as an aggravating factor that defendant had prior convictions punishable by more than sixty days' confinement based upon a detective's recollections of those convictions. *S. v. Strickland*, 653.

§ 138.29. Sentence; Aggravating Factors; Other Factors

The trial court erred in finding as a nonstatutory aggravating factor that defendant posed a dangerous threat to others. *S. v. Vaught*, 480.

§ 150. Right of Defendant to Appeal

Defendant may appeal an interlocutory superior court order reversing dismissal of criminal charges against him and remanding the cause to the district court only after a final judgment has been entered in the superior court. *S. v. Henry*, 408.

§ 161. Necessity for Exceptions and Assignments of Error

Whether a resentencing was improper was not properly before the court where there was no assignment of error or exception in the record. *S. v. Thompson*, 395.

CRIMINAL LAW — Continued

§ 163. Necessity for Objections and Exceptions to Charge

Defendant failed to show plain error in the court's failure to instruct the jury that evidence of prior sexual acts by defendant against the victim could be considered only for the purpose of showing intent and not character. *S. v. Ramey*, 457.

§ 177.1. Remand for Correction of Uncertainty or Error in Judgment or Sentence

The better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated. *S. v. Wortham*, 669.

DIVORCE AND ALIMONY

§ 30. Equitable Distribution of Marital Property

The trial court's finding of the value of a closely-held corporation was not sufficient in an equitable distribution proceeding. *Patton v. Patton*, 404.

EVIDENCE

§ 29.3. Hospital Records

A statement in hospital records that "[Defendant] apparently was concerned about the possibility" that veins implanted during heart bypass surgery on plaintiff had been put in backwards was not admissible as substantive evidence under the business records exception to the hearsay rule. *Donavant v. Hudspeth*, 1.

The statute prohibiting discovery of records and proceedings of a hospital's medical review committee, G.S. 131E-95, applies in actions against hospitals for corporate negligence. *Shelton v. Morehead Memorial Hospital*, 76.

A chief executive officer of a hospital was not a member of a medical review committee so as to make documents in his possession and information known to him immune from discovery under G.S. 131E-95. *Ibid.*

Information or documents relating to peer reviews of physicians not protected under G.S. 131E-95 were not immune from discovery and use as evidence under any common law privilege. *Ibid.*

The corporate defendants in a medical malpractice action were not protected by G.S. 131E-95 from answering an interrogatory that defendants "identify and state the name, address and telephone number of the custodian" of certain documents. *Ibid.*

§ 33. Hearsay Evidence in General

The requirement that hearsay evidence not falling within a recognized exception to the hearsay rule may be resorted to only when more probative evidence on the point cannot be procured through reasonable efforts applied to hearsay evidence offered in a trial conducted prior to the effective date of the N.C. Rules of Evidence. *Donavant v. Hudspeth*, 1.

§ 34.6. Declarations as to Bodily Feeling

A statement made by one physician to another regarding the non-testifying physician's observations of the patient did not come within the hearsay exception of statements made by a patient to a treating physician. *Donavant v. Hudspeth*, 1.

§ 50. Testimony by Medical Experts in General

Though medical information obtained from a fellow physician who has treated the same patient is sufficiently reliable to be used by a testifying physician as a

EVIDENCE — Continued

partial basis for his expert opinion, such information is not independently admissible into evidence. *Donavant v. Hudspeth*, 1.

HOMICIDE

§ 16. Dying Declarations

The trial court in a first degree murder case properly admitted as a dying declaration the video tape recording of the victim's identification of defendant. *S. v. Penley*, 30.

§ 19. Evidence Competent on Question of Self-Defense

The trial court in a murder case did not err in allowing the State to continue to ask defendant about deceased's conviction record after the court sustained defendant's objections to this line of questioning. *S. v. Fisher*, 512.

§ 19.1. Evidence Competent on Question of Self-Defense; Evidence of Character or Reputation

The prosecutor's jury argument that defendant failed to introduce evidence of the victim's criminal conviction record to show that the victim was a mean and violent person in support of his defense of self-defense was arguably misleading and improper, but the impropriety did not constitute reversible error. *S. v. Fisher*, 512.

§ 20.1. Photographs

The trial court in a first degree murder case did not err in admitting into evidence a photograph of the victim which was properly authenticated by a pathologist whose testimony it illustrated, a key to the victim's home, and gloves purportedly given to a co-conspirator by the victim's husband. *S. v. Lowery*, 54.

§ 21.2. Sufficiency of Evidence to Overrule Nonsuit Generally

There was sufficient evidence to support a finding that a gunshot wound inflicted by defendant was the proximate cause of the victim's death where expert medical testimony showed that the victim died from pneumonia which was directly related to the gunshot wound. *S. v. Penley*, 30.

§ 21.3. Sufficiency of Evidence that Death Resulted from Wound Inflicted by Defendant

The circumstantial evidence in a first degree murder case was sufficient to prove that defendant was the person who murdered the victim. *S. v. Sumpter*, 102.

§ 21.5. Sufficiency of Evidence of First Degree Murder

The State's evidence of premeditation and deliberation was sufficient to support defendant's conviction of first degree murder of a man with whom she had been romantically involved. *S. v. Joplin*, 126.

There was sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder by stabbing the victim. *S. v. Fisher*, 512.

§ 23.2. Instructions on Proximate Cause

The trial court sufficiently gave in substance the instruction on proximate cause requested by defendant. *S. v. Penley*, 30.

§ 25. Instructions on First Degree Murder Generally

Any error by the trial court in juxtaposing in his jury instructions the proposition "that a .22 caliber pistol is a deadly weapon" with an instruction that if the

INSURANCE

§ 6.2. Rule of Liberal Construction in Favor of Insured

Provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally, but provisions which exclude liability will be construed against the insurer. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 534.

§ 18. Life Insurance; Avoidance of Policy for Misrepresentations or Fraud

Defendant insurer could not contest a life insurance policy on the ground of material misrepresentations by the insured in an application for reinstatement of the policy where the period provided by a contestability clause had run while the original insurance contract was in effect. *Chavis v. Southern Life Ins. Co.*, 259.

§ 29.1. Life Insurance; Right to Proceeds; Change of Beneficiary

The trial court properly granted summary judgment for deceased's former wife in an action to determine who was entitled to the proceeds of a life insurance policy. *Fidelity Bankers Life Ins. Co. v. Dortch*, 378.

§ 68.4. Automobile Insurance; Injury from "Use of Vehicle"

An injury arose out of the use of an automobile so as to provide coverage under an automobile liability policy where a rifle accidentally discharged as a deer hunter removed it from his pickup truck. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 534.

§ 82. Automobile Liability Insurance; Vehicles Covered by Policy

In an action by an automobile lessor's insurer to determine whether a blanket insurance policy provided coverage for injuries received by third parties in an accident involving a leased car, the facts did not support the conclusion that the driver was a lessee at the time of the collision. *Nationwide Mutual Ins. Co. v. Land*, 551.

§ 87.2. Automobile Liability Insurance; "Omnibus" Clause; Proof of Permission to Use Vehicle

A lessee's use of an automobile at the time of a collision was outside the scope of the express permission granted by the lessor. *Nationwide Mutual Ins. Co. v. Land*, 551.

§ 143. Construction of Property Damage Policies Generally

A homeowners insurance policy provided coverage of injuries to a third party received when the policyholder reached behind the seat of his pickup truck for a rifle to shoot a deer and the rifle discharged. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 534.

INTEREST

§ 2. Time and Computation

Plaintiff's entitlement to interest from the date of a breach of contract was a question of law for the trial judge, not a question of fact for the jury. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 421.

JUDGMENTS

§ 35.1. Res Judicata in General

Res judicata did not apply to bar plaintiff's action to recover on an auction contract where defendant alleged that a prior action by plaintiff against her husband

PROCESS

§ 14.3. Service of Process on Foreign Corporation; Sufficiency of Evidence of Minimum Contacts within this State

Jurisdiction over a foreign corporation does not automatically follow from a determination that a transaction falls within the language of G.S. 55-145. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 361.

§ 14.4. Service of Process on Foreign Corporation; Sufficiency of Evidence; Contract to Be Performed in this State

Defendant was subject to jurisdiction in North Carolina where its contract was made in North Carolina and was to be performed in North Carolina. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 361.

RAPE AND ALLIED OFFENSES

§ 3. Indictment

A rape indictment alleging that the victim was "a female child eight (8) years old" sufficiently alleged that she was "a child under twelve" as required by former G.S. 15-144.1(b), and the additional allegation that the child was "thus of the age of under thirteen (13) years" was surplusage. *S. v. Ollis*, 370.

Defendant could not be convicted of first degree rape under G.S. 14-27.2(a)(1) by having vaginal intercourse with a female under thirteen years of age where he was charged in the indictment with forcible first degree rape pursuant to G.S. 14-27.2(a)(2). *S. v. Williams*, 624.

§ 3.1. Indictment; Lesser Degrees of Crime

Assault on a female is not a lesser included offense of second degree rape, and the trial court had no jurisdiction to convict defendant for assault on a female based upon an indictment for attempted rape. *S. v. Wortham*, 669.

§ 4. Competency of Evidence

The trial judge did not express an opinion in asking the victim whether defendant penetrated her vagina with his finger. *S. v. Whittington*, 114.

Although a question with regard to penetration could be answered yes or no, it was not an impermissible leading question. *S. v. Kim*, 614.

§ 4.1. Relevancy and Competency of Evidence; Proof of other Acts and Crimes

Defendant did not open the door to cross-examination about his prior sexual misconduct by volunteering instances of his wife's sexual misconduct. *S. v. Scott*, 237.

Evidence tending to show that eight years before the sexual offenses charged in this case defendant, then aged thirteen, threatened his sixteen-year-old sister with a knife and sexually molested her was too remote and dissimilar from the crimes charged to be probative of defendant's guilt of those crimes. *Ibid.*

§ 4.2. Relevancy and Competency of Evidence; Physical Condition of Prosecutrix

The trial court committed prejudicial error in refusing to allow defendant to question the child victim about instances of rape committed by defendant's adult son against the victim on the same day as the alleged rape by defendant in order to show that physical findings described by the physician who examined the victim were the results of those acts by defendant's son. *S. v. Ollis*, 370.

RAPE AND ALLIED OFFENSES — Continued

§ 5. Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction of first degree sexual offense although it showed that defendant was not in possession of a knife at the precise moment that defendant penetrated the victim's vagina with his finger. *S. v. Whittington*, 114.

Evidence was sufficient to convict defendant both for the rape he committed and for the simultaneous rape his codefendant committed some twenty feet away. *S. v. Belton*, 141.

There was sufficient evidence to support a conviction of first degree sexual offense. *S. v. Cooke*, 674.

The State's evidence was sufficient to show that defendant used physical force as well as the victim's fear and fright to have vaginal intercourse with the victim so as to support defendant's conviction of second degree rape. *S. v. Strickland*, 653.

§ 6. Instructions

The jury was not allowed to render a nonunanimous verdict by the court's charge that defendants could be found guilty of first degree rape and first degree sex offense if they employed a deadly weapon or were aided or abetted by another. *S. v. Belton*, 141.

Defendant failed to show plain error in the court's failure to instruct the jury that evidence of prior sexual acts by defendant against the victim could be considered only for the purpose of showing intent and not character. *S. v. Ramey*, 457.

The trial court erred in instructing the jury on vaginal intercourse with a female under thirteen years of age where defendant was charged in the indictment with forcible first degree rape. *S. v. Williams*, 624.

§ 7. Sentence and Punishment

Where defendant's conviction of a first degree sexual offense was used to raise kidnapping to first degree kidnapping, the trial judge erred in sentencing defendant for both crimes. *S. v. Whittington*, 114.

The mandatory life sentence for first degree sexual offense is constitutional. *S. v. Cooke*, 674.

§ 10. Carnal Knowledge of Female under Twelve; Competency and Relevancy of Evidence

The trial court in a rape case erred in allowing an expert witness to testify concerning the child victim's truthfulness during the expert's evaluation and treatment of her. *S. v. Kim*, 614.

§ 11. Carnal Knowledge of Female under Twelve; Sufficiency of Evidence

A seven-year-old child's testimony constituted sufficient evidence of penetration by defendant's finger to support conviction of defendant for first degree sexual offense. *S. v. Watkins*, 498.

ROBBERY

§ 4. Sufficiency of Evidence

The State's evidence was insufficient to support defendant's conviction of armed robbery where it raised only a suspicion that a watch, ring and television were stolen, the items were never found, and the evidence was insufficient to establish that the victim possessed the watch or the ring at the time of the alleged robbery. *S. v. Holland*, 602.

WORD AND PHRASE INDEX

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